

# FAIRFAX COUNTY ECONOMIC DEVELOPMENT AUTHORITY COMMONWEALTH OF VIRGINIA

## GENERAL CONDITIONS AND INSTRUCTIONS

The general rules and conditions which follow apply to all purchases and become a definite part of each formal solicitation and resulting contract award issued by the FAIRFAX COUNTY ECONOMIC DEVELOPMENT AUTHORITY, unless otherwise specified. Bidders or their authorized representatives are expected to inform themselves fully as to the conditions, requirements, and specifications before submitting bids: failure to do so will be at the bidder's own risk and relief cannot be secured on the plea of error.

Subject to all State and local laws, policies, resolutions, and regulations and all accepted rules, regulations and limitations imposed by legislation of the Federal Government, bids on all solicitations issued by the FAIRFAX COUNTY ECONOMIC DEVELOPMENT AUTHORITY (hereinafter "FCEDA") will bind bidders to the applicable conditions and requirements herein set forth unless otherwise specified in the solicitation.

**I. AUTHORITY-**The FCEDA President & CEO has the sole responsibility and authority for negotiating, placing and when necessary modifying every solicitation, contract and purchase order (except for capital construction projects) issued by the FCEDA. In the discharge of these responsibilities, the FCEDA President & CEO may be assisted by assigned buyers. Unless specifically delegated by the FCEDA President & CEO, no other FCEDA officer or employee is authorized to order supplies or services, enter into purchase negotiations or contracts, or in any way obligate the FCEDA for an indebtedness. Any contract made which is contrary to these provisions and authorities shall be void and of no effect, and the FCEDA shall not be bound thereby.

### 2. DEFINITIONS-

**BEST VALUE:** As predetermined in the solicitation, means the overall combination of quality, price and various elements of required services that in total are optimal relative to a public body's needs.

**BID:** The offer of a bidder to provide specific goods or services at specified prices and/or other conditions specified in the solicitation.

**BIDDER/OFFEROR:** Any individual, company, firm, corporation, partnership or other organization bidding on solicitations issued by the FCEDA President & CEO and offering to enter into contracts with the FCEDA. The term "bidder" will be used throughout this document and shall be construed to mean "offeror" where appropriate.

**CONTRACT MANAGER:** Contract Manager employed by the FCEDA.

**CONTRACTOR:** Any individual, company, firm, corporation, partnership or other organization to whom an award is made by the FCEDA.

**GOODS:** All material, equipment, supplies, printing, and automated data processing hardware and software.

**INFORMALITY:** A minor defect or variation of a bid or proposal from the exact requirements of the Invitation to Bid or the Request for Proposal which does not affect the price, quality, quantity or delivery schedule for the goods, services or construction being procured.

**INVITATION FOR BID (IFB):** A request which is made to prospective suppliers (bidders) for their quotation on goods or services desired by the FCEDA. The issuance of an IFB will contain or incorporate by reference the specifications and contractual terms and conditions applicable to the procurement.

**OPEN MARKET PROCUREMENT (OMP):** A method of competitive bidding for the purchase of or lease of goods, nonprofessional services or for the purchase of insurance when the estimated cost thereof shall be less than \$50,000. Open Market Procurement may also be used for single or term contracts for professional services if the aggregate or the sum of all phases is not expected to exceed \$80,000.

**PROFESSIONAL & CONSULTANT SERVICES:** Any type of professional service with is either: (1) performed by an independent contractor within the practice of accounting, actuarial services, architecture, land surveying, landscape architecture, law, dentistry, medicine, optometry, pharmacy and professional engineering, which shall be procured as set forth in Virginia Code Section 2.2-4301 in the definition of competitive negotiation at paragraph 3(a); or (2) any other type of similar contractual service (including consultants) required by the FCEDA but not furnished by its own employees, which is in its nature so unique that it should be obtained by negotiation on the basis of demonstrated competence and qualification for the type of professional service required and at fair and reasonable compensation rather than by competitive sealed bidding.

**REQUEST FOR PROPOSAL (RFP):** A request for an offer from prospective offerors which will indicate the general terms which are sought to be procured from the offeror. The RFP will specify the evaluation to be used and will contain or incorporate by reference other contractual terms and conditions applicable to the procurement.

**RESPONSIBLE BIDDER/OFFEROR:** An individual, company, firm, corporation, partnership or other organization having the capability in all respects to perform fully the contract requirements, and also having the moral and business integrity and reliability which will assure good faith performance, and having been prequalified, if required. (Reference paragraph 23, General Conditions and Instructions to Bidders.)

**RESPONSIVE BIDDER/OFFEROR:** An individual, company, firm, corporation, partnership or other organization having submitted a bid which conforms in all material respects to the Invitation for Bid or Request for Proposal.

**SERVICES:** Any work performed by an independent contractor wherein the service rendered does not consist primarily of acquisition of equipment or materials, or the rental of equipment, materials and supplies.

**SOLICITATION:** The process of notifying prospective bidders that the FCEDA wishes to receive bids on a set of requirements to provide goods or services. The notification of FCEDA requirements may consist of: public advertising, the mailing of an Invitation for Bid (IFB) or Request for Proposal (RFP), the public posting of notices, issuance of an open market procurement, or telephone calls to prospective bidders.

**STATE:** Commonwealth of Virginia.

### CONDITIONS OF BIDDING

**3. BID FORMS-**Unless otherwise specified in the solicitation, bid Cover Sheets and Pricing Schedules are furnished in duplicate and all bids shall be submitted in duplicate, on the forms provided, properly signed in ink in the proper spaces and submitted in a sealed envelope. The item pages of the Pricing Schedule which do not include any items for which a bid is required need not be included in the submission of a bid.

Should the bid prices and/or any other submissions differ on the copy of the submitted bid, the ORIGINAL copy shall prevail. All invitations to bid, requests for proposal, any other solicitations or any and all bids or proposals may be cancelled or rejected by the FCEDA, prior to award.

#### 4. LATE BIDS & MODIFICATIONS OF BIDS-

- a. Any bid/modification received at the office designated in the solicitation after the exact time specified for receipt of the bid/modification is considered a late bid/modification. A late bid/modification will not be considered for award except under the following conditions only:
  - 1) It was sent by registered or certified mail not later than the fifth (5th) calendar date prior to the date specified for receipt of the bid/modification; or
  - 2) The bid/modification was sent by mail and it is determined by the FCEDA President & CEO that the late receipt was due solely to mishandling by the FCEDA after receipt at the address specified in the solicitation.
- b. If the FCEDA declares administrative or liberal leave, scheduled bid openings or receipt of proposals will be extended to the next business day.
- c. The time of receipt of bids at the specified location is the time-date stamp of such location on the bid wrapper or other documentary evidence of receipt maintained by the specified location.
- d. A late hand-carried bid, or any other late bid not submitted by mail, shall not be considered for award.

#### 5. WITHDRAWAL OF BIDS-

- a. A bidder for a contract other than for public construction may request withdrawal of his or her bid under the following circumstances:
  1. Requests for withdrawal of bids prior to opening of such bids shall be transmitted to the FCEDA President & CEO in writing.
  2. Requests for withdrawal of bids after opening of such bids, but prior to award shall be transmitted to the FCEDA President & CEO, in writing, within two (2) business days after the conclusion of the bid opening procedure, accompanied by full documentation supporting the request. If the request is based on a claim of error, documentation must show the basis of the error. Such documentation may take the form of supplier quotations, vendor work sheets, etc. If bid bonds were tendered with the bid, the FCEDA may exercise its right of collection.

