

#### Chapter highlights

- Purpose: This chapter outlines VITA's statutory procurement authority for information technology (IT) and telecommunications goods and services as well as VITA's responsibility to establish IT and telecommunications procurement policies, standards and guidelines.
- Key points:
  - VITA has IT procurement authority for all executive branch agencies and institutions of higher education that are not specifically exempted from VITA's authority.
  - VITA has statutory governance/oversight responsibilities for certain Commonwealth IT projects and procurements.
  - Only VITA can establish statewide IT contracts.
  - Judicial and legislative branch as well as independent agencies are not subject to VITA's procurement authority.

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## 1.0 Introduction

The Commonwealth's Information Technology Procurement Manual (ITPM) is published by the Virginia Information Technologies Agency (VITA) under the authority granted to it by [§ 2.2-2012](#) of the *Code of Virginia*. The ITPM complies with [§2.2-2012\(A\)](#) which provides as follows: "The CIO shall develop policies, standards, and guidelines for the procurement of information technology of every description." The Commonwealth's Chief Information Officer (CIO), appointed by the Governor, has assigned VITA's Supply Chain Management Division (SCM) with this duty.

Based on the foregoing, this manual establishes policies, standards and guidelines to be followed by every executive branch agency as defined in [§ 2.2-2006](#) of the *Code of Virginia*, within their delegated authority limits or such delegated authority as determined by VITA.

For the purposes of this manual, the following definitions taken from the *Code of Virginia* apply:

"Contract value" means the total of all considerations from all parties (public body, contractors and any third parties) for the initial period of the contract plus any possible renewal periods.

"Executive branch agency" or "agency" means any agency, institution, board, bureau, commission, council, public institution of higher education, or instrumentality of state government in the executive department listed in the appropriation act. However, "executive branch agency" or "agency" does not include the University of Virginia Medical Center, a public institution of higher education to the extent exempt from this chapter pursuant to the Restructured Higher Education Financial and Administrative Operations Act ([§ 23.1-1000](#) et seq.) or other law, or the Virginia Port Authority.



"Public body" means any legislative, executive or judicial body, agency, office, department, authority, post, commission, committee, institution, board or political subdivision created by law to exercise some sovereign power or to perform some governmental duty, and empowered by law to undertake the activities described in this chapter. "Public body" shall include (i) any independent agency of the Commonwealth, and (ii) any metropolitan planning organization or planning district commission which operates exclusively within the Commonwealth of Virginia."

"Information technology" means communications, telecommunications, automated data processing, applications, databases, data networks, the Internet, management information systems, and related information, equipment, goods, and services. The provisions of this chapter shall not be construed to hamper the pursuit of the missions of the institutions in instruction and research."

"Telecommunications" means any origination, transmission, emission, or reception of data, signs, signals, writings, images, and sounds or intelligence of any nature, by wire, radio, television, optical, or other electromagnetic systems.

All VITA procurement policies and procedures contained within this manual comply fully with [§ 2.2-4300](#) et seq. of the *Code of Virginia*, (The Virginia Public Procurement Act) (VPPA). Throughout this manual, appropriate references are made to those procurement requirements specifically required by the *Code of Virginia* and the VPPA.

The Virginia General Assembly established VITA as the statutory central procurement agency for IT to accomplish the following objectives:

- Enable the Commonwealth to consolidate and leverage its purchasing power for technology products and services;
- Embrace and implement innovative solutions and tools to meet the Commonwealth's technology and business needs;
- Emphasize customer and supplier involvement;
- Increase the use and usefulness of statewide technology contracts by the Commonwealth's organizational entities;
- Develop best practice procurement methodologies and processes for effective and timely IT procurements;
- Reduce the risk to the Commonwealth from the dynamic changes in IT markets;
- Plan, develop and solicit contracts for major information technology projects and enterprise applications and infrastructure services;
- Monitor trends and advances in information technology;

In addition to complying with statutory requirements, the policies, standards and guidelines included in this manual are based on generally accepted government and industry best practices for the procurement of IT.

**VITA is the Commonwealth's statutory central procurement agency  
for IT goods and services.**

The objective of this manual is to integrate the Virginia Public Procurement Act (VPPA) with VITA's procurement policies, standards and guidelines and the IT industry's best practice concepts, guidance and tools for these purposes:

- to empower Commonwealth procurement professionals in IT acquisition, contractual risk mitigation and project complexities
- to promote a consistent IT procurement approach across the Commonwealth
- to encourage Commonwealth procurement professionals who participate in IT acquisitions to adopt VITA's key operating principles for IT procurement

<b>VITA's key operating principles for IT procurement</b>
➤ Invite, promote and sustain positive customer and supplier relationships;
➤ Strive for <i>solution-</i> not <i>product-</i> oriented procurements;
➤ Develop business driven and managed acquisitions;
➤ Think "enterprise-wise" to effectively leverage the Commonwealth's buying power;
➤ Negotiate <i>performance-based</i> contract vehicles that are fair and effective;
➤ Make best-value award decisions based on total cost of ownership throughout the technology life-cycle;
➤ Invite and promote participation and relationships with DSBSD certified small businesses, including small women-owned, minority-owned, service-disabled veteran-owned (SWaM) businesses, or micro businesses;
➤ Take advantage of suppliers' expert IT knowledge to drive creative solutions and innovation;
➤ Use procurement processes and contract vehicles to cultivate a common enterprise architecture;
➤ Maintain and honor the integrity of the Commonwealth and the public procurement profession in every procurement;
➤ Do all of the above while building and protecting public trust in accordance with the principles exemplified in the VPPA ( <a href="#">§ 2.2-4300</a> (B) and (C) of the <i>Code of Virginia</i> ).

## **1.1 VITA's statutory IT procurement authority and responsibility**

Pursuant to [§ 2.2-2012](#) of the *Code of Virginia*, VITA has sole authority to procure all IT for executive branch agencies and institutions of higher education except those explicitly exempted by the *Code of Virginia* or those institutions of higher education which have signed

management agreements with the Commonwealth. Under its statutory authority, VITA may enter into multiple vendor contracts for IT goods and services. All procurements conducted by VITA are pursuant to the VPPA and any VITA-promulgated applicable procurement policies and guidelines.

All agencies, institutions, localities and public bodies may utilize any statewide IT contracts developed by VITA or request VITA's assistance with IT procurement services.

## **1.2 In-scope to VITA's procurement authority**

VITA provides IT infrastructure services, including state network management, server and operational functions for executive branch agencies. VITA is also responsible for the procurement of all IT for all executive branch agencies (excluding those institutions of higher education which have signed management agreements with the Commonwealth.) Visit this VITA SCM webpage for further information: <https://vita.virginia.gov/supply-chain/place-an-order/>

## **1.3 Delegated IT procurement authority for executive branch agencies and institutions**

Executive branch agencies do not have the authority to procure IT on their own behalf over \$250,000, unless such authority is explicitly delegated to them by VITA. When an agency is given delegated authority from VITA for any IT procurement the agency is required to follow the VPPA and VITA's procurement policies, standards and guidelines in conducting the procurement.

If an agency intentionally fails to follow VITA's procurement policies and guidelines when conducting a delegated procurement, Sections H and I of [§2.2-2012](#) of the *Code of Virginia* may apply:

- H. The Comptroller shall not issue any warrant upon any voucher issued by a state agency covering the purchase of any information technology when such purchases are made in violation of any provision of this chapter or the Virginia Public Procurement Act (§ [2.2-4300](#) et seq.).
- I. Intentional violations of centralized purchasing requirements for information technology pursuant to this chapter by an executive branch agency, continued after notice from the Governor to desist, shall constitute malfeasance in office and shall subject the officer responsible for the violation to suspension or removal from office, as may be provided in law in other cases of malfeasance.

Use of VITA's statewide contracts is mandatory for the acquisition of all IT goods and services. If there is not a VITA statewide contract available for the needed IT good or service, a competitive procurement will be conducted. To browse VITA's statewide contracts, go to:  
<https://vita.cobblestonesystems.com/public/>.

Agencies have varying delegated authority for IT goods and services depending on if they are *out of scope* or in scope to VITA. These delegation thresholds are provided in the Authority and Delegation policy found at this webpage location:

[https://vita.virginia.gov/media/vitavirginiagov/supply-chain/pdf/authority\\_delegation.pdf](https://vita.virginia.gov/media/vitavirginiagov/supply-chain/pdf/authority_delegation.pdf)

IT procurement requests and orders shall not be split to circumvent delegation limits. For a list of in- scope and out of scope IT goods and services go to:

<https://vita.virginia.gov/supply-chain/place-an-order/>. Once at this site, select "VITA's IT Goods and Services List (Infrastructure/Non-Infrastructure)." In-scope goods and services are those identified in the above list by a "Y" in the "In- Scope to VITA" column. Items with an "N" in the column are defined as "Out of Scope to VITA". IT procurement requests exceeding delegated authority will require a "V" code in the PO Category field in [eVA](#) to route the request to VITA to ensure a proper procurement.

#### **1.4 Process for requesting an exception to a VITA's IT procurement policy or procedure**

If an agency head determines that compliance with a provision of any procurement policy, standard or guideline contained in this manual would result in a significant adverse impact or hardship to the agency, the agency head shall request approval to deviate from the procurement requirement by submitting an exception request to the CIO in writing. Included in such request shall be a statement detailing the reasons for the exception needed, the significant adverse impact or hardship the agency would experience if VITA's procurement policy or procedure was followed and how the agency intends to procure the needed IT good or service. All exception requests shall be evaluated and decided upon by the CIO and the requesting agency shall be informed of the decision and action taken.

#### **1.5 Procurements subject to VITA'S procurement authority**

##### **1.5.1 Public-Private Education Facilities and Infrastructure Act (PPEA)**

All IT goods and services procured by an executive branch agency for the benefit of the Commonwealth pursuant to any PPEA effort are also subject to VITA's procurement authority in accordance with [§ 2.2-2007](#) and [§2.2-2012](#) of the *Code of Virginia*. Further detail is provided in Chapter 10 of this manual, General IT Procurement Policies.

##### **1.5.2 Purchase of personal computers**

[§ 2.2-2012\(D\)](#) of the *Code of Virginia* states that if VITA, or any agency authorized by VITA, elects to procure personal computers and related peripheral equipment under a blanket purchasing arrangement, which public bodies as defined in [§ 2.2-4301](#) may use, such goods

may be purchased following competitive procurement, but without the conduct of an individual procurement by or for the using agency. Such procurement shall establish performance-based specifications emphasizing performance criteria including price, quality, and delivery without regard to "brand name." All vendors meeting the Commonwealth's performance requirements shall be afforded the opportunity to compete for such contracts. [§ 2.2-2012\(D\)](#) of the *Code of Virginia* provides that VITA may establish contracts for the purchase of personal computers and related devices by licensed teachers employed in a full-time teaching capacity in Virginia public schools or in state educational facilities for use outside the classroom. The computers and related devices shall not be purchased with public funds, but shall be paid for and owned by teachers individually provided that no more than one such computer and related device per year shall be so purchased. VITA has developed processes for ordering and tracking the purchase of personal computers and related devices by public school teachers. VITA will provide assistance with the resolution of customer (teacher) complaints and contract issues. VITA will negotiate modifications to existing PC contracts, if necessary, or establish new PC contracts as needed to provide for the use of PC contracts by licensed public school teachers. Further information can be found at this website location: <https://www.vita.virginia.gov/supply-chain/place-an-order/teacher-pc-purchase-program/>.

### 1.5.3 Acquisition of Information technology including telecommunications goods and services

The provisions of this chapter shall not be construed to hamper the pursuit of the missions of the institutions in instruction and research. Acquisition of computer or telecommunications equipment or services means the purchase, lease, rental, or acquisition in any other manner of any such computer or telecommunications equipment or services. Please visit VITA's website for additional, helpful information about placing orders for IT goods and services: <https://vita.virginia.gov/supply-chain/place-an-order/>. Below is a list of VITA's statutory offerings:

Telecommunications goods and services: Refer to: <https://vita.virginia.gov/services/>

Internet and application service providers: Refer to: <https://vita.virginia.gov/services/>

Printers/copiers: Procurement authority for Non-Networked devices is delegated to executive branch agencies for printers which are not networked or shared and whose purchase price is up to \$250,000 per order. This means that agencies should order these and other consumables directly through [eVA](#), utilizing an "R" code. Support is not available from VITA for printers ordered under this delegation. Manufacturer's warranty applies. For printers/copiers available through VITA, go to: <https://vita.virginia.gov/supply-chain/place-an-order/>. Once at this site, select "VITA's IT Goods and Service List (Infrastructure/Non-Infrastructure)." All network attached printers and multifunction printers are under VITA's authority and should be requested utilizing the VR1 code. A list of choices is provided on the VITA Web site.

New printers will have a recurring monthly charge to cover service, support, network access and refresh of the devices. VITA will provide pricing via [eVA](#) for the applicable monthly charge.

Document imaging and management: Equipment and services for analog methods of data imaging and retrieval, such as microfilm, are not within VITA's procurement authority.

IT management and IT consulting contracts: Pursuant to the procurement authority granted to VITA in [§ 2.2-2012](#) of the *Code of Virginia* to enter into information technology service contracts, VITA has entered a statewide contract for IT consulting and staff augmentation services. Go to: <https://vita.virginia.gov/supply-chain/>. Once at this site, select "IT Contingent Labor" to obtain more information.

Miscellaneous: Other IT procurements that are within VITA's procurement authority include:

- Geographic Information Systems services (GIS) systems and equipment;
- IT goods and services that support public broadcasting, radio/TV broadcast equipment (i.e. one-way transmission)
- IT-based badging systems
- 2-way satellite equipment
- Equipment needed to create, edit, and/or broadcast audio/video programming
- Digital x-ray equipment
- Online research or educational material (standard "off the shelf" delivery of static information without customized or interactive functionality) such as: electronic magazines; electronic databases – Lexis/Nexis, Westlaw, Solinet; and electronic textbooks or reference materials

## 1.6 Procurements not subject to VITA's procurement authority

Equipment, software or services for a specialized application whose primary function or purpose is other than IT and for which any IT functionality or component is secondary or incidental to the equipment's primary function may be outside the purview of VITA's procurement authority. Go to: <https://vita.virginia.gov/supply-chain/place-an-order/>. Once at this site, select "VITA's IT Goods and Service List (Infrastructure/Non- Infrastructure). Such procurements are delegated to agencies and do not need to be processed through VITA—only through the Commonwealth's electronic procurement system at: <https://www.eva.virginia.gov/>.

## 1.7 Authority to contract for IT goods and services

### 1.7.1 CIO's Authority to bind Commonwealth to an IT contract with other public bodies or states, PPEA contracts and IT services contracts

Pursuant to [§2.2-2007\(B\)\(9\)](#) of the Code of Virginia, The CIO has "the authority to enter into and amend contracts, including contracts with one or more other public bodies, or public

agencies or institutions or localities of the several states, of the United States or its territories, or the District of Columbia, for the provision of information technology services.” Under [§ 2.2-2007\(C\)](#), the CIO may “may enter into public-private partnership contracts to finance or implement information technology programs and projects.”

#### 1.7.2 Authority to bind VITA to an IT contract

Only the CIO has statutory authority to bind VITA to a contract or to contract for the payment of VITA funds to any entity. The CIO may delegate contract signature authority to specific named positions or individuals. (See [§ 2.2-604](#).) Only those specific named individuals with designated signature authority from the CIO may bind VITA to a contract or any variation thereof.

### 1.8 CIO approval required for certain IT procurements via the Procurement Governance Review (PGR) process

In accordance with the *Code of Virginia*, the Commonwealth CIO reviews and approves proposed IT investments (IT projects and IT procurements) with a value of \$250,000.00 and over, requests for proposals (RFPs), Invitations for bid (IFBs) and contracts for IT projects. Agency IT project procurements are reviewed and approved for those projects and procurements that are \$1 million dollars or more in cost. Additionally, the CIO, via the Division of Project Management, requires that any contract requiring CIO approval over \$1 million dollars shall be approved by the Office of the Attorney General prior to submission to VITA PMD for the CIO's review and approval."

#### 1.8.1 CIO approval and oversight required for certain IT projects

The Commonwealth CIO shall review certain projects and recommend whether they be approved or disapproved, or require VITA oversight (see [§ 2.2-2017](#) of the *Code of Virginia*.) The CIO will disapprove any procurement that does not conform to the Commonwealth strategic plan for information technology developed and approved pursuant to [§ 2.2-2007](#) or to the individual IT strategic plans (ITSPs) of agencies or public institutions of higher education.

IT investments by agencies must be added to their respective ITSP by requesting Investment Business Case (IBC) approval and Procurement Business Alignment (PBA) approval by the CIO, coordinated by the IT Investment Management (ITIM) group. After receiving PBA approval, the agency must request CIO approval to begin the procurement process (procurement execution) via the Procurement Governance Review (PGR) process. VITA staff will review to ensure that the procurement conforms to the agency's Information Technology Strategic Plan (ITSP) the statewide IT strategic plan and compliance with required Commonwealth Policies, Standards and Guidelines (PSGs) and certain IT and VITA related statutory laws. The VITA divisions who conduct the review are: Enterprise Architecture, Security, SCM, Project Management Division (PMD), and Customer Account Managers. Additionally, VITA's Enterprise Cloud Oversight Services (ECOS) will review all procurements that involve off-premise hosting (i.e., SaaS). PMD has the

responsibility to coordinate the review and deliver, to the CIO, a recommendation for his action. Visit this website for more information on the PGR process and agency requirements: <https://vita.virginia.gov/supply-chain/scm-policies-forms/summary-of-vitas-procurement-delegation/>

For more information on VITA's governance and oversight of certain IT projects, refer to the "Project Management Standard (CPM 112-03)" found at: <https://vita.virginia.gov/it-governance/itrm-policies-standards/>.

#### **1.8.2 Submission for approval**

All agency governance approval requests for Procurement Governance Reviews, RFPs, IFBs, contracts, and projects will be submitted to Project Management Division (PMD) through the IT Technology Portfolio and designated PMD analyst.

- 1.8.3 CIO recommendation for approval and termination of major IT projects** According to [§ 2.2-2016.1](#), the CIO shall have the authority to "review and approve or disapprove the selection or termination of any Commonwealth information technology project. The CIO shall disapprove any executive branch agency request to initiate a major information technology project or related procurement if funding for such project has not been included in the budget bill in accordance with [§ 2.2-1509.3](#), unless the Governor has determined that an emergency exists and a major information technology project is necessary to address the emergency. The CIO shall disapprove any Commonwealth information technology projects that do not conform to the Commonwealth strategic plan for information technology developed and approved pursuant to subdivision A 3 of [§ 2.2-2007.1](#) or to the strategic plan of executive branch agencies developed and approved pursuant to [§ 2.2-2014](#).

#### **1.8.4 CIO approval for joint and cooperative procurement arrangements or purchases from another public body's contract**

If any agency desires to participate in or sponsor a joint and cooperative procurement arrangement for the procurement of IT goods and services, that arrangement must be approved by the CIO, regardless of the amount of the procurement. If a public body desires to purchase IT goods and services, regardless of amount, from another public body's contract, that procurement may be permitted if approved in advance by the CIO ([§ 2.2-4304\(B\)](#) of the *Code of Virginia*).

#### **1.8.5 CIO approval for GSA schedule 70 procurements**

Procurements of IT goods and services of any amount using GSA schedule 70 or any other GSA schedule approved for use by states or localities must be approved by the CIO prior to being procured by any authority, department, agency or institution of the Commonwealth ([§ 2.2-4304](#) (C, E) of the *Code of Virginia*).



