

# PROCUREMENT AND CAPITAL OUTLAY POLICY HANDBOOK

Virginia Port Authority  
Procurement Department



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## CHAPTER 1: INTRODUCTION AND GENERAL POLICY

### 1.1 Introduction and General Policy

The enclosed policies represent the Virginia Port Authority's (VPA) adherence to prudent business practices when purchasing goods and services. All purchasing and contracting will be done to support the mission of the VPA and will be in the best interest of the Commonwealth of Virginia. The VPA will continue to consider the benefits of established State contracts to procure certain goods and services. VPA Procurement Department is responsible for determining the appropriate and most desirable source for each procurement in accordance with these policies.

### 1.2 Purpose, Considerations, and Procedures

#### 1.2.1 Introduction and Purpose

The Virginia Port Authority is a political subdivision of the Commonwealth and is exempt from the provisions of the Virginia Public Procurement Act (VPPA) pursuant to § 2.2-4343(A) of the Code of Virginia. As a result, the VPA is not required to follow the policies and procedures issued by the Department of General Services or other procurement-related agencies, except for transactions involving real estate acquisition. These policies are designed to ensure fairness and competitiveness in the VPA's procurement of goods and services and have been reviewed and adopted by the VPA's Board of Commissioners.

This Policy Handbook guides VPA procurements and ensure that the VPA:

- Obtains high quality goods and services at a reasonable cost.
- Conducts all procurements in a fair and impartial manner, avoiding any impropriety or appearance of impropriety.
- Seeks competition, consistent with the business needs of the VPA.
- Allows flexibility in fashioning details of such competition.
- Provides clear rules, in advance of competition, governing contract awards.
- Freely exchanges information between purchasers and vendors, inasmuch as such exchange does not negatively affect the business objectives of the VPA, or violate associated confidentiality requirements.
- Does not arbitrarily or capriciously exclude any qualified vendors and that all vendors have access to public business.

#### 1.2.2 Authority for the Policy Handbook

This Policy Handbook has been adopted by the VPA Board of Commissioners to meet the requirements of Virginia Code §2.2-4343(A) and constitutes the Board's policies to ensure fairness and competitiveness in the procurement of goods and services, and the administration of VPA's capital outlay program through the Procurement Department. This Policy Handbook provides rules for all employees of the VPA as they identify and pursue the procurement of goods and services to fulfill the business needs of the VPA. However, as indicated herein, specific responsibilities and authorities have been defined for purchasing goods and services on behalf of the VPA. All employees are therefore directed to the VPA responsible party, as defined herein, prior to pursuing any procurement.

Certain procedures and forms referenced in this Policy Handbook are subject to change. In cases where this Policy Handbook appears to contradict instructions on forms or other materials, the policies and procedures documented herein will take precedence.

The Procurement Head, and his/her staff in the VPA Procurement Department, have the duty to assist in any purchasing activity, and to interpret and apply these policies.

### 1.2.3 Applicability

Because of integration of functions between the VPA, a state agency, and private operating entities, Virginia International Terminals LLC (“VIT”) and Hampton Roads Chassis Pool II LLC (“HRCP II”), employees of private entities will sometimes perform management or operational functions relevant to VPA procurements. Additionally, the VPA will occasionally engage private consultants to perform procurement-related functions, such as participation on source-selection panels.

When VIT employees, HRCP II employees and/or private consultants are performing procurement-related functions on VPA procurements, they will adhere to the policies in this Policy Handbook, to include ethics and procurement integrity policies.

### 1.2.4 Changes to the VPA Procurement and Capital Outlay Policy Handbook and Waiver Authority

The VPA Executive Director is granted the authority to make non-material changes to this Policy Handbook, which will be reported to the Board at their next scheduled meeting. The Board can veto any change with a simple majority. The Executive Director is also granted the authority to waive provisions and requirements of this Policy Handbook so long as those waivers do not exceed the Executive Director’s approval authority of \$2.5 million and do not materially change the intent of this document.

Subsequent changes to the Policy Handbook that materially impact policy will be reviewed, approved, and adopted by the VPA Board of Commissioners.

### 1.2.5 Procedures Required by Source of Funding

Certain projects and procurements are funded by federal grant funds, private funds, or sources other than funds appropriated by the General Assembly. Often, these sources of funding come with specific procedural requirements. VPA’s policy is to conform its procurement procedures to any requirements associated with sources of funding unless they would put the VPA in violation of applicable law or directly contradict important VPA policies. The Executive Director is authorized to approve deviations from the policies in this Policy Handbook necessary to conform to such requirements.

## 1.3. Uniform Guidance, 2 CFR 200.317 -200.326

The Office of Management and Budget (OMB) has combined many federal circulars into a single guidance document known as Uniform Guidance (UG) (2 CFR 200.317-200.326.) to be used by all federal agencies.

Procurements utilizing funds by federal grants and sub-grants subject to the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (Uniform Rules) will follow the procedures and policies codified at 2 CFR 200.317 – 200.326 found at <https://www.ecfr.gov/>.

In the event the VPA Policy Handbook is more restrictive than the UG, the VPA Policy Handbook will govern.

## CHAPTER 2: ETHICAL STANDARDS OF CONDUCT

### 2.1 Ethics in Procurement

VPA employees, under direction and guidance of the Procurement Department, involved in the procurement process play an important role in ensuring the VPA conducts its business with integrity. Adherence to the VPA Ethical Standards of Conduct in the contracting process strengthens stakeholders' confidence in the VPA, and ensures the VPA colleagues act as good stewards of the Commonwealth of Virginia's resources. Responsible business conduct can avoid administrative, civil or criminal penalties as well as considerable business disruptions associated with misconduct.

VPA colleagues are the stewards of natural and economic resources belonging to the citizens of the Commonwealth of Virginia and have an inherent duty to use those resources wisely, fairly and with integrity, to achieve the greatest benefit for the Commonwealth. Accordingly, VPA personnel shall conduct business in compliance with the highest standards of ethical behavior, in strict compliance with applicable laws, regulations and policies. VPA colleagues shall consciously avoid the appearance of impropriety in the performance of their duties.

The VPA Ethical Standards of Conduct applies to all VPA colleagues in the performance of their official duties, and their personal business affairs as they relate to, or affect, their official duties with the VPA or its affiliates, VIT and HRCF II.

Where VIT or HRCF II employees are performing functions on or in support of VPA contracts they will adhere to the same standard of conduct as VPA employees.

The Ethical Standards of Conduct applies to all VPA vendors and suppliers when performing duties on behalf of the VPA.

The *Code of Virginia* dictates a higher standard of conduct for procurement and finance officials than for other public employees due to the extraordinary trust and responsibility exercised by public officials conducting procurement transactions, and because of the expectation by the public that this trust and responsibility will be exercised properly. Colleagues in such positions are typically regarded as having a fiduciary duty to their employer and the Commonwealth when dealing with public funds and public business.

As used in this policy, Official Responsibility means administrative or operating authority, whether intermediate or final, to initiate, approve and disapprove or otherwise affect a procurement transaction, or any claim resulting there from.

As used in this policy, Procurement Transaction means all functions that pertain to the obtaining of any goods, services or construction, including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration.

### 2.2 Confidentiality

VPA operating, financial, and procurement information is considered confidential and proprietary to the VPA, and shall not be disclosed to third parties outside of VPA, VIT, HRCF II and their consultants, without approval of an appropriate member of the Senior Leadership Team ("SLT"). Requests for such information submitted under FOIA or legal process shall be processed in accordance with VPA's FOIA policy.

Information concerning planned procurements and available funding for procurements must be kept confidential to ensure a fair opportunity for all potential vendors. VPA colleagues shall not give a potential vendor access to information relevant to current or future procurements unless all vendors are given equal access.

## 2.3 Outside Employment or Consulting Activities

As outlined in Section 6-7 of the VPA Employee Policies Handbook, VPA colleagues must obtain prior approval before any outside employment, or consulting endeavors, full or part-time, is undertaken.

VPA colleagues with procurement-related responsibilities shall not, without prior disclosure to and authorization from Human Resources:

1. Engage in outside business or employment with any outside company that might reasonably be expected to affect the objective performance of their procurement-related responsibilities at the VPA;
2. Engage in any private or business relationship or activity that could result in a conflict of interest or could reasonably be perceived as a conflict of interest;
3. Engage in business with, on behalf of, or employment by, a vendor to VPA, VIT, or HRCP II;
4. Lend money to or borrow money from any VPA vendor or supplier, or employee of such vendor or supplier; and/or
5. Maintain a Significant Ownership or Management Interest in a firm that does business with VPA, VIT or HRCP II.
6. Engage a business on behalf of VPA, VIT, or HRCP II that a family member maintains a Significant Ownership or Management Interest in.

## 2.4 Conflicts of Interest

As outlined in Section 6-1 of the VPA Employee Policy Handbook, VPA colleagues shall avoid conflicts of interest, and shall report the existence of a conflict of interest to the Compliance Head if it cannot be avoided entirely. Even situations creating an appearance of a conflict of interest are to be avoided, and if they cannot be avoided, must be reported to the VPA as soon as practicably possible.

A conflict of interest occurs when an employee's personal or financial interests may take priority over the VPA's interests and the employee's responsibility to the VPA or its affiliates. A conflict of interest occurs when a VPA employee or his/her family members obtains a private financial benefit by virtue of their official duties (i.e., including, but not limited to, kickbacks and gifts.)

Not every conflict of interest precludes a business relationship, but conflicts must be reported to the Compliance Head so that the VPA can make a prudent business decision that is in accord with any applicable laws or policy. A VPA colleague having official responsibility for or official participation in a VPA procurement transaction must disclose to the Compliance Head any employment relationship, or other direct business relationship with, any bidder, offeror or prospective Vendor to the VPA, VIT or HRCP II before performing any procurement related functions or responsibilities. Any VPA colleague having official responsibility for or official participation in a VPA procurement transaction must disclose to the Compliance Head any employment or business relationship that he/she has, or those of his/her immediate family members.

Any VPA colleague having official responsibility for a procurement transaction who accepts employment with, or otherwise establishes a business relationship with, a bidder, offeror or contractor with whom he/she has dealt in any official capacity shall provide written notice to the VPA, VIT or HRCP II of his/her intention to accept such employment or establish such business relationship.

## 2.5 Acceptance of Gifts, Gratuities, Entertainment, or Business Courtesies from Vendors or Potential Vendors

Gift means any gratuity, favor, discount, entertainment, hospitality, loan, forbearance or other item having monetary value. It includes services as well as gifts of transportation, local travel, lodgings and meals, whether provided in-kind, by purchase of a ticket, payment in advance or reimbursement after the expense has been incurred.

No VPA colleagues may accept gifts, including tangible property or items, money, meals, travel or entertainment (e.g. tickets to entertainment or sporting events) of excessive value if the acceptance of the gift creates an actual conflict of interest or the appearance of a conflict of interest.

## 2.6 Fair and Open Competition

VPA colleagues performing procurement functions with respect to competitive procurements will not show favoritism to existing suppliers, regardless of the length of relationship.

Contract requirements and specifications shall be written to ensure the broadest competition consistent with meeting the needs of the VPA or its affiliates.

