

**AN ORDINANCE OF THE COUNCIL
FOR THE TOWN OF ABINGDON, VIRGINIA
TO REPEAL, AMEND AND REENACT
PART II – CODE, CHAPTER 2 – ADMINISTRATION,
ARTICLE V. – PROCUREMENT; SALES**

WHEREAS, §15.2-1102 of the Code of Virginia 1950, as amended, established that the governing body of any town may enact and enforce ordinances for the general purpose of promoting the public health, safety, convenience and welfare of its general public; and

WHEREAS, the Town of Abingdon's current Code, Chapter 2 – Administration, Article V. – Procurement; Sales, the Council for the Town of Abingdon has found it in the best interest to adopt the Virginia Public Procurement Act, and repeal, amend and reenact, the body of its ordinance; and

NOW, THEREFORE BE IT ORDAINED by the council of the Town of Abingdon that:

1. Should any section or provision of this ordinance be decided to be invalid or unconstitutional by a court of competent jurisdiction, such decision shall not affect the validity or constitutionality of any other section or provision of this ordinance or the Code of the Town of Abingdon, Virginia; and

2. The Town of Abingdon's Code – Part II, Chapter 2 – Administration, Article V. Procurement; Sales that is proposed to repeal, amend and reenact, currently appears as follows:

ARTICLE V. - PROCUREMENT; SALES

DIVISION 1. - GENERALLY

Sec. 2-176. - Purpose.

- (a) The purpose of this article is to enunciate the public policies of this town pertaining to governmental procurement from nongovernment sources.
- (b) The provisions of this article shall not apply to those contracts entered into prior to January 1, 1983, which shall continue to be governed by the laws in effect at the time those contracts were executed.
- (c) To the end that this town obtains high quality goods and services at reasonable costs, that all procurement procedures be conducted in a fair and impartial manner with avoidance of any impropriety or appearance of impropriety, that all qualified vendors have access to public business and that no offeror be arbitrarily or capriciously excluded, it is the intent of the council that competition be sought to the maximum feasible degree, that the town enjoy broad flexibility in fashioning details of such competition, that the rules governing contract awards be made clear in advance of the competition, that specifications reflect the procurement needs

of the town rather than being drawn to favor a particular vendor, and that the town and vendor freely exchange information concerning what is sought to be procured and what is offered.

Sec. 2-177. - Definitions.

The following words, terms and phrases, when used in this article, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

Competitive negotiation means a method of contractor selection which includes the following elements:

- (1) Issuance of a written request for proposal indicating in general terms that which is sought to be procured, specifying the factors which will be used in evaluating the proposal and containing or incorporating by reference the other applicable contractual terms and conditions, including any unique capabilities or qualifications which will be required of the contractor.
- (2) Public notice of the request for proposal at least ten days prior to the date set for receipt of proposals by posting in a public place normally used for posting of public notices and by publication in a newspaper of general circulation in the area which the contract is to be performed so as to provide reasonable notice to the maximum number of offerors that can be reasonably expected to submit proposals in response to the particular request. In addition, proposals may be solicited directly from potential contractors.
- (3) a.
Procurement of professional services. The public body shall engage in individual discussions with two or more offerors deemed fully qualified, responsible and suitable on the basis of initial responses and with emphasis on professional competence, to provide the required services. Repetitive informal interviews shall be permissible. The offerors shall be encouraged to elaborate on their qualifications and performance data or staff expertise pertinent to the proposed project, as well as alternative concepts. The request for proposal shall not, however, request that the offerors furnish estimates of manhours or cost for services. At the discussion stage, the town may discuss nonbinding estimates of total project costs, including, but not limited to, life-cycle costing and where appropriate, nonbinding estimates of price for services. Proprietary information from competing offerors shall not be disclosed to the public or to competitors. At the conclusion of discussion, outlined in this provision, on the basis of evaluation factors published in the request for proposal and all information developed in the selection process to this point, the town shall select in the order of preference two or more offerors whose professional qualifications and proposed services are deemed most meritorious. Negotiations shall then be conducted, beginning with the offeror ranked first. If a contract satisfactory and advantageous to the town can be negotiated at a price considered fair and reasonable, the award shall be made to that offeror. Otherwise, negotiations with the offeror ranked first shall be formally terminated and negotiations conducted with the offeror ranked second, and so on until such a contract can be negotiated at a fair and reasonable price. Should the town determine in writing and in its sole discretion that only one offeror is fully qualified, or that one officer is clearly more highly qualified and suitable than the others under consideration, a contract may be negotiated and awarded to that offeror.

Multiphase professional services contracts satisfactory and advantageous to the state department of transportation for environmental, location, design and inspection work regarding highways and bridges may be negotiated and awarded based on a fair and reasonable price for the first phase only, when completion of the earlier phases is necessary to provide information critical to the negotiation of a fair and reasonable price for succeeding phases.

- b. *Procurement of other than professional services.* Selection shall be made of two or more offerors deemed to be fully qualified and best suited among those submitting proposals, on the basis of the factors involved in the request for proposal, including price if so stated in the request for proposal. Negotiations shall then be conducted with each of the offerors so selected. Price shall be considered, but need not be the sole determining factor. After negotiations have been conducted with each offeror so selected, the town shall select the offeror which, in its opinion, has made the best proposal, and shall award the contract to that offeror. Should the town determine in writing and in its sole discretion that only one offeror is fully qualified, or that one offeror is clearly more highly qualified than the others under consideration, a contract may be negotiated and awarded to that offeror.