#### **1.8.6 CIO approval for public auction procurements**

Any public body, as defined in [§ 2.2-4301](#), which desires to purchase IT and telecommunications goods and services from a public auction sale, including an online public auction, must have the purchase approved in advance of the auction by the CIO, regardless of the amount of the purchase [§ 2.2-4303\(l\)](#) of the *Code of Virginia*). Although agencies must request CIO approval for some but not all IT procurements, the CIO may disapprove any procurement, regardless of amount, that does not conform to the statewide technology plan or to the individual plans of agencies or public institutions of higher education ([§ 2.2-2012](#)(A) of the *Code of Virginia*).

#### **1.9 Enterprise cloud oversight (ECOS) policy and approvals**

In accordance with VITA's IT Operations Policies and Procedures for Third-Party Use, effective 12/15/16, and found here: <https://vita.virginia.gov/media/vitavirginiagov/it-governance/psqs/pdf/ThirdPartyUsePolicy.pdf>, agencies desiring a cloud-based solution (i.e., Software as a Service) for any procurement, must comply with the procedures and obtain the approvals described in this policy.

#### **1.10 Commonwealth Compliance with Federal Security and Privacy Rules and Regulations**

The CIO of Virginia is required to develop policies, standards and guidelines that require that any procurement of information technology made by the Commonwealth's executive, legislative, and judicial branches and independent agencies be made in accordance with federal laws and regulations pertaining to information security and privacy, as defined by [§ 2.2-2009](#) of the *Code of Virginia*. These agencies are required to validate their statutory compliance with this.

#### **1.11 Commonwealth Compliance with Cybersecurity Policies**

In addition, all agencies are required to have cybersecurity policies that meet or exceed the Commonwealth's cybersecurity policy. The CIO is required to conduct an annual comprehensive review of cybersecurity policies of every executive branch agency, with a particular focus on breaches in information technology that occurred in the reviewable year and any steps taken by agencies to strengthen cybersecurity measures in accordance with [§2.2-2009](#).

#### **1.12 Commonwealth Compliance with §2.2-5514 of the *Code of Virginia***

Code of Virginia. [§ 2.2-5514](#) states that no "public body" (as defined in therein) may use, whether directly or through work or on behalf of another public body, any hardware, software, or services that have been prohibited by the U.S. Department of Homeland Security for use on federal systems.

## **1.13 Exemptions from CIO approval or VITA's oversight pursuant to the Appropriations Act**

### *§ 4-5.04 GOODS AND SERVICES*

#### INFORMATION TECHNOLOGY FACILITIES AND SERVICES:

1. a) The Virginia Information Technologies Agency shall procure information technology and telecommunications goods and services of every description for its own benefit or on behalf of other state agencies and institutions, or authorize other state agencies or institutions to undertake such procurements on their own.
  
- b) Except for research projects, research initiatives, or instructional programs at public institutions of higher education, or any non-major information technology project request from the Virginia Community College System, Longwood University, or from an institution of higher education which is a member of the Virginia Association of State Colleges and University Purchasing Professionals (VASCUPP) as of July 1, 2003, or any procurement of information technology and telecommunications goods and services by public institutions of higher education governed by some combination of Chapters 933 and 945 of the 2005 Acts of Assembly, Chapters 933 and 943 of the 2006 Acts of Assembly, Chapters 594 and 616 of the 2008 Acts of Assembly, Chapters 824 and 829 of the 2008 Acts of Assembly, and Chapters 675 and 685 of the 2009 Acts of Assembly, requests for authorization from state agencies and institutions to procure information technology and telecommunications goods and services on their own behalf shall be made in writing to the Chief Information Officer or his designee. Members of VASCUPP as of July 1, 2003, are hereby recognized as: The College of William and Mary, George Mason University, James Madison University, Old Dominion University, Radford University, Virginia Commonwealth University, Virginia Military Institute, Virginia Polytechnic Institute and State University, and the University of Virginia.
  
- c) The Chief Information Officer or his designee may grant the authorization upon a written determination that the request conforms to the statewide information technology plan and the individual information technology plan of the requesting agency or institution.
  
- d) Any procurement authorized by the Chief Information Officer or his designee for information technology and telecommunications goods and services, including geographic information systems, shall be issued by the requesting state agency or institution in accordance with the regulations, policies, procedures, standards, and guidelines of the Virginia Information Technologies Agency.
  
- e) Nothing in this subsection shall prevent public institutions of higher education or the Virginia Community College System from using the services of Network Virginia.

### Chapter highlights

- **Purpose:** This chapter provides guidance on how the acquisition of information technology (IT) goods and services is different than the procurement of non-IT commodities and also provides guidance on the IT procurement process.
- **Key points:**
  - IT sourcing is constantly changing and requires the application of specialized best practices.
  - Technology risks must be analyzed and mitigated during solicitation development and prior to contract execution.
  - Applying strategies and principles to technology procurement, positions the Commonwealth to maximize the benefits it receives from technology and reduces the risk of supplier and technology failures.

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## 2.0 Introduction

This chapter focuses on how the process of technology acquisition is different from other types of commodity and services sourcing. It also explains why IT procurements require special diligence and the application of specialized best practices to obtain best-value IT solutions for the Commonwealth. IT procurement differs in complexity and analysis from commodity-driven procurements because technology is constantly changing due to new service offerings like cloud computing, constant technical improvements, software changes like open source software and security enhancements. Unlike general commodities, IT goods and services may have very complex interdependencies, continuity requirements or serious risk considerations that support the operational backbone of the Commonwealth's public safety and citizen services.

Additionally, the [Code of Virginia](#) has evolving procurement requirements, based on annual legislative changes. These changes involve the Commonwealth's IT strategic planning and reporting, which ensures that technology projects are planned in accordance with the Commonwealth's overall IT strategy. The CIO of Virginia is required to develop policies, standards and guidelines that require that any contract for information technology entered into by the Commonwealth's executive, legislative, and judicial branches and independent agencies be made in accordance with federal laws and regulations pertaining to information security and privacy, as defined by [§2.2-2009](#) of the [Code of Virginia](#). In addition, in accordance with [House Bill 1221](#), all agencies are required to have cybersecurity policies that

meet or exceed the Commonwealth's cybersecurity policy. The CIO is required to conduct an annual comprehensive review of cybersecurity policies of every executive branch agency, with a particular focus on breaches in information technology that occurred in the reviewable year and any steps taken by agencies to strengthen cybersecurity measures in accordance with [§2.2-2009](#).

Refer to [Chapter 1](#) for discussion on IT procurement delegation and authority and unique processes and procedures that agencies are required to comply with.

VITA is committed to using technology procurement processes supported by the Virginia Public Procurement Act and industry best practices. These IT procurement business processes will enable VITA and the Commonwealth to achieve an IT sourcing environment which:

- leverages Virginia's ample IT buying power which enables the procurement of innovative IT tools and solutions at competitive prices and terms
- promotes the increased use and usefulness of statewide technology contracts
- provides fast and flexible sourcing processes
- drives positive business relationships between the Commonwealth and its IT suppliers
- promotes an evaluation process for IT goods and services which is value-oriented, not price-oriented
- encourages sourcing processes which are business-driven and enterprise-oriented
- results in fair, standardized contract vehicles which are performance-based and can easily define the scope of the IT purchase
- improves the ability of suppliers to do business with the Commonwealth
- promotes a consistent IT procurement approach across the Commonwealth

## **2.1 The Commonwealth's dependence upon technology grows and evolves**

The Commonwealth is increasingly dependent on data, systems and communications that deliver information and services to its citizens and stakeholders, including systems that integrate and share data with other federal, state and local agencies.

Our dependence on technology necessitates that procurement professionals use efficient and repeatable procurement and project-related processes that comply with the VPPA; industry best practices; Commonwealth security, data privacy, project management and other technical standards; and that prompt careful analysis and mitigation of technology risks are carefully considered while staying within the Commonwealth's budget and strategic technology plan.

The increase in value of IT means a corresponding increase in risk to the Commonwealth and the services it provides to its citizens. Commonwealth IT procurement professionals must assess these risks and adapt agency IT strategies and outcomes to match business objectives. IT procurement professionals are experiencing fundamental changes in their roles and responsibilities—transitioning from commodity buyers to negotiators and from transactional order placers to strategic IT solution managers.

VITA's technology procurement process encompasses much more than sourcing and buying IT goods and services. It includes planning; developing requirements; compliance with Commonwealth and federal, technology standards or regulations, assessing risk factors; preparing the solicitation, evaluation, award and contract documents; approval, formal acceptance and receipt of deliverables; payment; inventory tracking and disposition and post-award supplier performance and compliance management. Regardless of whether the technology product or service required is procured by the agency under its delegated authority, purchased off a statewide contract or procured by VITA, the workflow is essentially the same. Here are some things that need to be considered when making any technology purchase:

- Identify the technology business needs and the technology products, services or solutions that will best fulfill those needs while determining life-cycle cost containment and aligning with the agency's IT strategic plan.
- Determine the business owner's technical, functional and performance requirements, and determine how these goals may be achieved through a structured procurement. This will require agency purchasing personnel or VITA personnel to meet with stakeholders to help identify needs, craft requirements and propose available technology solutions.
- Develop specifications that describe the characteristics of the technology product, service or solution being sought. Consideration should be given to product or system suitability and to overall cost effectiveness, in addition to acceptability and price. By their nature, specifications set limits and thereby eliminate or restrict Supplier's from proposing alternative solutions. Drafting technology specifications requires a balance between including sufficient detail to ensure appropriate responses from suppliers and encouraging, not discouraging, competition. The goal is to invite maximum reasonable competition while procuring the best value technology solution for the Commonwealth.
- Seek bids, proposals or price quotations from a number of potential suppliers, being careful to fulfill minimums established by the Virginia Public Procurement Act, set asides for small businesses and this manual.
- Evaluate bids or proposals to determine overall economy for the intended use and life cycle of the technology product, solution or services
- Develop a low-risk and legally sound and sufficient technology contract in accordance with Virginia Public Procurement Act and this manual to protect the Commonwealth and its assets and data.
- Receive/test the technology product, solution or service and verify that it meets the requirements of the contract and provides the intended technology solution before formal acceptance and payment.

## **2.2 Critical factors in IT procurement**

The Commonwealth can maximize the value it receives from technology and reduce the risk of supplier and technology failures by using smart sourcing and contract strategies. Listed below are examples of IT sourcing and contract strategies to mitigate some potential IT procurement difficulties:

Challenge	Impact/risk	IT sourcing principles to employ	IT contract approaches to mitigate
Complexity of business functions, technology and legal issues make procurement long and difficult	major omissions from a business, technical or legal standpoint are anticipated and prevented	use a structured IT acquisition process that provides a framework to ensure all areas are part of the screening and selection process	draft a clear, easy-to-use contract that documents the business relationship, and includes only mandatory and specialized IT terms and conditions and the essence of the deal
Industry consolidation/ monopoly suppliers	key products lie with powerful suppliers	use solution-based solicitations that focus on business problems and solutions, not technical specifications or requirements	adopt meaningful service level agreements (SLAs) and business performance commitments and measurements to monitor if solution continues to meet business need  assign incentives/remedies in the contract to incentivize Supplier performance
Products and solutions are intangibles	difficult to specify and evaluate products	collaborate in an evaluation process that incorporates all areas needed for successful IT solution: business, technical, legal and financial  include subject matter experts (SMEs) on evaluation team who will only evaluate their area(s) of expertise  provide contract template with solicitation, not prepared after selection  incorporate offeror response to contract template as part of the evaluation	use strong warranty language with significant business remedies  give significant attention to intellectual property rights and alternatives to ensure the right to use, access, transfer to other Commonwealth entities

Rapid and planned obsolescence	versions out of date  new entrants into market	conduct market research to evaluate market risk  evaluation based on value-to-cost ratio  include total life cycle costs in evaluation	tie contractual commitments to providing solution, not product  provide support of version and upgrades for appropriate period of time
Significant barriers to exit	customer is locked in to products or services	decision-making process  anticipate transitions/exit strategies	provide system data, back-up; ownership of work product or perpetual license to work product, including third party products needed to run systems/solutions; provide a strong transition/exit plan for agency
Complexity of IT products and services	difficult selecting the best from value solution due to complexity of needed IT good or service	collaborate in a team-based process to ensure all necessary requirements are appropriately evaluated  address all project, security, data privacy and cost risk factors  use data-driven evaluation processes to coalesce many different perspectives	base contract on solutions, not buying of specific product or version  include protections against product splitters or bundling  include risk mitigation project activities and contract language to align with risk potentialities
IT must support business function	evaluation criteria focused on business value and needs; not specification-driven process	use solution-based solicitations that focus on solving business problems and incentivizing Suppliers to offer solutions, not just meet technical specifications	include meaningful SLAs and performance commitments and measures to monitor solution continues to meet business need  assign incentives/remedies in the contract

Solutions being procured are highly interdependent	No accountability for full solution  the weakest component will drive your risk profile	take a full supply chain view of solutions  evaluate suppliers and components on strength of solution, both independently and collectively	give prime contractor accountability for performance, but also allow Commonwealth to reach through to subcontractors to maintain services
Contracts must protect Commonwealth data and systems	compromise of sensitive Commonwealth data  unauthorized disablement of Commonwealth data and citizen services	understand the data sensitivity of the procurement/project  collaborate with your business owner, project manager, information security officer and other SMEs	VITA SCM has cloud terms available if the procurement is for Software as a Service Agency may inquire at: <a href="mailto:scminfo@vita.virginia.gov">scminfo@vita.virginia.gov</a> <a href="#">v</a>

A structured IT sourcing process provides a comprehensive framework to ensure agencies that:

- omissions from a business, technical or legal standpoint are anticipated and prevented
- the costs and resources for the IT sourcing process are appropriate and are efficiently deployed
- the business case in support of the IT procurement is reaffirmed prior to selecting a solution
- across the board executive buy-in to the new system or technology is measurable as a result of user group involvement throughout the IT sourcing process

Regardless of the nature of the anticipated IT procurement, its size, cost and complexity, the following core principles of IT sourcing apply:

- Use a structured solicitation process which incorporates multiple complex domains, e.g., legal, technical, business functionality, financial.
- Sourcing should be a data-driven business process, which incorporates and balances concerns across multiple domains.
- Contract formation and negotiation are part of the decision process. It is critical to include an appropriate contract in the solicitation. If the supplier is not committed to providing the Commonwealth with value through the negotiation process, the Supplier should be evaluated accordingly.
- Business needs must be supported in the solicitation requirements and any statement of work. Focus less on specification-driven solicitations for major systems/solutions and write solicitations that are structured for IT suppliers to offer innovative and cost effective solutions.



- The sourcing evaluation process should include a comprehensive cost analysis that includes the total cost of ownership and all cost components including maintenance and not just the price of software or hardware.
- Long-term issues such as obsolescence, technology replacement and compatibility must be part of the evaluation, negotiation and decision-making process.
- Negotiations must be conducted prior to the selection of a particular IT solution or supplier.
- Intangible rights, software ownership and other critical terms and conditions must be considered in evaluation and negotiation.
- Risk analysis and trade-offs must consider the security of Commonwealth systems/data and continuity of operations for the Commonwealth and the solution and/or supplier's potential impact on the Commonwealth's ability to protect Commonwealth assets and service its citizens without interruption.

### Chapter highlights

- **Purpose:** This chapter outlines VITA's Supply Chain Management's (SCM's) vision, mission, core values and guiding principles. It also discusses the services that SCM provides to the Commonwealth.
- **Key points:**
  - SCM is the division of VITA charged with developing, implementing and leading the Commonwealth's technology procurement policies, standards and guidelines.
  - SCM is the central purchasing office for IT goods and services for the Commonwealth.
  - SCM seeks to achieve its mission of developing and managing supplier relationships to maximize the return on Commonwealth IT investments by integrating its customers' business needs with its strategic suppliers.

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### 3.0 Introduction

VITA's Supply Chain Management Division (SCM) is the division of VITA charged with developing, implementing and leading the Commonwealth's technology procurement policies, standards and guidelines. SCM is the central purchasing office for all IT goods and services for the Commonwealth. SCM develops IT policies, standards and guidelines and conducts and/or approves IT procurements for VITA and on behalf of agencies of the Commonwealth. SCM integrates data and information throughout its processes to ensure information is available and accurate to support analysis, planning and reporting. SCM's procurement responsibilities range from the ordering/purchasing process to the management and/or facilitation of major IT procurements.

### 3.1 SCM's vision, mission and core values

SCM's **Vision** is to be a recognized leader in IT procurement. Our **Mission** is to leverage external relationships to provide the best value IT solutions that meet the Commonwealth's business needs and our **Core Values** are:

- Enterprise perspective
- Value – cost and quality

- Service – to customers and citizens
- Public trust – transparency of action; fairness in dealing
- Respect and empower people

### 3.2 SCM's strategic goals

- Value – add value to the Commonwealth
- Customer Service – provide outstanding service to our customers
- Partnerships – develop positive/productive relationships with our suppliers
- Quality – build quality processes and tools to support our work
- People - develop a high performance team to accomplish our goals

### 3.3 SCM's guiding principles

SCM has established a set of guiding principles that create the framework within which all of its activities are conducted. Those guiding principles are as follows:

- SCM is responsive to customers in terms of cost, quality and timeliness of the delivered products or services.

✓	SCM personnel will be responsive and adaptive to customer needs, concerns and feedback.
✓	SCM will work diligently to select suppliers with a record of past successful performance in providing products or services or who demonstrate a current superior ability to perform.
✓	SCM will always promote fair and open competition.
✓	SCM will adopt procurement practices which follow the Virginia Public Procurement Act, include best commercial practices, and foster competitiveness and excellence in supplier performance.

- SCM's functions, processes and services are transparent.

✓	SCM is committed to promoting IT procurement practices which exhibit unparalleled transparency (advance notices, posted RFPs, awards), predictability and time sensitivity.
✓	SCM procurement professionals will conduct IT procurements so that all involved will have trust and confidence in the procurement process.
✓	IT suppliers will be assured that opportunities to provide IT goods and services to the Commonwealth are offered on a level playing field, while the citizen's interest is preserved.
✓	SCM is committed to achieving transparency through effective posting, advertising, public bid opening procedures, objective evaluation criteria, independent evaluation methods consistent with the solicitation document, awarding contracts to qualified suppliers, posting of award, fair and speedy protest and dispute resolution handling processes and disclosure of signed contracts and pricing.

- SCM promotes competition by offering a level playing field to all suppliers.

✓	SCM is committed to providing suppliers, customers and citizens with easy and fast access to IT procurement information.
✓	SCM is committed to reducing overhead and allowing DSBSD certified small businesses, including those small businesses owned by women, minorities, and service-disabled veterans (SWaM) businesses, and micro businesses a level playing field when competing for IT contracts.

- SCM minimizes administrative operating costs by streamlined and repeatable processes and procedures.

✓	SCM will promulgate policies and rules only when the benefits exceed the costs of their development, implementation, administration and enforcement.
✓	SCM is committed to streamlining processes to keep pace with new technology and procedures.

- SCM personnel conduct all business with integrity, fairness and openness.

✓	All SCM personnel are responsible for the prudent and ethical use of public resources and for acting in a manner that maintains the public's trust.
✓	All SCM personnel will exercise sound discretion and sound business judgment in their interactions with customers and suppliers.

- SCM implements procurement processes which fulfill the Commonwealth's public policy and strategic technology objectives.

✓	VITA's IT procurement manual is based on the <i>Code of Virginia</i> , the Virginia Public Procurement Act and sound, effective IT procurement best practices used within the IT market.
✓	VITA SCM personnel and agencies with VITA-delegated IT procurement authority are expected to follow the policies, procedures and guidelines in VITA's procurement manual.

### 3.4 Who does SCM serve?

SCM provides services to multiple audiences because it is a central pivot point in IT acquisitions for the Commonwealth. SCM customers span many business areas and include:

- Commonwealth of Virginia taxpayers—SCM aggressively implements competition for IT procurements. Suppliers are asked to provide the best value at the best price for Virginians.
- Virginia's IT suppliers—SCM provides a welcoming, fair, inclusive IT procurement opportunity process that encourages participation by DSBSD certified small businesses, including those small businesses owned by women, minorities- and service-disabled veterans, and micro businesses.