## 2.7 Misrepresentations and Insufficient Authorizations

Any VPA colleague engaging in a procurement transaction is prohibited from knowingly falsifying, concealing or misrepresenting material facts concerning a procurement.

No colleague, other than those designated in Section 3.1 shall obligate the VPA, VIT or HRCP II to any contract, purchase order or other agreement requiring expenditure of VPA, VIT or HRCP II funds without having received prior written authorization from an official with appropriate authority. To do so is a misrepresentation of authority.

## 2.8 Collusion Awareness and Reporting

As stewards of financial and economic resources of the Commonwealth of Virginia, VPA procurement and finance colleagues have a duty to prevent and report collusion between suppliers competing for VPA, VIT and HRCP II business. The purpose of the state and federal antitrust laws is to promote the free market system in the economy of this Commonwealth by prohibiting restraints of trade and monopolistic practices that decrease competition.

The following could be construed as collusive activity or suspected antitrust violations:

1. Any agreement or mutual understanding among competing firms that restrains the natural operation among market forces;
2. Existence of an “industry price list” or “price agreement” to which suppliers refer in formulating their offers;
3. Sudden change from competitive bidding to identical bidding;
4. Simultaneous price increases or follow-the-leader pricing;
5. Rotation of bids or proposals so that each offeror takes a turn as the low bidder;
6. Division of the market so that certain competitors bid low only for contracts led by certain agencies or for contracts in certain areas or on certain products;
7. Establishment by competitors of collusive price estimating systems;



8. Incidents suggesting direct collusion. (Assertion by employees of a supplier, etc., that an agreement to restrain trade exists.);
9. Identical bids that appear to be the result of collusion.

Practices that eliminate or restrict competition usually lead to excessive prices and may warrant criminal, civil, or administrative action by the Commonwealth against the supplier. Procurement colleagues are an important source for investigating leads and recognizing possible antitrust or collusion violations. As a result, procurement colleagues should be sensitive to indications of unlawful behavior by suppliers, supplier's contractors, and other procurement, technical, or administrative personnel. Suspected antitrust or collusive activities shall be reported to the General Counsel.

## 2.9 Vendor and Supplier Conduct

VPA vendors and suppliers have an obligation to avoid situations creating improprieties or the appearance of improprieties.

Vendors and Suppliers shall:

1. Provide a copy of its internal Ethics policy and Code of Conduct. If the vendor or supplier does not have an Ethics Policy or Code of Conduct they shall adopt VPA's Third Party Code of Conduct, to be included as an attachment to any contract
2. Avoid all situations where proprietary or financial interests, or the opportunity for financial gain, could lead to favored treatment for any organization or individual.
3. Avoid circumstances and conduct that might not constitute actual wrongdoing, or a conflict of interest, but might create the appearance of impropriety, thus compromising the integrity of the VPA and the Commonwealth.
4. Avoid offering or providing any interest, financial or otherwise, direct or indirect, in the business of the supplier or professional activity in which the supplier is involved with the officer or employee.
5. Avoid causing or influencing, or attempting to cause or influence any VPA officer or employee in his / her official capacity in any manner, which might tend to impair the objectivity or independence of judgment of that officer or employee.
6. Avoid offering any VPA official or employee any gift, favor, service or other item of value under circumstances from which it might be reasonably inferred that such gift, service or other item of value was given for the purpose of influencing the recipient in the discharge of his/her official duties.
7. Accept responsibility for representations made on behalf of their company by employees or agents;
8. Provide accurate and understandable pricing, schedules and terms and conditions.
9. Treat competitors and employees of the VPA with respect and professionalism, refraining from making any disparaging comments or accusations.
10. Refrain from providing misleading information or unfavorable implications about a competitor's products or services.

## 2.10 Doing Business with Foreign Entities

There are specific laws and rules applicable to certain business transactions and conduct when they involve a foreign government or its agents. Practices that are considered customary for business in many foreign countries may violate U.S. law.

Prior to providing any gift, service, or other item of value to a representative of a foreign government, VPA colleagues shall consult with the Attorney General's Office to obtain permission and advice of applicable rules, laws and guidelines.

## CHAPTER 3: OVERVIEW OF PROCUREMENT POLICIES

### 3.1 VPA Procurement

Subject to review and approval by the VPA Board of Commissioners, the Executive Director will have overall responsibility for developing, interpreting and enforcing all VPA Procurement policies and procedures. The VPA Contract Head shall review and interpret all contracts. The VPA Procurement head shall maintain the Procurement and Capital Outlay Policy Handbook, issuing updates or amendments as necessary and approved as specified herein.

The VPA Compliance Head will coordinate any inquiries, reviews or audits, which may be requested and conducted from time to time by the VPA Board of Commissioners.

### 3.2 VPA Purchasing Authority

The Executive Director and his designees will have the authority to procure goods, services and construction on behalf of the VPA. The Executive Director designates the Procurement Head to conduct procurement actions on behalf of the VPA. The Procurement Head authorizes individuals to procure items and services on behalf of the VPA using the VPA Small Purchase Charge Card (SPCC). SPCC procedures are outlined in this Policy Handbook.

Procurements over \$2.5 million require approval by the Board through resolution prior to signing of the contract. The Board hereby delegates final authorization authority for all procurements \$2.5 million or less to the Executive Director. The Executive Director may designate colleagues to sign on his behalf for contracts up to \$2.5 million by written confirmation, sent to the Procurement Head.

The Executive Director will have overall responsibility for the review, interpretation and approval of all contracts and other procurement documents relating to the VPA.

### 3.3 Single Point of Contact

The Procurement Department will act as the Single Point of Contact for VPA when communicating with vendors and suppliers during the procurement and award process. Communications include, but are not limited to, coordinating responses to questions and concerns on behalf of the internal customer, soliciting Request for Quotes (RFQ) and other pricing and availability information.

## CHAPTER 4: STANDARD PROCUREMENT METHODS

All methods outlined in this chapter are for the use of the Procurement Department. Determination of which method is appropriate is the sole responsibility of the Procurement Head. The standard procurement methods are not exclusive of all solicitations methods and others, at the discretion of Procurement Head, may be used as applicable.

### 4.1 Credit Cards

To support the streamlining of VPA's procedures for procuring and paying for small dollar goods and services the Small Purchase Charge Card (SPCC) will be used when feasible.

### 4.2 Informal Solicitations

For goods or services estimated to cost over \$10,000 and under \$100,000, an Informal Solicitation will be used. Prior to soliciting quotes, VPA may look to statewide contracts and catalogs to determine if the goods or services can be readily obtained through the contracts/ catalogs in a cost effective, timely and efficient manner.

The VPA Procurement Department will solicit at least three (3) quotes from potential suppliers and provide all supplier a reasonable and identical period of time to provide a response.

The Procurement Department will be present or involved in any and all communication with Vendors when soliciting quotes. For the procurement of Professional Services, see Section 4.5 of this Policy Handbook.

### 4.3 Competitive Sealed Bids/Invitation for Bids (IFBs)

Competitive Sealed bids, solicited through an “Invitation for Bids,” are used to introduce open competition into the procurement process and are used when the total expenditure level is \$100,000 or more. An IFB is appropriate when the scope of work clearly defines the needs, and the price is the main determining factor in the award. The Scope of work will be written by a VPA colleague and shall be:

- Sufficiently complete to ensure VPA needs are adequately met.
- Broad enough to ensure competition.
- Drawn to reflect the procurement needs of the VPA, rather than favor a particular vendor.

Competition is considered impractical and not necessary for purchases from the Federal government, other states and their agencies or institutions and public bodies as defined in § 2.2-4301 of the Code of Virginia. Past performance, to include performance on VPA, VIT and HRCP II contracts, and/or familiarity with VPA requirements, may be a legitimate and reasonable evaluation factor for certain procurements, and if such factors are publicly disclosed as evaluation factors, may be considered in evaluating proposals from vendors.

#### PROCEDURE:

- All IFB's will be advertised for a minimum for ten (10) days in a paper of general circulation in the area of the project and on the Commonwealth of Virginia's electronic procurement website (eVA).
- The Procurement Head may determine whether a pre-bid conference is necessary. If a pre-bid conference is determined to be necessary, all interested bidders are invited and encouraged to attend.
- Any changes or clarifications that are identified subsequent to publication of the IFB will be made in writing in the form of an addendum and provided to all interested bidders.
- Formal bids must be sealed when received. Bids will be opened in public. After receiving and opening the bidder's responses, the selection process shall begin to determine the lowest cost Responsive and Responsible bid. Bidders references may also be requested and contacted.
- The award shall be made prior to any negotiations taking place.
- If the lowest apparent responsive bid submitted by a responsible bidder is 25% or more below the next lowest bid, the Procurement Head or designee will request that the low bidder confirm its bid price in writing, to avoid delays associated with awards to companies that have made a mistake in their bid price. If the bidder claims that that the low bid was the result of a mistake, proceed in accordance with Section 4.8. If the apparent low bidder confirms its low price in writing, then VPA may proceed with the award

### 4.4 Competitive Negotiations/Request for Proposals (RFPs)

If specifications or scope of work cannot be written to: (i) completely define the needs; (ii) permit open competition; or (iii) if performance and solution based factors outweigh price factors, the competitive negotiation procurement method using a Request for Proposals (RFP) should be used to procure needed goods and services. While written specifications must be developed and published with the RFP, additional discussions, clarifications and negotiations are usually expected as a result of the RFP. All RFPs shall be conducted by the Procurement Head or designee. For the procurement of Professional Services see Section 4.5 of this Policy Handbook.

Competition is considered impractical and unnecessary for purchases from the Federal government, other states and their agencies or institutions, and public bodies as defined in § 2.2-4301 of the *Code of Virginia*. Past performance, to include performance on VPA, VIT and HRCP II contracts, and/or familiarity with VPA

requirements, may be a legitimate and reasonable evaluation factor for certain procurements, and if such factors are publicly disclosed as evaluation factors, may be considered in evaluating proposals from vendors.