Competitive sealed bidding means a method of contractor selection which includes the following elements:

- (1) Issuance of a written invitation to bid containing or incorporating by reference the specifications and contractual terms and conditions applicable to the procurement. Unless the town has provided for prequalification of bidders, the invitation to bid shall include a statement of any requisite qualifications of potential contractors. When it is impractical to prepare initially a purchase description to support an award based on prices, an invitation to bid may be issued requesting the submission of unpriced offers to be followed by an invitation to bid limited to those bidders whose offers have been qualified under the criteria set forth in the first solicitation.
- (2) Public notice of the invitation to bid at least ten days prior to the date set for the receipt of bids by posting in a designated public area, or publication in a newspaper of general circulation, or both. In addition, bids may be solicited directly from potential contractors. Any additional solicitation shall include businesses selected from a list made available by the state department of minority business enterprise.
- (3) Public opening and announcement of all bids received.
- (4) Evaluation of bids based upon the requirements set forth in the invitation, which may include special qualifications of potential contractors, life-cycle costing, value analysis, and any other criteria such as inspection, testing, quality, workmanship, delivery and suitability for a particular purpose, which are helpful in determining acceptability.
- (5) Award to the lowest responsive and responsible bidder. When the terms and conditions of responsible bids are so provided in the invitation to bid, awards may be made to more than one bidder.
- (6) Competitive sealed bidding shall not be required for the procurement of professional services.

Construction means building, altering, repairing, improving, or demolishing any structure, building or highway, and any draining, dredging, excavation, grading or similar work upon real property.

Construction management contract means a contract in which a party is retained by the owner to coordinate and administer contracts for construction services for the benefit of the owner, and may also include, if provided in the contract, the furnishing of construction services to the owner.

Design-build contract means a contract between the town and another party in which the party contracting with the town agrees to both design and build the structure, roadway or other item specified in the contract.

Goods means all material, equipment, supplies, printing and automated data processing hardware and software.

Informality means a minor defect or variation of a bid or proposal from the exact requirements of the invitation to bid, or the request for proposal, which does not affect the price, quality, quantity or delivery schedule for the goods, services or construction being procured.

Multiphase professional services contract means a contract for the providing of professional services where the total scope of work of the second or subsequent phase of the contract cannot be specified without the results of the first or prior phase of the contract.

Nonprofessional services means any services not specifically identified as professional services in the definition of "professional services."

Potential bidder or offeror, for the purposes of sections 2-229 and 2-233, means a person who, at the time the town negotiates and awards or proposes to award a contract, is engaged in the sale or lease of goods, or the sale of services, insurance or construction, of the type to be procured under such contract, and who at such time is eligible and qualified in all respects to perform that contract, and who would have been eligible and qualified to submit a bid or proposal had the contract been procured through competitive sealed bidding or competitive negotiation.

Professional services means work performed by an independent contractor within the scope of the practice of accounting, actuarial services, architecture, land surveying, landscape architecture, law, medicine, optometry, pharmacy or professional engineering.

Responsible bidder or offeror means a person who has the capability, in all respects, to perform fully the contract requirements and the moral and business integrity and reliability which will assure good faith performance and who has been prequalified, if required.

Services means any work performed by an independent contractor wherein the service rendered does not consist primarily of acquisition of equipment or materials, or the rental of equipment, materials and supplies.

Sheltered workshop means a work-oriented rehabilitative facility with a controlled working environment and individual goals which utilize work experience and related services for assisting the handicapped person to progress toward normal living and a productive vocational status.

Sec. 2-178. - Compliance with conditions on federal grants or contracts.

Where a procurement transaction involves the expenditures of federal assistance or contract funds, the receipt of which is conditioned on compliance with mandatory requirements in federal

laws or regulations not in conformance with the provisions of this article, the town may comply with such federal requirements, notwithstanding the provision of this article only by resolution of the town council that acceptance of the grant or contract funds under the applicable conditions is in the public interest. Such determination shall state the specific provision of this article in conflict with the conditions of the grant or contract.

Sec. 2-179. - Cooperative procurement.

The town may participate in, sponsor, conduct or administer a cooperative procurement agreement with one or more public bodies or agencies of the U.S. for the purpose of combining requirements to increase the efficiency or reduce administrative expense. Any public body which enters into a cooperative procurement agreement with the town shall comply with the policies and procedures adopted by the town by this article.

Sec. 2-180. - Sales of personal property to be based on competition.

- (a) All contracts for sale of supplies and equipment shall be in accordance with this article.
- (b) All sales of such personal property which has become obsolete and unusable shall be based wherever feasible on competitive bids. If the amount of the sale is estimated to exceed \$5,000.00, sealed bids shall, unless the council shall provide otherwise, be solicited by public notice inserted at least once in a newspaper of countywide circulation and at least five calendar days before the final date of submitting bids.

Secs. 2-181—2-190. - Reserved.

DIVISION 2. - CONTRACT FORMATION AND ADMINISTRATION

Sec. 2-191. - Methods of procurement.

All public contracts with nongovernmental contractors for the purchase of lease of goods, or for the purchase of services, insurance or construction shall be awarded after competitive sealed bidding, or competitive negotiation as provided in this section, unless otherwise authorized by law.

- (1) Professional services shall be procured by competitive negotiation.
- (2) Upon a determination in writing made in advance by the town council that competitive sealed bidding is either not practicable or not fiscally advantageous to the public, goods, services or insurance may be procured by competitive negotiation. The writing shall document the basis for this determination.
 - a. Insurance may be procured through a licensed agent or broker selected in the manner provided for the procurement of things other than professional services in subdivision 3b of the definition of "competitive negotiation" in Section 2.2-4301 of the Code of Virginia, 1950, as amended. The basis for this determination shall be documented in writing.
 - b. Construction may be procured only by competitive sealed bidding, except that competitive negotiation may be used in the following instances upon a determination made in advance by the town and set forth in writing that competitive sealed bidding is either not practicable or not fiscally advantageous to the public, which writing shall document the basis for this determination:

1. For the alteration, repair, renovation or demolition of buildings when the contract is not expected to cost more than \$1,000,000.00;
 2. For the construction of highways and any drainage, dredging, excavation, grading or similar work upon real property; or
 3. As otherwise provided in Section 2.2-4300, et seq. of the Code of Virginia, 1950, as amended.
- (3) Upon a determination in writing made in advance by the town council that there is only one source practicably available for that which is to be procured, a contract may be negotiated and awarded to that source without competitive sealed bidding or competitive negotiation. The writing shall document the basis for this determination. The town shall issue a written notice stating that only one source was determined to be practicably available and identifying that which is being procured, the contractor selected, and the date on which the contract was or will be awarded. The notice shall be posted in a designated public area or published in a newspaper of general circulation on the day the town awards or announces its decision to award the contract, whichever comes first.
- (4) In case of an emergency, a contract may be awarded without competitive sealed bidding or competitive negotiation; however, such procurement shall be made with such competition as is practicable under the circumstances. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file. The town shall issue a written notice stating that the contract is being awarded on an emergency basis, and identifying that which is being procured, the contractor selected, and the date on which the contract was or will be awarded. This notice shall be posted in a designated public area or published in a newspaper of general circulation on the day the town awards or announces its decision to award the contract, whichever occurs first, or as soon thereafter as is practicable.
- (5) The town may establish purchase procedures, if adopted in writing, not requiring competitive sealed bids or competitive negotiation for single or term contracts not expected to exceed \$50,000.00; however, such small purchase procedures shall provide for competition wherever practicable.
- (6) Upon a determination made in advance by the council and set forth in writing that the purchase of goods, products or commodities from a public auction sale is in the best interests of the public; such items may be purchased at the auction. The writing shall document the basis for this determination.

Sec. 2-192. - Competitive bidding on state-aid projects.

No contract for the construction of any building or for an addition to or improvement of an existing building by the town or subdivision of the town government for which state funds of \$30,000.00 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 shall be let except after competitive sealed bidding or after competitive negotiation as provided under Section 2.2-4305 of the Code of Virginia, 1950, as amended. The procedure for the advertising for bids or for proposals and for letting of the contract shall conform, mutatis mutandis, to this article. A person who has been engaged as an architect or engineer for the same project under a separate contract shall not be eligible to bid on or submit a proposal for any such contract or to have the contract awarded to him.

Sec. 2-193. - Cancellation, rejection of bids; waiver of informalities.

An invitation to bid, a request for proposal, any other solicitation, or any and all bids or proposals, may be canceled or rejected. The reasons for cancellation or rejection shall be made part of the contract file. The town may waive informalities in bids.

Sec. 2-194. - Contract pricing arrangements.

- (a) Except as prohibited in this article, public contracts may be awarded on a fixed price or cost reimbursement basis, or on any other basis that is not prohibited.
- (b) Except in case of emergency affecting public health, safety or welfare, no public contract shall be awarded on the basis of cost plus a percentage of cost. A policy or contract of insurance or prepaid coverage having a premium computed on the basis of claims paid or incurred, plus the insurance carrier's administrative costs and retention stated in whole or in part as a percentage of such claims shall not be prohibited by this section.

Sec. 2-195. - Discrimination prohibited.

In the solicitation or awarding of contracts, the town shall not discriminate because of the race, religion, color, sex or national origin of the bidder or offeror.

Sec. 2-196. - Exceptions to requirement for competitive procurement.

- (a) The town may enter into contracts without competition for the purchase of goods or services:
 - (1) Which are produced or performed by persons, or in schools or workshops, under the supervision of the state department for the visually handicapped; or
 - (2) Which are performed or produced by nonprofit sheltered workshops serving the handicapped.
- (b) The town may enter into contracts without competition for:
 - (1) Legal services provided that the pertinent provisions of Code of Virginia, § 2.1-117 et seq., remain applicable; or
 - (2) Expert witnesses and other services associated with litigation or regulatory proceedings.
- (c) The council 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.
- (d) The town may enter into contracts without competitive sealed bidding or competitive negotiation for insurance if purchased through an association of which it 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, provided such association has procured the insurance by use of competitive principles and provided that the town has made a determination in advance after reasonable notice to the public and set forth in writing that competitive sealed bidding and competitive negotiation are not fiscally advantageous to the public. The writing shall document the basis for this determination.

Sec. 2-197. - Prequalification.

Prospective contractors may be prequalified for particular types of supplies, services, insurance or construction, and consideration of bids or proposals limited to prequalified contractors. Any prequalification procedure shall be established in writing and sufficiently in advance of its implementation to allow potential contractors a fair opportunity to complete the process.

Sec. 2-198. - Debarment.

Prospective contractors may be debarred from particular types of supplies, services, insurance or construction, for specified periods of time. Any debarment procedure shall be established in writing by the council. Any debarment procedure may provide for the debarment on the basis of unsatisfactory performance for a public body.

Sec. 2-199. - Preference for state products with recycled content, state firms.

- (a) In the case of a tie bid, preference shall be given to goods, services and construction produced in Virginia or provided by persons resident in the state if such a choice is available; otherwise the tie shall be decided by lot.
- (b) Whenever any bidder is a resident of any other state and such state, under its laws, allows a resident contractor of that state a preference, a like preference may be allowed to the lowest responsible bidder who is a resident of the state.
- (c) Notwithstanding the provisions of subsections (a) and (b) of this section, in the case of a tie bid in instances where goods are being offered, and existing price preferences have already been taken into account, preference shall be given to the bidder whose goods contain the greatest amount of recycled content.

Sec. 2-200. - Preference for local products and firms.

- (a) The council may, in the case of a tie bid, give preference to goods, services and construction produced in the town or county, or provided by persons having principal places of business in the town or county, if such a choice is available; otherwise the tie shall be decided by lot, unless section 2-199 shall apply.
- (b) The provisions of this section shall apply only to bids submitted pursuant to a written invitation to bid.

Sec. 2-201. - Use of brand names.

Unless otherwise provided in the invitation to bid, the name of a certain brand, make or manufacturer does not restrict bidders to the specific brand, make or manufacturer named; it conveys the general style, type, character and quality of the article desired, and any article which the town in its sole discretion determines to be the equal of that specified, considering quality, workmanship and economy of operation, and suitability for the purpose intended, shall be accepted.

Sec. 2-202. - Comments concerning specifications.

The town shall establish procedures whereby comments concerning specifications or other provisions in invitations to bid or requests for proposal can be received and considered prior to the time set for receipt of bids or proposals or award of the contract.