- Executive branch agencies, other public bodies and institutions of higher education within the Commonwealth—SCM procures IT goods and services required to fulfill their missions and goals through standardizing many infrastructure services, by establishing pre-negotiated, VPPA-compliant statewide technology contracts to mitigate technology risks, reduce the procurement process and budget, leverage the IT industry's best solutions and pricing/volume discounts and by providing guidance or approval for agency-specific IT procurements.

### 3.5 What services does SCM offer?

SCM provides agencies with the following IT procurement services:

- Statewide IT agreements for use by all Commonwealth executive branch agencies, other public bodies and private institutions of higher education. Supplier and contract management methodology, processes, policies and guidelines unique to IT contracts.
- Procurement policies, standards and guidelines which provide a fair and open sourcing process based the Virginia Public Procurement Act regulations and established best practice tools and procedures.
- Enterprise IT contract policies, standards, guidelines and administration.
- Category strategies that define the Commonwealth's approach to IT services such as build/buy decisions, multiple or single supplier and degree of geographic concentration.
- Research on suppliers, IT markets, analysis of IT markets and development of supplier strategies including financial evaluation of potential suppliers.
- IT strategic sourcing based on knowledge of past and future IT projects, solicitations and contracts across the Commonwealth, and the Commonwealth's overall IT strategic plans
- Leading and facilitating procurement project teams through sourcing initiatives.
- Assistance in the development of requirements, statements of work, requests for information, invitations for bids, requests for proposals, evaluation scorecards, negotiation strategies, etc.
- Standardized and approved IT-specific solicitation and contract template documents
- Risk assessment and mitigation of IT suppliers, IT markets and IT-specific projects.
- Assistance in developing contract negotiation strategies.
- E-procurement and IT ordering assistance.
- Sourcing-related tools, templates and training.
- Strategic planning on how to structure the IT procurement to achieve maximum value and efficiency.
- Assistance in advancing appropriate strategic partnerships with IT suppliers and shaping the supplier selection process.
- Assistance in negotiating with IT suppliers and with effectively managing relationships with value-added reseller (VAR) suppliers.
- Strategy assistance in determining the appropriate solicitation type and the appropriate contract type (multiple award, performance-based, short term) to improve the chances of success for a particular IT procurement.
- Participation in customer compliance and governance activities and processes aligned with VITA statutory requirements and other VITA divisions including Relationship Management & Governance, Platform Relationship Management, Legal & Legislative Services, Service Management & Delivery, Internal Technology & Portfolio Management, Enterprise Cloud Oversight Services, Project

- Management Division, Commonwealth Security & Risk Management, and internal and customer support with VITA's and agencies' purchasing needs and requirements.

### 3.6 What business functions does SCM provide?

An overall objective within SCM's business function is to provide the integration of data and information throughout SCM's processes to ensure information is available and accurate to support analysis, planning, and reporting. The skilled and specialized procurement staff within SCM offers many IT-related business and service-oriented functions that include:

- **Category management** – Developing the strategic plan for sourcing and contracting in alignment with business needs and the IT marketplace to optimize value and reduce risk.
- **Strategic sourcing** – Integrating IT technical, business, financial, and contractual requirements to select suppliers and negotiate agreements that fulfill IT business functions.
- **Procurement** – Managing the processes by which goods and services are identified, ordered, and received; and, monitoring compliance guidelines and policies.
- **Supplier Relationship Management (SRM)** – Developing and managing VITA's interactions with its suppliers. Coordinating efforts across VITA to realize the value of the supplier relationship.
- **Policy and integration** – Developing policies, standards and guidelines; researching emerging best practices; defining new approaches to enhance the value of supply chain services throughout the Commonwealth; leading analysis and integration of new legislation and emerging procurement methods and models.
- **Procurement governance** – Ensuring executive branch agency compliance with strategic planning and related projects and VITA policies and standards; and reviewing/recommending approval of major and delegated procurements and projects.
- **ECOS review and approval services** – Supporting agencies with cloud procurement compliance and guidance by offering required Cloud Services Terms and Conditions to include with their solicitations and contracts; reviewing supplier redlines to those terms and coordinating with the Director of VITA ECOS on behalf of the agency to assist with successful negotiations of those terms with the agency and supplier. Under the *Tools* section of this SCM webpage location you will find other helpful guidance including an ECOS checklist with recommended RFP language and links to access other ECOS procedures and forms, the associated fees for SCM ECOS Services and how to obtain the required Cloud Services Terms and Conditions. At this link here is also a Process workflow diagram, solely related to cloud procurements: <https://www.vita.virginia.gov/supply-chain/scm-policies-forms/>
- **Procurement review** – Determining the effectiveness and compliance with VITA SCM policies, standards and guidelines and internal processes and procedures.
- **Customer IT training and guidance** – Providing valuable IT-gearred online tools, group training classes and sessions, as well as individual guidance to our customer agencies.

### 3.7 SCM's ongoing IT procurement initiatives and improvements

IT sourcing and contract management is focused on business value and source of innovation versus price-based or transactional procurement. Several key initiatives that support SCM's value-focused organization include:

- Managing IT spend through a proactive sourcing strategy.

- Managing the delivery of IT services through category management plans and category owners.
- Developing and managing flexible contracts that form the foundation of the relationship; specifically, creating and managing performance-based contracts.
- Procuring “solutions” to business problems rather than procuring products and/or services with extremely detailed specifications and limited technical requirements.
- Changing acquisition planning perspectives from “single-agency” to “enterprise,” “service-oriented,” “shared” and “Commonwealth strategic objectives” in order to invite and enable greater value and benefit from the IT market’s ever-changing innovation offerings.
- Processes which consistently manage contracts through the life of the contract.
- Provide maximum effectiveness and efficiency for the procurement process, with appropriate controls and compliance.
- Manage suppliers appropriate to their strategic importance.
- Increase the diversity and quality of suppliers providing services.
- Utilizing measurement of internal performance including compliance, process cycle times and costs, material cost savings and spend management. Implement a balanced score card for measuring and tracking the Commonwealth’s IT suppliers’ service, quality, delivery and pricing.
- Driving analysis based on total cost and ensuring compliance through integration of contract management, transaction management, spend data management and supplier performance management.
- Training IT Sourcing Specialists to be technology savvy consultants empowered with the skill sets needed to be efficient problem-solvers, technology risk mitigation/negotiation experts who are able to translate business needs into efficient and effective IT contracts.
- Being proactive in the industry’s shift to Cloud-based solutions and contracts by research, training and developing appropriate procurement documentation.
- Supporting VITA’s infrastructure procurements, transition-in and transition-out activities and supplier relationship management.
- Assessing opportunities to develop future statewide procurements to make more cloud- based offerings available to commonwealth agencies, institutions of higher education and localities.
- Providing formal training to Commonwealth procurement officers and project managers.

### 3.8 SCM’s desired future

SCM seeks to achieve its mission of developing and managing supplier relationships to maximize the return on Commonwealth IT investments by integrating its customers’ business needs with its strategic suppliers. As the Commonwealth unfolds and evolves its strategic and enterprise IT initiatives, SCM will implement proven, *Code of Virginia*- compliant, flexible and agile procurement strategies and methods to support the successful implementation of those initiatives. Over the long-term, the process includes establishing groups of IT products or services and aligning those groups with an owner that has accountability for usage decisions for the products or services. Each group will include suppliers capable of providing the best value and performance for IT services based on proactively determined customer needs. As customers identify the need for IT services, the process makes possible the best solution at a reasonable risk. The process takes advantage of strategic sourcing strategies such as capturing up-front service requirements, pre- qualifying suppliers, and pre-contracting for services to enhance quality and timeliness. The overall value is that quality service is delivered in a reasonable time, at reasonable cost and with reasonable risk— empowering the Commonwealth’s current and evolving strategic IT objectives.

### Chapter highlights

- **Purpose:** This chapter sets forth background information and policy that should be followed by agencies and institutions. Adherence to this policy will ensure compliance with statutory regulations, protect the trust established between procurement officials and citizens of the Commonwealth, and establish fair and equal treatment of all suppliers who are interested in doing business with the Commonwealth.
- **Key points:**
  - VITA is committed to developing procurement policies and maintaining procurement processes which are fair, ethical, non-biased and in strict compliance with the laws of the Commonwealth.
  - Procurement professionals have the responsibility to ensure that all information and documentation relative to the development of a solicitation or contractual document for a proposed procurement or anticipated contractual award remains confidential until successful completion of the procurement process.

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## 5.0 Introduction

VITA's Supply Chain Management (SCM) Division is responsible for establishing statewide contracts to meet agencies' needs for IT goods and services and for delegating procurement authority back to agencies, where appropriate. SCM is also responsible for developing policies, standards and guidelines for the procurement of information technology. Since information technology procurement involves the expenditure of significant tax dollars, a trust is created between procurement officials, suppliers and the citizens of the Commonwealth.

This chapter provides VITA's policy regarding behavior of procurement professionals and suppliers and other project team members involved in the procurement of information technology. Section [2.2-2006](#) of the *Code of Virginia* defines "information technology" (IT) as "communications, telecommunications, automated data processing, applications, databases, data networks, the Internet, management information systems, and related information, equipment, goods, and services."

The *Code of Virginia* dictates a higher standard of conduct for procurement 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 be exercised properly. Procurement professionals and suppliers, as well as IT project team members involved in any IT procurement, must be cognizant of these laws which include the Virginia Public Procurement Act, the State and Local Government Conflict of Interests Act, and the Governmental Frauds Act. All personnel having official responsibility for procurement transactions should be familiar with Article 6, *Code of Virginia*, [§ 2.2-4367 et seq.](#), entitled "Ethics in Public Contracting."

VITA expects all procurement professionals and project team members involved in any IT procurement to maintain the public trust by conducting themselves with integrity and in a manner above reproach, with complete impartiality and without preferential treatment. All procurement professionals should avoid acts which are improper, illegal, or give the appearance of impropriety and shall pursue a course of conduct that does not raise any appearance of impropriety or suspicion among the public or potential Commonwealth suppliers.

## 5.1 Responsibilities of Commonwealth procurement professionals and project team members involved in an IT procurement

### 5.1.1 Confidentiality

Procurement professionals involved in an IT procurement have a duty to maintain certain information as confidential before and during the course of a solicitation. Procurement professionals have the responsibility to ensure that all information and documentation relative to the development of a solicitation or contractual document for a proposed procurement remains confidential until successful completion of the procurement

process. All information and documentation relative to the development of a specification or requirements document will be deemed confidential in nature until award of a contract. A confidentiality statement required for signature by all project procurement team members is available in Appendix A.

### 5.1.2 Ethics

All Commonwealth procurement professionals are subject to [§ 2.2-4367 et seq.](#) of the *Code of Virginia*: Ethics in Public Contracting and State and Local Government Conflict of Interests Act ([§ 2.2-3100 et seq.](#)), the Virginia Governmental Frauds Act ([§ 18.2-498.1 et seq.](#)) and Articles 2 ([§ 18.2-438 et seq.](#)) and 3 ([§ 18.2-446 et seq.](#)) of Chapter 10 of Title 18.2.

In addition to the *Code of Virginia*, VITA's procurement professionals and those acting on behalf of any VITA-delegated agency procurement shall:

- Abide by the National Institute of Governmental Purchasing, Inc. (NIGP) Code of Ethics.
- Exhibit the highest ideals of honor and integrity in all public and personal relationships in order to merit the respect and inspire the confidence of the Commonwealth's agencies and suppliers and the citizens being served.
- Provide and foster a procurement environment where all business concerns, large businesses or DSBSD certified small businesses and small businesses owned by women- minorities and service-disabled veterans (SWaM) businesses, or micro businesses certified small, women-owned, minority-owned, service-disabled veteran- owned businesses, or micro businesses are afforded an equal opportunity to compete for the Commonwealth's business.
- Avoid the intent and appearance of unethical or compromising practices in actions, relationships and communications, while also avoiding the appearance of impropriety or any action which might reasonably result in the perception of impropriety.
- Conduct all procurement activities on behalf of the Commonwealth in accordance with the laws of the Commonwealth, obeying all relevant laws and remaining alert to any and all legal ramifications of procurement decisions.
- Refrain from any private or professional activity that would create a conflict between personal interests and the interests of the Commonwealth as defined in [§ 2.2-3106](#) and [§ 2.2-4367 et seq.](#) of the *Code of Virginia*, avoiding any appearance of a conflict and continually evaluating their outside interests which have the potential of being at variance with the best interests of the Commonwealth.
- Promote positive supplier relationships through professionalism, responsiveness, impartiality and objectivity in all phases of the procurement cycle.
- Enhance the proficiency and stature of the Commonwealth's purchasing community by adhering to the highest standards of ethical and professional behavior.
- Ensure all procurement project team members are aware of this policy and sign any required confidentiality and conflict of interest documents for the procurement file.

VITA procurement professionals and those acting on behalf of any VITA-delegated agency procurement shall not:

- Engage in outside business or employment by any outside company that might encroach upon their primary responsibilities as a procurement officer of the Commonwealth;
- 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;
- Engage in business with, or employment by a company that is a supplier to the Commonwealth;
- Lend money to or borrow money from any Commonwealth supplier;
- Maintain a significant interest in a firm that does business with VITA;
- Provide inside information to prospective bidders;
- Accept trips, lodging, meals, or gifts from suppliers;
- Accept meals, beverages, tickets to entertainment and/or sporting events or any other item which could be construed as having more than nominal value. (An officer/employee could accept food/refreshments of relatively low value provided during the course of a meeting sponsored by a supplier.)

### 5.1.3 Collusion awareness

As procurement watchdogs and citizens of the Commonwealth, procurement professionals have a duty to prevent and report collusion between suppliers competing for the Commonwealth's business. The purpose of the 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:

- Any agreement or mutual understanding among competing firms that restrains the natural operation among market forces is suspect;
- Existence of an "industry price list" or "price agreement" to which suppliers refer in formulating their offers;
- Sudden change from competitive bidding to identical bidding;
- Simultaneous price increases or follow-the-leader pricing;
- Rotation of bids or proposals so that each offeror takes a turn as the low bidder;
- 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;
- Establishment by competitors of collusive price estimating systems;
- Incidents suggesting direct collusion. (Assertion by employees of a supplier, etc., that an agreement to restrain trade exists.);
- 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 personnel are an important source of investigating leads and recognizing possible antitrust or collusion violations. As a result, procurement personnel should therefore 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 Office of the Attorney General, or to the agency's attorney advisor including any bids or proposals that show evidence or suspicion that an antitrust law violation has occurred. (See *Code of Virginia*, §§ [59.1-9.1](#) through [59.1-9.8](#) and §§ [59.1-68.6](#) through [59.1-68.8](#)).

NON-COLLUSION REQUIREMENT: Neither supplier nor any member, representative or employee of the supplier's organization shall enter into any combination, collusion or agreement with any person relative to any price to be bid. They shall not prevent any person from bidding nor induce anyone to refrain from bidding. Bids shall be made without reference to any other bid and without any agreement, understanding or combination that would serve to restrict competition.

## **5.2 Expectations of VITA's suppliers**

VITA expects its IT suppliers to deal with public officials in a manner that upholds the expectations of the public and reassures their confidence in the public procurement process. To that end, VITA expects suppliers to:

- Avoid all situations where propriety or financial interests, or the opportunity for financial gain, could lead to favored treatment for any organization or individual;
- Avoid circumstances and conduct that might not constitute actual wrongdoing, or a conflict of interest, but might nevertheless create the appearance of impropriety, thus compromising the integrity of VITA and the Commonwealth;
- 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;
- Avoid causing or influencing, or attempting to cause or influence any Commonwealth officer or employee in his or her official capacity in any manner which might tend to impair the objectivity or independence of judgment of that officer or employee;
- Avoid offering any Commonwealth/VITA 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 or her official duties;
- Accept responsibility for representations made on behalf of their company by employees or agents;
- Provide accurate and understandable pricing, schedules and terms and conditions;

- Treat competitors and employees of the Commonwealth with respect and professionalism, refraining from making any disparaging comments or accusations;
- Refrain from providing misleading information or unfavorable implications about a competitor's products or services.

### 5.3 Additional statutory prohibitions regarding contributions and gifts

Legislative actions from the 2015 General Assembly session resulted in additional statutory restrictions prescribed in the *Code of Virginia* that affect the procurement ethics and actions of public employees and private entities (suppliers) alike. In addition, the Appropriations Act contains language that directly addresses the solicitation and acceptance of gifts, grants and contracts by an agency at any time.

It is important to remember that § [2.2-3101](#) of the *Code of Virginia* defines "gift" very broadly:

"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.

"Gift" shall not include:

1. Any offer of a ticket or other admission or pass unless the ticket, admission, or pass is used.
2. Honorary degrees.
3. Any athletic, merit, or need-based scholarship or any other financial aid awarded by a public or private school, institution of higher education, or other educational program pursuant to such school, institution, or program's financial aid standards and procedures applicable to the general public.
4. A campaign contribution properly received and reported pursuant to Chapter 9.3 (§ [24.2-945](#) et seq.) of Title 24.2.
5. Any gift related to the private profession or occupation of an officer or employee or of a member of his immediate family.
6. Food or beverages consumed while attending an event at which the filer is performing official duties related to his public service.
7. Food and beverages received at or registration or attendance fees waived for any event at which the filer is a featured speaker, presenter, or lecturer.
8. Unsolicited awards of appreciation or recognition in the form of a plaque, trophy, wall memento, or similar item that is given in recognition of public, civic, charitable, or professional service.
9. A devise or inheritance.
10. Travel disclosed pursuant to the Campaign Finance Disclosure Act (§ [24.2-945](#) et seq.)
11. Travel paid for or provided by the government of the United States, any of its territories, or any state or any political subdivision of such state.
12. Travel provided to facilitate attendance by a legislator at a regular or special session of the General

Assembly, a meeting of a legislative committee or commission, or a national conference where attendance is approved by the House or Senate Committee on Rules.

13. Travel related to an official meeting of the Commonwealth, its political subdivisions, or any board,

commission, authority, or other entity, or any charitable organization established pursuant to § 501(c)(3) of the Internal Revenue Code affiliated with such entity, to which such person has been appointed or elected or is a member by virtue of his office or employment.

14. Presents from relatives. For the purpose of this definition, "relative" means the donee's spouse, child, uncle, aunt, niece, or nephew, or first cousin; a person to whom the donee is engaged to be married; the donee's or his spouse's parent, grandparent, grandchild, brother, or sister, *step-parent, step-grandparent, step-grandchild, step- brother, or step-sister*; or the donee's brother's or sister's spouse.

The Appropriations Act addresses the solicitation and acceptance of donations, gifts, grants and contracts by state agencies:

§ [4-2.01](#) (a) Nongeneral Fund Revenues of the Appropriations Act contains the following language:

#### § [4-2.01](#) NONGENERAL FUND REVENUES

##### a. SOLICITATION AND ACCEPTANCE OF DONATIONS, GIFTS, GRANTS, AND CONTRACTS:

1. No state agency shall solicit or accept any donation, gift, grant, or contract without the written approval of the Governor except under written guidelines issued by the Governor which provide for the solicitation and acceptance of nongeneral funds, except that donations or gifts to the Virginia War Memorial Foundation that are small in size and number and valued at less than \$5,000, such as library items or small display items, may be approved by the Executive Director of the Virginia War Memorial in consultation with the Secretary of Veterans Affairs and Homeland Security. All other gifts and donations to the Virginia War Memorial Foundation must receive written approval from the Secretary of Veterans Affairs and Homeland Security.
2. The Governor may issue policies in writing for procedures which allow state agencies to solicit and accept nonmonetary donations, gifts, grants, or contracts except that donations, gifts and grants of real property shall be subject to § 4-4.00 of this act and § [2.2-1149](#), *Code of Virginia*. This provision shall apply to donations, gifts and grants of real property to endowment funds of institutions of higher education, when such endowment funds are held by the institution in its own name and not by a separately incorporated foundation or corporation.
3. The preceding subdivisions shall not apply to property and equipment acquired and used by a state agency or institution through a lease purchase agreement and subsequently donated to the state agency

or institution during or at the expiration of the lease purchase agreement, provided that the lessor is the Virginia College Building Authority.