#### **PROCEDURES:**

1. A Request for Information (RFI) may be used when there is limited information on the goods or services and/or supplier base. After the information is received, the Procurement Head or designee will then follow the RFP procedure outlined below.
2. The RFP will be advertised at least 10 days prior to the date set for the receipt of proposals, in a paper of general circulation in the area of the project and on the Commonwealth of Virginia's electronic procurement website (eVA).
3. All interested offerors will be provided with a reasonable and identical period of time (e.g. no less than 10 days from date of issuance) to provide a written proposal.
4. The Procurement head may schedule and conduct a pre-proposal conference for all interested offerors.
5. Any changes or clarifications, which are identified subsequent to issuance of the RFP, will be made in writing in the form of an RFP addendum, and posted to eVA.
6. Prior to receiving proposals, the criteria to be used to evaluate the responses and select a contractor will be incorporated into the RFP. The criteria will involve specific categories, weighted to reflect the selection team's priorities. Selection shall be made using a points based system. Evaluation criteria shall be assigned points on a case by case basis.
7. Prior to evaluating proposals, the VPA will appoint a Selection Board who will conduct the scoring and ranking of proposals, according to the criteria in the RFP. Prior to conducting ranking or scoring of proposals, the members of the Selection Board will meet to develop a consistent and common scoring and ranking factors so that all Proposals will be evaluated against a uniform set of criteria and factors.
8. After receiving the offeror proposals and developing the scoring and ranking factors, the Selection Board shall begin the evaluation process. This includes analyzing offeror proposals relative to the published evaluation/award criteria. At the option of the Selection Board, oral presentations may be conducted. At the conclusion of the Selection Board's evaluation of the proposals, one or more Offerors will be recommended for the conduct of negotiations. Offerors not recommended for negotiations will be promptly notified in writing that they were not selected for negotiations, but the selected Offerors will not be identified in such communications.
9. Award will not necessarily be made to the lowest-cost, responsive and responsible Offeror but will be made to the Offeror with the best score on the published criteria, which will consider price. Negotiations of price are allowed and should be considered along with more qualitative criteria.
10. Upon conclusion of the evaluation and negotiation process, the Selection Board shall recommend to the Executive Director a vendor for the award of a contract. Any other Offerors with whom negotiations were conducted will be promptly advised in writing that they were not selected for award of the contract.

## **4.5 Professional Services**

VPA utilizes Qualification Based Selection (QBS) for Professional Services. Soliciting professional services differs from procurement of non-professional services, in that costs or man-hour estimates should not be obtained during the initial solicitation unless an appropriate business case is submitted and approved by the Procurement Head.

Professional Services include, but are not limited to, work which must be performed by a person or an entity licensed in the practice of a regulated profession (e.g. accounting, actuarial, architecture, land surveying, landscape architecture, law, dentistry, medicine, optometry, pharmacy, or professional engineering). For procurements involving both goods and services, it will be considered a “service procurement” if the estimated cost of labor is more than 50% of the total purchase price.

It is the policy of the VPA to utilize the services of qualified and capable Virginia firms whenever practicably possible. It is understood that there are instances where the complexity of a given project may require the specific and/or unique expertise and no policy is intended to preclude the use of the most logical and capable firm regardless of location.

It is the policy of the VPA to contribute to the establishment, preservation, and strengthening of small businesses owned by women, minorities and category’s under Disadvantaged Business Enterprise (DBE) program and to encourage their participation in VPA procurement activities. The VPA encourages firms to provide for the participation of small businesses and businesses owned by women and minorities through partnerships, joint ventures, subcontracts, or other contractual opportunities.

Firms that provide Professional Services for the design, planning, or management of a construction contract or a contract for procurement of supplies or services, cannot provide the underlying construction or supplies or services. This limitation also applies to subsidiaries and affiliates of a firm. Exceptions are various means and methods of providing alternative project delivery for systems and facilities, such as Design-Build or Construction Management.

Contracts for Professional Services will be awarded as either Time and Materials (T&M), or Lump Sum (LS) contracts. Other pricing scenarios may be used but must be approved by the Procurement Head who will consult with the General Counsel.

Professional liability insurance may be required for Professional Services, details of which will be specified by the VPA Risk Management Head during the preparation of a solicitation for procurement of such services.

In the event of an emergency, selection may be made without regard to use of these procedures defined herein but through evaluation of past experience of Professional Service providers and recommendation of the Operational Manager and Procurement Head. Such emergency procurements of Professional Services must be justified and approved in accordance with Section 4.6

#### 4.5.1 Procurement of Professional Services (Non-Term Contracts)

Procurement of Professional Services that are not term contracts will follow the RFP process described in Section 4.4.

#### 4.5.2 Procurement of Term Contracts

Term Contracts may be utilized by the VPA for the execution of multiple projects or service orders that have similar scope.

Term Contracts will be advertised with an anticipated yearly contract maximum and a generic scope of services that may be required under the term contract. The ordinary Term Contract will be for a term of one year but may be procured for more or less depending on the need and scope of services. The required authorization level for the procurement shall be determined by the maximum expenditure the VPA could make under the Contract.

Term Contracts are typically renewable at the VPA’s discretion up to four additional terms or a total of five years maximum. Once an initial award is made, the term contract time may be extended by the Procurement Head. The

Procurement Head may also increase the contract maximum up to the amount equal to the initial one year maximum amount one time in a 365 day period since funds are only obligated during execution of Service Orders.

Selection and Award shall be through the RFP process defined in Section 4.4.

#### 4.5.3 Approvals

Professional Services Contracts may be approved in accordance with internal VPA Procedure. Subsequent change orders, modifications, or task orders under a term contract may not be issued if they would cause the total contract price to exceed the authorization authority of the official approving the award. No such change order shall be issued until authorization or approval is obtained from a person with authority to award a contract in the full amount as modified.

### 4.6 Emergency Purchases

Emergencies sometimes arise that makes it impractical or impossible to follow the standard procurement methods contained herein. In such situations, and after approval from the Procurement Head, the standard procurement methods will not be followed. To be considered an emergency for the purposes of this Policy Handbook, a situation must exist which is likely to:

- Endanger life or property.
- Cause injury to any person.
- Cause non-performance of any duty or obligation of the VPA imposed by law or contract.
- Cause cessation of essential services, operations, or functions of the VPA.
- Cause financial loss or risk of loss to the VPA.
- Create or cause an emergency if not immediately corrected.

Authorization of an Emergency Purchase indicates that in management's judgment, the benefits of an immediate and direct purchase of goods or services outweigh the benefits of limited competition.

### 4.7 Sole/ Single Source

Upon determination in writing that there is only one source practicably available for that which is to be procured, a contract may be awarded to that sources without competitive bidding. Authorization of a sole source indicates that in management's judgment no other viable sources are practicably available who can supply the required good or service in a timely manner.

A single source is one of the multiple sources that are capable of producing the desired item(s). A single source procurement occurs when one source is selected without competition for compelling and justifiable reasons. These compelling and justifiable reasons must be reduced to writing and submitted to the appropriate approving authority prior to conducting a single source or sole source procurement.

Primary Factors:

1. Continuation of an ongoing service or an addition to a critical system already procured from that supplier.
  - a. List the reasons why it would not be cost effective and/or schedule effective and/or technical risk mitigation effective to procure through normal competitive means for this procurement.
2. Economically justified
3. Standardization/Interchangeability with existing or current operations.



## 4.8 Proprietary Products

Proprietary purchases involve goods where only specific brands, makes or models are acceptable, but they can be obtained from several sources (e.g. dealers, sellers, distributors). Rarely do proprietary purchases involve services. If only one source is available, it is considered a Sole Source Purchase (see Section 4.7).

## 4.9 Alteration or Withdrawal of Bids and Proposals

Bids or Proposals submitted to the VPA pursuant to IFBs and RFPs may only be withdrawn or amended in the following circumstances:

1. **Before the Due Date:** A bid/proposal may be amended and/or withdrawn by a bidder or offeror if the office issuing the solicitation receives such a request in writing before the due date and hour for the bid or proposal. The request must be signed by a person authorized to represent the person or firm that submitted the bid/proposal.
2. **Mistake:** A bid/proposal may be amended and/or withdrawn by a bidder or offeror upon demonstration that an allegedly mistaken bid was submitted in response to an IFB or RFP as a result of a mathematical or clerical mistake.
3. **Withdrawal of Unusually Low Bid:** If, in response to an IFB, the lowest apparent responsive bid is 25% or more less than the next low bid, the VPA Procurement Head or designee must contact the bidder to confirm the bid price. Bidders notified of such a disparity in price are not entitled to amend their bid such that it is no longer 25% or more less than the next low bid. The bid is either withdrawn or the price confirmed. If the bidder contends the bid price was in error and is able to verify, to the satisfaction of the Procurement Head, that it was a nonjudgmental or mathematical mistake, the bid may be withdrawn. If a bid is withdrawn, the lowest remaining bid shall be deemed to be the apparent low bid. If the bid is confirmed, the bidder is locked into the bid provided such bidder is responsive and responsible.
  - 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.
  - No bid may be withdrawn 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.
4. **Denial of Withdrawal of Bid:** If the VPA denies the withdrawal of a bid under the provisions above, it shall notify the bidder in writing stating the reasons for its decision and award the contract to such bidder at the bid price, provided such bidder is responsible and responsive. The decision denying withdrawal of a bid shall be final and conclusive unless the bidder appeals the decision within ten days after receipt of the decision by submitting an appeal under the dispute procedures outlined in this Policy Handbook.

## 4.10 Equipment Leasing

Rental, lease, or installment purchase of materials, equipment or supplies is handled in the same manner as the purchase of goods. All proposed leases of equipment or supplies shall be based upon an analysis of the costs and benefits of leasing verses purchase of the same equipment or supplies.

## 4.11 Liquidated Damages; Incentive/Disincentive Provisions

VPA contracts for construction and procurements for supplies and services may contain provisions for liquidated damages when actual damages suffered by the VPA due to delays in completion may be difficult to determine. Contracts may also contain provisions for financial incentives for early completion, and/or disincentives for late completion, in addition to or in lieu of liquidated damage provisions.

1. Liquidated damages include, but are not limited to, additional costs associated with administration, engineering, supervision, and inspection of the project, costs of temporary or replacement services and other expenses. Liquidated damages are usually incurred as a specified dollar amount per calendar day of delay in completion of the contract work or delivery of products after the contract date of required completion has passed. Liquidated damages may also be incurred for other contractually specified milestone dates tied to completion of a specified portion of the work.
2. VPA construction contracts in which the project cost is in excess of \$100,000 shall contain a liquidated damages provision. This provision shall require, for each calendar day that any work remains incomplete after the contract time limit specified for the completion of the work, that VPA will assess liquidated damages against the contractor. Liquidated damages will be assessed at the rate applicable to the Contract on a case by case basis and stated clearly in the Contract. Liquidated damages will be deducted from any monies due the Contractor for each calendar day of additional time consumed until final completion and acceptance of the work, or accomplishment of any specified contract milestone. Assessed liquidated damages are incurred not as a penalty, but as an estimate of the costs incurred by the VPA due to delay.
3. For VPA service and supply contracts, liquidated damage provisions may also be included for delay in overall contract completion or contract milestone completion. The VPA Contracts Department will determine whether liquidated damage provisions are necessary for service and supply contracts on a case by case basis.
4. VPA contracts shall contain a provision stating that the Contractor waives any defense as to the validity of any liquidated damages stated in the Contract or this Policy Handbook and assessed by the VPA against the contractor on the grounds that such liquidated damages are void as penalties or are not reasonably related to actual damages.
5. Incentive/Disincentive ("I/D") Provisions. VPA contracts may include an Incentive/Disincentive Provision upon the approval of such arrangement by the Executive Director.
  - a. An Incentive/Disincentive arrangement is a contract provision which compensates the contractor a certain amount of money for each day identified critical work is completed ahead of schedule and assesses a deduction for each day the contractor overruns the I/D time. Its use is primarily intended for those critical projects where traffic inconvenience and delays are to be held to a minimum. The amounts are based upon estimates of such items as project safety, impact on terminal operations or impact on other construction or procurement.
  - b. I/D provisions require determination of the I/D Time, which is the time (calendar days or completion date) established for the contractor to complete critical work on the project or structure(s). This time begins when terminal operation is impacted by the project and normally ends when unrestricted terminal operations can resume using the project or structure. This is the time upon which the I/D payment will be based. The I/D time and contract time may be the same in situations where operational impacts exist for the full duration of the project or I/D time may be for a shorter period when operations are impacted only during a certain phase or phases of contract work.