No bid may be withdrawn under this paragraph when the result would be the awarding of the contract on another bid of the same bidder or of another bidder in which the ownership of the withdrawing bidder is more than five percent. If a bid is withdrawn under the authority of this paragraph, the lowest remaining bid shall be deemed to be the low bid. No bidder who is permitted to withdraw a bid shall, for compensation, supply any material or labor to or perform any subcontract or other work agreement for the person or firm to whom the contract is awarded or otherwise benefit, directly or indirectly, from the performance of the project for which the withdrawn bid was submitted.

- b. A bidder for a public construction contract, other than a contract for construction or maintenance of public highways, may withdraw his or her bid from consideration if the price bid was substantially lower than the other bids due solely to a mistake therein, provided the bid was submitted in good faith, and the mistake was a clerical mistake as opposed to a judgment mistake, and was actually due to an unintentional arithmetic error or an unintentional omission of a quantity of work, labor or material made directly in the compilation of a bid, which unintentional arithmetic error or unintentional omission can be clearly shown by objective evidence drawn from inspection of

original work papers, documents and materials used in the preparation of the bid sought to be withdrawn. If a bid contains both clerical and judgment mistakes, a bidder may withdraw his bid from consideration if the price bid would have been substantially lower than the other bids due solely to the clerical mistake, that was an unintentional arithmetic error or an unintentional omission of a quantity of work, labor or material made directly in the compilation of a bid which shall be clearly shown by objective evidence drawn from inspection of original work papers, documents and materials used in the preparation of the bid sought to be withdrawn. The bidder shall give notice in writing to the FCEDA President & CEO of his or her claim of right to withdraw his or her bid within two (2) business days after the conclusion of the bid opening procedure and shall submit original work papers with such notice.

- c. Work papers, documents, and materials submitted in support of a withdrawal of bids may be considered as trade secrets or proprietary information subject to the conditions of the Freedom of Information Act.

**6. ERRORS IN BIDS-**When an error is made in extending total prices, the unit bid price will govern. Erasures in bids must be initialed by the bidder. Carelessness in quoting prices, or in preparation of bid otherwise, will not relieve the bidder. Bidders are cautioned to recheck their bids for possible error. Errors discovered after public opening cannot be corrected and the bidder will be required to perform if his or her bid is accepted.

**7. MAILING OR DELIVERY OF BIDS-**All bids must be delivered or mailed in a sealed envelope. In the event that the bid contains bulky subject material, the bid must be in a sealed envelope, securely attached to the additional bid material being submitted.

**8. COMPLETENESS-**To be responsive, a bid must include all information required by the solicitation.

**9. ACCEPTANCE OF BIDS/BINDING 90 DAYS-**Unless otherwise specified, all formal bids submitted shall be binding for ninety (90) calendar days following bid opening date, unless extended by mutual consent of all parties.

**10. CONDITIONAL BIDS-**Conditional bids are subject to rejection in whole or in part.

**11. BIDS FOR ALL OR PART-**Unless otherwise specified by the FCEDA President & CEO or by the bidder, the FCEDA President & CEO reserves the right to make award on all items in the aggregate or on any of the items on an individual basis, whichever is in the best interest of the FCEDA. A bidder may restrict his or her bid to consideration in the aggregate by so stating but shall name a single unit price on each item bid. Any bid in which the bidder names a total price for all the articles without quoting a unit price for each and every separate item may not be considered for award.

**12. TIME FOR RECEIVING BID-**Bids received prior to the time of opening will be securely kept, unopened. The representative of the FCEDA President & CEO assigned to open them will decide when the specified time has arrived, and no bid received thereafter will be considered, except as provided in paragraph 4, General Conditions and Instructions to Bidders. No responsibility will attach to the FCEDA President & CEO or his or her representative for the premature opening of a bid not properly addressed and identified. Unless specifically authorized in the solicitation, electronic telegraphic or facsimile bids/modifications will not be considered.

**13. BID OPENING-**All bids received in response to an Invitation to Bid (IFB) will be opened at the date, time and place specified, and read publicly and made available for inspection as provided in paragraph 68, General Conditions and Instructions. Abstracts or tabulations of bids received are posted at the Fairfax County Economic Development Authority for a minimum of 30 days.

Proposals received in response to a Request for Proposal (RFP) will be made available as provided in paragraph 68, General Conditions and Instructions.

**14. OMISSIONS & DISCREPANCIES-**Any items or parts of any equipment listed in this solicitation which are not fully described or are omitted from such specification, and which are clearly necessary for the completion of such

equipment and its appurtenances, shall be considered a part of such equipment although not directly specified or called for in the specifications. Should a bidder find discrepancies or ambiguities in, or omissions from, the solicitation, including the drawings and/or specifications, he or she shall notify the FCEDA President & CEO at least five (5) days prior to the date set for the opening of bids. If necessary, the FCEDA President & CEO will send a written addendum for clarification to all bidders no later than three (3) days before the date set for opening of bids. Notifications regarding specifications will not be considered if received within five days of the date set for opening of bids.

**15. RESPONSE TO SOLICITATIONS**-In the event a vendor cannot submit a bid on a solicitation, he or she is requested to return the solicitation cover sheet with an explanation as to why he or she is unable to bid on these requirements. Because of the large number of firms listed on the FCEDA's Bidders List, it may be necessary to delete from this list the names of those persons, firms or corporations who fail to respond after having been invited to bid for three (3) successive solicitations. Such deletion will be made only after formal notification of the intent to remove the firm from the FCEDA's Bidders List.

**16. BIDDER INTERESTED IN MORE THAN ONE BID**-If more than one bid is offered by any one party, either directly or by or in the name of his or her clerk, partner, or other persons, all such bids may be rejected. A party who has quoted prices on work, materials, or supplies to a bidder is not thereby disqualified from quoting prices to other bidders or firms submitting a bid directly for the work, materials or supplies.

**17. TAX EXEMPTION**-Fairfax County and the FCEDA are exempt from the payment of any federal excise or any Virginia sales tax. The bid price must be net, exclusive of taxes. However, when under established trade practice any federal excise tax is included in the list price, a bidder may quote the list price and shall show separately the amount of federal tax, either as a flat sum or as a percentage of the list price, which shall be deducted by Fairfax County and the FCEDA. Fairfax County's Federal Excise Tax Exemption Number is 54-74-0127K. Contractors located outside the Commonwealth of Virginia are advised that when materials are picked up by the FCEDA at their place of business, they may charge and collect their own local/state sales tax. Materials used in the performance of construction contracts are subject to Virginia Sales/Use Tax as described in Section 630-10-27J of the Virginia Retail Sales and Use Tax Regulations.