Sec. 2-203. - Employment discrimination by contractor prohibited.

There shall be included in every contract of over \$10,000.00 the provisions in subsections (1) and (2) of this section.

(1) During the performance of this contract, the contractor agrees as follows:

- a. The contractor will not discriminate against any employee or applicant for employment because of race, religion, color, sex or national origin, except where religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of the contractor. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth provisions of this nondiscrimination clause.
- b. The contractor, in all solicitations or advertisements for employees placed by or on behalf of the contractor, will state that such contractor is an equal opportunity employer.
- c. Notices, advertisements and solicitations placed in accordance with federal law, rule or regulation shall be deemed sufficient for the purpose of meeting the requirements of this section.

(2) The contractor will include the provisions of the foregoing subsections a, b and c of subsection (1) of this section in every subcontract or purchase order of over \$10,000.00 so that the provisions will be binding upon each subcontractor or vendor.

Sec. 2-204. - Public inspection of procurement records.

- (a) Except as provided in this article, all proceedings, records, contracts and other public records relating to procurement shall be open to the inspection of any citizen, or any interested person, in accordance with the state freedom of information act (Code of Virginia, § 2.1-340 et seq.).
- (b) Cost estimates relating to a proposed procurement transaction prepared by or for the town shall not be open to public inspection.
- (c) Any competitive sealed bidding bidder, upon request, shall be afforded the opportunity to inspect bid records within a reasonable time after the opening of all bids but prior to the award, except if the town decides not to accept any of the bids and reopen the contract. Otherwise bid records shall be open to public inspection only after award of the contract.
- (d) Any inspection of procurement transaction records under this section shall be subject to reasonable restrictions to ensure the security and integrity of the records.
- (e) Trade secrets or proprietary information submitted by a bidder, offeror or contractor in connection with a procurement transaction shall not be subject to public disclosure under the state freedom of information act (Code of Virginia, § 2.1-340 et seq.); however, the bidder, offeror or contractor must invoke the protections of this section prior to or upon submission

of the data or other materials, and must identify the data or other materials to be protected and state the reasons why protection is necessary.

Sec. 2-205. - Negotiation with lowest responsible bidder.

Unless canceled or rejected, a responsive bid from the lowest responsible bidder shall be accepted as submitted, except that if the bid from the lowest responsible bidder exceeds available funds, the council may negotiate with the apparent low bidder to obtain a contract price within the available funds; however, such negotiation may be undertaken only under conditions and procedures described in writing and approved by the council prior to issuance of the invitation to bid and summarized therein.

Sec. 2-206. - Withdrawal of bid due to error.

(a) A bidder for a public construction contract, other than a contract for construction or maintenance of public highways, may withdraw his bid from consideration if the price bid was substantially lower than the other bids due solely to a mistake therein, provided the bid was submitted in good faith, and the mistake was a clerical mistake as opposed to a judgment mistake, and was actually due to an unintentional arithmetic error or an unintentional omission of a quantity of work, labor or material made directly in the compilation of a bid, which unintentional arithmetic error or unintentional omission can be clearly shown by objective evidence drawn from inspection of original work papers, documents and materials used in the preparation of the bid sought to be withdrawn. One of the following procedures for withdrawal of a bid shall be selected by the council and stated in the advertisement for bids:

- (1) The bidder shall give notice in writing of his claim of right to withdraw his bid within two business days after the conclusion of the bid opening procedure and shall submit original work papers with such notice; or
- (2) The bidder shall submit to the town or designated official his original work papers, documents and materials used in the preparation of the bid within one day after the date fixed for submission of bids.

The work papers shall be delivered by the bidder in person or by registered mail at or prior to the time fixed for the opening of bids. In either instance, such work papers, documents and materials may be considered as trade secrets or proprietary information subject to the conditions of Code of Virginia, § 11-52D. The bids shall be opened one day following the time fixed by the town for the submission of bids. Thereafter, the bidder shall have two hours after the opening of bids within which to claim in writing any mistake as defined herein and withdraw his bid. The contract shall not be awarded by the town until the two-hour period has elapsed. Such mistake shall be proved only from the original work papers, documents and materials delivered as required herein.

- (b) The council may establish procedures for the withdrawal of bids for other than construction contracts.
- (c) No bid may be withdrawn under this section 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.
- (d) If a bid is withdrawn under the authority of this section, the lowest remaining bid shall be deemed to be the low bid.

- (e) 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 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.
- (f) If the council denies the withdrawal of a bid under the provisions of this section, 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 a responsible and responsive bidder.

Sec. 2-207. - Modification of the contract.

- (a) A public contract may include provisions for modifications of the contract during performance, but no fixed price contract may be increased by more than 25 percent of the amount of the contract or \$10,000.00, whichever is greater, without the advance approval of council by resolution.
- (b) Nothing in this section shall prevent the town from placing greater restrictions on contract modifications.

Sec. 2-208. - Retainage on construction contracts.

- (a) In any public contract for construction which provides for progress payments in installments based upon an estimated percentage of completion, the contractor shall be paid at least 95 percent of the earned sum when payment is due, with not more than five percent being retained to assure faithful performance of the contract. All amounts withheld may be included in the final payment.
- (b) Any subcontract for a public project which provides for similar progress payments shall be subject to the same limitations.

Sec. 2-209. - Deposit of certain retained funds on certain contracts; penalty for failure to timely complete.

- (a) The town, or an agency thereof, when contracting directly with contractors for public contracts of \$200,000.00 or more for construction of highways, roads, streets, bridges, parking lots, demolition, clearing, grading, excavating, paving, pile driving, miscellaneous drainage structures, and the installation of water, gas, sewer lines and pumping stations where portions of the contract price are to be retained, shall include in the bid proposal an option for the contractor to use an escrow account procedure for utilization of the town's retainage funds by so indicating in the space provided in the proposal documents. In the event the contractor elects to use the escrow account procedure, the "escrow agreement" form included in the bid proposal and contract shall be executed and submitted to the town within 15 calendar days after notification. If the "escrow agreement" form is not submitted within the 15-day period, the contractor shall forfeit his rights to the use of the escrow account procedure.
- (b) In order to have retained funds paid to an escrow agent, the contractor, the escrow agent, and the surety shall execute an "escrow agreement" form. The contractor's escrow agent shall be a trust company, bank or savings institution with its principal office located in the commonwealth. The "escrow agreement" and all regulations promulgated by the town entering into the contract shall be substantially the same as that used by the state department of transportation.