4. The use of endowment funds for property, plant or equipment for state-owned facilities is subject to [§ 4-2.03](#) Indirect Costs, [§ 4-4.01](#) Capital Projects-General and [§ 4-5.03](#) Services and Clients of this act.

### 5.3.1 Contributions and gifts prohibited during PPEA or PPTA approval process

This prohibited conduct affects all procurements, bids and proposals under the Virginia Public Procurement Act, Public-Private Transportation Act, or the Public-Private Education Facilities and Infrastructure Act. These are provided below by direct quote or summary.

[“§ 2.2-3104.01.](#) Prohibited conduct; bids or proposals under the Virginia Public Procurement Act, Public-Private Transportation Act, and Public-Private Education Facilities and Infrastructure Act.

- A. Neither the Governor, his political action committee, or the Governor's Secretaries, if the Secretary is responsible to the Governor for an executive branch agency with jurisdiction over the matters at issue, shall knowingly solicit or accept a contribution, gift, or other item with a value greater than \$50 from any bidder, offeror, or private entity, or from an officer or director of such bidder, offeror, or private entity, who has submitted a bid or proposal to an executive branch agency that is directly responsible to the Governor pursuant to the Virginia Public Procurement Act ([§ 2.2-4300](#) et seq.), the Public-Private Transportation Act of 1995 ([§ 33.2-1800](#) et seq.), or the Public-Private Education Facilities and Infrastructure Act of 2002 ([§ 56-575.1](#) et seq.) (i) during the period between the submission of the bid and the award of the public contract under the Virginia Public Procurement Act or (ii) following the submission of a proposal under the Public-Private Transportation Act of 1995 or the Public-Private Education Facilities and Infrastructure Act of 2002 until the execution of a comprehensive agreement thereunder.
- B. The provisions of this section shall apply only for public contracts, proposals, or comprehensive agreements where the stated or expected value of the contract is \$5 million or more. The provisions of this section shall not apply to contracts awarded as the result of competitive sealed bidding as set forth in [§ 2.2-4302.1](#).
- C. Any person who knowingly violates this section shall be subject to a civil penalty of \$500 or up to two times the amount of the contribution or gift, whichever is greater, and the contribution, gift, or other item shall be returned to the donor. The attorney for the Commonwealth shall initiate civil proceedings to enforce the civil penalties. Any civil penalties collected shall be payable to the State Treasurer for deposit to the general fund and shall be used exclusively to fund the Council.

[§ 56-575.17:1.](#) Contributions and gifts; prohibition during approval process.

- A. No private entity that has submitted a bid or proposal to a public entity *that is an executive branch agency directly responsible to the Governor* and is seeking to develop or operate a qualifying project pursuant to

this chapter, and no individual who is an officer or director of such a private entity, shall knowingly provide a contribution, gift, or other item with a value greater than \$50 or make an express or implied promise to make such a contribution or gift to the Governor, his political action committee, or the Governor's Secretaries, if the Secretary is responsible to the Governor for an *executive branch* agency with jurisdiction over the matters at issue, following the submission of a proposal under this chapter until the execution of a comprehensive agreement thereunder. The provisions of this section shall apply only for any proposal or an interim or comprehensive agreement where the stated or expected value of the contract is \$5 million or more.

- B. Any person who *knowingly* violates this section shall be subject to a civil penalty of \$500 or up to two times the amount of the contribution or gift, whichever is greater. The attorney for the Commonwealth shall initiate civil proceedings to enforce the civil penalties. Any civil penalties collected shall be payable to the State Treasurer for deposit to the general fund."

[§ 2.2-3103.1](#). Certain gifts prohibited.

- A. For purposes of this section:

"Person, organization, or business" includes individuals who are officers, directors, or owners of or who have a controlling ownership interest in such organization or business. "Widely attended event" means an event at which at least 25 persons have been invited to attend or there is a reasonable expectation that at least 25 persons will attend the event and the event is open to individuals:

1. Who are members of a public, civic, charitable, or professional organization.
2. Who are from a particular industry or profession.
3. Who represent persons interested in a particular issue.

- B. No officer or employee of a local governmental or advisory agency or candidate required to file the disclosure form prescribed in [§ 2.2-3117](#) or a member of his immediate family shall solicit, accept, or receive any single gift with a value in excess of \$100 or any combination of gifts with an aggregate value in excess of \$100 within any calendar year for himself or a member of his immediate family from any person that he or a member of his immediate family knows or has reason to know is:

1. A lobbyist registered pursuant to Article 3 ([§ 2.2-418](#) et seq.) of Chapter 4
2. A lobbyist's principal as defined in [§ 2.2-419](#)
3. A person, organization, or business who is or is seeking to become a party to a contract with the local agency of which he is an officer or an employee.

Gifts with a value of less than \$20 are not subject to aggregation for purposes of this prohibition.



- C. No officer or employee of a state governmental or advisory agency or candidate required to file the disclosure form prescribed in § [2.2-3117](#) or a member of his immediate family shall solicit, accept, or receive any single gift with a value in excess of \$100 or any combination of gifts with an aggregate value in excess of \$100 within any calendar year for himself or a member of his immediate family from any person that he or a member of his immediate family knows or has reason to know is:
1. a lobbyist registered pursuant to Article 3 (§ [2.2-418](#) et seq.) of Chapter 4
  2. a lobbyist's principal as defined in § [2.2-419](#)
  3. a person, organization, or business who is or is seeking to become a party to a contract with the state governmental or advisory agency of which he is an officer or an employee or over which he has the authority to direct such agency's activities.

Gifts with a value of less than \$20 are not subject to aggregation for purposes of this prohibition.

- D. Notwithstanding the provisions of subsections B and C, such officer, employee, or candidate or a member of his immediate family may accept or receive a gift of food and beverages, entertainment, or the cost of admission with a value in excess of \$100 when such gift is accepted or received while in attendance at a widely attended event and is associated with the event. Such gifts shall be reported on the disclosure form prescribed in

§ [2.2-3117](#).

- E. Notwithstanding the provisions of subsections B and C, such officer or employee or a member of his immediate family may accept or receive a gift from a foreign dignitary with a value exceeding \$100 for which the fair market value or a gift of greater or equal value has not been provided or exchanged. Such gift shall be accepted on behalf of the Commonwealth or a locality and archived in accordance with guidelines established by the Library of Virginia. Such gift shall be disclosed as having been accepted on behalf of the Commonwealth or a locality, but the value of such gift shall not be required to be disclosed.

- F. Notwithstanding the provisions of subsections B and C, such officer, employee, or candidate or a member of his immediate family may accept or receive certain gifts with a value in excess of \$100 from a person listed in subsection B or C if such gift was provided to such officer, employee, or candidate or a member of his immediate family on the basis of a personal friendship. Notwithstanding any other provision of law, a person listed in subsection B or C may be a personal friend of such officer, employee, or candidate or his immediate family for purposes of this subsection. In determining whether a person listed in subsection B or C is a personal friend, the following factors shall be considered:

1. The circumstances under which the gift was offered

2. The history of the relationship between the person and the donor, including the nature and length of the friendship and any previous exchange of gifts between them
  3. To the extent known to the person, whether the donor personally paid for the gift or sought a tax deduction or business reimbursement for the gift.
  4. Whether the donor has given the same or similar gifts to other persons required to file the disclosure form prescribed in § [2.2-3117](#) or [30-111](#).
- G. Notwithstanding the provisions of subsections B and C, such officer, employee, or candidate or a member of his immediate family may accept or receive gifts of travel, including travel-related transportation, lodging, hospitality, food or beverages, or other thing of value, with a value in excess of \$100 that is paid for or provided by a person listed in subsection B or C when the officer, employee, or candidate has submitted a request for approval of such travel to the Council and has received the approval of the Council pursuant to § [30-356.1](#). Such gifts shall be reported on the disclosure form prescribed in § [2.2-3117](#).
- H. During the pendency of a civil action in any state or federal court to which the Commonwealth is a party, the Governor or the Attorney General or any employee of the Governor or the Attorney General who is subject to the provisions of this chapter shall not solicit, accept, or receive any gift from any person that he knows or has reason to know is a person, organization, or business that is a party to such civil action. A person, organization, or business that is a party to such civil action shall not knowingly give any gift to the Governor or the Attorney General or any of their employees who are subject to the provisions of this chapter.
- I. The \$100 limitation imposed in accordance with this section shall be adjusted by the Council every five years, as of January 1 of that year, in an amount equal to the annual increases for that five-year period in the United States Average Consumer Price Index for all items, all urban consumers (CPI-U), as published by the Bureau of Labor Statistics of the U.S. Department of Labor, rounded to the nearest whole dollar.
- J. The provisions of this section shall not apply to any justice of the Supreme Court of Virginia, judge of the Court of Appeals of Virginia, judge of any circuit court, or judge or substitute judge of any district court. However, nothing in this subsection shall be construed to authorize the acceptance of any gift if such acceptance would constitute a violation of the Canons of Judicial Conduct for the State of Virginia.

### **5.3.2 Return of gifts during procurement process**

§ [2.2-3103.2](#) of the *Code of Virginia* states:

"No person shall be in violation of any provision of this chapter prohibiting the acceptance of a gift if:

1. The gift is not used by such person and the gift or its equivalent in money is returned to the donor or delivered to a charitable organization within a reasonable period of time upon the discovery of the value of the gift and is not claimed as a charitable contribution for federal income tax purposes.
2. Consideration is given by the donee to the donor for the value of the gift within a reasonable period of time upon the discovery of the value of the gift provided that such consideration reduces the value of the gift to an amount not in excess of \$100 as provided in subsection B or C of § [2.2-3103.1](#)."

### 5.3.3 Contributions and gifts prohibited during procurement process

[§ 2.2-4376.1](#) of the *Code of Virginia* states:

A. "No bidder or offeror who has submitted a bid or proposal to an executive branch agency that is directly responsible to the Governor for the award of a public contract pursuant to this chapter, and no individual who is an officer or director of such a bidder or offeror, shall knowingly provide a contribution, gift, or other item with a value greater than \$50 or make an express or implied promise to make such a contribution or gift to the Governor, his political action committee, or the Governor's Secretaries, if the Secretary is responsible to the Governor for an executive branch agency with jurisdiction over the matters at issue, during the period between the submission of the bid and the award of the public contract under this chapter. The provisions of this section shall apply only for public contracts where the stated or expected value of the contract is \$5 million or more. The provisions of this section shall not apply to contracts awarded as the result of competitive sealed bidding."

Any supplier or person who knowingly violates this requirement is subject to a civil penalty of \$500 or up to two times the amount of the contribution or gift, whichever is greater. Civil proceedings for any violation will be initiated by the Commonwealth's attorney. A person who willfully violates this and is convicted will be guilty of a Class 1 misdemeanor. A convicted public employee will have to forfeit his or her employment with the Commonwealth and is subject to other fines or penalties provided by law.

## **Appendix A**

### **Procurement Project/Evaluation Team Confidentiality and Conflict of Interest Statement**

A current version of this form may be located under the Forms section of this VITA SCM website:

<https://vita.virginia.gov/supply-chain/scm-policies-forms/>

### Chapter highlights

- **Purpose:** This chapter includes procurement policies that ensure that IT procurement and contracting practices in the Commonwealth are consistently executed in a manner that promotes fair and open competition.
- **Key points:**
  - VITA is committed to fair and open competition through the implementation of procurement policies and procedures that are transparent to agencies, suppliers and the public.
  - Fair and open competition creates and drives value, reduces costs, and enables greater choices as increased supplier participation necessitates delivery of innovative solutions and improved supplier performance.

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## 6.0 Introduction

In alignment with the Virginia Public Procurement Act (VPPA), all Commonwealth information technology (IT) procurements must be based on the principles of fair and open competition, neutrality in contracting and the effective and efficient use of tax dollars. IT procurement decisions should be neutral and geared toward seeking the highest quality IT goods and services at the best price, thus ensuring that the Commonwealth is a responsible steward of citizens' tax dollars. IT procurement in the Commonwealth must be fair and open to ensure that all suppliers, including small businesses and small businesses owned by women, minorities and service-disabled veterans can compete for business on a level playing field. VITA promulgates competitive market procurement policies and standards that drive IT value for the Commonwealth through sourcing technology goods and services from a range of suppliers and which encourage suppliers to be innovative and invest in the Commonwealth's technology success while helping smaller firms overcome barriers to competition.

The Commonwealth spends more than \$1 billion on IT goods and services annually. Competitive pricing, product innovation and performance improvements are some of the benefits that come from fair and open procurement practices. Open procurement ensures that state government gets the best value and maximizes taxpayer dollars. The VPPA reinforces the goal of fair and open competition: [§ 2.2-4300\(C\)](#) of the *Code of Virginia* states “[t]o the end that public bodies in the Commonwealth 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, it is the intent of the General Assembly that competition be sought to the maximum feasible degree, that procurement procedures involve openness and administrative efficiency, that individual public bodies 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 purchasing body rather than being drawn to favor a particular vendor, and that the purchaser and vendor freely exchange information concerning what is sought to be procured and what is offered. Public bodies may consider best value concepts when procuring goods and nonprofessional services, but not construction or professional services. The criteria, factors, and basis for consideration of best value and the process for the consideration of best value shall be as stated in the procurement solicitation.”

VITA is committed to fair and open competition through the implementation of IT procurement policies, procedures and processes that are transparent to its IT suppliers and the public. All VITA IT procurement professionals and those given delegated IT procurement authority from VITA should understand and accept their accountability to the taxpayers. All IT suppliers should be provided the opportunity to do business with the Commonwealth.

VITA will use and encourage the use of competition as much as possible to achieve maximum value for the Commonwealth’s IT dollars.

## 6.1 VITA’s competition principles

The following principles facilitate fair and open competition and should be used in the sourcing of all VITA and VITA-delegated IT procurements:

Promote full and open competition to the maximum extent practicable.
Allow acquisitions without competition only when authorized by law or policy.
Restrict competition only when necessary to satisfy a reasonable public requirement.
Provide clear, adequate and sufficiently defined information about public needs to allow offerors to enter the solicitation process on an equal footing.
Publicize requirements and provide timely access to solicitation documents (including amendments, clarifications and changes to requirements) for all suppliers.
Solicitations should state the basis to be used for evaluating bids and proposals and for making the award.
Evaluate bids and proposals and make award(s) based on the criteria in the solicitation and applicable law. Enable transparency and public access to procurement information consistent with the protection of trade secrets, proprietary or confidential source selection information and person privacy rights.
Ensure that all parties involved in the procurement process participate fairly, honestly and in good faith.

Recognize that adherence to the principles of competition is essential to the maintenance of the integrity of the IT procurement process.
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Promote the expansion of contracting opportunities for small businesses, including small businesses owned by women, minorities, and service-disabled veterans (SWaM), and micro-businesses.
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Competition enables the Commonwealth to achieve value in its IT purchases through:

- Increasing the quantity, quality and diversity of IT suppliers. Fair and open competition incentivizes IT suppliers to submit bids and/or proposals that meet the Commonwealth's needs.
- Creating incentives for suppliers to deliver IT projects with emphasis on time, quality and cost.
- Motivating suppliers to innovate and invest in Commonwealth IT projects.

VITA operates on the premise that fair and open competition in IT procurement achieves the following objectives for the Commonwealth:

- Instills public and supplier confidence about the integrity and cost effectiveness of public sector procurement.
- Maximizes the most economically beneficial outcome for the taxpayers ensuring that the procurement process produces an optimal solution at a reasonable price.
- Ensures that all IT suppliers desiring to conduct business with the Commonwealth are given a reasonable opportunity to do so.
- Guards against favoritism, fraud and collusion and allows qualified suppliers an opportunity to obtain Commonwealth business.
- Ensures that all solicitation documents reflect the requirements and desired outcome of the Commonwealth and that all bidders and offerors are subject to equivalent terms, conditions and requirements.

## 6.2 Promoting competition

To achieve maximum value for its IT dollars, the Commonwealth needs a sufficient number of strategic suppliers to ensure competition. Procurement officials should attempt to understand the marketplace to identify and promote the involvement of the maximum number of eligible suppliers to promote maximum competition. Knowledge of the marketplace also helps identify and minimize any barriers to participation that suppliers may face. Some states have been successful in identifying factors that might prevent suppliers from bidding by establishing "communities of practice"—a network of buyers and suppliers that actively seeks to work more effectively together. This forum supports obtaining market intelligence about suppliers, the solutions they are delivering, and their reputation in the eyes of other buyers. The greater the number of suppliers participating in the IT procurement process—the greater the competition. Agency requests for assistance in obtaining sourcing information may be sent to: [scminfo@vita.virginia.gov](mailto:scminfo@vita.virginia.gov).

## 6.3 Enabling competition

VITA utilizes the following guidelines to promote competition and increase the number of participating suppliers willing to compete for the Commonwealth's IT spend:

- Requesting source information from VITA SCM at: [scminfo@vita.virginia.gov](mailto:scminfo@vita.virginia.gov) and conducting a search of VITA statewide contracts at: <https://vita.cobblestonesystems.com/public/>
- Requesting source information about DSBSD-certified suppliers through [eVA](#)
- Consulting with suppliers during the procurement planning stage to understand the range of services and options available in the market and to learn of projects that have already been successfully delivered.
- Issuing a Request for Information (RFI) when little market information exists or when unsure of what exactly is being procured but knowing the business objectives that need to be met.
- Publicizing long-term IT project and expenditure plans and listening to feedback from suppliers on potential constraints.
- Staggering, rather than delaying, work (or phases of a technology project) where IT suppliers may face delivery or capacity constraints. Staggering and/or phasing may remove performance barriers for overloaded suppliers who want to participate. When the actual value of future demand is uncertain, it is often helpful to clarify the nature and amount of that demand with potential suppliers who are already participating in that marketplace.
- Developing solicitations that are designed to result in performance-based contracts where agency/project objectives are met, rather than those where detailed how-to requirements are provided. Solutions-based solicitations and performance-based contracts promote supplier innovation and limit constraints or barriers to suppliers.
- Recruiting DSBSD-certified small businesses, including small businesses owned by women, minorities, and service-disabled veterans (SWaM), and micro businesses, to compete for state contracting opportunities.
- Providing feedback to suppliers on their past performance, including why they were not selected for a particular award and what they need to do to increase their chances of future success. This will help to maintain interest among suppliers for future projects and increase the pool of competitive bidders.
- Asking for objective feedback from suppliers on the state's performance as a client and learning lessons from this feedback.

## 6.4 Aggregating or disaggregating IT procurements

Aggregating or disaggregating IT procurements can provide benefits and maximize competition in a number of different ways. Aggregation of business requirements occurs when multiple public bodies combine their individual requirements to procure common goods and services to achieve increased buying power and value.

Aggregation benefits	Aggregation disadvantages
Enable suppliers to be more efficient.	Increases difficulty for smaller specialist suppliers who only have the required expertise for part of the aggregated contract.



Increase the number of bidders.	Removes the ability of the Commonwealth to benchmark the performance of different suppliers providing similar services.
Attract different types of suppliers.	Creates incumbency advantages.
	Results in an over-dependency on a limited number of suppliers in the longer term.

Disaggregating IT procurements can benefit smaller or specialist suppliers by allowing them to participate in only a portion of the solicitation when they might not otherwise be able to compete. Disaggregation can be used to motivate suppliers into participating in future solicitation opportunities by linking their past or current contractual performance to opportunities for future awards.