**18. PROHIBITION AGAINST UNIFORM PRICING**-The FCEDA President & CEO shall encourage open and competitive bidding by all possible means and shall endeavor to obtain the maximum degree of open competition on all purchase transactions using the competitive sealed bidding, competitive negotiation, or open market methods of procurement. In submitting a bid each bidder shall, by virtue of submitting a bid, guarantee that he or she has not been a party with other bidders to an agreement to bid a fixed or uniform price. Violation of this implied guarantee shall render void the bids of participating bidders. Any disclosure to or acquisition by a competitive bidder, in advance of the opening of the bids of the terms or conditions of the bid submitted by another competitor shall render the entire proceedings void and shall require re-advertising for bids.

## SPECIFICATIONS

**19. QUESTIONS CONCERNING SPECIFICATIONS**-Any information relative to interpretation of specifications and drawings shall be requested of the Contract Manager, in writing, in ample time before the opening of bids. No inquiries, if received by the Contract Manager within five (5) days of the date set for the opening of bids, will be given any consideration. Any material interpretation of a specification, as determined by the Contract Manager, will be expressed in the form of an addendum to the specification which will be posted on the FCEDA web site and sent to all prospective bidders no later than three (3) days before the date set for receipt of bids. Oral answers will not be authoritative.

**20. BRAND NAME OR EQUAL ITEMS**-Unless otherwise provided in the invitation for bid, the name of a certain brand, make or manufacturer does not restrict bidders to the specific brand, make or manufacturer named; it conveys the general style, type, character, and quality of the article desired, and any article which the FCEDA in its sole discretion determines to be the equal of

that specified, considering quality, workmanship, economy of operation, and suitability for the purpose intended, shall be accepted.

**21. FORMAL SPECIFICATIONS**-When a solicitation contains a specification which states no substitutes, no deviation therefrom will be permitted and the bidder will be required to furnish articles in conformity with that specification.

The bidder shall abide by and comply with the true intent of the specifications and not take advantage of any unintentional error or omission, but shall fully complete every part as the true intent and meaning of the specifications and drawings. Whenever the mention is made of any articles, material, or workmanship to be in accordance with laws, ordinances, building codes, underwriter's codes, A.S.T.M. regulations or similar expressions, the requirements of these laws, ordinances, etc., shall be construed as to the minimum requirements of these specifications.

**22. FEDERAL SPECIFICATIONS**-Any Federal Specifications referred to herein may be obtained from the GSA Federal Supply Service Bureau - Specification Section, 470 East L'Enfant Plaza, S.W., Suite #8100, Washington, D.C. 20407 (1-202-619-8925)

## AWARD

**23. AWARD OR REJECTION OF BIDS**-The FCEDA President & CEO shall award the contract to the lowest responsive and responsible bidder complying with all provisions of the IFB, provided the bid price is reasonable and it is in the best interest of the FCEDA to accept it. Awards made in response to a RFP will be made to the highest qualified offeror whose proposal is determined, in writing, to be the most advantageous to the FCEDA taking into consideration the evaluation factors set forth in the RFP. The FCEDA President & CEO reserves the right to award a contract by individual items, in the aggregate, or in combination thereof, or to reject any or all bids and to waive any informality in bids received whenever such rejection or waiver is in the best interest of the FCEDA. Award may be made to as many bidders as deemed necessary to fulfill the anticipated requirements of FCEDA. The FCEDA President & CEO also reserves the right to reject the bid of a bidder deemed to be a non-responsible bidder.

In determining the responsibility of a bidder, the following criteria will be considered:

- a. The ability, capacity and skill of the bidder to perform the contract or provide the services required;
- b. Whether the bidder can perform the contract or provide the service promptly, or within the time specified, without delay or interference;
- c. The character, integrity, reliability, reputation, judgment, experience and efficiency of the bidder;
- d. The quality of performance on previous contracts or services;
- e. The previous and existing compliance by the bidder with laws and ordinances relating to the contract or service;
- f. The sufficiency of the financial resources and ability of the bidder to perform the contract or provide the service;
- g. The quality, availability and adaptability of the goods or services to the particular use required;
- h. The ability of the bidder to provide future maintenance and service for the use of the subject of the contract;
- i. The number and scope of the conditions attached to the bid;
- j. Whether the bidder is in arrears to the FCEDA on a debt or contract or is in default on a surety to the FCEDA; and
- k. Such other information as may be secured by the FCEDA President & CEO having a bearing on the decision to award the contract.

**24. NOTICE OF ACCEPTANCE/CONTRACT DOCUMENTS-**A written award (or Acceptance Agreement) mailed (or otherwise furnished) to the successful bidder within the time for acceptance specified in the solicitation shall be deemed to result in a binding contract. The following documents which are included in the solicitation shall be incorporated by reference in the resulting contract and become a part of said contract:

- a. FCEDA Solicitation Form/Acceptance Agreement (Cover Sheet) and other documents which may be incorporated by reference, if applicable,
- b. General Conditions & Instructions to Bidders,
- c. Special Provisions and Specifications,
- d. Pricing Schedule,
- e. Any addenda/amendments/Memoranda of Negotiations

**25. TIE BIDS-**If two or more bidders submit bids that are identical as to price, authorized prompt payment discounts and delivery times, preference will be given to the resident bidder from the Commonwealth of Virginia if there is one, except when in the judgment of the FCEDA such purchase would operate to the disadvantage of the FCEDA. Otherwise, the award will be made by the public drawing of lots. The decision of the FCEDA to make award to one or more of such bidders shall be final.

**26. PROMPT PAYMENT DISCOUNT-**

- a. Unless otherwise specified in the solicitation, prompt payment discounts requiring payment in less than thirty (30) days will not be considered in evaluating a bid for award. However, even though not considered in the evaluation, such discounts will be taken if payment is to be made within the discount period.
- b. In connection with any discount offered, time will be computed from the date of delivery of the supplies to the carrier when delivery, inspection and acceptance are at the point of origin; or, from date of delivery, inspection and acceptance at destination; or, from date correct invoice or voucher is received in the office specified by the FCEDA, if the latter is later than the date of acceptance. In the event the bidder does not indicate a prompt payment discount, it shall be construed to mean NET 30 days.

For the purpose of earning the discount, payment is deemed to be made as of the date of mailing of the Fairfax County check.

**27. INSPECTION-ACCEPTANCE-**For determining acceptance of supplies in accordance with the provisions of the prompt payment discount paragraph, inspection and acceptance shall be accomplished only after examination (including testing) of supplies and services to determine whether the supplies and services conform to the contract requirements. Acceptance shall occur only after receipt and inspection provided such inspection, as appropriate, is accomplished within a reasonable time.

**28. DEFINITE BID QUANTITIES-**Where definite bid quantities are specifically stated, acceptance will bind the FCEDA to order quantities specified and to pay for, at contract prices, all such supplies or services delivered that meet specifications and conditions of the contract. However, the FCEDA will not be required to accept delivery of any balances unordered, as of the contract expiration date, unless the Contractor furnished the FCEDA President & CEO with a statement of unordered balances not later than ten (10) days after the termination date of the contract.

**29. REQUIREMENT BID QUANTITIES-**On "Requirement" bids, acceptance will bind the FCEDA to pay for, at unit bid prices, only quantities ordered and delivered. Where the FCEDA specifies estimated quantities, the Contractor shall not be required to deliver more than ten (10) percent in excess of the estimated quantity of each item, unless otherwise agreed upon.