- (c) This section shall not apply to public contracts for construction for railroads, public transit systems, runways, dams, foundations, installation or maintenance of power systems for the generation and primary and secondary distribution of electric current ahead of the customer's meter, the installation or maintenance of telephone, telegraph or signal systems for public utilities and the construction or maintenance of solid waste or recycling facilities and treatment plants.
- (d) Any such public contract for construction with the town, or an agency thereof, which includes payment of interest on retained funds, may require a provision whereby the contractor, exclusive of reasonable circumstances beyond the control of the contractor stated in the contract, shall pay a specified penalty for each day exceeding the completion date stated in the contract.
- (e) Any subcontract for such public project which provides for similar progress payments shall be subject to the provisions of this section.

Sec. 2-210. - Public construction contract provisions barring damages for unreasonable delays declared void.

- (a) Any provision contained in any public construction contract entered into on or after July 1, 1991, that purports to waive, release, or extinguish the rights of a contractor to recover costs or damages for unreasonable delay in performing such contract, either on his behalf or on behalf of his subcontractor if and to the extent such delay is caused by acts or omissions of the town, its agents or employees and due to causes within their control is against public policy and is void and unenforceable.
- (b) Subsection (a) of this section shall not be construed to render void any provision of a public construction contract that:
 - (1) Allows the town to recover that portion of delay costs caused by the acts or omissions of the contractor, or its subcontractors, agents or employees;
 - (2) Requires notice of any delay by the party claiming the delay;
 - (3) Provides for liquidated damages for delay; or
 - (4) Provides for arbitration or any other procedure designed to settle contract disputes.
- (c) A contractor making a claim against a public body for costs or damages due to the alleged delaying of the contractor in the performance of its work under any public construction contract shall be liable to the town and shall pay it for a percentage of all costs incurred by the town in investigating, analyzing, negotiating, litigating and arbitrating the claim, which percentage shall be equal to the percentage of the contractor's total delay claim which is determined through litigation or arbitration to be false or to have no basis in law or in fact.

Sec. 2-211. - Bid bonds.

- (a) Except in cases of emergency, all bids or proposals for construction contracts in excess of \$100,000.00 shall be accompanied by a bid bond from a surety company selected by the bidder which is legally authorized to do business in the state, as a guarantee that if the contract is awarded to such bidder, that bidder will enter into the contract for the work mentioned in the bid. The amount of the bid bond shall not exceed five percent of the bid.

- (b) No forfeiture under a bid bond shall exceed the lesser of:
 - (1) The difference between the bid for which the bond was written and the next low bid; or
 - (2) The face amount of the bid bond.
- (c) Nothing in this section shall preclude the town from requiring bid bonds to accompany bids or proposals for construction contracts anticipated to be less than \$100,000.00.

Sec. 2-212. - Performance and payment bonds.

- (a) Upon the award of any public construction contract exceeding \$100,000.00 awarded to any prime contractor, such contractor shall furnish to the town the following bonds:
 - (1) A performance bond in the sum of the contract amount conditioned upon the faithful performance of the contract in strict conformity with the plans, specifications and conditions of the contract.
 - (2) A payment bond in the sum of the contract amount. Such bond shall be for the protection of claimants who have and fulfill contracts to supply labor or materials to the prime contractor to whom the contract was awarded, or to any subcontractors, in the prosecution of the work provided for in such contract, and shall be conditioned upon the prompt payment for all such material furnished or labor supplied or performed in the prosecution of the work. "Labor or materials" shall include public utility services and reasonable rentals of equipment, but only for periods when the equipment rented is actually used at the site.
- (b) Each of such bonds shall be executed by one or more surety companies selected by the contractor which are legally authorized to do business in the state.
- (c) Bonds required for the contracts shall be payable to the town.
- (d) Each of the bonds shall be filed with the clerk of the council or a designated official thereof.
- (e) Nothing in this section shall preclude the town from requiring payment or performance bonds for construction contracts below \$100,000.00.
- (f) Nothing in this section shall preclude such contractor from requiring each subcontractor to furnish a payment bond with surety thereon in the sum of the full amount of the contract with such subcontractor conditioned upon the payment to all persons who have and fulfill contracts which are directly with the subcontractor for performing labor and furnishing materials in the prosecution of the work as provided for in the subcontract.

Sec. 2-213. - Action on performance bond.

No action against the surety on a performance bond shall be brought unless within one year after:

- (1) Completion of the contract, including the expiration of all warranties and guarantees; or
- (2) Discovery of the defect or breach of warranty, if the action be for such.

Sec. 2-214. - Actions on payment bonds.

- (a) Subject to the provisions of subsection (b) of this section, any claimant who has performed labor or furnished material in accordance with the contract documents in the prosecution of the work provided in any contract for which a payment bond has been given, and who has not been paid in full therefor before the expiration of 90 days after the day on which such claimant performed the last of such labor or furnished the last of such materials for which he claims payment, may bring an action on such payment bond to recover any amount due him for such labor or material, and may prosecute such action to final judgment and have execution on the judgment. The obligee named in the bond need not be named a party to such action.
- (b) Any claimant who has a direct contractual relationship with any subcontractor from whom the contractor has not required a subcontractor payment bond under section 2-212(f) but who has no contractual relationship, express or implied, with such contractor, may bring an action on the contractor's payment bond only if he has given written notice to such contractor within 180 days from the day on which the claimant performed the last of the labor or furnished the last of the materials for which he claims payment, stating with substantial accuracy the amount claimed and the name of the person for whom the work was performed or to whom the material was furnished. Any claimant who has a direct contractual relationship with a subcontractor from whom the contractor has required a subcontractor payment bond under section 2-212(f) but who has no contractual relationship, express or implied, with such contractor, may bring an action on the subcontractor's payment bond. Notice to the contractor shall be served by registered or certified mail, postage prepaid, in an envelope addressed to such contractor at any place where his office is regularly maintained for the transaction of business. Claims for sums withheld as retainages with respect to labor performed or materials furnished shall not be subject to the time limitations stated in this subsection.
- (c) Any action on a payment bond must be brought within one year after the day on which the person bringing such action last performed labor or last furnished or supplied materials.