- c. Determination of Incentive/Disincentive Amount. The major challenge in the use of I/D provisions is determination of the appropriate dollar amount per day for I/D provisions for early completion of projects. To be effective and accomplish the objectives of I/D provisions, the dollar amount must be of sufficient benefit to the contractor to encourage his interest, stimulate innovative ideas and increase the profitability of meeting tight schedules. If the incentive payment is not sufficient to cover the contractor's cost for the extra work, then there is little incentive to accelerate production and the I/D provisions will not produce the intended results.
- d. A daily I/D amount is calculated on a project-by-project basis using established construction engineering inspection costs and operational impact costs. Engineering judgment may be used to adjust the calculated daily amount to a final daily I/D amount that:
  - I. Provides a favorable benefit/cost ratio to the VPA where the cost is the daily I/D amount and the benefit is the calculated daily savings accruing to terminal operations; and
  - II. Is large enough to motivate the contractor as determined by the industry standard.

**If a favorable benefit/cost ratio cannot be realized and/or the resulting daily amount is not high enough to motivate a contractor, the project should not be further developed as an I/D project.**

## CHAPTER 5: INTERNAL CONTROLS AND RECORD KEEPING

### 5.1 Audit Reviews

The VPA procurement process will be subject to audit and other reviews, as directed by the following:

- VPA Finance Department
- The International Standards Organization Internal Audit
- VPA Board of Commissioners
- External Auditor
- State Attorney General's Office
- Legislative Boards and Commissions

To support audits of VPA procurement actions and processes, VPA purchase orders and contracts will require contractors to retain relevant records associated with bids or proposals, contract performance, schedules, costs, warranties and other records, and to make those records available to VPA and other auditors for the Commonwealth upon request.

#### **PROCEDURES:**

1. The basis for audit reviews of VPA's procurement records will be the VPA purchasing policies and procedures, as approved by the VPA Board and as documented herein. All audits, other than ISO Internal Audits, or other such reviews will be coordinated by the Finance Department and the Finance Head, who shall consult with the Executive Director in connection with any such review.
2. The participation in audit reviews by other members of the VPA management and staff, and the release of materials to support those audits/reviews, must be coordinated and authorized by the Finance Head, or in the case of internal audits, by Compliance Head.
3. Contractors on VPA contracts shall permit the VPA to audit, examine, and copy all documents, computerized records, electronic mail, or other records of the Contractor during the life of the contract and for a period of not less than five years after the date of final payment, or the date the Contractor is declared in default of contract, or the date of termination of the contract. The documents and records shall include, but not be limited to:
  - a. Those that were used to prepare and compute the bid or proposal, prepare all schedules used on the project, record the progress of work on the project, accounting records, purchasing records, personnel payments, or records necessary to determine employee credentials, vendor payments, and written policies and procedures used to record, compute, and analyze all costs incurred on the project, including those used in the preparation or presentation of claims to the VPA.
  - b. Records pertaining to the project as the VPA may deem necessary in order to permit adequate evaluation and verification of Contractor's compliance with contract requirements, compliance with VPA's business policies, and compliance with provisions for pricing change orders or claims submitted by the Contractor or the Contractor's subcontractors, insurance agents, surety bond agents, and material suppliers. The Contractor shall make his personnel available for interviews when requested by the VPA.

- c. Upon request, the Contractor shall provide the VPA with data files on data disks or other suitable alternative computer data exchange format. Data furnished by the Contractor that cannot be verified will be subject to an audit by the VPA.
4. The Contractor shall ensure that the record-keeping requirements, and requirements to make such records available for audit in this Section, are made applicable to his subcontractors, insurance agents, surety bond agents and material suppliers. The Contractor shall cooperate and shall cause all related parties to furnish or make available in an expeditious manner all such information, materials, and data.
5. Upon request by the VPA, the Contractor shall provide prompt access to records for the audit and provide acceptable facilities for the audit. Failure on the part of the Contractor to afford the VPA immediate access or proper facilities for the audit will be considered failure to cooperate and a potential breach of contract.
6. Upon completion of the Contract audit, any adjustments or payments the Contractor owes to the VPA as a result of the audit shall be made to the VPA within 60 days from presentation of the VPA's audit findings to the Contractor. Failure on the part of the Contractor to make such payment may result in disqualification as a bidder for future contracts.
7. If the Contractor disagrees with the findings of the VPA's audit, the Contractor may dispute the findings in accordance Chapter II of this Manual, except that if the time provided for the Contractor to submit a claim on the contract has expired, the Contractor shall instead submit a written claim to dispute the findings of the audit to the VPA Procurement Head within 30 days from the VPA sent date the VPA send the findings. Failure on the part of the Contractor to submit a claim disputing the VPA's findings within such 30-day period shall constitute a waiver and release of any claim disputing the VPA's findings.

## 5.2 Virginia Freedom of Information Act

Under the Virginia Freedom of Information Act (FOIA)<sup>1</sup>, information relating to the procurement of goods and services which are funded, in whole or in part, by public monies is available for inspection by the public. The latter includes any citizen or interested person, firm, corporation, research organization or other public entity. Such information will be made available to the public only after the award of the contract.

Except as provided in this section, 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 (§ 2.2-3700 et seq.). Cost estimates relating to a proposed procurement transaction prepared by or for a public body shall not be open to public inspection.

While the VPA will fully comply with valid FOIA requests, certain information is exempt from disclosure. This typically includes proprietary information, trade secrets and the like, submitted by vendors as part of their bids/proposals. Therefore, if a request for information relating to any previous or ongoing VPA procurement is made under FOIA or otherwise; the request should be immediately referred to the Executive Director. The Executive Director will make the final determination in connection with the release of any information.

Trade secrets or proprietary information submitted by a bidder, offeror or contractor in connection with a procurement transaction or prequalification application submitted pursuant to subsection B of § 2.2-4317 shall not be subject to the Virginia Freedom of Information Act (§ 2.2-3700 et seq.); however, the bidder, offeror or contractor shall (i) invoke the protections of this section prior to or upon submission of the data or other

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<sup>1</sup> Va. Code § 2.2-3700.

materials, (ii) identify the data or other materials to be protected, and (iii) state the reasons why protection is necessary.

#### **PROCEDURES:**

The VPA must respond to any request within five working days of receiving it. “Day one” is considered the day after the request is received. The five-day period does not include weekends or holidays.

1. FOIA requires the VPA to make one of the following responses to the request within the five-day time period:
  - a. The VPA shall provide the records that have been requested in their entirety;
  - b. The VPA shall withhold all of the records that have been requested because all of the records are subject to a specific statutory exemption. If all of the records are being withheld, the VPA must send the requesting party a response in writing. That writing must identify the volume and subject matter of the records being withheld and state the specific section of the Code of Virginia that allows the VPA to withhold the records;
  - c. The VPA shall provide some of the records that have been requested, but withhold other records. The VPA cannot withhold an entire record if only a portion of it is subject to an exemption. In that instance, the VPA may redact the portion of the record that is to be withheld but must provide the requesting party with the remainder of the record. The VPA must provide the requesting party with a written response stating the specific section of the Code of Virginia that allows portions of the requested records to be withheld; or
  - d. The VPA shall inform the requesting party in writing that the requested records cannot be found or do not exist (the VPA does not have the records the requesting party wants). However, if the VPA is aware that another public body has the requested records, the VPA must include contact information for the other public body in the response to the requesting party.
2. If it is practically impossible for the VPA to respond to the request within the five-day period, the VPA must state this in writing, explaining the conditions that make the response impossible. This notice provides the VPA with seven additional working days to respond to the request.
3. If the requesting party’s request includes an extraordinary volume of records or will require an extraordinarily lengthy search, and the VPA decides that it is unable to provide the records to the requesting party within twelve working days without disrupting other organizational responsibilities, the VPA may petition the court for additional time to respond to the request.
  - a. FOIA requires, however, that the VPA make a reasonable effort to reach an agreement with the requesting party concerning the production of the records before it is permitted to petition the court for additional time.

## CHAPTER 6: VENDOR QUALIFICATION AND PERFORMANCE

### 6.1 Responsible Bidder

In determining a responsible bidder or offeror, a number of factors including, but not limited to, the following are considered.

The vendor should:

- Be a regular dealer, supplier and/or an authorized dealer of the goods or services offered;
- Have the ability to comply with the required delivery or performance schedule, taking into consideration other business commitments;
- Have a satisfactory record of performance;
- Have a satisfactory record of integrity; and,
- Have the necessary facilities, organization, experience, technical skills and financial resources to fulfill the terms of the purchase order or contract.

### 6.2 Responsive Bidder

A responsive bidder means a person who has submitted a bid, which conforms in all material respects to the Invitation for Bids or Request for Proposal.

Examples of non-responsiveness include, but are not limited to, failure to sign a bid, failure to return the required bid documents, substitution of terms, deletion of terms and conditions stated in the Invitation for Bids, and failure to offer a product or service that meets the requirements of the Invitation for Bids.

A bidder who fails to provide prices for all categories of labor in the pricing schedule of a time and materials service contract is considered non-responsive. This is true whether the price was left blank or the bidder entered a figure of \$0. Bidders who provide multiple prices for performing a service where a single price was solicited are also non-responsive.

### 6.3 Debarment

Debarment, as used in this section, means action taken by the VPA to exclude individuals or business entity (“a firm”) from contracting with the VPA for particular types of goods or nonprofessional services for specified periods of time. Firms may be debarred based on convictions or other prohibited actions taken by individuals in positions of responsibility with the firm.

The purpose of debarment is to protect the VPA and the Commonwealth from risks associated with awarding contracts to persons or firms having exhibited an inability or unwillingness to fulfill contractual requirements, and to protect state interests and the integrity of the state's procurement process by preventing individuals or firms who have displayed improper conduct from participating on Commonwealth requirements for specific periods of time.

#### **Reasons for Debarment:**

An individual or firm may be debarred (not allowed to do business with the VPA, VIT or HRCP II) for any of the following reasons:

- I. Breach (default) of a contract with a public body.

2. Unwillingness or inability to honor a binding bid.
3. False statements or misrepresentations in bids, proposals or related documents.
4. Conferring or offering to confer upon any VPA, VIT or HRCP II employee participating in a procurement (for which the entity has submitted a bid or intends to submit a bid) any gift, gratuity, favor, or advantage, present or future. It is not necessary that the offer be accepted by the employee, or that the offer is made with intent to influence the employee in an official act. Extending to any VPA, VIT or HRCP II employee exercising official responsibility for a procurement transaction any discount or privilege not available to all members of the public is considered to be offering an advantage.
5. Failing to disclose a condition constituting a conflict of interest by any officer, director, owner, or partner of the firm in a contract or purchase order awarded by the VPA (See Va. Code § 2.2-3106).
6. Failure to comply with mandatory e-Verify requirements. (See Va. Code §2.2-4308.2).
7. Conviction of the contractor or prospective contractor, or any officer or senior manager of same, of any criminal offense, antitrust law violations, or convictions indicating lack of moral or business integrity (in which cases debarment may be for three years), or a conviction involving public contracting.
8. Debarment of the contractor, a director, officer or owner thereof, by other agencies or political subdivisions of the Commonwealth, or debarment from federal procurement.
9. Failure to pay re-procurement costs or other damages pursuant to termination for default of a contract with VPA, VIT, HRCP II or another agency of the Commonwealth.