**CONTRACT PROVISIONS**

**30. TERMINATION OF CONTRACTS-**Contracts will remain in force for full periods specified and/or until all articles ordered before date of termination

shall have been satisfactorily delivered and accepted and thereafter until all requirements and conditions shall have been met, unless:

- a. Terminated prior to expiration date by satisfactory deliveries of entire contract requirements, or upon termination by the FCEDA for convenience or cause.
- b. Extended upon written authorization of the FCEDA President & CEO and accepted by Contractor, to permit ordering of unordered balances or additional quantities at contract prices and in accordance with contract terms.

**31. TERMINATION FOR CONVENIENCE-**A contract may be terminated in whole or in part by the FCEDA in accordance with this clause whenever the FCEDA President & CEO shall determine that such a termination is in the best interest of the FCEDA. Any such termination shall be effected by delivery to the Contractor at least five (5) working days prior to the termination date of a Notice of Termination specifying the extent to which performance shall be terminated and the date upon which termination becomes effective. An equitable adjustment in the contract price shall be made for completed service, but no amount shall be allowed for anticipated profit or unperformed services.

**32. TERMINATION-**

- a. Either party may terminate the contract between the parties upon thirty (30) days written notice to the other. In such event, all finished or unfinished documents, data, studies, surveys, drawings, maps, models, and reports prepared by the Contractor under the contract shall become the property of the FCEDA, and the Contractor shall be entitled to receive just and equitable compensation for any satisfactory work completed up through the date of termination.
- b. Notwithstanding the above, the Contractor shall not be relieved of liability to the FCEDA for damages sustained by the FCEDA by virtue of any breach of contract by the Contractor for the purpose of setoff until such time as the exact amount of damages due to the FCEDA from the Contractor is determined.

**33. CONTRACT ALTERATIONS-**No alterations in the terms of a contract shall be valid or binding upon the FCEDA unless made in writing and signed by the FCEDA President & CEO or his or her authorized agent.

**34. SUBLETTING OF CONTRACT OR ASSIGNMENT OF CONTRACT FUNDS-**It is mutually understood and agreed that the Contractor shall not assign, transfer, convey, sublet or otherwise dispose of his or her contractual duties to any other person, firm or corporation, without the previous written consent of the FCEDA President & CEO. If the Contractor desires to assign his or her right to payment of the contract, Contractor shall notify the FCEDA President & CEO immediately, in writing, of such assignment of right to payment. In no case shall such assignment of contract relieve the Contractor from his or her obligations or change the terms of the contract.

**35. FUNDING-**A contract shall be deemed binding only to the extent of appropriations available to the FCEDA for the purchase of goods and services.

**36. DELIVERY FAILURES-**Failure of a Contractor to deliver within the time specified, or within reasonable time as interpreted by the FCEDA President & CEO, or failure to make replacements of rejected articles when so requested, immediately or as directed by the FCEDA President & CEO, shall constitute authority for the FCEDA President & CEO to purchase in the open market articles of comparable grade to replace the articles rejected or not delivered. On all such purchases, the Contractor shall reimburse the FCEDA, within a reasonable time specified by the FCEDA President & CEO, for any expense incurred in excess of contract prices. Such purchases shall be deducted from the contract quantities. Should public necessity demand it, the FCEDA reserves the right to use or consume articles delivered which are substandard in quality, subject to an adjustment in price to be determined by the FCEDA President & CEO.

**37. NON-LIABILITY-**The Contractor shall not be liable in damages for delay in shipment or failure to deliver when such delay or failure is the result of fire, flood, strike, the transportation carrier, act of God, act of Government, act of an alien enemy or by any other circumstances which, in the FCEDA President

& CEO's opinion, are beyond the control of the Contractor. Under such circumstances, however, the FCEDA President & CEO may, at his or her discretion, cancel the contract.

**38. NEW GOODS, FRESH STOCK-**All Contractors, unless otherwise specifically stated, shall provide new commodities, fresh stock, latest model, design or pack.

**39. NON-DISCRIMINATION-**During the performance of this contract, the Contractor agrees as follows:

- a. The Contractor will not discriminate against any employee or applicant for employment because of race, religion, color, sex, national origin, age, disability, or any other basis prohibited by state law relating to discrimination in employment., except where there is a bona fide occupational qualification reasonably necessary to the normal operation of the Contractor. The Contractor agrees to post in conspicuous places, accessible to employees and applicants for employment, notices setting forth the provisions of this non-discrimination clause.
- b. The Contractor, in all solicitations or advertisements for employees placed by or on behalf of the contract, will state that such Contractor is an equal opportunity employer.
- c. Notices, advertisements and solicitations placed in accordance with federal law, rule or regulation shall be deemed sufficient for the purpose of meeting the requirements of this section.
- d. The Contractor will include the provisions of the foregoing paragraphs a, b, and c above in every subcontract or purchase order of over \$10,000 so that the provisions will be binding upon each subcontractor or vendor.
- e. Contractor and Subcontractor hereunder shall, throughout the term of this contract, comply with the Human Rights Ordinance, Chapter 11 of the Code of the County of Fairfax, Virginia, as reenacted or amended.
- f. If one or more subcontractors are used, the Contractor is encouraged to utilize small minority-owned, women-owned, and service disabled veteran-owned business enterprises. For assistance in finding such subcontractors, the Contractor agrees to contact the director of the FCEDA Small and Minority Business Development Division, the Virginia Department of Business Assistance, and the Virginia Department of Minority Business Enterprise (prior to January 1, 2014), or the Department of Small Business and Supplier Diversity (beginning January 1, 2014), the local chambers of commerce, and other business organizations.

As part of the contract award, the prime Contractor agrees to provide the names and addresses of each subcontractor, the subcontractor's status as defined by Fairfax County, as a small minority-owned, woman-owned and/or service disabled veteran-owned business, and the type and dollar value of the subcontracted goods/services provided.

The Contractor agrees, upon request of the FCEDA, to provide information regarding the actual use of such contractors and subcontractors.

**40. COMPLIANCE WITH FEDERAL IMMIGRATION LAW-**

The Contractor does not, and shall not during the performance of the contract, knowingly employ an unauthorized alien as defined in the federal Immigration Reform and Control Act of 1986. Effective December 1, 2013, any employer with more than an average of 50 employees for the previous 12 months entering into a contract in excess of \$50,000 with the FCEDA shall register in the "E-Verify" program to verify the work authorization status of newly hired employees under the Illegal Immigration Reform and Immigrant Responsibility Act, as operated by the U.S. Department of Homeland Security or other designated federal agency. Any such employer who fails to comply with the "E-Verify" program shall be debarred from contracting with the FCEDA for a period up until one year. Such debarment shall cease

upon the employer's registration and participation in the E-Verify program.

**41. DRUG-FREE WORKPLACE –** During the performance of this contract, the Contractor agrees as follows:

- a. The Contractor agrees to (i) provide a drug-free workplace for the contractor's employees; (ii) post in conspicuous places, available to employees and applicants for employment, a statement notifying employees that the unlawful manufacture, sale, distribution, dispensation, possession, or use of a controlled substance or marijuana is prohibited in the contractor's workplace and specifying the actions that will be taken against employees for violations of such prohibition; (iii) state in all solicitations or advertisements for employees placed by or on behalf of the contractor that the contractor maintains a drug-free workplace; and (iv) include the provisions of the foregoing clauses in every subcontract or purchase order over \$10,000, so that the provisions will be binding upon each subcontractor or vendor.
- b. A "drug-free workplace" means a site for the performance of work done in connection with a specific contract awarded to a contractor in accordance with the Public Procurement Act, the employees of whom are prohibited from engaging in the unlawful manufacture, sale, distribution, dispensation, possession or use of any controlled substance or marijuana during the performance of the contract.

