

# Chapter 4. Determining Which Procedure Applies

## Summary

This section briefly examines the several procedures available for the procurement of goods and services and establishes the methodology to be used to determine which procedure applies to a particular procurement.

<b>Essential Information in this Chapter</b>
<ul style="list-style-type: none"><li>• Generally, the procurement of goods or services requires using the competitive sealed bidding or competitive negotiation procedure if the costs are expected to exceed \$50,000. If the costs are not expected to exceed \$50,000, one of the three small purchase procedures applies.</li><li>• If there is only a sole source, an emergency exists, or if the goods may be procured at public auction, the competitive sealed bidding or competitive negotiation procedure need not be followed even if the costs are expected to exceed \$50,000.</li><li>• There are several types of goods and services that are exempt from the competitive sealed bidding or competitive negotiation procedure even if the costs are expected to exceed \$50,000. Legal services are the most notable goods or services in this exempt class.</li><li>• When determining which procedure applies, begin by assuming that the competitive sealed bidding procedure applies, and then determine the expected cost of the goods or services, classify what is being procured, and determine whether an excuse or exemption applies.</li></ul>
<b>Key References to the Code of Virginia Applicable to this Chapter</b>
Section 2.2-4301: Definitions used in the Virginia Public Procurement Act Section 2.2-4343(B): Compliance with conditions on federal grants or contracts Section 2.2-4304: Cooperative procurement Section 2.2-4303(A): When competitive sealed bidding and competitive negotiation required, generally Section 2.2-4303(B): Competitive negotiation required for procurement of professional services Section 2.2-4303(D): When competitive negotiation available in lieu of competitive sealed bidding Section 2.2-4303(E): Procurement from a sole source Section 2.2-4303(F): Procurement in an emergency Section 2.2-4303(H): Small purchases Section 2.2-4303(J): Reverse auctioning Section 2.2-4305: Competitive bidding on state-aid projects Section 2.2-4344: Exceptions to the requirement for competitive procurement

### 4-1 General

There are several possible procedures that may apply to a particular procurement. If the expected costs of the goods or services are expected to exceed \$50,000, most procurements require a competitive procedure such as the competitive sealed bidding procedure or the competitive negotiation procedure. The small purchase procedures set forth in chapter 22 apply when the expected costs of the goods or services are expected to be \$50,000 or less.

There are certain circumstances, such as emergencies, and certain goods or services, such as legal services, which are excused or exempted from these competitive procedures.

## **4-2 The Formal Competitive Procedures**

There are three formal competitive procedures available: competitive sealed bidding, competitive negotiation for professional services, and competitive negotiation for goods or nonprofessional services. Each are briefly described below, and discussed in more detail in parts 2 and 3.

### **4-2.1 Competitive Sealed Bidding for Goods or Nonprofessional Services**

Competitive sealed bidding is a method of vendor selection that is used when the cost of the goods or nonprofessional services is expected to exceed \$50,000. This procedure has five elements: (1) the issuance of an invitation for bids; (2) public notice; (3) public opening of sealed bids; (4) evaluations of bids; and (5) award. This procedure is described in more detail in part 2, beginning with chapter 5.

### **4-2.2 Competitive Negotiation for Professional Services**

Competitive negotiation for professional services is the method of vendor selection used only for the procurement of services within the scope of the practice of accounting, actuarial services, architecture, dentistry, land surveying, landscape architecture, law, medicine, optometry, pharmacy, or professional engineering where the cost of the services is expected to exceed \$50,000. This procedure has four elements: (1) the issuance of a request for proposals; (2) public notice; (3) negotiations; and (4) award. These elements are described in more detail in part 3, beginning with chapter 11.

### **4-2.3 Competitive Negotiation for Goods or Nonprofessional Services**

Competitive negotiation for goods or nonprofessional services is the method of vendor selection that may be used in lieu of the competitive sealed bidding procedure for the procurement of goods or services, other than professional services, where the cost of the goods or services is expected to exceed \$50,000. ~~To use this procedure, the purchasing agent must determine in advance and in writing that the competitive sealed bidding procedure is either not practicable or not fiscally advantageous to the public.~~ This procedure has four elements: (1) the issuance of a request for proposals; (2) public notice; (3) negotiations; and (4) award. These elements are described in more detail in part 3, beginning with chapter 11.