Prospective or current contractors, or individuals associated with prospective or current contractors, being considered for suspension or debarment will be provided written notice of the action and the grounds therefore, and will be provided an opportunity for a hearing on the proposed debarment action.

1. Debarments shall be for a stated period, which shall be between ninety (90) days and three (3) years, except that debarments for convictions as stated in ground number 8 above shall be for three (3) years.
2. Debarment does not relieve the contractor of responsibility for existing obligations.
3. Firms or individuals considered for debarment will be notified in writing. Proposals for debarment of an individual or firm shall be processed in accordance with Section 6.3 of this Policy Handbook.
4. Vendors debarred by other State entities will also be considered debarred from doing business with the VPA. The Procurement Department monitors updated listings of debarred vendors on the eVA website ([www.eva.virginia.gov](http://www.eva.virginia.gov)) at least quarterly.
5. A debarred individual or firm can apply for reinstatement at any time by submitting, in writing, to the Executive Director a request for reinstatement, citing actions taken to remedy the reason for debarment or actions taken to prevent recurrence of the situation that caused the debarment. A debarment may be lifted or suspended at any time if it is in the best interest of the VPA. Such determination may only be made by the Executive Director or his/her designee.
6. A firm debarred for failure to comply with e-Verify requirements may be reinstated upon providing proof to the VPA of the employer's registration and participation in the E-Verify program. If requested, the employer shall present a copy of their Maintain Company page from E-Verify to prove that they are enrolled in E-Verify.



## 6.4 Surplus/Unclaimed Property

Property that has exceeded its useful life or is no longer needed by the VPA will be considered surplus property. The Procurement Head, working with the Finance Department, will make such determination and Asset Management will coordinate the transfer or disposal of such items. Prior to any transfer or disposal, research will be conducted to determine fair market value.

## CHAPTER 7: ALTERNATE PROJECT DELIVERY METHODS FOR CONSTRUCTION

### 7.1 Alternate Project Delivery Methods

The VPA approaches construction projects using the conventional Design-Bid-Build approach; however, the VPA recognizes that in certain circumstances that an alternative delivery method may be in the best interest of the VPA.

Alternate project delivery methods will be reviewed on a case-by-case basis based on what is most beneficial for construction projects.

Alternate delivery methods include, but are not limited to, Design-Build, Construction Management At-Risk, Guaranteed Maximum Price Construction, Cost-Plus, Energy Service Contracts (ESCOs) Public Private Partnerships (P3s), etc.

VPA may elect to use established Virginia contract processes, approved vendors (ESCO), or other procedures.

In the event that the VPA elects to pursue a Public/Private Partnership such as Public Private Transportation Act (PPTA) and Public Private Education Improvement Acts (PPEA), the VPA will develop guidelines for use in soliciting and evaluating proposals prior to procurement activities beginning.

The VPA is subject to the requirements in Virginia Code Title 2.2, Chapter 43.1. Any proposal, solicitation, or contract for a project subject to Chapter 43.1 shall comply with the procedures therein. The Executive Director is authorized to make the determinations required by Va. Code § 2.2-4380.B.

Upon determination that an alternate delivery method is appropriate, the Procurement Department will document the decision in writing, including the criteria discussed in Va. Code § 2.2-4380, and formalize recommendations in a memorandum. The memorandum should include a justification as to why the conventional delivery method is not in the best interest of the VPA. The proposed procurement will be reviewed with the Department of General Services, as required in Va. Code § 2.2-4380.D.

Procurement and General Counsel will determine appropriate procedures for procurement of those services prior to beginning procurement activities.

## CHAPTER 8: CONTRACT ADMINISTRATION

### 8.1 General Contract Administration Provisions

The VPA will only issue payments to vendors if:

- Goods or services are timely received in accordance with the procurement specifications and other contract requirements;
- Expenditures are properly authorized and coded for accounting and cost control; and
- Invoices and payments have appropriate supporting documentation.

Contract modifications or changes will only be made upon adequate consideration or to correct errors in contract documents. All contract modifications must be memorialized in writing.

### 8.2 Supply and Service Contract Administration

VPA Departments receiving goods or services from a contractor are responsible for ensuring that the goods or services conform to the contract requirements and that the contractor's performance is acceptable.

The VPA Procurement Department is responsible for coordinating with all VPA departments receiving goods and services to ensure that contractor invoices have been validated by the end-user department prior to processing invoices for payment, and that any discrepancies in the goods or services have been communicated to the contractor and corrected.

### 8.3 Construction Contract Administration

The VPA Engineering Director or designee for each construction project, will be responsible for ensuring proper administration of the project in accordance with this Policy Handbook and the Contract Documents.

1. The Contract Documents, and in particular the General and Supplemental Conditions of the Contract, shall be the primary guide to proper administration of a VPA construction contract. Construction projects will be administered in accordance with the requirements of this Policy Handbook, as appropriate, including the other Sections in Chapter 8. The provisions of this Section are to be followed subject to the provisions of the Contract Documents for a specific project or contract.
2. VPA Engineering will publish Technical Standards and Preferences (S&Ps) as a separate document for use during design and construction projects and update it at an appropriate interval and will be posted to the VPA website.
3. Project Meetings. The VPA Project Manager shall ensure that throughout the course of performance of the contract, there is a timely exchange of information between the VPA, the architect or engineer and the Contractor. The Project Manager is responsible for scheduling meetings to facilitate such communication and for prompt responses to Contractor submittals and inquiries.
4. Insurance. A Contractor shall not commence work under a VPA Contract until he has obtained all the insurance required hereunder from an insurer authorized to do business in Virginia, provided a Certificate of Insurance to the Project Manager, and such insurance has been approved by the VPA; nor shall the Contractor allow any Subcontractor to commence work on his subcontract until the same types of insurance in the same amount have been obtained by the Subcontractor and approved by the Contractor. The Contractor must provide evidence of such insurance coverages, complying with the requirements of this Policy Handbook and the Contract Documents, prior to allowing the Contractor to commence work. Upon receipt of notification

that the contractor's, or any subcontractor's, insurance has lapsed or been cancelled, the Project Manager shall suspend such contractor or subcontractor's work until new insurance coverage is in place.

5. The Project Manager has the authority to suspend work when in his judgment the Contract Documents are not being followed. Any such suspension shall be effective only until the matter in question is resolved to the satisfaction of the VPA. The cost of any such work stoppage shall be borne by the contractor unless it is later determined by the Project Manager that no fault existed in the Contractor's work.
6. Where the contract documents require submission of a construction schedule by the contractor, the Project Manager shall review the baseline schedule and all updates to determine if the schedule accurately reflects actual as-built progress on the Project, as well as a reasonable plan and time to completion. Any discrepancies, ambiguities, or errors will be referred back to the Contractor for clarification or correction.

## 8.4 Shipment and delivery

VPA contracts will require that all supplies and equipment purchased by the VPA are new when delivered, are identified to a specific contract or purchase order upon delivery, are delivered in accordance with the contract requirements or commercial standards if no special requirements are stated, and conform to the contract or purchase order requirements.

1. All supplies and equipment furnished must be new and in first class condition unless the solicitation and contract award specified used items. Demonstration, previously rented or reconditioned items are not considered new. No equipment is acceptable if serial numbers or any other manufacturers' identifying labels or marks have been removed, obliterated or changed.
2. Unless otherwise specified in the solicitation, new standard commercial packing and shipping containers shall be used for shipment of goods. Shipping containers should be legibly marked or labeled on the outside with the commodity description and number, size, quantity, contract number and VPA contract or purchase order number. A packing slip or invoice should accompany all shipments and should reference the purchase order or contract number. Failure to do so may result in delayed payment processing.
3. Substitution is defined as delivery of an item that does not conform to the specifications of the purchase order or contract. Substitutions on purchase orders require the prior approval of the purchasing office issuing the award. Any item delivered not meeting specifications may be returned to the contractor at the contractor's expense. When an item is returned, the contractor must make immediate replacement with acceptable merchandise or be considered in default.

## 8.5 Retainage

Retainage is an appropriate tool to protect the VPA from losses due to contractor's defaults or failure to complete work in accordance with the contract requirements. Retainage, not to exceed 5%, shall be withheld from progress payments on VPA construction contracts in excess of \$100,000. Retainage may be used on service and supply contracts when appropriate. VPA contractors may not withhold retainage on subcontractors or suppliers in excess of the percentage actually withheld by the VPA on the contract.

1. VPA contracts for construction will normally contain a provision requiring withholding of retainage from contractor progress payments. Retainage will normally not exceed 5%, and may be withheld in lesser amounts as determined appropriate by the Director of Engineering or Vice President of Sustainability.
2. VPA contracts for procurement of complex or specially engineered equipment, or contracts for services, may include provisions for retainage where determined appropriate and in percentages determined appropriate by the Procurement Head.

3. All VPA contracts shall contain a provision prohibiting the prime or general contractor from withholding retainage from subcontractors or suppliers in excess of the percentage retainage actually withheld by the VPA on the contract.
4. VPA contracts authorizing the withholding of retainage shall contain a provision requiring payment of the balance of withheld retainage to subcontractors or suppliers within a certain time following completion of their work or performance, irrespective of whether the VPA has released all retainage to the prime or general contractor.

## 8.6 Invoicing and Payment

The VPA will promptly pay contractor invoices in accordance with contract payment terms, upon confirmation by the Department receiving the goods or services, or managing construction, that the supplies, services, or construction conforms to contract requirements and the invoice is recommended for payment.

The VPA will require contractors to include provisions in subcontracts requiring prompt payment of subcontractors or notice to VPA of non-payment and the reasons therefore.