**42. OFFICE OF SMALL BUSINESS -**

- a. The FCEDA adheres to the policy, as declared by the Fairfax County Board of Supervisors in the adoption of a Small and Minority Business Enterprise Program on April 6, 1981, that the FCEDA and its employees shall undertake every effort to increase opportunity for utilization of small and minority businesses in all aspects of procurement to the maximum extent feasible.
- b. In connection with the performance of this contract, the Contractor agrees to use his or her best effort to carry out this policy and to insure that small and minority businesses shall have the maximum practicable opportunity to compete for subcontract work under this contract consistent with the efficient performance of this contract.
- c. As used in this contract, the term small business means an independently owned and operated business which, together with affiliates, has 250 or fewer employees or average annual gross receipts of \$10 million or less averaged over the previous three years.
- d. As used in this contract, the term "minority business" means a business concern that is at least 51% owned by one or more minority individuals or in the case of a corporation, partnership or limited liability company, or other entity, at least 51% of the equity ownership interest in the corporation, partnership or limited company or other entity is owned by one or more minority individuals and both the management and daily business operations are controlled by one or more minority individuals. Such persons include African Americans; Hispanic Americans; Asian Americans; Native Americans; Eskimos and Aleuts; women who are U.S. citizens or legal resident aliens, regardless of race or ethnicity; persons with a physical impairment that substantially limits one or more of the major life activities of such individual, a record of such impairment, or who is regarded as having such an impairment; and service disabled veterans.
- e. Contractors may rely on oral or written representations by subcontractors regarding their status as small and/or minority business enterprises in lieu of independent investigation.
- f. Where Federal grants or monies are involved it is the policy of the FCEDA, through its agents and employees, to comply with the requirements set forth in the U.S. Office of Management and Budget Circular No. A-102, uniform administrative requirements for Grants and Cooperative Agreements with State and Local Governments, as they pertain to small and minority business utilization.

**43. GUARANTEES & WARRANTIES**-All guarantees and warranties required shall be furnished by the Contractor and shall be delivered to the FCEDA President & CEO before final payment on the contract is made. Unless otherwise stated, manufacturer's standard warranty applies.

**44. PRICE REDUCTION**-If at any time after the date of the bid the Contractor makes a general price reduction in the comparable price of any material covered by the contract to customers generally, an equivalent price reduction based on similar quantities and/or considerations shall apply to this contract for the duration of the contract period (or until the price is further reduced). Such price reduction shall be effective at the same time and in the same manner as the reduction in the price to customers generally. For the purpose of this provision, a "general price reduction" shall mean any horizontal reduction in the price of an article or service offered (1) to Contractor's customers generally, or (2) in the Contractor's price schedule for the class of customers, i.e., wholesalers, jobbers, retailers, etc., which was used as the basis for bidding on this solicitation. An occasional sale at a lower price, or sale of distressed merchandise at a lower price, would not be considered a general price reduction" under this provision. The Contractor shall submit his or her invoice at such reduced prices indicating on the invoice that the reduction is pursuant to the "Price Reduction" provision of the contract documents. The Contractor in addition will within ten days of any general price reduction notify the FCEDA President & CEO of such reduction by letter. **FAILURE TO DO SO MAY REQUIRE TERMINATION OF THE CONTRACT.** Upon receipt of any such notice of a general price reduction, all ordering offices will be duly notified by the FCEDA President & CEO.

The Contractor, if requested, shall furnish within ten days after the end of the contract period, a statement certifying either (1) that no general price reduction, as defined above, was made after the date of the bid, or (2) if any such general price reductions were made, that as provided above, they were reported to the FCEDA President & CEO within ten (10) days and ordering offices were billed at the reduced prices. Where one or more such general price reductions were made, the statement furnished by the Contractor shall include with respect to each price reduction (1) the date when notice of any such reduction was issued, (2) the effective date of the reduction, and (3) the date when the FCEDA President & CEO was notified of any such reduction.

**45. CHANGES**-Should it become proper or necessary in the execution of this contract to make any change in design, or to make any alterations which will increase the expense, the FCEDA President & CEO shall determine an equitable adjustment.

No payment shall be made to the Contractor for any extra material or services, or of any greater amount of money than stipulated to be paid in the contract, unless some changes in or additions to the contract requiring additional outlay by the Contractor shall first have been expressly authorized and ordered in writing by contract amendment or otherwise furnished by the FCEDA President & CEO.

**46. PLACING OF ORDERS**-Orders against contracts will be placed with the Contractor by a written request executed and released by the FCEDA President & CEO or his or her designee. The Written Request must bear the appropriate contract number and date. Where a Written Request has been executed and released by the FCEDA President & CEO, telephonic orders for the period of the request may be placed directly with the Contractor by authorized personnel in the FCEDA.

## DELIVERY PROVISION

**47. SHIPPING INSTRUCTIONS - CONSIGNMENT**-Unless otherwise specified in the solicitation each case, crate, barrel, package, etc., delivered under the contract must be plainly stenciled or securely tagged, stating the Contractor's name, purchase order number, and delivery address as indicated in the order. Where shipping containers are to be used, each container must be marked with the purchase order number, name of the Contractor, the name of the item, the item number, and the quantity contained therein. Deliveries must be made within the hours of 8:00 AM - 3:00 PM. Deliveries at any other time will not be accepted unless specific arrangements have been previously made with the storekeeper at the delivery point. No deliveries will be accepted on Saturdays, Sundays and holidays unless previous arrangements have been made. It shall be the responsibility of the Contractor to insure compliance with these instructions for items that are drop-shipped.

**48. RESPONSIBILITY FOR SUPPLIES TENDERED**-The Contractor shall be responsible for the materials or supplies covered by the contract until they are delivered at the designated point, but the Contractor shall bear all risk on rejected materials or supplies after notice of rejection. Rejected materials or supplies must be removed by and at the expense of the Contractor promptly after notification of rejection, unless public health and safety require immediate destruction or other disposal of rejected delivery. If rejected materials are not removed by the Contractor within ten (10) days after date of notification, the FCEDA may return the rejected materials or supplies to the Contractor at his or her risk and expense or dispose of them as its own property.

**49. INSPECTIONS**-Inspection and acceptance of materials or supplies will be made after delivery at destinations herein specified unless otherwise stated. If inspection is made after delivery at destination herein specified, the FCEDA will bear the expense of inspection except for the value of samples used in case of rejection. Final inspection shall be conclusive except in regard to latent defects, fraud or such gross mistakes as to amount to fraud. Final inspection and acceptance or rejection of the materials or supplies will be made as promptly as practicable, but failure to inspect and accept or reject materials or supplies shall not impose liability on the FCEDA for such materials or supplies as are not in accordance with the specifications.