## 6.5 When waiver of competition is necessary

Competition may be waived only in certain circumstances and only when deemed to be in the best interest of the Commonwealth as specified below:

- When competition is not practical for an IT purchase. The procurement request, along with the justification, must be signed by the agency head or designee and sent to VITA for review and approval prior to the agency taking any further action.
- When a needed product is only available from one source. For additional information refer to [Chapter 16](#) of this manual, Sole Source Procurement Method.
- When standardization or compatibility is the overriding consideration. Proprietary procurements are those in which there is only one solution available to meet an agency's needs; however, multiple suppliers may be able to provide the IT goods and/or services required for the solution. Competition may or may not be available for proprietary procurements; therefore, the sole source process does not always apply to these procurements.
- When the amount of the purchase is too small (less than \$10,000) to justify the issuance of a solicitation or where a purchase is being made and a satisfactory price is available from an existing contract.
- Competition is waived for purchases less than \$10,000 as they are set aside for small businesses including micro-businesses. In addition, purchases less than \$100,000 are set aside for small businesses including small businesses owned by women, minorities and service-disabled veterans.
- When an emergency procurement is needed to remedy a situation to protect the health, welfare or safety of the Commonwealth's citizens and there is no time for a competitive procurement; although competition should be sought to the maximum degree possible. An emergency is a serious or urgent situation requiring immediate action to protect persons or property. (The potential loss of funds at the end of a fiscal year or grant year is not considered an emergency.) Refer to VITA's IT Emergency Procurement Policy, located on our website at: <https://www.vita.virginia.gov/supply-chain/scm-policies-forms/scm-policies/>.
- When purchases from joint and cooperative contracts available through the federal government; other states, their agencies; and public bodies are available and such purchase has been pre-approved by the Commonwealth's CIO. Refer to VITA's [IT Procurement: Joint and Cooperative Procurement Policy](#), located on our website at: <https://www.vita.virginia.gov/supply-chain/scm-policies-forms/scm-policies/>.

- When purchases are under \$50,000 and for **used** materials and equipment, if the purchase is pre-approved by the Commonwealth's CIO.
- When procurements are made from competitively procured VITA statewide IT contracts. These contracts have been through the competitive procurement process. Purchases from these contracts are allowed in any amount without further competition being required.

## 6.6 Specific non-competitive actions prohibited by the *Code of Virginia*

[§ 2.2-4310](#) of the *Code of Virginia* specifically prohibits discrimination against any bidder or offeror because of race, religion, color, sex, national origin, age, disability or other basis and encourages the inclusion of DSBSD certified small, women-owned, minority-owned, service-disabled veteran-owned businesses, or micro businesses in the Commonwealth's procurement opportunities. To the extent allowed by law, this public body does not discriminate against faith-based organizations in accordance with the *Code of Virginia*, [§ 2.2-4343.1](#) or against a bidder or offeror because of race, religion, color, sex, national origin, age, disability, sexual orientation, gender identity or expression, political affiliation, or status as a service disabled veteran or any other basis prohibited by state law relating to discrimination in employment. These prohibitions against discriminatory procurement practices and barriers to procurement participation are designed to encourage all suppliers interested in doing business with the Commonwealth to do so freely.

## 6.7 Small Business Enhancement Program

[§ 2.2-4310](#) of the *Code of Virginia* provides that any enhancement or remedial measure authorized by the Governor for state public bodies may allow for small businesses certified by DSBSD or a subcategory of small businesses established as a part of the enhancement program to have a price preference over noncertified businesses competing for the same contract award, provided that the certified small business or the business in such subcategory of small businesses does not exceed the low bid by more than five percent.

### Chapter highlights

- **Purpose:** This chapter provides the policies and guidelines that the Commonwealth's executive branch agencies and institutions shall follow to promote the Commonwealth's socio-economic goals while procuring information technology (IT).
- **Key points:**
  - [Executive Order 35 \(2019\)](#) establishes a goal that the Commonwealth should exceed its target goal of 42% of its purchases from small businesses including small businesses owned by women, minorities, service-disabled veterans and micro-businesses.
  - Any executive branch agency's goals under § [2.2-4310](#) of the *Code of Virginia* for participation by small businesses shall include within the goals a minimum of 3% participation by service disabled veteran businesses as defined in §§ [2.2-2001](#) and [2.2-4310](#) when contracting for goods and services.
  - VITA has developed procurement policies and guidelines designed to encourage eligible contract users and state agencies to procure IT products and services which help to minimize the environmental impact from the use and disposal of those products.

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## 7.0 Introduction

The Commonwealth's procurement professionals have leveraged the tremendous purchasing power of the state to demand lower prices and better quality products and services. Meanwhile, the Commonwealth is also increasing its demand for cleaner or "greener" products, for products made locally and for products manufactured or sold by small businesses. Using the considerable procurement leverage of the Commonwealth, VITA is committed to achieving the following socio-economic goals, as appropriate to the procurement:

- Encouraging the participation of a more diverse supplier base of small businesses, including small businesses owned by women, minorities, and service-disabled veterans in IT procurement transactions, as well as micro-businesses.
- Promoting the procurement of energy-saving and environmentally-friendly information technology (IT) products.
- Substantially increasing the procurement of recycled content/products,

## 7.1 Small businesses, including small businesses owned by women, minorities and service disabled veterans and micro-businesses

### 7.1.1 Overview

VITA is dedicated to dramatically increasing IT value to the Commonwealth by providing world-class IT goods and services at competitive prices and rates. In conjunction, VITA is committed to increasing procurement opportunities for small businesses, including small businesses owned by women-, minority- and service disabled veteran-owned businesses and micro-businesses. These small businesses can often provide innovative IT goods and services not readily available through larger corporations while fostering opportunities for small business growth. In line with these efforts, VITA is committed to enabling a minimum of three percent (3%) participation by service-disabled veteran businesses as defined in §§ [2.2-2000.1](#) and [2.2-4310](#) of the *Code of Virginia* when contracting for goods and services by VITA and by executive branch agencies. For more details on VITA's efforts to encourage small business participation, refer to Appendix A. Also, Refer to Virginia Public Procurement Act (VPPA) § [2.2-4310\(E\)](#) for definitions of small, small women-, minority- and service disabled veteran-owned businesses. Micro-businesses are defined in [Executive Order 35 \(2019\)](#) as "certified small businesses that have no more than 25 employees and no more than \$3 million in average revenue over the three-year period prior to their certification.

### 7.1.2 Required agency small business plans

Each executive branch agency and institution of the Commonwealth shall prepare and adopt an annual race- and gender-neutral small business plan that specifies its small business goals for procurement in accordance with [Executive Order 35 \(2019\)](#).

Each agency is responsible for submitting an annual Small, Woman-Owned and Minority- Owned (SWaM) business plan to the Department of Small Business and Supplier Diversity (DSBSD) and the agency's appropriate cabinet secretary by September 1 of each year. Each plan shall include the annual designation of a SWaM Champion to ensure nondiscrimination in the solicitation and awarding of contracts.

Agencies which have been delegated procurement authority by VITA to conduct IT procurements shall establish internal procedures consistent with the provisions of the VPPA, [Executive Order 35 \(2019\)](#) and this manual to facilitate the participation of small businesses, including those small businesses owned by women, minorities, service-disabled veterans and micro-businesses, in IT procurement transactions. All IT procurement procedures shall be in writing, comply with the provisions of any enhancement or remedial measures authorized by the Governor pursuant to § [2.2-4310\(C\)](#) of the *Code of Virginia*, and shall include specific plans to achieve any goals established therein (Code of Virginia, § [2.2-4310\(B\)](#)).

To the extent allowed by law, this public body does not discriminate against faith-based organizations in accordance with, § [2.2-4343.1](#) of the *Code of Virginia* or against a bidder or offeror because of race, religion, color, sex, national origin, age, disability, sexual orientation, gender identity or expression, political affiliation, or status as a service disabled veteran or any other basis prohibited by state law relating to discrimination in employment. Please see § [2.2-4310](#) of the *Code of Virginia*.

### 7.1.3 Removal of barriers

VITA will review all VITA-issued IT solicitations prior to posting in [eVA](#) to identify and remove, when possible, any potential barriers or limitations to participation by small businesses, including those small businesses owned by women, minorities and service- disabled veterans and micro-businesses. In addition, VITA's annual SWaM plan will address VITA's ongoing attempts to ensure that all barriers or limitations to the participation of small businesses in IT procurement opportunities have been removed. VITA's SWaM Champion works closely with VITA's procurement personnel and DSBSD to ensure nondiscrimination in sourcing, solicitations and awarding of contracts. Agencies operating under delegated authority should also review their solicitations to ensure removal of any possible barriers or limitations to small business participation.

### 7.1.4 Ordering against optional use and mandatory use statewide contracts

Set asides for small businesses (including set asides for micro-businesses) do not apply when ordering from a previously competitively procured mandatory use or optional use statewide IT contract established by VITA.

### 7.1.5 Set-asides for small businesses

The goal of the Commonwealth is that 42 percent or more of its discretionary spend be made from small businesses. Small businesses include, but are not limited to, DSBSD- certified micro-businesses, and women-minority- and service-disabled veteran-owned small businesses.

- IT solicitations from \$0 to \$10,000 are set aside for micro-businesses: All solicitations up to \$10,000 shall be set aside for DSBSD certified micro-businesses when the price quoted is fair and reasonable and does not exceed five percent (5%) of the lowest responsive and responsible noncertified bidder. These set asides would require soliciting a minimum of one (1) DSBSD-certified micro-business, if available for all procurements up to \$10,000.
- IT solicitations up between \$10,000 and \$100,000 are set aside for small businesses: If available, four (4) qualified DSBSD-certified small business sources should be solicited for all IT procurements between \$10,000 and \$100,000. If two or more DSBSD-certified small businesses cannot be identified as qualified to set aside the procurement under \$100,000, the procurement file shall be documented with VITA's efforts through [eVA](#) to obtain the number of required sources. An award may then be made to a qualified, reasonably ranked small, minority or women- owned offeror, if available, that is other than the highest ranking offeror if the price submitted is fair and reasonable and does not exceed five percent (5%) of the lowest responsive and responsible noncertified bidder. If an informal RFP is utilized in lieu of Quick Quote the award shall be made to the highest ranking and qualified small, woman-or minority- owned offeror. If the procurement is set aside and the agency or institution receives no acceptable bids or offers, the set aside may be withdrawn and the procurement resolicited utilizing non- set-aside procedures.
- IT solicitations over \$100,000: VITA delegates all IT procurements back to agencies subject to VITA's procurement authority up to \$250,000. Except for Cloud Services,

Agencies that are not in scope to VITA services have \$250,000 delegated authority for IT. All IT procurements between \$200,000 (VITA's small purchase limit) and \$250,000 (VITA's delegated authority amount) must be procured competitively utilizing competitive sealed bidding or competitive negotiation.

### 7.1.6 Award to other than the lowest price bidder or highest ranking offer or over \$100,000

Contracts over \$100,000 may be awarded to a reasonably priced or reasonably ranked DSBSD-certified and qualified small business bidder or offeror that is other than the lowest price bidder or highest ranking offeror. All potential awards to other than the lowest price bidder or highest ranking offeror must be approved in writing by VITA's Supply Chain Management Director or his designee before issuance of such award. In those instances, where an award is made to other than the lowest price bidder or highest ranked offeror, the award shall be made to the DSBSD-certified small business that is the lowest priced responsive and responsible bidder, or the highest ranking offeror.

### 7.1.7 Small business enhancement program

§ [2.2-4310\(C\)](#) of the *Code of Virginia* provides that any enhancement or remedial measure authorized by the Governor for state public bodies may allow for small businesses certified by DSBSD or a subcategory of small businesses established as a part of the enhancement program to have a price preference over noncertified businesses competing for the same contract award, provided that the certified small business

or the business in such subcategory of small businesses does not exceed the low bid by more than five percent.

#### **7.1.8 Solicitation sizing to encourage small business participation**

Agencies shall work to identify solicitations that may involve bundling and analyze those procurements to gauge their impact on small business suppliers. Agencies and institutions should work to facilitate participation by small businesses, including women-service disabled veteran- and minority-owned small businesses, as well as micro-businesses, through appropriate contract sizing including the use of small business partnering opportunities and the use of small businesses as subcontractors. When appropriate, agencies and institutions may divide potential IT acquisitions into reasonably small lots or packages to permit offers on quantities or services less than the total requirement or project so that more than one small business may provide the needed IT goods or services.

Delivery schedules should be realistic to encourage small business participation, and solicitations should be worded to encourage prime contractors, when appropriate, to subcontract with small businesses.

Additionally, a public body may include a proposer's employment of persons with a disability as a factor in evaluating the submitted proposal. See [Chapter 24](#) for further guidance on evaluating proposals.

#### **7.1.9 Consultation with the Department of Small Business and Supplier Diversity (DSBSD)**

Each contracting agency, in consultation with DSBSD and VITA where practical, shall seek to identify those purchases in which contract sizing may influence the availability of purchasing opportunities to micro-businesses or small business suppliers (a "size- related contract").

Where these purchases are identified, the agency shall determine whether there are a number of small businesses capable of meeting the purchasing requirements. If the agency identifies no DSBSD-certified small businesses capable of performing the contract requirements, then the agency shall consult with DSBSD to help identify available suppliers unless contract timing issues require the agency or institution to complete the contract process before DSBSD input can be obtained. For any size- related contract for which the agency determines that contract timing issues require contract award without identifying any small business suppliers or consultation with DSBSD, the agency may consult with DSBSD promptly after award of the contract to develop potential small business suppliers for the next similar procurement. Agencies shall work together with DSBSD and the Department of Business Assistance (DBA) to seek to increase the number of DSBSD- certified IT small businesses, including small businesses owned by women, minorities, service-disabled veterans and micro-businesses that are available to do business with the Commonwealth.

VITA and other executive branch agencies shall strive to develop procurements and collaborate with DSBSD to locate available small businesses owned service-disabled veteran businesses to encourage their participation. Chapter 680 enacted by the 2018 General Assembly directs "Any executive branch agency's goals under § [2.2-4310](#) of the *Code of Virginia* for participation by small businesses shall include within the goals a minimum of 3% participation by service disabled veteran businesses as defined in § [2.2-2000.1](#) when contracting for goods and services."



### 7.1.10 Establishing mandatory use statewide contracts

In the event VITA awards a statewide contract for IT goods or services to a qualified DSBSD-certified small business, VITA may, at its discretion, make the use of such contract mandatory for agencies and institutions of higher education, except those explicitly exempted by the *Code of Virginia*. Mandatory contracts are designated as such in the actual contract document, which may be accessed for viewing on VITA's Web site at: <https://vita.cobblestonesystems.com/public/>

### 7.1.11 Prime contractor requirements

VITA solicitations for contracts, regardless of amount I require that the following be included as a contractual requirement of the prime contractor who receives the contract award:

- **Monthly Report of Sales and Supplier Procurement and Subcontracting Report:** Prime contractors shall submit to VITA: (1) a monthly report of all sales for which the prime contractor has received full and complete payment for under each contract; and (2) a report of monthly subcontracting spend for all subcontractors who provide direct performance for the prime contractor under each contract. The prime contractor will submit these reports using the instructions and further detailed requirements and methods found on the Supplier & Vendor Reporting Requirements webpage at this URL: <https://www.vita.virginia.gov/supply-chain/supplier-reporting/>.
- **Supplier Procurement and Subcontracting Plan:** Prime contractors shall include a Supplier Procurement and Subcontracting Plan in all proposals. The inclusion of the Supplier Procurement and Subcontracting Plan may be considered when evaluating each bid or offer. The subsequent monthly reports shall reflect compliance with the Supplier Procurement and Subcontracting Plan, subject only to shortfalls and to shortfalls arising from subcontractor default. When such business has been subcontracted to these firms, the contractor agrees to furnish the agency the following information: name of firm, phone number, overall commitment percentage, category type (small; small and women-owned; or small and minority- owned, small business owned by a service- disabled veteran, micro-business, etc.), and type of product/service provided, each month. Final payment under the contract in question may be withheld or the contract may not be renewed, if applicable, until such certification and/or required reporting is delivered and, if necessary, confirmed by the agency or institution, or other appropriate remedies may be assessed in lieu of withholding such payment.

## 7.2 Green procurement

### 7.2.1 Overview

VITA and the Commonwealth are committed to encouraging the procurement of IT goods and services which use fewer resources, including energy, in order to decrease pollution and energy costs. Such IT goods must also meet all price and performance requirements of the Commonwealth. VITA has developed procurement guidelines designed to encourage state agencies and institutions to procure IT products and services which help to minimize the environmental impact from the use and disposal of those products. Computers and other IT products are an important focus of environmentally-friendly purchasing activities



due to their high prominence in the waste stream, their numerous hazardous chemical components and their significant energy use. More details about VITA's green procurement objectives are listed in Appendix B. The overall energy costs, as well as the environmentally friendly disposal costs, for IT equipment may be considered in overall lifecycle costs.

### 7.2.2 Petitioning for less toxic goods or products

Any supplier, who manufactures, sells or supplies IT goods or services may petition VITA to include requirements for less toxic goods and services into its procurement process. The supplier shall submit, prior to or during the procurement process, documentation which establishes that the IT goods or services being offered meet the applicable performance standards. If VITA determines that the documentation establishes that the less toxic products meet or exceed the performance standards set forth in the applicable specifications, VITA shall incorporate the specifications for the less toxic goods and products into its procurement process. Agencies procuring IT goods and services under their delegated procurement authority are instructed to revise their procedures and specifications on a continuing basis to encourage the use of less toxic goods and products; however, agencies are not required to purchase, test or evaluate any particular good or product other than those that would be purchased under regular purchasing procedures. (*Code of Virginia*, § [2.2-4314](#)).

### 7.2.3 Procurement of recycled goods and products

VITA and the Commonwealth are committed to the reduction of energy use and waste products through the use of recycled materials. Agencies are encouraged to promote the procurement and use of recycled goods. Through its programs the Department of Environmental Quality will assist agencies in increasing agency awareness of the benefits of using such products. Agencies shall, to the greatest extent possible, adhere to any recycled products procurement guidelines established by VITA (*Code of Virginia*, § [2.2-4323\(C\)](#)).

### 7.2.4 Agency guidelines

VITA has developed the following guidelines to assist IT procurement professionals in identifying IT suppliers and IT goods and services which have demonstrated product improvement on key environmental attributes and initiatives. Nothing in these guidelines shall be construed as requiring the Commonwealth, VITA or any executive branch agency or institution or supplier to procure IT products or services that do not perform adequately for their intended use or are not available at a reasonable, competitive price in a reasonable period of time:

Attribute	Guideline
Manufacturer "take back" of equipment	This can be accomplished through a lease or a contractual provision whereby the seller agrees to be responsible for taking back the products and providing for appropriate re-use or recycling when the buyer no longer needs the product. However, it is mandatory that any such returned equipment have all Commonwealth data removed in compliance with VITA's data removal standards at this location: <a href="https://www.vita.virginia.gov/it-governance/itrm-policies-standards/">https://www.vita.virginia.gov/it-governance/itrm-policies-standards/</a> .