Sec. 2-215. - Alternative forms of security.

- (a) In lieu of a bid, payment, or performance bond, a bidder may furnish a certified check or cash escrow in the face amount required for the bond.
- (b) If approved by the town attorney, 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 proffered affords protection to the town equivalent to a corporate surety's bond.

Sec. 2-216. - Bonds on other than construction contracts.

The council may require bid, payment or performance bonds for contracts for goods and services if provided for in the invitation to bid or request for proposal.

Secs. 2-217—2-225. - Reserved.

DIVISION 3. - REMEDIES

Sec. 2-226. - Ineligibility.

- (a) Any offeror, bidder or contractor refused permission to, or disqualified from, participation in public contracts shall be notified in writing. Such notice shall state the reasons for the action taken. This decision shall be final unless the bidder, offeror or contractor appeals within 30 days of receipt by invoking administrative procedures meeting the standards of section 2-234, if available, or in the alternative by instituting legal action as provided in section 2-233.
- (b) If, upon appeal, it is determined that the action taken was arbitrary or capricious, or not in accordance with the Constitution of the state, statutes or regulations, the sole relief shall be restoration of eligibility.

Sec. 2-227. - Appeal of denial of withdrawal of bid.

- (a) A decision denying withdrawal of bid under the provisions of section 2-206 shall be final and conclusive unless the bidder appeals the decision within ten days after receipt of the decision by invoking administrative procedures under section 2-234, if available, or in the alternative by instituting legal action as provided in section 2-233.
- (b) If no bid bond was posted, a bidder refused withdrawal of a bid under the provisions of section 2-206, prior to appealing, shall deliver to the council a certified check or cash bond in the amount of the difference between the amount sought to be withdrawn and the next low bid. Such security shall be released only upon a final determination that the bidder was entitled to withdraw the bid.
- (c) If upon appeal, it is determined that the decision refusing withdrawal of the bid was arbitrary and capricious, the sole relief shall be the withdrawal of the bid.

Sec. 2-228. - Determination of nonresponsibility.

- (a) Any bidder who, despite being the apparent low bidder, is determined not to be a responsible bidder for a particular contract shall be notified in writing. Such notice shall state the basis for the determination, which shall be final unless the bidder appeals the decision within ten days by invoking administrative procedures under section 2-234, if available, or in the alternative, by instituting legal action as provided in section 2-233.
- (b) If, upon appeal, it is determined that the decision of the council was arbitrary or capricious, and the award of the contract in question has not been made, the sole relief shall be finding that the bidder in question is a responsible bidder for the contract. If it is determined that the decision of the council was arbitrary or capricious, the relief shall be as set forth in section 2-229(b).
- (c) A bidder contesting the determination that he is not a responsible bidder for a particular contract shall proceed under this article and may not protest the award or proposed award under section 2-229.
- (d) Nothing contained in this section shall be construed to require the council when procuring by competitive negotiation, to furnish a statement of the reasons why a particular proposal was not deemed to be the most advantageous.

Sec. 2-229. - Protest of award or decision to award.

- (a) Any bidder or offeror may protest the award or decision to award a contract by submitting such protest in writing to the council, or an official designated by the council, no later than ten days after the award or the announcement of the decision to award, whichever occurs first. Any potential bidder or offeror on a contract negotiated on a sole source or emergency basis who desires to protest the award or decision to award such contract shall submit such protest in the same manner no later than ten days after posting or publication of the notice of such contract as provided in section 2-191. However, if the protest of any actual or potential bidder or offeror depends in whole or in part upon information contained in public records pertaining to the procurement transaction which are subject to inspection under section 2-204, then the time within which the protest must be submitted shall expire ten days after those records are available for inspection by such bidder or offeror under section 2-204, or at such later time as provided in this section. No protest shall lie for a claim that the selected bidder or offeror is not a responsible bidder or offeror. The written protest shall include the basis for the protest and the relief sought. The council or designated official shall issue a decision in writing within ten days stating the reasons for the action taken. The decision shall be final unless the bidder or offeror appeals within ten days of the decision by invoking administrative procedure under section 2-234, if available; or in the alternative by instituting legal action as provided in section 2-233.
- (b) If prior to an award it is determined that the decision to award is arbitrary or capricious, then the sole relief shall be a finding to that effect. The council shall cancel the proposed award or revise it to comply with the law. If, after an award, it is determined that an award of a contract was arbitrary or capricious, then the sole relief shall be as hereinafter provided. Where the award has been made but performance has not begun, the performance of the contract may be enjoined. Where award has been made and performance begun, the council may declare the contract void upon a finding that this action is in the best interest of the public. When a contract is declared void, the performing contractor shall be compensated for the cost of performance up to the time of such declaration. In no event shall the performing contract be entitled to lost profits.
- (c) Where the council, a designated official, or an appeals board determines, after a hearing held following reasonable notice to all bidders, that there is probable cause to believe that a decision to award was based on fraud or corruption or an act in violation of division 4 of this article, the council, a designated official or appeals board may enjoin the award of the contract to a particular bidder.

Sec. 2-230. - Effect of appeal on contract.

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

Sec. 2-231. - Stay of award during protest.

An award need not be delayed for the period allowed a bidder or offeror to protest, but upon a timely protest, no further action to award the contract will be taken unless there is a written

determination that proceeding without delay is necessary to protect the public interest or unless the bid or offer would expire.

Sec. 2-232. - Contractual disputes.