1. If the Policy criteria stated in Section 8.1 are met and proper invoicing procedures have been followed, the VPA Finance Department will process the transaction, and the contractor will receive payment, as follows:
  - a. Promptly pay for the completed delivered goods or services by the required payment date, which shall be either: (i) the date on which payment is due under the terms of the contract for the provision of goods or services; or, (ii) if such date is not established by contract, not more than 30 days after goods or services are required or not more than 30 days after the date a valid invoice is received by the VPA, whichever is later.
  - b. If the policy criteria stated in section 8.1 are met and proper invoice procedures have been followed, the VPA Finance Department will process the transaction and issue payment. If no terms have been negotiated, but the vendor invoice specifies terms, the VPA may, in its sole discretion, accept such terms if they are favorable to the VPA, or otherwise elect to pay on a “Net 30” basis. Nothing in this section shall prohibit the VPA from establishing provisions that would grant the ability to secure discounts from vendors for early payments. Prompt payment discounts will be taken if offered and payment is made within the prescribed time frame.
2. Contractors shall submit invoices as stated in the contract, or if no separate person or office for submission of invoices is stated in the contract, they shall be submitted to [ap-invoices@portofvirginia.com](mailto:ap-invoices@portofvirginia.com)
3. Invoices should reference the purchase order or contract number and be documented in accordance with the terms of such.
4. Partial payments will be allowed only if the receipt of the partial shipment/delivery can be confirmed, and if the vendor invoice reflects the partial shipment/delivery (i.e. the vendor should invoice only the amount delivered, with subsequent shipments/delivery being invoiced separately).
5. Subcontractor payment requirements. All contracts awarded by the VPA shall require the following actions to be taken by contractors:
  - a. Within seven days after receipt of amounts paid for work performed by the subcontractor under that contract:

- I. pay the subcontractor for the proportionate share of the total payment received from the VPA attributable to the work performed by the subcontractor under that contract; or
  - II. notify the VPA and the subcontractor, in writing, of its intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment.
- b. Pay interest to subcontractors on all amounts owed by the contractor that remain unpaid after seven days following receipt by the contractor of payment from the state agency for work performed by the subcontractor under that contract, except for amounts withheld as allowed above.
  - c. Interest shall accrue at the rate of one percent per month.
  - d. To include in each of its subcontracts a provision requiring each subcontractor to include or otherwise be subject to the same payment and interest requirements with respect to each lower-tier subcontractor.
  - e. A contractor's obligation to pay an interest charge to a subcontractor is not an obligation of the VPA. A contract modification will not be made for the purpose of providing reimbursement for such interest charge paid by the contractor, nor may any claim include any amount for reimbursement for such interest charge.

## 8.7 Testing and Inspection

All materials, equipment, supplies, services, and construction procured by the VPA are subject to inspection and testing.

Items or services that do not meet specifications may be rejected. Failure to test or inspect a product or service, or to reject upon receipt, however, does not relieve the contractor of its responsibility for compliance with all contract terms, or liability for defects subsequently revealed when goods are put to use or tested. If defects are found, the contractor is responsible for replacing the defective goods within the delivery time originally stated in the contract and is liable for any resulting expenses incurred by the VPA.

1. All materials, equipment, supplies and services are subject to inspection and testing. Items or services that do not meet specifications may be rejected. Failure to test a product or service, or to reject upon receipt, however, does not relieve the contractor of liability for latent or hidden defects subsequently revealed when goods are put to use or tested. If latent defects are found, the contractor is responsible for replacing the defective goods within the delivery time originally stated in the solicitation and is liable for any resulting expenses incurred by the state.
2. The VPA may specify and use reasonable methods of testing products prior, upon, or after delivery to determine their conformance to contract specifications and performance requirements. Failure of the VPA to test products shall not waive any warranty or other rights it has under the contract, nor waive or diminish the contractor's obligations thereunder.

## 8.8 Acceptance

The VPA Procurement Department and operational departments ordering and receiving goods, services or construction, shall formally document, in writing, acceptance of such goods, services or construction.

- I. Upon the delivery of goods, performance of services, or performance of construction under a VPA contract, the VPA Department receiving the goods or services or managing the construction project, shall be responsible for documenting the acceptance of the goods, services or construction.

2. Such documentation shall record that the goods, services or construction complied with all contract requirements at the time of acceptance, or shall annotate any deviations or discrepancies, and their resolution. All discrepancies shall be reported immediately to the appropriate person.
3. Acceptance documentation will be made a part of the procurement file and project file, if one exists.

## 8.9 Termination for Convenience

VPA contracts may contain a provision allowing the VPA to terminate the contract for its convenience and will specify what payments are to be made to the contractor upon termination for convenience.

1. A purchase order or contract may be terminated, in whole or part, for the convenience of the VPA by delivering to the contractor a notice of termination specifying the extent to which performance under the purchase order or contract is terminated and the date of termination. After receipt of a notice of termination, the contractor must stop all work or deliveries under the purchase order or contract on the date and to the extent specified.
2. If the purchase order or contract is for commercial items sold in substantial quantities to the general public and no specific identifiable inventories were maintained exclusively for the VPA's use, no claims will be accepted by the VPA for reduced quantities or lost profits. Payment will be made for items shipped or services provided prior to receipt of the termination notice, unless otherwise specified in the contract.
3. If the purchase order or contract is for construction, or services or items being produced exclusively for the use of the VPA, and raw materials or subcontracted services must be secured by the contractor from other sources, the contractor shall order no additional materials or subcontracted services except as may be necessary for completion of any portion of the work which was not terminated. The VPA may direct the delivery of the fabricated or non-fabricated parts, work in process, completed work, supplies and other material produced as a part of, or acquired in connection with the performance of the work, or direct the contractor to sell the same, subject to the VPA's approval as to price. The contractor may, with the approval of the VPA, retain the same and apply a credit to the amount owed. The contractor must complete performance on any part of the purchase order or contract not terminated.
4. The contractor must submit any termination claim within 60 days after receipt of the notice of termination. Termination for convenience claims will be considered for only actual expenses incurred up to the time of termination. This claim will be in a form and with certifications prescribed by the purchasing office that issued the purchase order. The claim will be reviewed and resolved in accordance with the Dispute Resolution provisions in Chapter 3 section 3.1.2 of this Policy Handbook.

## 8.10 Default and Termination

Purchase orders and contracts will contain provisions for declaring a contractor in default when a material deficiency or discrepancy exists between contract requirements and the delivered performance. The VPA will reserve rights to a range of remedies for defaults to include rejection and re-procurement of contract requirements, termination for default and pursuing demands or claims on sureties or guarantors.

1. Default. In case of failure to deliver goods or services, or to complete construction, in accordance with the contract terms and conditions, the VPA, after due oral or written notice, may procure them from other sources and hold the contractor responsible for any resulting additional purchase, construction and administrative costs. This remedy shall be in addition to any other remedies which the VPA may have at law or under the contract.
2. Termination for Default.

- a. In case of default by a contractor for failure to deliver or perform in accordance with the contract specifications or terms and conditions, the VPA may procure the articles or services from other sources and hold the defaulting contractor responsible for any resulting additional purchase, construction, and administrative costs. On a case by case basis, the VPA will decide whether to repurchase from the next low bidder or purchase competitively by re-solicitation.
  - b. If the repurchase or re-procurement results in increased costs to the VPA, a letter will be sent to the defaulted contractor requiring payment for additional costs. When repayment is requested, the contractor may be precluded from receipt of future contracts or purchase orders until the repayment has occurred. Contractors shall not be liable for any excess cost if the failure to perform arises out of any act of war, order of legal authority, strikes, act of God or other unavoidable causes not attributed to their fault or negligence. Failure of a contractor's source to deliver is generally not considered to be an unavoidable cause. The burden of proof rests with the contractor to demonstrate adequate defense to default.
3. Claims on Performance Bonds and Guarantees. Upon a determination to terminate a contract for default, the Supply Management Head, the manager of the VPA Department managing the Project, and the General Counsel shall confer to determine if there are any available forms of performance security, surety bonds or guarantees that may be available under the Contract. If such security or guarantees are available, the Director of Procurement with the assistance of the General Counsel, shall ensure that procedural requirements are followed in order to make a claim on such security, bond or guarantee. The Project Manager will make a recommendation to the Executive Director on whether to enforce or make a claim on the security, bond or guarantee, and the Executive Director shall make the decision to pursue such a claim. A decision not to make such a claim or enforce the VPA's rights under such security, bond or guarantee shall be documented in the project file.



## CHAPTER 9: VENDOR INSURANCE AND BONDING

### 9.1 Insurance

For service contracts under \$100,000, the need for vendors to maintain insurance coverage will be determined by the Risk Department on a case-by-case basis.

For service contracts over \$100,000, the VPA may require insurance coverage from the vendor consistent with the limits below. Required coverages shall be determined on a case-by-case basis.

1. **Workers Compensation:** in compliance with Virginia statutory requirements and benefits and an endorsement to the policy for coverage under the federal Longshore and Harbor Workers' Compensation Act, if applicable. The Workers' Compensation policy shall be endorsed to waive subrogation against Virginia Port Authority, Virginia International Terminals, LLC and the Commonwealth of Virginia.
2. **Employer's Liability:** insurance with liability limits not less than One Million Dollars (\$1,000,000) per occurrence. For service contracts under \$100,000, a lesser limit of \$500,000 may be required.
3. **Commercial General Liability:** insurance with liability limits not less than One Million Dollars (\$1,000,000) per occurrence and general aggregate. The policy must be endorsed to waive subrogation in favor of Virginia Port Authority, Virginia International Terminals LLC and the Commonwealth of Virginia.
4. **Automobile Liability:** insurance with liability limits not less than One Million Dollars (\$1,000,000) per occurrence combined single limit.
5. **Professional Liability:** insurance with liability limits not less than One Million Dollars (\$1,000,000) on a claims made basis, if applicable.
6. **Contractor Pollution Liability:** insurance with liability limits not less than One Million Dollars (\$1,000,000), on a claims made basis, if applicable.

The following entities must be named as additional insured: Virginia Port Authority, Virginia International Terminals, LLC, HRCP II, LLC and the Commonwealth of Virginia, if applicable, and the City of Richmond (provided Richmond Marine Terminal is involved).

In some cases, Workers' Compensation Insurance and Employer's Liability Insurance may not be required. Workers' Compensation insurance is required when the contractor has three (3) or more employees. If work is performed by a sole proprietor, the person does not need Workers' Compensation insurance, as they do not have employees. Employer's Liability is required if an employer has employees who are paid a wage or salary. Employer's Liability is not required for persons in business together, e.g., husband and wife, siblings or parents and children, as these persons would be considered owners not employees.

For construction contracts, if any subcontractors are involved, subcontractors shall also be required to have workers' compensation insurance in accordance with Code of Virginia, § 2.2-4332 and 65.2-800 et seq. Stipulated insurance must be obtained prior to commencing work and be maintained during the entire term of the contract. The Procurement Department require a certificate of insurance to be furnished prior to commencement of work and at any time during contract performance.

Each policy shall require the insurer to give the VPA at least thirty (30) days prior written notice, via certified mail, return receipt requested, at the addresses for notices to the VPA stated below, in the event of any cancellation of, modification to or difficulty (if any) in extending, renewing or reinstating such insurance

## 9.2 Bonding

**Bid Bonds.** A Bid Bond may be required in a solicitation to protect the VPA in the event that a selected bidder fails to accept the contract as bid. Bid Bonds may be required in solicitations where the value of that project is projected to exceed \$250,000. When the VPA requires a Bid Bond, it shall not exceed five percent of the amount bid and the bond must accompany the bid.

**Payment and Performance Bonds.** Payment and Performance Bonds shall be required for every construction-related solicitation when the projected value of that project exceeds \$500,000. For certain non-construction projects, Payment and Performance Bonds may be required whenever the value of that project is projected to exceed \$250,000. Performance and Payment Bonds may be used on service or supply contracts involving significant risks, significant subcontracting, or where VPA would have difficulty procuring replacement services in the event of a contractor default. Performance Bonds and Payment Bonds must be in an amount at least equal to 100% of the accepted bid or proposal and should be filed prior to issuance of the purchase order or notice to proceed unless a written determination is made that it is in the best interests of the VPA to grant an extension.