Reduction of toxic components	IT good manufacturers must demonstrate they are complying with the European Union's Directive – Restriction of Hazardous Substances – which requires the phase out of lead, mercury, hexavalent chromium, cadmium and certain brominated flame retardants (PBBs and PBDEs).
Attribute	Guideline
Increased recycled content	Purchasing consideration should be given to IT products that use recycled content and products that can easily be recycled.
Reduced packaging	IT suppliers should be encouraged to use reduced and/or recycled packaging for shipping, to minimize quantity and weight of non-recyclable packaging and to produce user manuals that are easily recyclable.
Shelf life and supportability	IT goods should be evaluated on upgradeability and longevity to avoid short replacement cycles and reduce waste.
Energy efficiency	IT suppliers should be encouraged to produce equipment that meets Energy Star specifications including: <ul style="list-style-type: none"> <li>• Offer equipment which meets the current U.S. Environmental Protection Agency's and Department of Energy's Energy Star guidelines.</li> <li>• Equipment shall be configured so it automatically enters a low- power mode after a period of inactivity. When equipment in a low- power mode is used again, it automatically returns to active mode.</li> <li>• Computers shall be shipped with power management feature enabled.</li> <li>• Provide integrated computer systems, where the CPU and monitor will together enter a low-power mode of no more than 45 watts after a specified period of inactivity.</li> <li>• Deliver all products configured for automatic energy-saving features per current Energy Star specifications.</li> </ul>
Clean manufacturing practices	Identify and encourage IT suppliers who minimize the use of toxic and hazardous components in their manufacturing and production processes.
Design for reuse and recycling	Identify and reward suppliers of IT products that use recycled content and produce goods that can easily be recycled.

### 7.3 Preferences

In order to protect the viability of Virginia's businesses, promote recycling and other important social or economic initiatives or goals, the Virginia General Assembly has enacted statutory preferences for Virginia products with recycled content, for Virginia firms in the case of a tie bid with a non-state firm, for recycled paper and paper products used by state agencies and for local products and firms. There are other statutory preferences outlined in the *Code of Virginia*; however, they are not directly related to the procurement of IT goods and services. These preferences are to be used by agencies and institutions in solicitations and

contract awards, when appropriate. § [2.2-4324\(A\)](#) of the *Code of Virginia* provides that in the case of a tie bid between a Virginia supplier and a non-Virginia supplier, preference shall be given to goods or services provided by Virginia persons, firms or corporations. Whenever the lowest bidder is a resident of another state which allows a percentage preference for its state suppliers, a like preference will be allowed to the lowest Virginia- based bidder. If the lowest bidder is a non-Virginia resident and its state allows a price- matching preference, a like preference shall be allowed to Virginia bidders. If the lowest Virginia bidder is unable to match the price, the preference shall be given to other Virginia bidders in ascending price order. If the lowest bidder is based in a state with an absolute preference, that bid will not be allowed. DGS is charged with maintaining a list of states with absolute and percentage preferences. This list is available at the following eVA link: <https://eva.virginia.gov/>.

#### **7.4 Executive Order 47 – Expanding Opportunities for Virginians with Disabilities**

Executive Order 47 reaffirms and expands upon the Commonwealth’s commitment to the increased inclusion of, and expansion of opportunities for, individuals with disabilities. This includes ensuring that the Commonwealth’s websites are readily accessible to individuals with disabilities.

VITA supports the effort set forth in Executive Order 47, and continues to work with other state agencies to improve the accessibility of the Commonwealth’s websites for Virginians with disabilities. VITA encourages Suppliers to support the advancement of opportunities for disabled Virginians by expanding and improving upon accessibility of the Commonwealth websites.

## **Appendix A**

### **VITA's Ongoing Small Business Initiatives**

VITA will work with the Commonwealth's DSBSD certified small businesses, including those owned by women, minorities, and service-disabled veterans and micro-businesses to increase their participation in IT solicitations and to increase the number of IT contracts awarded to these suppliers. VITA's procurement guidelines provide for increasing SWaM participation on VITA's small procurements by implementing a set aside program for micro-businesses and small businesses. VITA will promote greater representation of small businesses on all IT contracts through actively recruiting SWaM, small businesses, including those owned by women, minorities, and service-disabled veterans and micro-businesses to bid on statewide cooperative procurement agreements and/or all contracts. As required by the Code of Virginia, VITA will post solicitations on [eVA](#) to enable small businesses to prepare potential bids or proposals.

- I. **Initiatives.** VITA will support and encourage the participation of small businesses, including those owned by women, minorities, and service-disabled veterans and micro-businesses through utilization of the following initiatives:
  - A. Identification and outreach to potential small IT businesses, including those owned by women, minorities, and service-disabled veterans and micro-businesses. VITA will assist these businesses with DSBSD certification, [eVA](#) registration and provide education on VITA's procurement procedures.
  - B. All VITA solicitations will promote the use of partnerships with small businesses, including those owned by women, minorities, and service-disabled veterans and micro-businesses and the use of SWaM subcontractors in providing IT goods and services to the Commonwealth.
  - C. VITA will provide procurement outreach and educational opportunities for Swam businesses. Such opportunities will include, but not be limited to the following:
    - 1. Coordinate with DSBSD and the Department of General Services (DGS) for SWaM-related seminars and/or fairs for consistent, statewide communications;
    - 2. Host and participate in IT related procurement fairs and educational opportunities;
    - 3. Meet with SWaM-supplier organizations for input and perspective;
    - 4. Participate in a SWaM procurement advisory committee comprised of IT SWaM businesses to assist VITA in enhancing opportunities for IT SWaM businesses as needed;
    - 5. Engage and educate internal sourcing consultants and purchasing specialists regarding SWaM policies and practices;
    - 6. Update and maintain externally accessible web site forSWAMs;
    - 7. Maintain a SWaM email address and other communications channels (i.e. mail and phone) for direct, SWaM-related purchasing and contracting inquiries to VITA;

8. Identify and publicize VITA's future contracting needs and procurement planning to assist small businesses, including those owned by women, minorities, and service-disabled veterans and micro-businesses suppliers in preparing to participate in upcoming VITA procurements;
9. Develop appropriate contract terms related to use of SWaM and Swam subcontract spend reporting.

VITA's procurement professionals play an integral role in improving the participation of these businesses in the Commonwealth's IT procurement processes. In order to facilitate an increase in access and participation by this business community in VITA's procurements, VITA will post subcontract opportunities and provide directions on how such businesses can qualify or compete for them. VITA will assist these suppliers in identifying the business opportunity, any qualification or prequalification requirements for subcontractors and where to obtain technical data needed to successfully respond to the subcontract opportunity.

VITA will work with the Commonwealth's small IT businesses to increase participation in solicitations and to increase the number of contracts awarded. VITA's procurement guidelines will provide for increasing small business participation on VITA's small procurements (up to \$100,000) through a set-aside program for small businesses and for the implementation of other small business enhancement tools. VITA will promote greater representation of small businesses on all IT contracts through actively recruiting small businesses, including those owned by women, minorities, and service-disabled veterans and micro-businesses to bid on all statewide joint and cooperative procurements. In compliance with § 2.2-4302.2 of the *Code of Virginia*, VITA will post upcoming solicitations on the eVA "[Future Procurements](#)" page to enable small businesses to prepare potential bids or proposals.

A supplier which is a small business but which is not yet certified with DSBSD must receive certification prior to award: <http://www.sbsd.virginia.gov/>. DSBSD-certified businesses that are women-, minority- and service disabled veteran-owned businesses and micro-businesses shall also be considered small businesses when they have received DSBSD small business certification.

## **Appendix B**

### **VITA's Green Procurement Objectives**

In order to support and increase environmentally friendly or "green procurement" for the purchase of IT goods and services across the Commonwealth, VITA and its Supply Chain Management Division (SCM) are committed to achieving the following objectives:

- Educate all VITA procurement staff on the requirements of federal "green" procurement programs.
- Create and publicize opportunities to purchase environmentally-friendly, energy-saving or "green" IT products and services for the Commonwealth.
- Increase purchases of "green" IT products and services consistent with VITA's mission.
- Reduce the amount of solid waste generated from VITA-procured IT products. VITA and its customer agencies will review how IT supplies, materials, and equipment are manufactured, purchased, packaged, delivered, used and disposed in order to reduce the amount of solid waste produced.
- Encourage VITA's IT suppliers to offer high quality, environmentally sound and environmentally preferable IT products and services to the Commonwealth at competitive prices.
- Encourage VITA's IT service providers to consider environmental impacts of service delivery.
- Encourage recycling, market development and use of recycled/recyclable materials through contractual relationships and purchasing practices with the Commonwealth's IT suppliers, contractors, businesses and other governmental agencies.
- Encourage the procurement of IT goods and services which reduce the consumption of energy and natural resources.
- Expand markets for environmentally-friendly and energy-saving IT products and services within the Commonwealth.
- Develop specifications and requirements aimed at eliminating barriers to the procurement of recycled-content IT products.
- Develop and maintain market information about environmentally sound and preferable IT products and recycled IT products which are available to be purchased by VITA, executive branch agencies whenever possible.
- Serve as a model for the Commonwealth to influence IT waste prevention, recycling and energy-saving procurement efforts.

## **Appendix C**

### **Supplier Procurement and Subcontracting Plan**

This form is available under the Policy, "IT Procurement Policy for Enhancing Opportunities for Small, Women- and Minority-Owned Businesses" on VITA SCM's website at the following URL:

<https://www.vita.virginia.gov/supply-chain/scm-policies-forms/scm-policies/>

## **Appendix D**

### **Expanding Opportunities for Individuals with Disabilities**

The link to Executive Order 47 can be found using the link below: <https://www.governor.virginia.gov/executive-actions/>



### Chapter highlights

- **Purpose:** This chapter sets forth VITA's policies and guidance on preparing effective specifications and requirements for the procurement of information technology (IT) goods and services.
- **Key points:**
  - By their nature, specifications set limits and thereby eliminate or restrict items that are outside the boundaries drawn. Technology specifications should be written to encourage, not discourage, competition consistent with seeking overall economy for the purpose and technology solution intended.
  - Specifications constitute the heart of a contract document that will govern the supplier of required goods or services in the performance of the contract as well as the basis for judging compliance.
  - Fixing a requirement error after delivery can cost up to 100 times the cost of fixing the implementation error.
  - The procurement requirements are the foundation for the solicitation's and contract's scope and statement of work.

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## 8.0 Introduction

The technology procurement process includes all activities from planning, preparation of requirements and processing of a requisition, solicitation, evaluation, award and contract formation, to receipt and acceptance of delivery, payment, inventory tracking and goods and services disposition. Regardless of whether the technology product or service required is processed by the agency under its delegated authority, purchased off a statewide contract or sent to VITA for procurement, the workflow is essentially the same.

Two preliminary and critical steps that need to be completed when preparing for any technology acquisition:

- Identify the technology business need and the type of technology product or service that will best fulfill the technology need. Identify a technology solution, not a specific product, which would meet that technology need. Keeping in mind cost containment, what is the product or service that best fulfills the job requirements? This may require that the agency purchasing personnel or VITA personnel meet with end user(s) to identify needs, craft requirements and propose technology solutions.
- Develop requirements and/or specifications that reflect the business objectives and describe the characteristics of the technology product, service or solution being sought. Consideration should be given to suitability and to overall cost effectiveness in addition to acceptability and initial price. Technology specifications should be written to encourage, not discourage, competition consistent with seeking overall economy for the purpose and technology solution intended. The goal is to invite maximum reasonable competition while procuring the best technology solution for the Commonwealth.

## 8.1 Information technology specifications

An information technology (IT) specification is a description of a technology product or service a customer seeks to procure and is also a description of what a supplier must be prepared to offer to be considered for an award. Specifications describe the technical requirements for a material, product, or service and include the criteria for determining whether these requirements are met. A specification may describe the performance parameters which a supplier has to meet, or it may provide a complete design disclosure of the work or job to be done.

Specifications provide the basis for judging whether or not the supplier has met the requirements in the solicitation. The nature of the technology good or service being procured will determine whether specifications will be long or short and what descriptive format should be used. Most specifications contain a description of the requirements and quality assurance provisions and will thoroughly define the minimum requirements of the needed technology.

Specifications are the only way to obtain the IT goods or services required. Specifications constitute the heart of a contract document that will govern the supplier of required goods or services in the performance of the contract as become the basis for judging compliance. Good specifications promote full and unrestricted competition through setting forth actual, minimum requirements as opposed to desires. Specifications should also contain quality assurance provisions which provide a means of determining that the supplier has met the

contractual requirements. Specifications should be clear and precise. If requirements are ambiguous or leave room for interpretation, suppliers are entitled to make interpretations that work to their own advantage. A good specification should:

- Be based on the business need.
- Emphasize performance rather than design.
- Not require features not needed for the product or solution's intended use.
- Identify the essential characteristics of the desired product or solution.
- Not be written by a bidder/offeror or prepared with the assistance of a potential bidder/offeror.
- Leverage commercial, off-the-shelf products.
- Avoid requirements that favor a particular vendor.
- Allow for competition to the maximum extent possible.
- Be quantifiable rather than qualitative.
- Be verifiable.
- Not overstate quality, but plainly define performance expectations and needs for the intended business purpose.
- Avoid the use of words such as "must" or "shall" as these restrict competition and often rule out a supplier with a new and innovative solution.

Specifications must always be clear and understandable. They must permit competition between products of equal quality. Specifications may include a statement regarding the qualitative nature of the purchase and should identify minimum essential characteristics and standards to which the purchase must conform if it is to satisfy its intended use.

Performance requirements or specifications should be identified. Specifications control:

- The performance level of the product,
- The amount of competition,
- The suitability of the product, solution or service for the job to be done,
- The method of evaluation used in making an award and in determining the best value bid for the purchase.

## **8.2 Characteristics of effective IT specifications**

Effective IT specifications will be written with certain characteristics that include:

- Simple: Avoid unnecessary detail, but be complete enough to ensure that requirements will satisfy their intended purpose.
- Clear: Use terminology that is understandable to the agency and suppliers. Avoid legalese type language and jargon whenever possible. Include definitions of terms where needed to mitigate conflicting interpretations and to align with Commonwealth and/or agency-specific technology terms and definitions.
- Informative: Describe the agency's desired state for the IT solution, to include usage and audience and any technical/functional needs/restrictions, workflows or data flows, interface with other applications/systems and architecture for legacy systems, platforms, operating systems that must align with Commonwealth or the agency's overall IT strategy.

- **Accurate:** Use units of measure or performance compatible with industry standards. All quantities and packing, delivery and acceptance requirements should be clearly identified. Include all required state, federal and/or national technical, professional, industry standards, specifications and certifications, as needed.
- **Flexible:** Avoid inflexible specifications which prevent the acceptance of a proposal that could offer greater performance for fewer dollars. Use approximate values such as dimensions, weight, speed, etc. (whenever possible) if they will satisfy the intended purpose. If approximate dimensions are used, it should be within a 10% rule of thumb unless otherwise stated in the solicitation document.

In order to promote fair and open competition among all suppliers and to motivate offerors to prepare creative and innovative proposals, specifications should be written as generically as possible. IT business owners and agencies should avoid writing restrictive requirements/specifications by:

- Including only essential requirements of the IT product, service or solution needed.
- Avoiding restrictive or impractical requirements such as those that are nonessential or obsolete.
- Carefully check product delivery or project schedule requirements to ensure the turnaround time from supplier's receipt of order to completion is not too restrictive or limiting.
- Defining requirements to promote and encourage suppliers to propose standard, commercially available products, solutions or services where possible.
- Not specifying a particular brand name, product or feature that is peculiar to one manufacturer, except for reference purposes.
- Not dictating detailed design solutions prematurely.
- Allowing sufficient time for suppliers to review the technology need, consider the requirements, and prepare and submit a proposal.

One of the first considerations in preparing specifications should be determining what type of specifications will best describe the technology needed. There are certain types of specifications: standard, design, performance, or brand.

### **8.3 Standard specifications**

Standard specifications are those that are used for most purchases. In order to develop standard specifications, an agency may examine the characteristics and needs for products, solutions or services of similar end usage and develop a single specification that will satisfy the need for most purchases. Standard specifications are created for the express purpose of establishing performance and quality levels. Standard specifications may be particularly useful for commonly used items. Standard specifications may also reduce the variety of items being purchased, thus facilitating the consolidation of requirements into larger volume bids. Standard specifications eliminate duplicative specification writing.

### **8.4 Design specifications**

Design specifications set the requirements for the product or solution being purchased by detailing the desired characteristics. To fully describe the agency's need, design specifications may be very lengthy. However, great care must be taken to ensure that design specifications are not written so tightly that they unfairly preclude other suppliers from offering their supplies or services.

Design specifications set forth the physical characteristics of the item to be procured in definitive terms. Design specifications may also include the dimensions, tolerances and specific manufacturing processes. Drawings or other detailed instructions should describe the product when utilizing design specifications. Design specifications are not conducive to procuring commercial off-the-shelf products and the specifications are not tailored to the commercial market place. Design specifications, may, as a result of being over-specific, unnecessarily limit the competition for a particular product, solution or service.

## **8.5 Performance specifications**

Performance specifications (or functional specifications) are more widely used and more flexible than design or standard specifications. Performance specifications describe the needed or desired capabilities of the product, solution, services and/or supplier, or performance requirements for deliverables. Performance specifications provide a description and purpose of the IT product or service needed but only include minimal functional specifications, usually including only those functions which correlate specifically with identified agency or Commonwealth business needs. Performance specifications should be compatible with existing equipment and should contain a description of the existing equipment along with any upgrade requirements or future needs.

Performance specifications identify the requirements of the IT product or solution needed in terms of capacity, function and operation. These specifications should state what the needed product or solution is to do without setting out specific technical detail. Performance specifications can include requirements for output, capacity, dimensional limitations, maneuverability, degree of tolerance or accuracy and other needs. Usually, performance specifications do not describe the best available item on the market but describe exactly what the agency needs to meet its business objectives. If the performance specifications are restrictive, the solicitation should be specific as to why the restrictive requirements are necessary for the particular business need. If maintenance is a requirement, the specifications should include what maintenance arrangement would be most acceptable to the agency for the items being purchased.

Performance specifications throw the responsibility for a satisfactory IT product, solution or service back to the supplier. Because performance specifications are results- and use- oriented, the supplier is left with the decision of which product, solution and/or service would be most suitable for the agency's needs.

## **8.6 Brand name specifications**

Brand name specifications are the most restrictive type of specification. Brand specifications should only be used when there is only one brand, which for reasons of expertise and/or standardization, quality, compatibility with existing equipment, specifications or availability is the only brand acceptable to meet a specific need. When it is determined to be impractical to develop a generic specification, a brand name may be referenced to convey the general style, type, character and quality of the article desired. Unless otherwise provided in the solicitation the name of a certain brand, make or manufacturer does not restrict potential suppliers to the specific brand or manufacturer named. In addition, a brand specification (or sole acceptable brand) may be available from more than one source and should be competed. Any agency which is brand-specific in its IT needs should be mindful that any rejection of similar, but not brand-specific, products should be based solely on an equitable evaluation of comparable products and their failure to meet a specific stated need. Brand specifications may be used to establish a standard of quality except when buying personal computers. If a brand specification is used, it should include the common generic identification of the IT product, the make, the model or catalog number and the name and address of the manufacturer as well as an itemization of the

salient characteristics, performance or other criteria that are required of the brand name IT product. A brand specification should only be used to purchase a standard IT product for which a complete definition is impractical. Use of a brand name specification can promote competition if there are enough "equals" to the brand in the marketplace. Brand name or equivalent specifications shall seek to designate three, or as many different brands as are practicable, as "or equivalent" references and shall further state that substantially equivalent products to those designated may be considered for award.

A brand name proprietary specification restricts the acceptable IT products to those of one or more specified manufacturers. It is appropriate to use a proprietary specification when the desired product must be compatible with or is an integral component of existing equipment or products, or where prequalification of products is necessary to support specific needs of a program; is covered by a patent or copyright; must yield absolute continuity of results; or is one with which an agency has had extensive training and experience, and the use of any other similar piece of equipment would require considerable reorientation and training. Every effort should be made in the solicitation process to obtain full competition among value-added resellers (VARs) or distributors which carry the manufacturer's IT product.

A written determination for the use of a proprietary specification must be made in advance of the procurement and be included in the procurement file.

#### **8.6.1 When to use brand name or equivalent specifications**

Brand name or equivalent specifications may be used when the IT purchasing professional or business owner determines that:

- No other design, performance, or qualified product list is available;
- Time does not permit the preparation of another form of purchase description, not including a brand name specification;
- The nature of the product or the nature of the requirements makes use of a brand name or equivalent specification suitable for the procurement; or
- Use of a brand name or equivalent specification is in the Commonwealth's best interest.