- (a) Contractual claims, whether for money or other relief, shall be submitted in writing no later than 60 days after final payment; however written notice of the contractor's intention to file such claim shall have been given at the time of occurrence or beginning of the work upon which the claim is based. Nothing in this section shall preclude a contract from requiring submission of an invoice for final payment within a certain time after completion and acceptance of the work or acceptance of the goods. Pendency of claims shall not delay payment of amounts agreed due in the final payment.
- (b) The council shall include in its contracts a procedure for consideration of contractual claims. Such procedure, which may be incorporated into the contract by reference, shall establish a time limit for a final decision in writing by the council.
- (c) A contractor may not invoke administrative procedures under section 2-234 or institute legal action as provided in section 2-233 prior to the receipt of the council's decision on the claims unless the council fails to render a decision within the time specified in the contract.
- (d) The decision of the council shall be final and conclusive unless the contractor appeals within six months of the date of the final decision on the claim by the town by invoking the administrative procedures of section 2-234, if available, or in the alternative by instituting legal action as provided in section 2-233.

Sec. 2-233. - Legal actions.

- (a) A bidder or offeror, actual or prospective, who is refused permission or disqualified from participation in bidding or competitive negotiation, or who is determined not to be a responsible bidder or offeror for a particular contract, may bring an action in the county circuit court challenging that decision, which shall be reversed only if the petitioner establishes that the decision was arbitrary or capricious.
- (b) A bidder denied withdrawal of a bid under this article may bring an action in the county circuit court challenging that decision, which shall be reversed only if the bidder establishes that the decision of the town was clearly erroneous.
- (c) A bidder, offeror or contractor or a potential bidder or offeror on a contract negotiated on a sole source or emergency basis, whose appeal is denied, may bring an action in the county circuit court challenging the award or the proposed award of a contract, which shall be reversed only if the petitioner establishes that the award or proposed award is not an honest exercise of discretion, but rather is arbitrary or capricious or not in accordance with the Constitution of the state, statutes, regulations or the terms and conditions of the invitation to bid or the request for proposal.
- (d) If injunctive relief is granted, the court, upon request of the town, shall require the posting of reasonable security to protect the town.
- (e) A contractor may bring an action involving a contract dispute with the town in the county circuit court.

- (f) A bidder, offeror or contractor need not utilize any administrative procedures under section 2-234, but if those procedures are invoked by the bidder, offeror or contractor, the procedures shall be exhausted prior to instituting legal action concerning the same procurement transaction unless the town agrees otherwise.
- (g) Nothing in this section shall be construed to prevent the town from instituting legal action against a contractor.

Sec. 2-234. - Administrative appeals procedure.

- (a) The council may establish an administrative procedure for hearing protests of a decision to award or an award, appeals from refusals to allow withdrawal of bids, appeals from disqualifications and determinations of nonresponsibility, and appeals from decisions on disputes arising during the performance of a contract, or any of these. Such administrative procedure shall provide for a hearing before a disinterested person or panel, the opportunity to present pertinent information and the issuance of a written decision containing findings of fact. The disinterested person or panel shall not be an employee of the town against whom the claim has been filed. The findings of fact shall be final and conclusive and shall not be set aside unless the same are fraudulent or arbitrary or capricious, or so grossly erroneous as to imply bad faith. No determination on an issue of law shall be final if appropriate legal action is instituted in a timely manner.
- (b) Any party to the administrative procedure, including the town, shall be entitled to institute judicial review if such action is brought within 30 days of receipt of the written decision.

Secs. 2-235—2-245. - Reserved.

DIVISION 4. - ETHICS IN PUBLIC CONTRACTING

Sec. 2-246. - Purpose.

The provisions of this division supplement, but do not supersede, other provisions of law including, but not limited to, the state and local government conflict of interests act (Code of Virginia, § 2.1-639.1 et seq.), the state governmental frauds act (Code of Virginia, § 18.2-498.1 et seq.), and Code of Virginia, §§ 18.2-438 et seq. and 18.2-446 et seq. The provisions of this division apply notwithstanding the fact that the conduct described may not constitute a violation of the state and local government conflict of interests act (Code of Virginia, § 2.1-639.1 et seq.).

Sec. 2-247. - Definitions.

The words defined in this section shall have the meanings set forth below throughout this division:

Immediate family means a spouse, children, parents, brothers and sisters, and any other persons living in the same household as the employee.

Official responsibility means administrative or operating authority, whether intermediate or final, to initiate, approve, disapprove or otherwise affect a procurement transaction, or any claim resulting therefrom.

Pecuniary interest arising from the procurement means a personal interest in a contract as defined in the state and local government conflict of interests act (Code of Virginia, § 2.1-639.1 et seq.).

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.

Town employee means any person employed by the town, including elected officials or appointed members of governing bodies.

Sec. 2-248. - Proscribed participation by town employees in procurement transactions.

Except as may be specifically allowed by provisions of the state and local government conflict of interests act (Code of Virginia, § 2.1-639.1 et seq.), no town employee having official responsibility for a procurement transaction shall participate in that transaction on behalf of the town when the employee knows that:

- (1) The employee is contemporaneously employed by a bidder, offeror or contractor involved in the procurement transaction;
- (2) The employee, the employee's partner, or any member of the employee's immediate family holds a position with a bidder, offeror or contractor such as an officer, director, trustee, partner or the like, or is employed in a capacity involving personal and substantial participation in the procurement transaction, or owns or controls an interest of more than five percent;
- (3) The employee, the employee's partner or any member of the employee's immediate family has a pecuniary interest arising from the procurement transaction; or
- (4) The employee, the employee's partner, or any member of the employee's immediate family is negotiating, or has an arrangement concerning, prospective employment with a bidder, offeror or contractor.

Sec. 2-249. - Solicitation or acceptance of a gift.

No town employee having official responsibility for a procurement transaction shall solicit, demand, accept, or agree to accept from a bidder, offeror, contractor or subcontractor any payment, loan, subscription, advance, deposit of money, services or anything of more than nominal or minimal value, present or promised, unless consideration of substantially equal or greater value is exchanged. The town may recover the value of anything conveyed in violation of this section.