**50. COMPLIANCE**-Delivery must be made as ordered and in accordance with the solicitation or as directed by the FCEDA President & CEO when not in conflict with the bid. The decision of the FCEDA President & CEO as to reasonable compliance with delivery terms shall be final. Burden of proof of delay in receipt of goods by the purchaser shall rest with the Contractor. Any request for extension of time of delivery from that specified must be approved by the FCEDA President & CEO, such extension applying only to the particular item or shipment affected. Should the Contractor be delayed by the FCEDA, there shall be added to the time of completion a time equal to the period of such delay caused by the FCEDA. However, the contractor shall not be entitled to claim damages or extra compensation for such delay or suspension. These conditions may vary for construction contracts. See Special Provisions for the individual solicitation.

**51. POINT OF DESTINATION**-All materials shipped to the FCEDA must be shipped F.O.B. DESTINATION unless otherwise stated in the contract. The materials must be delivered to the "Ship to" address indicated on the purchase order.

**52. ADDITIONAL CHARGES**-Unless bought F.O.B. "shipping point" and Contractor prepays transportation, no delivery charges shall be added to invoices except when express delivery is authorized and substituted on orders for the method specified in the contract. In such cases, difference between freight or mail and express charges may be added to invoice.

**53. METHOD AND CONTAINERS**-Unless otherwise specified, goods shall be delivered in commercial packages in standard commercial containers, so constructed as to ensure acceptance by common or other carrier for safe transportation to the point of delivery. Containers become the property of the FCEDA unless otherwise specified by bidder.

**54. WEIGHT CHECKING**-Deliveries shall be subject to re-weighing over official sealed scales designated by the FCEDA. Payments shall be made on the basis of net weight of materials delivered. Normal shrinkage may be allowed in such instances where shrinkage is possible. Net weights only, exclusive of containers or wrapping, shall be paid for by the FCEDA.

**55. DEMURRAGE AND RE-SPOTTING**-The FCEDA will be responsible for demurrage charges only when such charges accrue because of the FCEDA's negligence in unloading the materials. The FCEDA will pay railroad charges due to the re-spotting of cars, only when such re-spotting is ordered by the FCEDA.

**56. REPLACEMENT**-Materials or components that have been rejected by the FCEDA President & CEO, in accordance with the terms of a contract, shall be replaced by the Contractor at no cost to the FCEDA.

**57. PACKING SLIPS OR DELIVERY TICKETS**-All shipments shall be accompanied by Packing Slips or Delivery Tickets and shall contain the following information for each item delivered:

1. The Name of the Article and Stock Number (Supplier's),
2. The Fairfax County EDA Identification Number (FCEDAIN), if specified in the order,
3. The Quantity Ordered,
4. The Quantity Shipped,
5. The Quantity Back Ordered,
6. The Name of the Contractor.

Contractors are cautioned that failure to comply with these conditions shall be considered sufficient reason for refusal to accept the goods.

## BILLING

**58. BILLING**-Billing for the FCEDA: Unless otherwise specified on the contract or purchase order, invoices are to be submitted, in DUPLICATE, for each purchase order immediately upon completion of the shipment or services. If shipment is made by freight or express, the original Bill of Lading, properly receipted, must be attached to the invoice. Invoices should be mailed to the "BILL TO" address on the P.O. or to the appropriate address specified below:

FCEDA  
 Attn: Barbara Cohen  
 Administrator  
 8300 Boone Blvd, Suite 450  
 Vienna, VA 22182

## PAYMENTS

**59. PAYMENT**-Payment shall be made by Fairfax County, on behalf of the FCEDA, in US dollars, after satisfactory performance of the contract, in accordance with all of the provisions thereof, and upon the FCEDA's receipt of a properly completed invoice. Payment will be made within thirty (30) days of the FCEDA's receipt of the contractor's invoice. The FCEDA will not be responsible for the payment of VAT or any similar taxes. The FCEDA and Fairfax County, on behalf of the FCEDA, reserve the right to withhold any or all payments or portions thereof for Contractor's failure to perform in accordance with the provision of the contract or any modifications thereto.

**60. PARTIAL PAYMENTS**-Unless otherwise specified, partial payments will be made upon acceptance of materials or services so invoiced if in accordance with completion date. However, 5 percent (5%) of the value of the entire order may be retained until completion of contract.

**61. PAYMENT FOR EQUIPMENT, INSTALLATION, AND TESTING**-When equipment requires installation (which shall also be interpreted to mean erection and/or setting up or placing in position, service, or user end test, and where such installation or testing is delayed, payment may be made on the basis of 50% of the contract price when such equipment is delivered on the site. A further allowance of 25% may be made when the equipment is installed and ready for test. The balance shall be paid after the equipment is tested and found to be satisfactory. If the equipment must be tested, but installation is not required to be made by the Contractor or if the equipment must be installed but testing is not required, payment may be made on the basis of 75% at the time of delivery and the balance shall be paid after satisfactory test or installation is completed.

## GENERAL

**62. GENERAL GUARANTY**-Contractor agrees to:

- a. Save the FCEDA, its agents and employees harmless from liability of any nature or kind for the use of any copyrighted or uncopyrighted composition; secret process, patented or unpatented; invention; article or appliance furnished or used in the performance of a contract for which the Contractor is not the patentee, assignee, licensee or owner.
- b. Protect the FCEDA against latent defective material or workmanship and to repair or replace any damages or marring occasioned in transit or delivery.

- c. Furnish adequate protection against damage to all work and to repair damages of any kind to the building or equipment, to his or her own work or to the work of other contractors, for which his or her workers are responsible.
- d. Pay for all permits, licenses and fees and give all notices and comply with all laws, ordinances, rules and regulations of the FCEDA.
- e. Protect the FCEDA from loss or damage to FCEDA owned property while it is in the custody of the Contractor.

**63. SERVICE CONTRACT GUARANTY**-Contractor agrees to:

- a. Furnish services described in the solicitation and resultant contract at the times and places and in the manner and subject to conditions therein set forth provided that the FCEDA may reduce the said services at any time.
- b. Enter upon the performance of services with all due diligence and dispatch, assiduously press to its complete performance, and exercise therein the highest degree of skill and competence.
- c. All work and services rendered in strict conformance to all laws, statues, and ordinances and the applicable rules, regulations, methods and procedures of all government boards, bureaus, offices and other agents.
- d. Allow services to be inspected or reviewed by an employee of the FCEDA at any reasonable time and place selected by the FCEDA. The FCEDA and Fairfax County, on behalf of the FCEDA, shall be under no obligation to compensate Contractor for any services not rendered in strict conformity with the contract.
- e. Stipulate that the presence of a County Inspector shall not lessen the obligation of the Contractor for performance in accordance with the contract requirements, or be deemed a defense on the part of the Contractor for infraction thereof. The Inspector is not authorized to revoke, alter, enlarge, relax, or release any of the requirements of the contract documents. Any omission or failure on the part of the Inspector to disapprove or reject any work or material shall not be construed to be an acceptance of any such defective work or material. Notification of an omission or failure will be documented by the FCEDA President & CEO.