**Table 4-1**

<b>Thresholds for Applicability of the Competitive Sealed Bidding And Competitive Negotiation Procedures</b>	
<b>Competitive Sealed Bidding</b>	<b>Competitive Negotiation</b>
<p>Goods or nonprofessional services, including insurance, expected to exceed \$50,000</p> <p>Construction expected to exceed \$50,000</p>	<p>Professional services expected to exceed \$50,000</p> <p>Goods or nonprofessional services, including insurance, where <del>it is determined that competitive sealed bidding is either not practicable or not fiscally advantageous, and</del> expected to exceed \$50,000</p> <p>The construction of highways and any draining, dredging, excavation, grading or similar work on real property</p>

**4-3 Procurements Excused from Formal Competitive Procedures**

There are three circumstances when compliance with the competitive sealed bidding or competitive negotiation procedure is excused, even though the cost of the goods or services are expected to exceed \$50,000.

**4-3.1 Sole Source**

The sole source procedure may be used in lieu of either the competitive sealed bidding or the competitive negotiation procedure when there is only one source practicably available for that which is to be procured. This procedure is described in more detail in chapter 19.

**4-3.2 Public Auction**

Goods, products and commodities may be procured at a public auction if the purchasing agent determines in advance and in writing that the procurement by public auction in the best interests of the County. The public auction procedure is described in more detail in chapter 20.

**4-3.3 Emergency**

The emergency procedure may be used in lieu of either the competitive sealed bidding or the competitive negotiation procedure when there is an emergency. Emergencies include, but are not limited to, natural disasters and situations when goods or services are needed immediately, even when the emergency is self-created by the using department. The emergency procurement procedure is described in more detail in chapter 21.

#### 4-4 Goods and Services Exempt from Formal Competitive Procedures

The Virginia Public Procurement Act exempts several goods and services from the competitive sealed bidding and competitive negotiation procedures, even though the expected cost of the goods or services may exceed \$50,000. These exempt goods and services are:

- Legal services: Legal services, provided that the pertinent provisions of Virginia Code § 2.2-500 et seq. (pertaining to the legal services of the Attorney General) remain applicable.
- Litigation related services: Expert witnesses and other services associated with litigation or regulatory proceedings.
- Insurance purchased through an association: If insurance is purchased through an association of which the County is a member, if the association was formed and is maintained for the purpose of promoting the interest and welfare of, and developing close relationships with, similar public bodies. The association must obtain the insurance using competitive principles. The purchasing agent must make a determination in advance after reasonable notice to the public and state in writing that competitive sealed bidding and competitive negotiation are not fiscally advantageous to the public and document the basis for this determination.
- Goods produced or services performed by the disabled: Goods produced or services performed by the disabled, if produced or performed by persons, or in schools or workshops under the supervision of the Virginia Department for the Visually Handicapped or by nonprofit sheltered workshops or other nonprofit organizations which offer transitional or supported employment services serving the handicapped.
- Goods or services for recipients of certain public welfare programs: Goods or services for an individual recipient of a public assistance program defined in Virginia Code § 63.1-87, the fuel assistance program, a person receiving services from a community services board as defined in Virginia Code § 37.1-1, or if the County is purchasing services under the Comprehensive Services Act for At-Risk Youth and Families under Virginia Code § 2.2-5200 et seq., may be procured without using a competitive procedure. However, the bulk procurement of goods or services for use by such recipients must be competitively procured.
- Extension of an existing contract: The purchasing agent may extend the term of an existing contract for services to allow completion of any work undertaken but not completed during the original term of the contract.

Legislation may also exempt some goods and services from the Act (e.g., Virginia Code §2.2-4343(A)(12) (school boards that make purchases through educational technology foundation exempt from certain provisions of

Procurement Act); Virginia Code § 2.2-4346(A) (certain election materials), Virginia Code § 2.2-4343(A)(4) (vehicles purchased by the local department of social services for TANF recipients) or makes the exemption optional (e.g., Virginia Code § 46.2-1217 (police-requested towing services)).

#### **4-5 Determining Which Procedure Applies**

The following steps should be taken to determine which procurement procedure applies:

##### **4-5.1 Determine the Expected Cost of the Goods or Services**

The first step is to identify the expected cost of the goods or services to be procured. If the cost of the goods or services is expected to exceed \$50,000, then a formal competitive procedure applies unless the procurement is otherwise excused or exempted. If the expected cost of the goods or services is \$50,000 or less, then one of the small purchase procedures apply.