A certified check or cash escrow may be accepted in lieu of a Bid, Payment or Performance Bond. If approved by the Attorney General's Office, a bidder may furnish a personal bond, property bond, or bank or savings and loan association's letter of credit on certain designated funds in the face amount required for the Bid, Payment, or Performance Bond. Approval shall be granted only upon a determination that the alternative form of security offered affords protection to the VPA equivalent to a corporate surety bond.

If a Performance Bond requirement is not stated in the solicitation and the VPA later determines that a bond should be provided prior to the award of a contract, the contractor to whom the award will be made shall provide a Performance Bond and the VPA will pay the cost of the bond.

**Warranty Bonds.** The VPA may require a Warranty Bond to secure a contractor's long term performance of warranty obligations when it would be difficult or much more expensive to procure substitute warranty repairs from another source.

**Advance Payment Guarantees.** The VPA will use advance payment guarantees when a contract requires substantial payments to be made in advance of delivery of goods or services, consistent with the advance payment provisions of the CAPP Manual.

## CHAPTER 10: CLAIMS AND DISPUTES

### 10.1 General Provisions

These administrative procedures shall apply to all pre-award and contract disputes and decisions by the VPA, including without limitation: appeals from disqualifications, appeals from determinations of non-responsibility, protests of award or decision to award a contract, and appeals from decisions on disputes arising during the performance of a purchase order or contract awarded by the VPA.

The VPA encourages resolution of disputes and claims in the least adversarial way. Significant disputes and claims will be reviewed and adjudicated on behalf of the VPA by an Administrative Review Panel (“the Review Panel”) consisting of senior managers who are not directly involved in the project, the procurement or the issue in dispute.

1. The procedures specified in this Chapter provide bidders, offerors, and contractors an opportunity to present pertinent information regarding disputes arising from VPA procurement actions.
2. Disputes and claims where the amount in dispute is less than \$100,000 shall be initially decided by the cognizant VPA Department Manager on behalf of the VPA, subject to an appeal to the Executive Director.
3. Disputes and claims where the amount in dispute is equal to or in excess of \$100,000 shall be referred to a Review Panel for review and a decision.
4. The Review Panel will consist of the following senior managers: (1) the CFO, (2) the Vice President of Sustainability, and (3) the Vice President of Contracts and Risk Management. In the event that there is a conflict or if one of the senior managers identified is directly involved in the dispute, the Vice President of Asset Management will act as an alternate.
5. If any of the foregoing managers have direct involvement in the procurement, project or issue in dispute, or in the absence or unavailability of one of the designated panel members, the Executive Director shall appoint a replacement.

### 10.2 Pre-Award Disputes, Protests and Appeals

The VPA will use the administrative procedures in this Section for hearing appeals from disqualifications, appeals from determinations of non-responsibility, protests of award or decision to award a contract (“Pre-Award Disputes”).

1. **Procedure.** An offeror, bidder, or prospective vendor pursuant to a solicitation issued by the VPA must file such Pre-Award Dispute with the VPA Procurement Head in accordance with this procedure. A Pre-Award Dispute shall be submitted to the Review Panel for a decision. The offer or bidder may submit materials for the consideration of the Review Panel, and a decision on the Pre-Award Dispute by the Review Panel shall be issued within the time periods provided below. This decision shall be final and conclusive unless the offeror, or bidder, submits a written request for an administrative appeal to the VPA Executive Director within seven (7) calendar days of receipt of the written decision. The Executive Director or his/her designee shall review the decision, and issue his/her decision on the appeal in writing within seven (7) calendar days after receiving the written appeal. The decision of the Executive Director or his/her designee shall be final and conclusive and shall not be set aside unless the same are fraudulent, arbitrary, or capricious or so grossly erroneous as to imply bad faith. An offeror or vendor shall be entitled to institute judicial review if such legal action is brought after receipt of the Executive Director or designee’s written decision within the time specified herein. An offeror or bidder must utilize this administrative procedure, and these administrative procedures shall be

exhausted prior to the vendor instituting legal action concerning the same procurement transaction unless the VPA agrees otherwise. All legal actions appealing such decisions shall be filed in Circuit Court for the City of Norfolk, Virginia.

2. The types of Pre-Award Disputes that may be filed are as follows:

a. Ineligibility.

- I. Any offeror, or bidder refused permission to, or disqualified from participation in a VPA procurement or VPA contract shall be notified in writing. Prior to the issuance of a written determination of disqualification or ineligibility, the VPA shall (a) notify the offeror or bidder in writing of the results of the evaluation, and (b) disclose the factual support for the determination.
- II. Within five (5) calendar days after receipt of the notice, the offeror or contractor may submit rebuttal information challenging the evaluation. If the dispute is over \$100,000, the Review Panel shall issue its written determination of disqualification or ineligibility based on all information in the possession of the VPA, including any rebuttal information, within seven (7) calendar days of the date the VPA received such rebuttal information. If the dispute is under \$100,000 the cognizant department manager will make the decision.
- III. If the evaluation reveals that the offeror or contractor should be allowed permission to participate in the public contract, the VPA shall cancel the proposed disqualification action. If the evaluation reveals that the offeror or contractor should be refused permission to participate, or disqualified from participation, in the public contract the VPA shall so notify the offeror or contractor. Such notice shall state the reasons for the action taken. A disqualification decision may be appealed to the Executive Director, as provided above, and the Executive Director or his/her designee shall issue a written decision on such appeal within seven (7) days.

b. Protest of Contract Award or Decision to Award.

- I. An offeror or bidder may protest a contract award, or the decision to award a contract, by submitting such protest in writing to the Supply Management Head, no later than five (5) calendar days after the earlier of: (a) the offeror's or bidder's receipt of individual notice, or (b) public notice posted on the eVA website, of the award or the announcement of the decision to award the contract, whichever occurs first. The written protest must be received in the purchasing office no later than 5:00 p.m. on the fifth day. If the fifth day falls on a weekend or an official holiday, the five-day period expires at 5:00 p.m. on the next regular workday.
- II. The written protest shall include the basis for the protest and the relief sought. No protest shall lie for a claim that the selected offeror is not a responsible offeror.
- III. If the dispute is over \$100,000, a protest of an award or a decision to award a contract shall be referred to the Review Panel. The Review Panel shall issue a decision on the Protest within seven (7) calendar days. If the protestor chooses to appeal the denial of the protest, an administrative appeal must be delivered to the Executive Director within seven (7) calendar days of the receipt of the Review Panel decision. The Executive Director or his/her designee shall issue a decision in writing within seven (7) calendar days of receipt of the appeal stating the reasons for the action taken. This decision shall be final unless the offeror or bidder files a legal proceeding to appeal this decision within seven (7) calendar days of receipt of the written decision. Nothing in this subsection shall be construed to permit an offeror to challenge the validity of the terms or conditions of the RFP, which must be protested prior to the receipt of bids or offers.

3. If prior to an award it is determined in a legal proceeding that the decision to award is arbitrary or capricious, then the sole relief shall be a finding to that effect. 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 VPA may cancel the award and either reject or reevaluate bids or proposals. A protest by an offeror or bidder shall have no effect upon any existing contracts which have been awarded and accepted in good faith, or awards which must be made to ensure the continued operation of critical functions of the VPA, or if such other bids or proposals will expire.
4. **Effect of Appeal Upon Contract.** Pending final determination of a protest or appeal, the validity of a contract awarded and accepted in good faith shall not be affected by the fact that a protest or appeal has been filed.
5. **Legal Actions.** The administrative procedures herein shall be exhausted prior to instituting legal action concerning the same procurement transaction. Unless otherwise provided herein, any legal action to appeal a decision of the Executive Director or his designee must be filed in the Circuit Court for the City of Norfolk, Virginia within seven (7) days of receipt of the decision

### 10.3 Claims and Contract Performance Disputes

Timely written notice of a Contractor's intent to file a claim is a prerequisite to a Contractor's right to file a claim arising from or related to performance of a VPA contract. Upon receipt of a Notice of Intent to File Claim, the Budget Holder responsible for the procurement or project administration will attempt to resolve the dispute through negotiation without formal dispute resolution processes.

1. **Notice Required.** All formal disputes regarding a Contractor's requests for additional compensation, adjustment of contract time or other relief under a VPA contract shall be submitted as a claim. Written notice of the Contractor's intention to file a claim must be given at the time the Contractor knows of, or through the exercise of reasonable diligence should have known of, the occurrence on which the claim is based. In all cases notice must be provided before beginning of the work upon which the claim is based. Such notice shall be entitled or clearly marked "Notice of Intent to File Claim," and shall be delivered to the Procurement Head. Alternatively, if a contract designates another VPA representative to receive Notices of Intent to File Claim, a copy of the notice shall be provided to the Procurement Head at the time of filing. Failure to submit a timely, written notice of Intent to File Claim as required in this Section 10.3 shall constitute conclusive waiver of the Contractor's claim.
2. Upon receipt of the Notice of Intent to File Claim, the Budget Holder will endeavor to settle all disputes and claims at the project level. Settlements requiring a change in contract compensation or contract time will be formalized in a written Change Order.
3. **Affirmative Claims by VPA against a Contractor.** Adjustments to compensation, contract time or other terms and conditions of a contract, initiated by the VPA shall be processed as a matter of contract administration. If a contractor wishes to challenge or dispute such an adjustment by the VPA, the contractor must provide timely notice of its objection or dispute of the VPA action, and file a claim as provided herein.
4. **Time of Submission.** Contractual claims submitted by a contractor, whether for additional compensation, an extension of contract time, or other relief, must be submitted in writing to the Procurement Head no later than sixty (60) days after final payment. If a claim is based upon an action taken by VPA after final payment, including claims based on warranty disputes, the claim must be filed no later than sixty (60) days after the action taken by the VPA that forms the basis for the claim.

5. Continuation of Performance. Unless otherwise agreed in writing by the VPA, the contractor shall continue performance of its contract following submission of a Notice of Intent to File Claim, and throughout the dispute resolution process.

## 10.4 Dispute Resolution

Following timely submission of a claim as required above, claims will be resolved according to the procedure described in this Section below. The submission of a timely Notice of Intent to File Claim in manner prescribed in Section 10.3, and submission of the claim within the time specified in Section 10.3, shall be a condition precedent to the contractor's right to maintain a claim. Pending resolution of any dispute, the Contractor must continue performance of the contract unless otherwise directed by the VPA.