**64. INDEMNIFICATION**-Contractor shall indemnify, keep and save harmless the FCEDA, its agents, officials, employees and volunteers against claims of injuries, death, damage to property, patent claims, suits, liabilities, judgments, cost and expenses which may otherwise accrue against the FCEDA in consequence of the granting of a contract or which may otherwise result therefrom, if it shall be determined that the act was caused through negligence or error, or omission of the Contractor or his or her employees, or that of the subcontractor or his or her employees, if any; and the Contractor shall, at his or her own expense, appear, defend and pay all charges of attorneys and all costs and other expenses arising therefrom or incurred in connection therewith; and if any judgment shall be rendered against the FCEDA in any such action, the Contractor shall, at his or her own expense, satisfy and discharge the same. Contractor expressly understands and agrees that any performance bond or insurance protection required by this contract or otherwise provided by the Contractor, shall in no way limit the responsibility to indemnify, keep and save harmless and defend the FCEDA as herein provided.

**65. OFFICIALS NOT TO BENEFIT-**

- a. Each bidder or offeror shall certify, upon signing a bid or proposal, that to the best of his or her knowledge no FCEDA official or employee having official responsibility for the procurement transaction, or member of his or her immediate family, has received or will receive any financial benefit of more than nominal or minimal value relating to the award of this contract. If such a benefit has been received or will be received, this fact shall be disclosed with the bid or proposal or as soon thereafter as it appears that such a benefit will be received. Failure to disclose the information prescribed above may result in suspension or debarment, or

rescission of the contract made, or could affect payment pursuant to the terms of the contract.

- b. Whenever there is reason to believe that a financial benefit of the sort described in paragraph "a" has been or will be received in connection with a bid, proposal or contract, and that the contractor has failed to disclose such benefit or has inadequately disclosed it, the FCEDA President & CEO, as a prerequisite to payment pursuant to the contract, or at any other time, may require the Contractor to furnish, under oath, answers to any interrogatories related to such possible benefit.
- c. In the event the bidder or offeror has knowledge of benefits as outlined above, this information should be submitted with the bid or proposal. If the above does not apply at time of award of contract and becomes known after inception of a contract, the bidder or offeror shall address the disclosure of such facts to the Fairfax County Economic Development Authority, President & CEO, 8300 Boone Boulevard, Suite 450, Vienna, Virginia 22182. Relevant Invitation/Request for Proposal Number (see cover sheet) should be referenced in the disclosure.

**66. LICENSE REQUIREMENT-**All firms located in Fairfax County shall obtain a license as required by Chapter 4, Article 7, of The Code of the County of Fairfax, Virginia, as amended, entitled "Business, Professional and Occupational Licensing (BPOL) Tax." Questions concerning the BPOL Tax should be directed to the Office of Assessments, telephone (703) 222-8234, or visit [http://www.co.fairfax.va.us/dta/business\\_tax.htm](http://www.co.fairfax.va.us/dta/business_tax.htm). The BPOL Tax number must be indicated in the space provided on the Cover Sheet, "Fairfax License Tax No." when appropriate.

**67. AUTHORIZATION BY STATE CORPORATION COMMISSION-**

a. A Contractor organized as a stock or nonstock corporation, limited liability company, business trust, or limited partnership or registered as a registered limited liability partnership must be authorized to transact business as a domestic or foreign business entity as required by the State Corporation Commission (SCC), if such is required by law. Such authorization must be maintained during the term of a contract. Any competitive sealed bidding bidder or competitive negotiation offeror required to be authorized by the SCC must include in its bid or proposal the identification number issued to it by the SCC. Any foreign business entity engaging in competitive sealed bidding or competitive negotiation that is not required by law to be authorized to transact business as required by the SCC must include in its bid or proposal a statement describing why the bidder or offeror is not required to be so authorized. A contract entered into by a business in violation of these requirements is voidable at the option of the FCEDA. The SCC may be reached at Post Office Box 1197, Richmond, Virginia 23218; (804) 371-9733.

b. A foreign corporation transacting business in Virginia shall secure a certificate of authority from the SCC as required by Section 13.1-757 of the Code of Virginia. The consequences of failing to secure a certificate of authority are set forth in Virginia Code Section 13.1-758.

**68. COVENANT AGAINST CONTINGENT FEES-**The Contractor warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, except bona fide employees or bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business. For violation of this warranty, the FCEDA shall have the right to terminate or suspend this contract without liability to the FCEDA or in its discretion to deduct from the contract price or consideration, or otherwise recover, the full amount of such commission, percentage, brokerage, or contingent fee.

**69. VIRGINIA FREEDOM OF INFORMATION ACT-**All proceedings, records, contracts and other public records relating to procurement transactions shall be open to the inspection of any citizen, or any interested person, firm or corporation, in accordance with the Virginia Freedom of Information Act except as provided below:

- a. Cost estimates relating to a proposed procurement transaction prepared by or for a public body shall not be open to public inspection.

- b. Any competitive sealed bidding bidder, upon request, shall be afforded the opportunity to inspect bid records within a reasonable time after the opening of all bids but prior to award, except in the event that the FCEDA decides not to accept any of the bids and to reopen the contract. Otherwise, bid records shall be open to public inspection only after award of the contract. Any competitive negotiation offeror, upon request, shall be afforded the opportunity to inspect proposal records within a reasonable time after the evaluation and negotiations of proposals are completed but prior to award except in the event that the FCEDA decides not to accept any of the proposals and to reopen the contract. Otherwise, proposal records shall be open to the public inspection only after award of the contract except as provided in "c". Any inspection of procurement transaction records under this section shall be subject to reasonable restrictions to ensure the security and integrity of the records.
- c. Trade secrets or proprietary information submitted by a bidder, offeror or contractor in connection with a procurement transaction shall not be subject to public disclosure under the Virginia Freedom of Information Act; however, the bidder, offeror or contractor must invoke the protections of this section prior to or upon submission of the data or other materials, and must identify the data or other materials to be protected and state the reasons why protection is necessary.
- d. Nothing contained in this section shall be construed to require the FCEDA, when procuring by "competitive negotiation" (Request for Proposal), to furnish a statement of the reasons why a particular proposal was not deemed to be the most advantageous to the FCEDA.

**BIDDER/CONTRACTOR REMEDIES**

**70. INELIGIBILITY-**

- a. Any person or firm suspended or debarred from participation in FCEDA procurement shall be notified in writing by the FCEDA President & CEO.
  - 1. The Notice of Suspension shall state the reasons for the actions taken and such decision shall be final unless the person or firm appeals within thirty (30) days of receipt of the Notice by instituting legal action as provided in the Code of Virginia.
  - 2. The Notice of Debarment shall state the reasons for the actions taken and the decision shall be final unless the person or firm appeals within thirty (30) days of receipt of the notice by instituting legal action as provided in the Code of Virginia.
- b. The FCEDA President & CEO shall have the authority to suspend or debar a person or firm from bidding on any contract for the causes stated below:
  - 1. conviction for commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract;
  - 2. conviction under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty which currently, seriously, and directly affects responsibility as a FCEDA contractor;
  - 3. conviction under the state or federal antitrust statutes arising out of the submission of bids or proposals;
  - 4. violation of contract provisions, as set forth below, of a character which is regarded by the FCEDA President & CEO to be so serious as to justify suspension or debarment action;



(a) failure without good cause to perform in accordance with the specifications or within the time limit provided in the contract; or

(b) a recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts; provided, that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor shall not be considered to be a basis for suspension or debarment;

5. any other cause the FCEDA President & CEO determines to be so serious and compelling as to affect responsibility as a contractor, such as debarment by another governmental entity for any cause listed herein, or because of prior reprimands;

6. the contractor has abandoned performance or been terminated for default on any other FCEDA project;

7. the contractor is in default on any surety bond or written guarantee on which FCEDA is an obligee.

c. If, upon appeal, it is determined that the action taken by the FCEDA President & CEO was arbitrary or capricious, or not in accordance with the Constitution of Virginia, statutes or regulations, the sole relief available to the person or firm shall be restoration of eligibility. The person or firm may not institute legal action until all statutory requirements have been met.