- Cost estimated by the using department: The using department shall determine the expected cost of the goods or services to be procured, and present that determination to the purchasing agent in writing.
- Review of cost estimate by the purchasing agent: The purchasing agent shall review the determination of expected cost made by the using department if the expected cost is determined to be greater than \$15,000, and may review any other determination of expected cost made by the using department. The purchasing agent should independently determine the expected cost of the goods or services.

##### **4-5.2 Classify What is Being Procured**

The second step requires that the purchasing agent classify what goods or services are sought to be procured, and identify whether professional services are sought. When determining which procedure applies, the purchasing agent should assume that the competitive sealed bidding procedure applies, and then identify the basis, if any, for another procedure, an excuse, or exemption, to apply.

- Goods: Goods are procured by the competitive sealed bidding procedure. However, goods may be procured by the competitive negotiation procedure for goods or nonprofessional services if the purchasing agent determines in advance and in writing that the competitive sealed bidding procedure is either not practicable or not fiscally advantageous to the public. (See Table 4.2 below)

- **Nonprofessional services:** Nonprofessional services are procured by the competitive sealed bidding procedure. However, nonprofessional services may be procured by the competitive negotiation procedure for goods or nonprofessional services if the purchasing agent determines in advance and in writing that the competitive sealed bidding procedure is either not practicable or not fiscally advantageous to the public. (See Table 4-2, below)

**Table 4-2**

<b>Factors to Consider in Determining Whether <u>to Use</u> the Competitive Sealed Bidding Procedure <u>is not Practicable or Fiscally Advantageous</u></b>
Whether the contract needs to be other than a fixed-price type
Whether oral or written discussions may need to be conducted with vendors concerning technical and price aspects of their proposals
Whether vendors may need to be afforded the opportunity to revise their proposals, including price
Whether the market will respond better to a solicitation permitting not only a range of alternative proposals, but evaluation and discussion of them before making the award
Whether the award may need to be based upon a comparative evaluation of differing price, quality, and contractual factors in order to determine the most advantageous offering to the County
Whether the primary consideration in determining the award may not be price

- **Professional services:** Services to be performed by an independent contractor within the scope of the practice of accounting, actuarial services, architecture, dentistry, land surveying, landscape architecture, law, medicine, optometry, pharmacy, or professional engineering, must be procured by the competitive negotiation procedure for professional services.
- **Construction:** Construction is procured by the competitive sealed bidding procedure; except that the construction of highways and any draining, dredging, excavation, grading or similar work upon real property may be procured by the competitive negotiation procedure for goods or nonprofessional services if the purchasing agent determines in advance and in writing that the competitive sealed bidding procedure is either not practicable or not fiscally advantageous to the public.

**Table 4-3**

<b>Comparison of the Competitive Negotiation and Competitive Sealed Bidding Procedures</b>	
<b>Competitive Negotiation</b>	<b>Competitive Sealed Bidding</b>
<p><b>Advantages</b> Evaluation, interview and negotiation processes allow in-depth analysis of every offeror's qualifications and capabilities</p> <p>If the price is too high, the scope of work or the specifications and price may be negotiated to meet the County's needs</p> <p>The ability to negotiate the price is an effective technique to offset potential inflated prices in a market with little or no competition</p> <p><b>Disadvantages</b> Evaluation and award process can be lengthy and complicated</p> <p>Vendors evaluated by proposals and negotiations; the process must be managed carefully to assure objective selection process</p> <p>County staff can be at a disadvantage in negotiations, particularly when dealing with experienced vendors with trained negotiators</p>	<p><b>Disadvantages</b> Only the lowest responsive and responsible bidder may be considered for award, regardless of the qualifications of the other bidders or how close their price may be to that of the lowest bidder</p> <p>If the price is too high, the County may either negotiate with the low bidder to reduce the price to the amount budgeted, or cancel the procurement</p> <p>The inability to negotiate the price, except when the bid price exceeds the amount budgeted, may result in paying inflated prices in a market with little or no competition</p> <p><b>Advantages</b> Evaluation and award process is simple; determination of lowest responsive and responsible bidder generally quickly determined, contract applying objective criteria</p> <p>Vendors evaluated by contents of bids only</p> <p>No negotiations except with lowest responsive and responsible bidder when the low bid exceeds available funds</p>

- Insurance: Insurance shall be procured by the competitive sealed bidding procedure. However, insurance may be procured by the competitive negotiation procedure for goods or nonprofessional services if the purchasing agent determines in advance and in writing that the competitive sealed bidding procedure is either not practicable or not fiscally advantageous to the public.