Sec. 2-250. - Disclosure of subsequent employment.

No town employee or former town employee having official responsibility for procurement transactions shall accept employment with any bidder, offeror or contractor with whom the employee or former employee dealt in an official capacity concerning procurement transactions for a period of one year from the cessation of employment by the town unless the employee or former employee provides written notification to the town, or a public official if designated by the town, or both, prior to commencement of employment by that bidder, offeror or contractor.

Sec. 2-251. - Gifts by bidders, offerors, contractors, or subcontractors.

No bidder, offeror, contractor or subcontractor shall confer upon any public employee having official responsibility for a procurement transaction, any payment, loan, subscription, advance, deposit of money, services or anything of more than nominal value, present or promised, unless consideration of substantially equal or greater value is exchanged.

Sec. 2-252. - Kickbacks.

- (a) No contractor or subcontractor shall demand or receive from any of his suppliers or his subcontractors, as an inducement for the award of a subcontract or order, any payment, loan, subscription, advance, deposit of money, services or anything, present or promised, unless consideration of substantially equal or greater value is exchanged.
- (b) No subcontractor or supplier shall make, or offer to make, kickbacks as described in this section.
- (c) No person shall demand or receive any payment, loan, subscription, advance, deposit of money, services or anything of value in return for an agreement not to compete on a public contract.
- (d) If a subcontractor or supplier makes a kickback or other prohibited payment as described in this section, the amount thereof shall be conclusively presumed to have been included in the price of the subcontract or order and ultimately borne by the town and will be recoverable from both the maker and recipient. Recovery from one offending party shall not preclude recovery from other offending parties.

Sec. 2-253. - Purchase of building materials, etc., equipment from architect or engineer prohibited.

- (a) No building materials, supplies or equipment for any building or structure constructed by or for the town shall be sold by or purchased from any person employed as an independent contractor by the town to furnish architectural or engineering services, but not construction, for such building or structure or from any partnership, association or corporation in which such architect or engineer has a personal interest as defined in Code of Virginia, § 2.1-639.2.
- (b) No building materials, supplies or equipment for any building or structure constructed by or for the town shall be sold by or purchased from any person who has provided or is currently providing design services specifying a sole source for such materials, supplies or equipment to be used in such building or structure to the independent contractor employed by the town

to furnish architectural or engineering services in which such person has a personal interest as defined in Code of Virginia, § 2.1-639.2.

- (c) The provisions of subsections (a) and (b) of this section shall not apply in cases of emergency.

Sec. 2-254. - Certification of compliance required; penalty for false statements.

- (a) The town may require town employees having official responsibility for procurement transactions in which they participated to annually submit for such transactions a written certification that they complied with the provisions of this division.
- (b) Any town employee required to submit a certification as provided in subsection (a) of this section who knowingly makes a false statement in such certification shall be punished as provided in section 2-256.

Sec. 2-255. - Misrepresentations prohibited.

No town employee having official responsibility for a procurement transaction shall knowingly falsify, conceal, or misrepresent a material fact; knowingly make any false, fictitious or fraudulent statements or representation; or make or use any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry.

Sec. 2-256. - Penalty for violation.

Willful violation of any provision of this division shall constitute a class 1 misdemeanor. Upon conviction, any public employee, in addition to any other fine or penalty provided by law, shall forfeit his employment.

Secs. 2-257—2-300. - Reserved.

BE IT FURTHER ORDAINED, that upon the recommendation of the Council for the Town of Abingdon, Part II – Code, Chapter 2 – Administration, Article V. – Procurement; Sales be repealed, amended and reenacted as follows:

ARTICLE V. - PROCUREMENT

Sec. 2-176. – Virginia Public Procurement Act, Code of Virginia, Chapter 43

In order that the Town shall obtain high quality goods and services at reasonable cost, that all procurement procedures be conducted in a fair and impartial manner with avoidance of any impropriety or appearance of impropriety, that all qualified vendors have access to public business and that no offeror be arbitrarily or capriciously excluded, the Town adopts, and incorporates by reference, the Virginia Public Procurement Act, Virginia Code § 2.2-4300, *et seq.*, as may be amended, to govern the Town's procurement of goods and services.

The town manager or designee may establish purchasing procedures in writing that do not require competitive sealed bids or competitive negotiation for certain contracts that are consistent with the Virginia Public Procurement Act.

CERTIFICATE

Pursuant to Section 2-100 of the Code of the Town of Abingdon, Virginia, I hereby certify that I have reviewed the foregoing proposed ordinance to amend Part II – Code, Chapter 2 – Administration, Article V. – Procurement, and find it to be in correct form, as set forth above, this _____ day of _____, 2020.


Cameron Bell, Counsel

This ordinance was adopted on the 2 day of March²⁰²⁰, to take effect on April 2, 2020

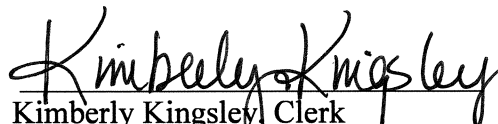

J. Wayne Craig, Mayor

The undersigned Clerk of the Town of Abingdon, Virginia (the “Town”), hereby certifies that the foregoing constitutes a true and correct copy of an ordinance duly adopted at a meeting of the Council held on March 2, 2020. I hereby certify that such meeting was a regularly scheduled meeting and that, during the consideration of the foregoing ordinance, a quorum was present. I further certify that the minutes of meeting was a regularly scheduled meeting and that, during the consideration of the foregoing ordinance, a quorum was present. I further certify that the minutes of such meeting reflect the attendance of the members and the voting on the foregoing ordinance was as follows:

MEMBERS	ATTENDANCE	VOTE
J. Wayne Craig, Mayor	yes	aye
Cindy Patterson, Vice Mayor	yes	aye
Al Bradley	yes	aye
Donna Quetsch	yes	aye
Derek Webb	yes	aye

WITNESS MY HAND and the seal of the Town of Abingdon as of March 3, 2020

(SEAL)


Kimberly Kingsley, Clerk