1. Budget Holder will endeavor to settle all claims at the Project level with oral or written communication with the vendor. Settlements requiring a change in contract compensation or contract time will be formalized in a written Change Order.
  2. Upon review of the contractor's claim, the VPA agrees that it shall, as the case may be, (i) adjust the Contract time by the amount of time that the VPA reasonably believes to be the amount of additional time, (ii) pay the contractor the amount that the VPA reasonably believes to be the amount of additional compensation due, in accordance with payment procedures applicable to the contract or procurement action, and/or (iii) grant such other relief sought by the contractor that the VPA reasonably believes to be appropriate. The VPA shall provide the contractor with a written explanation of its decision concerning the amount of time, money or other relief sought by the contractor considered as reasonable and correct by the VPA. For claims under \$100,000 not resolved by the Budget Holder, an initial decision on claim will be made on behalf of VPA by the cognizant department manager. Claims in excess of \$100,000 will be submitted to the Review Panel constituted in accordance with Section 10.1.
2. For claims submitted for a decision by the Review Panel, the contractor shall be afforded an opportunity to submit materials for consideration by the Review Panel. The Review Panel may, at its sole discretion, hold an informal hearing in which the contractor and the VPA contract or project management personnel present information relevant to the Review Panel's consideration of the claim. The contractor may be represented by counsel at such informal hearing, but the rules of evidence and other procedures applicable to formal legal proceedings shall not apply at the hearing or to the deliberations of the Review Panel. The Review Panel shall issue a written decision on the claim within sixty (60) days of receipt of the claim. Such sixty (60) day period may be extended by up to another sixty (60) days upon agreement of the contractor or upon certification by the Review Panel of urgent or compelling circumstances. Failure of the Review Panel to render a decision on the claim within one hundred twenty (120) days after receipt of the claim may be deemed a denial of the claim and the contractor may proceed as provided herein.
3. A contractor dissatisfied with the decision of, as applicable, the cognizant department manager or the Review Panel as to its claim may appeal that decision in writing to the Executive Director within thirty (30) days of receipt of the decision on the claim. Within seven (7) days, of receipt of the appeal, or such longer time as agreed between VPA and the contractor, the Executive Director or his designee shall afford the contractor an opportunity to be heard on the claim, and shall render a written decision on the contractor's appeal and claim within thirty (30) days following receipt of the contractor's appeal.
4. The contractor may not institute legal action prior to receipt of the Executive Director's written decision on the claim unless the Executive Director fails to render a final decision within sixty (60) calendar days of receipt of the contractor's appeal of the Review Panel's decision, or such longer time as agreed between the VPA and the contractor. The decision of the Executive Director or his Designee shall be final and conclusive unless the

contractor, within thirty (30) days following receipt of the decision of the Executive Director or his/her designee files a legal action in Norfolk Circuit Court as provided below.

5. All legal actions filed to challenge or appeal a decision of the Executive Director shall be filed in the Circuit Court for the City of Norfolk, Virginia, and such court shall have exclusive jurisdictions to hear such appeals. Such legal actions shall be tried before the court without a jury. The submission of the timely written Notice of Intent to File Claim in the manner prescribed in this Policy Handbook, the submission of the claim within the times specified, and the exhaustion of the administrative process provided herein, shall be conditions precedent to the contractor's right to bring any legal proceeding against the VPA. Upon appeal in a legal proceeding, the decision or action taken by the Executive Director or his/her designee shall not be overturned unless the court shall determine that such decision or action: (1) was not in compliance with the Virginia or Federal Constitution, (2) was not in compliance with applicable statutes or regulations, (3) was procured by fraud, or (4) was arbitrary, capricious or taken in bad faith.

## CHAPTER 11: SMALL BUSINESS PROGRAMS

### 11.1 Small Woman and Minority-Owned (SWaM) and Disadvantaged Business Enterprise (DBE)

The VPA develops and submits a Small, Woman and Minority-Owned (SWaM) Plan on an annual basis. The plan is approved by the Executive Director and is submitted to the Secretary of Transportation, and Department of Small Business and Supplier Diversity. All individuals with procurement authority shall comply with the VPA's SWaM Plan.

#### **PURPOSE/CONSIDERATIONS:**

1. The purpose of the VPA's SWaM program is to increase opportunities, participation and contract awards for Department of Small Business and Supplier Diversity (DSBSD) certified SWaM businesses in order to achieve the Commonwealth of Virginia's and the VPA's SWaM goals.
2. VPA's purchases with contractors registered as SWaM vendors are counted toward the SWaM goal, whether or not the contractor uses a sub-contractor. The VPA has developed language that requires offerors to provide their proposed plan to utilize SWaM businesses during the performance of the contract. This information is required with proposal submittals or as requested by the Procurement Head. No contract will be awarded unless this information is provided as specified and/or requested.
3. The VPA may collect reports from vendors that have been awarded contracts indicating actual utilization of SWaM businesses as subcontractors during the performance of the contract. These reports will indicate the amount of expenditures with, or payments to, SWaM vendors by the appropriate category. Reports are collected by the Procurement Department. VPA may deem the vendor to be in breach of contract and may withhold final payment or a part of the retainage should the vendor fail to provide required reports.
4. The VPA reserves the right to solicit bids with SWaM set-asides in order to support the policy and goals assuming there is sufficient competition in the market. Set-asides will not be used to pre-select individual vendors or suppliers.
5. Awards under \$10,000: For purchases under \$10,000, the award of a contract shall be made to the lowest priced DSBSD-certified micro business bidder/offeror that is responsive and responsible (for bids) or fully qualified and most suitable (for proposals) if such micro business bid or offer is available and the price is fair and reasonable. If there are no reasonably priced bids/offers meeting the above criteria received from certified micro businesses, an award shall be made to the lowest priced or highest ranked DSBSD-certified small business bidder/offeror that is responsive and responsible (for bids) or fully qualified and most suitable (for proposals) if such small business bid or offer is available and the price is fair and reasonable. If there are no reasonably priced bids or offers meeting the above criteria received from certified micro or small businesses, an award may be made to the lowest priced bidder or highest ranked offeror of any size that is responsive and responsible (for bids) or fully qualified and most suitable (for proposals) if the price is fair and reasonable. If the agency or Institution determines and documents that no bid/offered price is fair and reasonable then the procurement may be cancelled and re-solicited removing the set-aside award priority.



## CHAPTER 12: DEFINITIONS

**Addendum:** Written or graphic instruments issued prior to the opening of bids that clarify, correct or change the bidding documents.

**Architect/Engineer (A/E):** The term used to refer to the architect and/or engineer who contracts with the VPA to provide the architectural and/or engineering services for a Project. The A/E is a separate Contractor and is not an agent of the VPA. This term also includes any associates or consultants employed by the A/E to assist the A/E in providing services.

**Affiliate:** A person or company attached to the Virginia Port Authority, Virginia International Terminals LLC or Hampton Roads Chassis Pool II.

**Budget Holder:** the colleague responsible for a budget cost center.

**Capital Project:** “Capital Project” means the acquisition or proposed acquisition of property, including any improvements thereto, a new construction project or improvements to state-owned property, a renovation, maintenance or repair project, and equipment acquisition or improvements to state-leased property.

**Change Order:** A document which authorizes an addition, deletion or revision in the work, or an adjustment in the Contract Price, Contract Time or the Contract Documents, issued on or after the effective date of the Agreement.

**Compliance Head:** The functional manager of the procurement, code of conduct, and ethics compliance function.

**Consultant:** An individual or firm with professional expertise engaged to render a specific service in connection with a project.

**Contract Completion Date:** The date by which the construction work must be substantially complete. The Contract Completion Date is customarily set forth in the contract based on Notice to Proceed and the Time for Completion. In some instances, however, the contract contains a mandatory Contract Completion Date, which date shall have been stated in the Invitation for Bids.

**Contract Documents:** This term shall mean the contract and any documents expressly incorporated therein. Such incorporated documents customarily include the bid submitted by the contractor, the General Conditions of the Construction Contract, any Supplemental General Conditions, any Special Conditions, the plans and specifications, and all modifications, including addenda and subsequent change orders.

**Contract Administrator:** The VPA’s designated representative for the contract by the Budget Holder.

**Contract Price:** The total compensation stated in the Contract, as modified by Change Orders, payable to the Contractor for performing the work set forth in the Contract Documents.

**Contract Head:** The functional manager of the Contracts department.

**Contractor:** The person, firm or corporation with whom the VPA has entered into a contract agreement including their subcontractors.

**Disadvantaged Business Enterprise (DBE):** Program is a U.S. Department of Transportation (USDOT) program that was established to ensure that firms owned by minorities, women, and other

socially and economically disadvantaged persons have an equal opportunity to participate in federally assisted projects.

**Engineering Head:** The functional manager of the engineering department.

**Facility:** A structure or group of structures, including all buildings and other improvements thereto, which built, installed or established to serve a particular purpose.

**Goods:** 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 for Bids or Request for Proposals that does not affect the price, quality, quantity or delivery schedule for the goods, services or construction being procured.

**Nonprofessional Services:** Any services not specifically identified as professional services in the definition of professional services.

**Notice of Award:** The written notification by the VPA to the apparent successful bidder, notifying the bidder that it has been awarded the contract, pending the submittal and execution of all documents required in the IFB.

**Notice to Proceed:** A written notice by the VPA to the Contractor (with a copy to A/E) fixing the date on which the contract time will commence for the contractor to begin the prosecution of the work in accordance with the requirements of the Contract Documents. The Notice to Proceed will customarily identify a Contract Completion Date.

**Offerors:** Vendors or suppliers who may prepare a response to an IFB or RFP.

**Pre-bid Conference:** A meeting of interested, prospective bidders held by the VPA, usually with the assistance of the A/E, prior to the receipt of bids in which comments or questions concerning specifications or other provisions in the IFB or RFP can be received and considered. Any response shall be in writing and distributed to all who requested/received the IFB and RFP.

**Pre-qualification of Bidders:** The process by which the qualifications and credentials of potential bidders may be evaluated for particular types of services or construction in accordance with criteria established in writing and sufficiently in advance of their implementation to allow interested persons or firms a fair opportunity to complete the process.

**Small, Woman-owned, and Minority-Owned Business (SWaM):** is a state certification program of the Commonwealth of Virginia. The purpose is to enhance procurement opportunities for SWaM businesses participating in state-funded projects.

**Supply Management Head:** The functional manager of the Procurement Department.

**Project Manager:** The VPA's designated representative for the project.

**Requestor:** The colleague authorized by the Budget Holder of their department who submitted the original request for procurement of goods or services to the Procurement Department.

**Requisition:** A requisition in PeopleSoft is an online form for requesting goods and or services. After you enter and submit a requisition, you can route it for approval. Approved requisitions are then sourced.

**Selection Board:** a group consisting of Port of Virginia colleagues who will evaluate the proposals submitted by Offerors for RFP's.

**Substantial Completion:** The date on which the project (or a specific part thereof) is sufficiently complete, in accordance with the Contract Documents, so that the project (or the specific part thereof) can be utilized by the VPA for the purposes for which it is intended. The VPA, at its sole discretion, may request approval from the Building Official to take Beneficial Occupancy at this time or may choose to wait until final completion to occupy.

**Supplier:** A manufacturer, fabricator, distributor, material provider or vendor who provides material for the project, but does not provide on-site labor.

**Time for Completion:** That number of consecutive calendar days, following receipt of a Notice to Proceed, which the Contractor has in which to substantially complete everything required by the contract. The time for completion is usually set out in the IFB. When the Notice to Proceed is issued, it states a Contract Completion Date which has been set by VPA based on the Time for Completion.