#### **8.6.2 Required characteristics of brand name specifications**

Unless the IT purchasing professional or technology business owner determines that the essential characteristics of the brand name included in the specifications are commonly known in the industry or trade, the brand name or equivalent specifications shall include a description of the particular design, functional, or performance characteristics required.

#### **8.6.3 Nonrestrictive use of brand name or equivalent specifications**

Where a brand name or equivalent specification is used in a solicitation, the solicitation shall contain explanatory language that the use of a brand name is for the purpose of describing the standard of quality, performance, and characteristics desired and is not intended to limit or restrict competition.

#### 8.6.4 Determination of equivalents

Any prospective supplier may apply in writing for a pre-bid/proposal determination of brand name equivalence by the agency purchasing professional who is assigned to the procurement. If sufficient information is provided by the prospective suppliers, the agency purchasing professional may determine, in writing and prior to the bid or proposal opening time, that the proposed product would be equivalent to the brand name used in the solicitation. Any IT product which the Commonwealth, in its sole discretion, determines to be the equal of that specified, considering quality, workmanship, economy of operation and suitability for the purpose intended, shall be accepted (*Code of Virginia*, § [2.2-4315](#)). When brand or manufacturers' names are specified, and one or more of these are known to be Virginia brands or manufacturers, those known to be from Virginia shall be listed first prior to listing non-Virginia brands or firms.

#### 8.6.5 Specifications of equivalents required for bid/proposal submittal

Suppliers proposing equivalent products must include in their bid/proposal submittal the manufacturer's specifications for those products. Brand names and model numbers are used for identification and reference purposes only.

#### 8.6.6 Code references regarding brand names

Section [2.2-4315](#) of the *Code of Virginia*, Use of Brand Names: "Unless otherwise provided in the Invitation to Bid, the name of a certain brand, make or manufacturer shall not restrict bidders to the specific brand, make or manufacturer named and shall be deemed to convey the general style, type, character, and quality of the article desired. Any article that the public body in its sole discretion determines to be the equal of that specified, considering quality, workmanship, economy of operation, and suitability for the purpose intended, shall be accepted". Performance-based specifications when procuring personal computers and related peripheral equipment pursuant to any type of blanket purchasing arrangement shall be established without regard to 'brand name.'

Section [2.2-2012\(E\)](#) of the *Code of Virginia* provides as follows: "E. If VITA, or any executive branch agency authorized by VITA, elects to procure personal computers and related peripheral equipment pursuant to any type of blanket purchasing arrangement under which public bodies, as defined in § [2.2-4301](#), may purchase such goods from any vendor following competitive procurement but without the conduct of an individual procurement by or for the using agency or institution, it shall establish performance-based specifications for the selection of equipment. Establishment of such contracts shall emphasize performance criteria including price, quality, and delivery without regard to "brand name." All vendors meeting the Commonwealth's performance requirements shall be afforded the opportunity to compete for such contracts."

### 8.7 Qualified products/suppliers specifications and lists

It is sometimes necessary to prequalify products or suppliers and only solicit those who have been prequalified. In such cases, a list is maintained of specific products ("Qualified Product List" or "QPL") or suppliers ("Qualified Supplier List" or "QSL") which have been evaluated and determined to be acceptable in meeting predetermined minimum acceptable levels of quality or performance (*Code of Virginia*, § [2.2-4317](#)). This qualification is performed in advance of any particular IT procurement. By having a prequalification procedure, the time in the purchase cycle for specification development and testing can be reduced. The qualification requirements for supplier or product prequalification must be established and potential suppliers advised by letter and/or public posting sufficiently in advance of the anticipated procurement to allow for evaluation and qualification of



potential suppliers and/or products. A supplier whose product or service has been determined not qualified will be advised in writing. Solicitations may be sent to only those suppliers determined to be qualified.

A QPL or QSL provides an advance determination as to which IT suppliers or products can meet the agency's requirements. A QPL identifies various brands that have met specific criteria. Bidding may be limited to those suppliers whose products are on the list. Awards then may be made to IT products on the QPL. A supplier who submits a bid/proposal for a non-QPL product when a QPL product is required is deemed nonresponsive.

There are many benefits in developing a QPL. Once a QPL is established, the solicitation may be used for submission of samples or products to be examined for initial inclusion on the list. Specifications should state the criteria that will be used to evaluate the IT products offered and should describe all requirements necessary for supplier's products to qualify for the list. A specifications draft may be circulated for review by suppliers and known interested bidders. Communication with interested suppliers when developing specifications and requirements may be very helpful. Potential suppliers may provide useful feedback on the feasibility of a particular requirement or specification, including performance requirements, statements of work and data requirements.

## 8.8 Analyzing and planning the IT procurement

Normally, the agency's business owner (i.e., project manager) and a team of technical subject matter experts will prepare the requirements definition, but procurement officials will want to ensure that the requirements have been well-planned and are adequate to define the procurement details in the scope statement and statement of work (refer to chapter 12, Statements of Work for IT Procurements). The solicitation's scope and/or statement of work will reflect the results of the requirements definition, analysis and planning. Below is a table that offers various high-level questions that a project team may need to consider when identifying and planning the project's requirements. The table below provides a generic tool. More detailed guidance consistent with VITA's technology program directives may be found at the following website: <https://www.vita.virginia.gov/it-governance/project-management/project-management-templates-tools/>.

1	What are the project's primary objectives/ goals?	Determine the high-level goals of the procurement including all technical, functional, performance, performance or service-level expectations, schedule, user and customer audience objectives. Include services, hardware, software and licensing requirements. Consider modular or phased projects to accommodate your schedule/budget. Discuss long-term goals or life expectancy of the system/project.
2	What are the project's secondary objectives/ goals?	Determine the mid- and lower-level objectives for technical, functional, performance, performance or service-level expectations, schedule, user and customer audience elements of the procurement. Include services, hardware, software and licensing requirements.
3	What does the project need least?	Be honest in evaluating all unnecessary elements in this procurement, possibly removing results of questions 1 and 2 and moving them to question 12.
4	What is the current environment?	Prepare textual and graphic descriptions of the current technical and user environment, including personnel, other programs, agencies/entities and services affected.



5	What dependencies exist or may evolve?	Provide detail of other internal and external networks, servers, applications and/or systems, interfaces and legacy systems that will be affected by this procurement, including other agencies/entities/users and the VITA Partnership.
6	Is this procurement consistent with agency- specific and the Commonwealth's strategic planning?	Identify any direct or potential conflicts this procurement may create with your own agency's or the Commonwealth's short-term or long-term enterprise strategies or other objectives. Contact your current AITR for assistance with this question.
7	What can be done in- house?	Re-visit questions 1 and 2 and match current staff or roles to the detailed objectives.
8	What does the agency need to procure from external sources?	Answers should include all hardware, software (COTS and/or newly developed), support services, implementation, design, interface development, training, maintenance, etc. Be sure to conduct a search of existing statewide contracts that may serve some or all of these needs: ( <a href="https://vita.cobblestonesystems.com/public/">https://vita.cobblestonesystems.com/public/</a> ).
9	What is the budget?	Define the project's definite and projected budget sources and timing. Include budget sources for out-year support and maintenance and any phased procurement activity, and/or federal funding.
10	What is the in-house estimate?	Developing a work breakdown structure to use as the basis of your estimate is recommended, as this could parlay into the requirements and/or statement of work portions of the procurement documentation (i.e., solicitation and contract). This approach also helps to ensure that all details of the project's life cycle are considered and may offer justification during proposal evaluations.
11	What is the schedule?	Identify any hard and soft project schedule dates—overall and milestone events to use for any technical dependency concerns and for budget expenditure (and supplier payment) planning.
12	What can we put off buying?	Move answers from question 3 here. Include optional purchases for a next phase acquisition, if appropriate, and possible out-year support and maintenance depending on budget constraints.
13	What are our risks?	Brainstorm and identify all risks that could potentially affect the technical, functional and performance requirements including, installation, implementation, existing or relational applications/systems/user environments, interface development, production, testing, roll-out; budget and financial; schedule; licensing restrictions, etc. Apply mitigation resolutions when possible that could affect your agency, supplier and/or other third-party agencies/agents.

14	What specifications and standards must apply?	Create a document that lists names, numbers, version, etc., and provide links, if available, of all agency-specific, Commonwealth, VITA and/or federal, if federal grants apply, specifications and standards that are required for proper contract performance for all solutions, services and/or products being procured.
15	Is this a high-risk contract as defined by <i>Code of Virginia</i> § 2.2- 4303.01?	<p>§ <a href="#">2.2-4303.01</a> defines “high risk contracts” as any public contract with a state public body for the procurement of goods, services, insurance, or construction that is anticipated to either (i) cost in excess of \$10 million over the initial term of the contract or (ii) cost in excess of \$5 million over the initial term of the contract and meet at least one of the following criteria: (a) the goods, services, insurance, or construction that is the subject of the contract is being procured by two or more state public bodies; (b) the anticipated term of the initial contract, excluding renewals, is greater than five years; or (c) the state public body procuring the goods, services, insurance, or construction has not procured similar goods, services, insurance, or construction within the last five years.</p> <p>Any IT solicitation or contract that meets the definition of “high risk contract” must be reviewed by VITA and the Office of the Attorney General. Employees designated as primary administrators of high-risk contracts are required to complete a training program on effective contract administration created by DGS and VITA pursuant to requirements of the bill prior to commencing high-risk contract administration duties. Some provisions of the law have delayed effective dates for implementation of the high- risk contract training and review processes.</p>
16	Have you ensured that your performance specifications contain distinct and measurable performance metrics and clear enforcement provisions?	<p>VITA has issued a High Risk Solicitation and Contract policy (eff. 7/1/2019) which requires agencies that are planning to conduct an IT procurement under a delegation of authority to notify VITA’s SCM Division immediately (<a href="https://www.vita.virginia.gov/supply-chain/scm-policies-forms/">https://www.vita.virginia.gov/supply-chain/scm-policies-forms/</a>). SCM will provide advice and consulting services to these agencies to assist them in preparing the required performance metrics and enforcement provisions. Agencies are advised to contact <a href="mailto:scminfo@vita.virginia.gov">scminfo@vita.virginia.gov</a> to notify VITA of an upcoming high risk procurement.</p>

The requirements analysis should begin with an agency’s business or organizational requirements and those requirements should translate into project requirements included in the solicitation. If meeting the stated requirements will be unreasonably costly or take too long, the requirements may have to be negotiated down, down-scoped or down-sized, through discussions with SMEs, customers or users. The requirements analysis should cover the whole scope of the project. It must be comprehensive and thorough and must consider the views and needs of all the project stakeholders.

## 8.9 Building IT requirements

IT Procurement requirements are defined as the need or demand for personnel, equipment, hardware, software, application/design solutions, hosting/cloud services or solutions, telecommunications, facilities, other

resources, or services, by specified quantities for specific periods of time or at a specified time. Requirements are defined by the agency's business owner, and translated into a specification by the business owner and the agency's technical subject matter experts (SMEs). Requirements definition is the most crucial part of the IT project. Incorrect, inaccurate, or excessive definition of requirements may result in schedule delays, wasted resources, or customer dissatisfaction. To develop good requirements for the solicitation, remember the following:

- Always thoroughly examine the IT business need being procured.
- Write a clear statement of project objectives and scope.
- Know the difference between wants and needs.
- Examine the requirements definition interactively with the business owner and customer, if different from the business owner and the technical SMEs.
- Conduct a thorough and comprehensive analysis of the requirements.
- Document the results unambiguously in sufficient detail.
- Put the requirements document under version control.

A good requirement states something that is necessary, verifiable and attainable. To be verifiable, a requirement must have criteria for acceptance. To be attainable, the requirement must be technically feasible and within budget, schedule and other constraints. The most common problems in writing requirements include:

- Making bad assumptions.
- Writing implementation (how to do something) instead of requirements (what the customer needs as an end product or service).
- Using incorrect industry technology terms.
- Missing, ambiguous or conflicting requirements.
- Overlooking future requirements and/or interface requirements for existing systems.
- Over-specifying.

The requirements document component of the solicitation is the official statement of what is required of the IT procurement. As far as possible, it should set forth what the product, solution or supplier should do, rather than how it should be done. The requirements document should include both a definition and a specification of requirements and include both functional and technical data. The procurement requirements become the foundation for the solicitation's and contract's scope and statement of work (refer to chapter 12).

There are four basic types of technology procurement requirements—mandatory, functional, technical and work or performance. These may be based on agency-specific or, as applicable, on Commonwealth security, enterprise architecture, infrastructure and/or strategic requirements. The following subsections provide discussion of these four types.

### 8.9.1 Mandatory requirements

Mandatory requirements are an agency's must-have requirements. If there are a large number of mandatory requirements included in the solicitation, competition will be reduced as each potential supplier must meet the intent of each mandatory requirement, thus reducing the number of eligible offerors.

### 8.9.2 Functional requirements

Functional requirements document the business functionality for the IT product, service or solution that will meet the agency's needs. The procurement project's SMEs and business owner will provide the necessary documentation of the needed functionality. The functional requirement documentation is complete when the defined functional requirements of the business need have been fully described and all team members have agreed to the documentation.

Pre-solicitation planning time is the best time to validate the functional requirements. Incomplete functional requirements make it impossible to prepare accurate technical requirements documentation, invite misaligned supplier proposals and lead to extended project time and often failed implementation. Ensuring that comprehensive, complete and accurate functional requirements are included in the solicitation will increase the likelihood of a successful procurement. Functional requirements for an IT project include, but are not limited to:

- Work flow or business processes,
- Scope (what is included and what is not included),
- Inputs, outputs (files, systems, programs, reports),
- Databases
- Interface requirements
- Reporting requirements (hourly, daily, weekly, monthly hard or soft copy),
- Work rules,
- Performance standards and remedies for non-performance,
- Documentation deliverables (methods, hard or soft copy).

### 8.9.3 Technical requirements

Technical requirements for an IT product or solution must include complete descriptions of the technical needs of the software or solution that will meet the agency's business and technical needs and VITA's technical standards. The agency's IT business owner and the project's technical SMEs will be responsible for defining and documenting the project's technical requirements. VITA's Project Management Division located at this link: <https://www.vita.virginia.gov/it-governance/project-management/> can assist with this process. Technical requirements include items such as:

- Hardware
- Architecture
- Software
- Platforms
- Materials
- Space requirements
- Maintainability
- Energy requirements
- Materials
- Interfaces
- Program libraries
- Capacity limitations (scaling requirements)
- Operating systems
- Connectivity

- Capacity
- Construction
- Brand standards

#### **8.9.4 Performance requirements**

Performance requirements describe what the supplier must do to accomplish the work or deliver the required products, services or solution that may be unique to a particular IT project. These requirements may cover the required qualifications of a supplier and its project team, specific tasks and subtasks to be completed, parameters and restrictions on performance, time for completion of work (if not otherwise stated) and a list of deliverables the supplier must provide. See table in section 8.8 for more guidance.

#### **8.9.5 Requirements quality control**

Before any IT solicitation is released, the business owner, SMEs and the IT procurement professional should complete the following checklist to verify completeness and quality of the requirements:

- **Applicability:** Do the requirements actually define what is being procured. Fixing a requirement error after delivery can cost up to 100 times the cost of fixing the implementation error.
- **Validity:** Do the requirements provide the functions which best support the agency's needs?
- **Consistency:** Are there any conflicts or ambiguities in the requirements?
- **Completeness:** are all performance, technical and functional requirements and expectations required by the agency included?
- **Realism:** Can the requirements be implemented given available time, budget, resources and technology?
- **Verifiability:** Are the requirements realistically testable?
- **Comprehensibility:** Are the requirements easily understood?
- **Traceability:** Is the origin of the requirements clearly stated?
- **Adaptability:** Can the requirements be changed without a large impact on other requirements?

#### **8.9.6 Prohibition against wired requirements**

Incomplete requirements or "wired" requirements biased toward a particular supplier, product or solution will limit the number of competitive proposals received. In keeping with the Commonwealth's commitment to foster open and fair competition and to good faith dealings with suppliers, no agency should create or knowingly issue a wired solicitation.

#### **8.9.7 Assistance by suppliers or potential suppliers in developing procurement specifications or requirements**

A potential or existing supplier may provide technical assistance to an agency free of charge in developing procurement specifications or requirements. However, an agency may not accept a bid or proposal or award a contract to a supplier who received compensation from the agency to provide assistance in the preparation of the specifications on which the solicitation or contract is based. A supplier who assists an agency in developing specifications or requirements may not disclose to any potential supplier who plans to submit a bid or proposal information concerning the procurement which is not available to the public. In addition, the supplier who provided such development services for payment may not be a subcontractor or partner for the supplier who is awarded the contract or any of that supplier's subcontractors or partners, however far removed. Any independent contractor employed or otherwise paid by an agency to design a project, develop a scope of work, write specifications, or otherwise define contract requirements is also not eligible to compete for or receive the resulting contract.

Specifications or requirements may be provided to potential suppliers for comments and feedback before the solicitation is issued. Commonwealth agencies should leverage the expertise of suppliers in understanding the market for a particular IT good or service.

Suppliers may provide helpful information to the agency by identifying restrictive or proprietary features included in the specifications or requirements which could be challenged by other potential suppliers causing delays and/or cancellations. Suppliers can also assist the Commonwealth in understanding what end users really need to achieve their desired business processes, what the commercial and government best practices are in a particular IT area and who the experts are in the marketplace for a particular technical solution.

Section [2.2-4373](#) of the *Code of Virginia* provides as follows: "Participation in bid preparation; limitation on submitting bid for same procurement. No person who, for compensation, prepares an invitation to bid or request for proposal for or on behalf of a public body shall

(i) submit a bid or proposal for that procurement or any portion thereof or (ii) disclose to any bidder or offeror information concerning the procurement that is not available to the public. However, a public body may permit such person to submit a bid or proposal for that procurement or any portion thereof if the public body determines that the exclusion of the person would limit the number of potential qualified bidders or offerors in a manner contrary to the best interests of the public body."

### Chapter highlights

- **Purpose:** This chapter covers the process for determining a fair and reasonable price related to information technology (IT) procurements.
- **Key points:**
  - All IT procurement professionals have a fiduciary responsibility to analyze the price or cost the Commonwealth pays for its IT goods and services.
  - A fair and reasonable price is characterized by factoring industry and market pricing with the expected value and quality of products, solutions and/or services to be received. Fair and reasonable does not necessarily mean the lowest offer.
  - Fair and reasonable pricing is determined by conducting either a price analysis or cost analysis.

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## 9.0 Introduction

A fair and reasonable price can be reached by factoring industry and market pricing with the expected value and quality of the IT products, solutions and/or services to be received. Fair and reasonable does not necessarily mean the lowest price offer. All information technology (IT) procurement professionals have a

fiduciary responsibility to analyze the price or cost the Commonwealth pays for its IT goods and services and to pay no more than a fair and reasonable price for such goods and services. These are things to keep in mind when analyzing the pricing of IT goods and services:

- Most commercial items are considered to be fairly priced. Buyers and suppliers have many product and supplier choices and there is a balance of market leverage. If there is adequate competition among suppliers, then buyers can generally rely on market-based prices as being fair and reasonable. However, if there is only one supplier, and many buyers, then the marketplace does not ensure that a price is fair and reasonable; it is simply the price the market will bear.
- Commonwealth procurement professionals are held to a higher standard than just accepting “what the market will bear.” They must determine and verify that the price they have agreed to pay is a fair and reasonable price. A price that has been established in a non-competitive commercial marketplace is not necessarily fair and reasonable. There is no harm in asking the supplier to provide evidence of prices charged to other similar customers purchasing like IT products and services.
- IT procurement professionals may be reluctant to challenge the advertised commercial price of an IT good or service. Do not make the mistake of considering commercial or advertised pricing non-negotiable. Securing an optimum pricing agreement may require challenging the market for the best terms. Commerciality can impact the original contract as well as modifications. If a modification is so significant as to alter the commerciality of an item, then cost or pricing data may be needed.
- Services (e.g., packaging, shipping, and availability) for commercial items may exceed the Commonwealth’s need. It may be possible to negotiate a price reduction by reducing or eliminating some of these services, thus reducing the supplier’s cost and the price charged to the Commonwealth, while still ensuring that the item meets the Commonwealth’s need.
- Alternatives may not have been sufficiently reviewed. Areas overlooked may include cost benefit analysis of lease versus buy or analysis of spare or replacement parts pricing.
- Catalog pricing may be restrictive based on the quantity being purchased or the Commonwealth’s requirements may exceed normal commercial demand. If so, the buyer should attempt to negotiate a lower price for quantities greater than listed in the catalog to maximize possible discounts or rework the requirements to reflect market available IT goods and services.