**4-5.3 Determine Whether an Excuse Applies**

The third step requires that the purchasing agent determine whether compliance with the competitive sealed bidding or competitive negotiation procedure may be excused as follows:

- Goods: Goods may be procured without complying with the competitive sealed bidding or competitive negotiation procedures if

there is only a sole source, an emergency exists, or if it is determined to be in the best interests of the public to procure the goods at a public auction sale.

- Services, construction and insurance: Services, construction and insurance may be procured without complying with the competitive sealed bidding or competitive negotiation procedures if there is only a sole source or an emergency exists.

These excuses are described in more detail in section 4-3.

#### **4-5.4 Determine Whether an Exemption Applies**

The final step requires that the purchasing agent determine whether compliance with the competitive sealed bidding or competitive negotiation procedure may be exempted as follows:

- Goods: Goods produced by certain disabled persons, schools and workshops and goods for an individual recipient of certain public welfare programs may be procured without using a competitive procedure.
- Services: Services performed by certain disabled persons, schools and workshops, legal services, litigation related services, and the extension of existing contracts for services may be procured without using a competitive procedure.
- Insurance: Insurance purchased through an association to which the County is a member may be procured without using a competitive procedure.
- Other: Enabling legislation for the procurement of particular goods or services may authorize the goods or services to be procured without using a competitive procedure.

These exemptions are described in more detail in section 4-4.

**Table 4-4**

<b>Circumstances When the Competitive Sealed Bid and Competitive Negotiation Procedures may be Excused</b>	
<b>Circumstances</b>	<b>Procedural Requirements</b>
Insurance	Determine in writing in advance that competitive sealed bidding and competitive negotiation processes not practicable or fiscally advantageous; procure through broker or agent selected through competitive negotiation process
Sole source	Determine in writing that only one source practicably available; post public notice or publish notice in newspaper
Emergency	Determine in writing the basis for the emergency and the selection of the contractor; post public notice or publish notice in newspaper
Single-term contract less than or equal to \$50,000	Establish written purchase procedures which so provide
Goods, products or commodities purchased at public auction	Determine in writing in advance that the purchase is in the best interests of the public

**4-6 Cooperative Procurements and Procurements Using Federal or State Money**

The County may procure goods or services in cooperation with other public bodies, and may procure goods or services with the assistance of federal grants or contracts, or state-aid, as set forth below:

**4-6.1 Cooperative Procurements**

The purchasing agent may enter into a procurement agreement with one or more public bodies or agencies of the United States for the cooperative procurement of goods or services. The procedures of the Virginia Public Procurement Act and this manual or the procurement manual of another party public body shall apply.

**4-6.2 Procurements Funded by Federal Grants or Contracts**

The purchasing agent may procure goods or services that involve the expenditure of federal assistance or contract funds, the receipt of which is conditioned upon compliance with mandatory requirements in federal laws or regulations inconsistent with the Virginia Public Procurement Act and this manual.

Prior to issuing a notice of the invitation for bids or request for proposals,

the purchasing agent shall obtain from the Board of Supervisors or the County School Board, as applicable, a written determination: (1) that acceptance of the grant or contract funds under the applicable conditions is in the public interest; and (2) identifying the specific provisions of the Virginia Public Procurement Act that are in conflict with the conditions of the grant or contract.

#### **4-6.3 State-Aid Projects**

The purchasing agent may procure the construction of any building or for an addition to or improvement of an existing building for which state funds of \$50,000 or more, either by appropriation, grant-in-aid or loan, are used or are to be used for all or part of the cost of construction, using either the competitive sealed bidding procedure or the competitive negotiation procedure for goods or nonprofessional services. The Virginia Public Procurement Act and this manual apply to these procurements.

#### **4.7 Reverse Auctioning**

Reverse auctioning is a procurement method where bidders are invited to bid on specified goods or nonprofessional services through real-time electronic bidding, with the award being made to the lowest responsive and responsible bidder.

During the bidding process, bidders' prices are revealed and bidders have the opportunity to modify their bid prices for the duration of the time period established for bid opening.