#### 71. APPEAL OF DENIAL OF WITHDRAWAL OF BID-

a. A decision denying withdrawal of a bid submitted by a bidder or offeror shall be final and conclusive unless the bidder appeals the decision within ten (10) days after receipt of the decision by instituting legal action as provided in the Code of Virginia. The bidder or offeror may not institute legal action until all statutory requirements have been met.

b. If no bid bond was posted, a bidder refused withdrawal of bid under the provisions of Article III, Section A.7 of the FCEDA Public Procurement Guideline, prior to appealing, shall deliver to the FCEDA a certified check, cashier's check or cash bond in the amount of the difference between the bid sought to be withdrawn and the next low bid. Such security shall be released only upon a final determination that the bidder was entitled to withdraw the bid.

c. If, upon appeal, it is determined that the decision refusing withdrawal of the bid was not an honest exercise of discretion, but rather was arbitrary or capricious or not in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms or conditions of the Invitation to Bid, the sole relief shall be withdrawal of the bid.

#### 72. APPEAL OF DETERMINATION OF NONRESPONSIBILITY-

a. Any bidder who, despite being the apparent low bidder, is determined not to be a responsible bidder for a particular FCEDA contract shall be notified in writing by the FCEDA President & CEO. Such notice shall state the basis for the determination. Within ten (10) days, the bidder may submit rebuttal information. The FCEDA will issue a written determination within five (5) days of the date that the FCEDA receives the rebuttal information, which shall be final unless the bidder appeals the decision within ten (10) days of receipt of the notice by instituting legal action as provided in the Code of Virginia. The bidder may not institute legal action until all statutory requirements have been met.

b. If, upon appeal, it is determined that the decision of the FCEDA President & CEO was not an honest exercise of discretion, but rather was arbitrary or capricious or not in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms or conditions of the Invitation to Bid, and the award for the particular FCEDA contract in question has not been made, the sole relief available to the bidder shall be a finding that the bidder is a responsible bidder for the FCEDA contract in question, or directed award, or both. Where the award has been made and performance has begun, the FCEDA may declare the contract void upon a finding that this action is in the best interest of the public. Where a contract is declared void, the performing contractor

shall be compensated for the cost of performance up to the time of such declaration. In no event shall the performing contractor be entitled to lost profits.

#### 73. PROTEST OF AWARD OR DECISION TO AWARD-

a. Any bidder or offeror may protest the award or decision to award a contract by submitting a protest in writing to the FCEDA President & CEO, or an official designated by the FCEDA, no later than ten (10) days after public notice of the award or the announcement of the decision to award, whichever occurs first. Public notice of the award or the announcement of the decision to award shall be given by the FCEDA in the manner prescribed in the terms or conditions of the Invitation to Bid or Request for Proposal. Any potential bidder or offeror on a contract negotiated on a sole source or emergency basis who desires to protest the award or decision to award such contract shall submit such protest in the same manner no later than ten days after posting or publication of the notice of such contract as provided in Article III, Section C. However, if the protest of any actual or potential bidder or offeror depends in whole or in part upon information contained in public records pertaining to the procurement transaction which are subject to inspection under Article II, Section M, then the time within which the protest must be submitted shall expire ten days after those records are available for inspection by such bidder or offeror under Article II, Section M, or at such later time as provided herein. No protest shall lie for a claim that the selected bidder or offeror is not a responsible bidder or offeror. The written protest shall include the basis for the protest and the relief sought. The FCEDA President & CEO shall issue a decision in writing within ten (10) days of the receipt of the protest stating the reasons for the action taken. This decision shall be final unless the bidder or offeror appeals within ten (10) days of receipt of the written decision by instituting legal action as provided in the Code of Virginia.

Nothing in this subsection will be construed to permit a bidder or offeror to challenge the validity of the terms or conditions of the Invitation to Bid or Request for Proposal.

b. If prior to award it is determined that the decision to award is arbitrary or capricious, then the sole relief shall be a finding to that effect. The FCEDA President & CEO shall cancel the proposed award or revise it to comply with the law. If, after an award, it is determined that an award of a contract was arbitrary or capricious, then the sole relief shall be as hereinafter provided. Where the award has been made but performance has not begun, the performance of the contract may be declared void by the FCEDA. Where the award has been made and performance has begun, the FCEDA President & CEO may declare the contract void upon a finding that this action is in the best interest of the FCEDA. Where a contract is declared void, the performing contractor shall be compensated for the cost of performance at the rate specified in the contract up to the time of such declaration. In no event shall the performing contractor be entitled to lost profits.

c. Pending final determination of a protest or appeal, the validity of a contract awarded and accepted in good faith in accordance with this article shall not be affected by the fact that a protest or appeal has been filed.

d. An award need not be delayed for the period allowed a bidder or offeror to protest, but in the event of a timely protest, no further action to award the contract will be taken unless there is a written determination that proceeding without delay is necessary to protect the public interest or unless the bid or offer would expire.

#### 74. CONTRACTUAL DISPUTES-

a. Any dispute concerning a question of fact as a result of a contract with the FCEDA which is not disposed of by agreement shall be decided by the FCEDA President & CEO, who shall reduce his decision to writing and mail or otherwise forward a copy thereof to the contractor within ninety (90) days. The decision of the FCEDA President & CEO shall be final and conclusive unless the contractor appeals within six (6) months of the date of the final written decision by instituting legal action as provided in the Code of Virginia. A contractor may not institute legal

action, prior to receipt of the public body's decision on the claim, unless the public body fails to render such decision within the time specified.

b. Contractual claims, whether for money or other relief, shall be submitted in writing no later than ninety (90) days after final payment: however, written notice of the contractor's intention to file such claim shall have been given at the time of the occurrence or beginning of the work upon which the claim is based. Nothing herein shall preclude a contract from requiring submission of an invoice for final payment within a certain time after completion and acceptance of the work or acceptance of the goods. Pendency of claims shall not delay payment of amounts agreed due in the final payment.

**75. LEGAL ACTION**-No bidder, offeror, potential bidder or offeror, or contractor shall institute any legal action until all statutory requirements have been met.

**76. COOPERATIVE PURCHASING**-When stated specifically in the solicitation, the FCEDA President & CEO may solicit bids and award contracts on behalf of other public bodies for the purpose of combining requirements to increase efficiency, effect cost savings, or reduce administrative expenses. Jurisdictions participating in such solicitations shall be identified in the solicitation.

Approved:

/s/ Victor Hoskins  
FCEDA President & CEO

/s/ Thomas O. Lawson  
FCEDA Legal Counsel

Reviewed 8/19