## 9.1 Fair and reasonable pricing

### 9.1.1 Fair pricing

Buyers and suppliers may have different perceptions on what price is fair. To be fair to the buyer, a price must be in line with the fair market value of the contract deliverable. To be fair to the supplier a price must be realistic in terms of the supplier’s ability to satisfy the terms and conditions of the contract. In agreeing to a price that is too low a supplier may:

- cut corners on product quality
- deliver late
- default, forcing a time-consuming re-procurement
- refuse to deal with the Commonwealth in the future
- be forced out of business entirely



Below-cost prices are not necessarily unfair to the supplier. A supplier, in its business judgment may decide to submit a below-cost bid. Such a bid is not invalid. Whether the supplier can then perform the contract at the low price offered is a matter of responsibility which may pose a risk to the buyer. Be aware of suppliers who submit offers below anticipated costs and may expect to either increase the contract amount after award through change orders or to receive follow-on contracts at higher prices to recover losses incurred on the buy-in contract. In addition, the offered price may be unexpectedly low because the supplier has made gross mistakes in determining price.

### 9.1.2 Reasonable pricing

A reasonable price is a price that a prudent and competent buyer would be willing to pay given available data on market conditions. Economic forces such as supply, demand, general economic conditions and competition change constantly. Hence, a price that is reasonable today may not be reasonable tomorrow. Markets can be defined by considering the number of buyers, the number of suppliers, product homogeneity, and ease of market entry and exit. Market conditions include:

- **Supply and demand.** The forces of supply and demand have a significant effect on the price of IT goods and services.
- **General economic conditions.** General economic conditions affect the prices of all goods and services, but the effect will not be the same for every product. Inflation and deflation affect the value of the dollar. Economic boom, recession and depression affect available production capacity.
- **Competition.** When competition does not exist, the forces of supply and demand may not work effectively. The buyer or supplier may have an advantage in the pricing decision process. Solicitation specifications that are not well defined or are too restrictive, proprietary or aimed at one solution could restrict price competition.

### 9.1.3 Determining a fair and reasonable price

Fair and reasonable pricing is determined by conducting either a price analysis or cost analysis.

## 9.2 Price or cost analysis requirement

The most basic reason for requiring that a price or cost analysis be performed is to ensure Commonwealth funds are expended in the most cost effective manner.

### 9.2.1 Price analysis

Price analysis is the process of deciding if the asking price for an IT product, solution or service is fair and reasonable, without examining the specific cost and profit calculations the supplier used in arriving at its price. It is basically a process of comparing the price with known indicators of reasonableness. When adequate price competition does not exist, some other form of analysis is required.

### 9.2.2 Methods of price analysis

The most common methods or criteria used to determine whether a price is fair and reasonable are:

- **Price competition.** When two or more acceptable offers are received and the lowest price is selected, the price of the lowest offeror can be assumed to be fair and reasonable. It is noted that generally

where the difference in prices between the two offers ranges up to 15%, price competition is said to exist. A price which is very low must be checked to assure that the supplier understands what he is selling and has made no errors.

- **Catalog or established price list.** Where only one offer is received and the supplier has a published or established price list or catalog which sets forth the price of an IT good that is offered generally, this fact can be used to find the price fair and reasonable. The catalog should be current (within one year, usually). It is a good idea to obtain a name of another recent purchaser and confirm that this was the price paid. Often, discounts off of the price list are offered. If this is the case, it should be included in the written price analysis. The IT good to be purchased should generally be a commercially produced one sold to the general public in substantial quantities.
- **GSA contracts or pricing agreements.** The federal government often enters into contracts with various companies as to the prices of items which will be sold to the government. Typically these are the highest prices that a supplier can sell a single unit to a federal government agency, and they often include fees and rebates back to the federal General Services Administration (GSA). A fair and reasonable price is typically lower than GSA prices.
- **Price based on prior competition.** If only one supplier bids and the price of the item is relatively the same as the price of the item when it was purchased using an earlier competition, this may be acceptable. In such cases, the buyer must cite the price of the prior purchase and note if it was competitive or based on catalog price or other means. An increase in price, with no current catalog or competition, should be near the current rate of inflation.
- **Comparison to substantially similar item(s).** Often an item is very similar to a commercial one but has added features, which are required. If the supplier can validate the price of the base item, by a catalog, and then state the cost of the additional features, the buyer can determine the price is reasonable based on these two factors. The reasonableness of the extra cost can be checked from other purchases that had similar extras or be based on an evaluation of the extra cost by technical subject matter experts.
- **Sales of the same item to other purchasers.** If the supplier has no catalog but has sold the same item to others recently, the price can be determined to be fair and reasonable by verifying with those other purchasers what price they paid.
- **Market prices:** Where an item has an established market price, verification of an equal or lower price also establishes the price to be fair and reasonable.
- **Historical prices.** If the buyer has a history of the purchase of the item over several years, use of this information, taking into account inflation factors, can be used to determine a price fair and reasonable. Refer to Appendix A for more details on historical prices.
- **Independent estimate.** If an independent 3<sup>rd</sup> party estimate of the item has been prepared and other methods or information is available, a price can be compared to the estimate. If it compares favorably this can be the basis to find a price fair and reasonable.

### 9.2.3 Cost analysis

Cost analysis should be performed in situations where price analysis does not yield a fair and reasonable price. The goal of cost analysis is to determine whether the supplier's costs are in line with what reasonably economical and efficient performance should cost. Cost or pricing data provided by the supplier is the means for conducting cost analysis and provides factual information about the costs that the supplier says may be

incurred in performing the contract. Cost analysis techniques are used to break down a supplier's cost or pricing data to verify and evaluate each component. Some of the cost elements examined for necessity and reasonableness are materials' costs, labor costs, equipment and overhead. These costs can be compared with actual costs previously incurred for similar work, the cost or pricing data received from other suppliers, and independent cost estimate breakdowns.

#### **9.2.4 When to perform a cost analysis**

Cost analysis is used whenever there is no price competition or when the price is set by law or regulation, a cost analysis is not required. A cost analysis is required when:

- Negotiating a contract with a sole source or on an emergency basis.
- If during a competitive sealed bidding solicitation, only one bid is received and it differs substantially from your agency's independent estimate of the contract price. If it is determined that the bid is unreasonable and a decision is made to not re-compete (e.g., market survey indicates that you would not get competition), then the agency may formally cancel the solicitation and negotiate a contract price with the single bidder. A cost breakdown of the single bid price must then be obtained, analyzed and a determination made about that price's reasonableness.
- Negotiating a contract price modification. If the modification changes the work authorized under the contract, and changes the price or total estimated cost either upwards or downwards, the buyer should obtain a detailed breakdown of the supplier's proposed costs before negotiating the change in contract price.
- Insight into the supplier's fixed and variable cost structures would allow the buyer to negotiate volume discounts appropriate for the volume.
- Identification of the key drivers of the supplier's costs would allow the buyer an opportunity to impact or reduce one or more of these key cost elements in order to negotiate a lower price for the Commonwealth.
- Price analysis is inadequate to determine a fair and reasonable price.

### **9.3 Other price evaluation factors**

There are other price-related factors that need to be considered when determining the price to be used in evaluating a supplier's proposal or bid. Some examples include:

- Multiple awards or the costs associated with awarding multiple contracts.
- Logistical support requirements including maintenance, warranty protection or repair, training, installation, technical manuals, spare parts and supplemental supplies. Request prices for all such services needed either on a per-service basis, package basis or some combination.
- Life cycle costing including expected life, salvage value, discounted total cost of ownership. Select life cycle costing for equipment with an expected life greater than one year if there are sufficient data, from market research.
- Economic price adjustments based on projected and historical data.
- Transportation and/or shipping costs.
- Packaging and marking costs.

- Lease versus purchase costs. Perform an analysis to determine which is of greater overall value based on ownership, support and maintenance and life-cycle needs.
- Options and/or multiyear costs. Sometimes alternate pricing is available if your agency is willing to contractually commit up front to an extended base term and/or minimal out- year support and maintenance terms; however, there are many project and/or budgetary considerations that must be taken into account with state agencies.
- Incremental pricing or quantity discounts.
- Energy conservation and efficiency criteria.
- Estimated quantities.

## 9.4 Evaluating warranty pricing to determine if price is fair and reasonable

Common warranties include general warranty, express warranty, implied warranty of merchantability, and implied warranty of specifications. Warranty pricing may be greater on warranties other than general or express, which are likely built into the IT product's or service's market price.

Term	Definition
General warranty	A promise or affirmation given by the supplier regarding the nature, usefulness, or condition of the supplies, solution or performance of services furnished under a contract.
Express warranty	Means the warranty terms as defined in the contract.
Implied warranty of merchantability	Means the implication by sale of the item is that it is reasonably fit for ordinary purposes for which the item is used. Items must be of at least average, fair, or medium-grade quality and must be comparable in quality to those that will pass without objection in the trade or market for items of the same description.
Implied warranty of specifications	Is interpreted as the supplier's specific warranty to the Commonwealth that its design specifications can be successfully used to perform a contract. When a supplier fails to perform because such specifications are defective, it can assert a constructive change claim in order to obtain an equitable adjustment in the contract price.  Essentially, by providing the supplier with specifications to be followed in carrying out the contract work, the Commonwealth warrants that if the supplier complies with those specifications, an adequate result will follow.

The principal purpose of warranties in a Commonwealth contract is to delineate the rights and obligations of the supplier to the Commonwealth for defective work or products and to foster quality performance. By agreeing to a warranty, suppliers accept the risk of deferred liability. That acceptance of risk has associated costs and a supplier's unwillingness to accept that risk may drop them from the competition. Other suppliers may increase their prices to compensate for the risk.

Before a warranty provision or requirement is included in a solicitation, the buyer should evaluate the benefits of the warranty against the effect on competition and price. The buyer should understand the relationship between warranty requirements, competition, the nature of the product, and trade practice. Warranty

requirements that are unreasonable will reduce competition and increase price. Requirements that significantly exceed trade practice will also reduce competition and increase price. Agencies should identify and eliminate warranty requirements that will increase costs, unless to do so would incur further risk or liability on the IT project or the Commonwealth. In a warranty analysis, the following should be considered:

- For commercial items, use commercial or standard warranties rather than Commonwealth or agency-unique warranties.
- For non-commercial items, tailor warranty requirements to mirror existing market or trade practices.
- When a Commonwealth or agency-unique warranty is required, solicit the warranty as a separately priced line item, which the agency may or may not include in the final contract.
- If the agency is unsure about the benefits of an extended warranty, solicit offerors for the extended warranty as a separately priced option, especially for out-years.
- Take advantage of commercial warranties (including extended warranties, where appropriate and in the Commonwealth's best interest) offered by the supplier for the repair and replacement of commercial items.
- In solicitations for standard IT goods or services, require suppliers to offer the Commonwealth at least the same warranty terms, including offers of extended warranties, as those offered to the general public in customary commercial practice. For example, the supplier may provide warranty services to select high volume customers that are not offered to the general public. If the Commonwealth is not one of those select customers, do not expect to receive extra warranty services without having to pay extra for them.
- In some markets, customary commercial practices may exclude or limit the implied warranties contained in the Commonwealth's contract terms and conditions. In such cases, the Commonwealth must ensure that the express warranty provides for the repair or replacement of defective items discovered within a reasonable period of time after acceptance.
- Analyze the proposed warranty period as a price factor. In IT procurements, it is a buyer's best practice to insist that a warranty period begin after final acceptance of the product, service or solution rather than at time of delivery or installation and last for a longer negotiated period; however, a COTS software warranty may have a shorter warranty period (60, 90 days after installation.) Major technology solution contracts may necessitate a year-long warranty period after final acceptance and affect pricing but be worth it.
- Study the supplier's proposed warranties as price factors to ensure Commonwealth stakeholders and users comply with any restrictions that would void the warranty and negotiate these to the reasonable price benefit of the Commonwealth.

## **9.5 Price reasonableness determination documentation requirements**

A written price reasonableness determination is required to determine if offered prices are fair and reasonable when:

- Competition is restricted or lacking, i.e., sole source purchases, emergency procurements, single response purchases, contract changes and renewals,
- The prices offered do not appear on the face of the proposal or bid to be fair and reasonable,

- The decision is made to award to other than the lowest bidder or highest ranking offeror (appropriate award clause must have been included in the solicitation).

The written determination of fair and reasonable price requires that the price is acceptable to both the agency and the supplier considering all circumstances, which may include the degree of competition, market conditions, quality, location, inflation, value, technology and unique requirements of the procuring agency. The written determination may be based on price analysis (comparison with prices previously paid, prices charged for functionally similar items, prices paid by other consumers, prices set forth in a public price list or commercial catalog, or state estimates) or through the analysis of price-to-unit variations, value analysis (make-or-buy study), or cost analysis. The written analysis must be supported by factual evidence in sufficient detail to demonstrate why the proposed price is deemed to be fair and reasonable. If a determination is made that the prices offered are not fair and reasonable, a decision must be made whether to seek broader competition through a re-solicitation, to revise specifications and re-compete, or to negotiate a better price identified through the price analysis process. A combination of these methods may be necessary.

## **Appendix A**

### **Researching Historical Pricing Data**

Research of historical market information can provide analysis of the acquisition situation for the product at some point(s) in the past. The following table presents research elements that should be considered when conducting historical pricing research and examining historical acquisition information.

Research element	You should be able to answer questions such as...
Trends in supply and demand	When did past acquisitions take place? Is there any indication of prevailing market conditions at that time?
Pattern of demand	What quantities were solicited for each acquisition? What quantities were acquired?
Trends in prices	What was the contract price? How did the unsuccessful offers compare with the successful offer?
Start-up costs and pricing strategy	Did the contract price include one-time engineering, tooling, or other start-up costs? Should future contracts include similar or related costs? Were necessary start-up costs paid for in a manner separate from the price for the item or service?
Sources of supplies or services	How many sources were solicited for the prior acquisition? What specific sources were solicited? How many sources offered bids or proposals? What specific sources offered bids or proposals?
Product characteristics	Are there any significant differences between the requirements documents for the prior contract and the current requirements?
Delivery/ performance terms	What was the delivery or performance period in days, weeks, months, or years? In what month(s) were the supplies to be delivered, the service to be performed or the milestones/deliverables completed? Did the supplier meet the delivery or major deliverable or milestone targets? What was the FOB point? Were premium transportation costs or additional resources required for timely delivery or project completion?
Ownership costs	What costs of ownership were associated with the acquisition?
Acquisition Method	What acquisition method was employed for past acquisitions?
Contract terms and conditions	What were the general terms of past contracts? Are there any significant differences between terms of the last contract (e.g., packing requirements, type of contract, service/performance requirements) and those recommended for this acquisition?
Problems	What problems (if any) were encountered during contract performance?

**Appendix B**  
**Price Reasonableness Determination Form**

This form is available on VITA SCM's website at the following URL:

[https://www.vita.virginia.gov/media/vitavirginiagov/supply-chain/docs/Price\\_Reasonableness\\_Determination\\_Form.doc](https://www.vita.virginia.gov/media/vitavirginiagov/supply-chain/docs/Price_Reasonableness_Determination_Form.doc)



### Chapter highlights

- **Purpose:** This chapter contains general policies applicable to the procurement of IT goods and services.
- **Key points:**
  - Under Virginia's Freedom of Information Act, the presumption is that all documents in the possession of any public body or public official and all meetings of state and local public bodies are open to citizens of the Commonwealth.
  - To the extent allowed by law, this public body does not discriminate against faith-based organizations in accordance with the *Code of Virginia*, [§ 2.2-4343.1](#) or against a bidder or offeror because of race, religion, color, sex, national origin, age, disability, sexual orientation, gender identity or expression, political affiliation, or status as a service disabled veteran or any other basis prohibited by state law relating to discrimination in employment. Placing multiple orders to one or more suppliers for the same, like or related goods or services in order to avoid having to utilize the appropriate method of procurement or to remain within delegated procurement authority or to avoid competition is prohibited.

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## 10.0 Introduction

These policies are applicable to all procurements of IT goods and services. These policies were developed to clarify and implement the various provisions and requirements of the Virginia Public Procurement Act and the *Code of Virginia* pertaining to IT procurement.

### 10.1 Freedom of Information Act

Under Virginia law, the presumption is that all documents in the possession of any public body or public official and all meetings of state and local public bodies are open to citizens of the Commonwealth. The Virginia Freedom of Information Act (FOIA) ([§§ 2.2-3700 et seq.](#) of the *Code of Virginia*) guarantees citizens of the Commonwealth and representatives of the media access to public records held by public bodies, public officials and public employees. The purpose of FOIA is to promote an increased awareness of all persons of governmental activities. FOIA requires that the law be interpreted liberally, in favor of access, and that any exemption allowing public records to be withheld be interpreted narrowly. VITA requires all IT procurement professionals to comply with the Commonwealth's Freedom of Information Advisory Council's requirements and their own agency's policies and procedures. VITA SCM procurement professionals must follow the current SCM process and procedures. In addition, before any agency can procure a system, equipment or software, the agency must consider whether it is capable of producing products that facilitate the rights of the public to access public records under FOIA.

### 10.2 Confidentiality

Confidentiality of all information utilized in the procurement process is very important to ensure fair and open competition for suppliers competing for Commonwealth contracts. All information and documentation relative to the development of a solicitation or contractual document for a proposed procurement is confidential. These records will not be open to public inspection until completion of the procurement process. All information and documentation relative to the development of a specification or requirements document is confidential until the procurement process is completed. Pursuant to [§ 2.2-4342](#) and [§ 2.2-4343](#) of the *Code of Virginia*, trade secrets or proprietary information that a supplier wishes to exempt from FOIA disclosure must be specifically identified by bidder with a statement of the reason(s) the protection is necessary. A supplier shall not improperly designate as trade secrets or proprietary information (i) an entire bid, proposal, or prequalification application; (ii) any portion of a bid, proposal, or prequalification application that does not contain trade secrets or proprietary information; or (iii) line item prices or total bid, proposal, or prequalification application prices. Refer to [Chapter 5](#), Ethics in Public Procurement, for more information and for a VITA- approved Confidentiality and Conflict of Interest Statement form.

It is critical to ensure that no records or information are disclosed from a supplier's proposal that are marked "Confidential" or "Proprietary," are included in such supplier's redacted proposal or are responses in the supplier's ECOS/Security Assessment, including any security exceptions, if applicable.

## 10.3 Section 508

### 10.3.1 Overview

As specified in [§ 2.2-2012\(B\)](#) of the *Code of Virginia*, procurement of all IT must be made in accordance with the electronic and information technology accessibility standards of the Rehabilitation Act of 1973 (29 U.S.C. § 794(d)).

Section 508 refers to a statutory section in the Rehabilitation Act of 1973 (found at 20 U.S.C. § 794d). The primary purpose of Section 508 is to provide access to and use of government electronic and information technology (EIT) by individual with disabilities. Section 508 requires federal agencies to ensure that their procurement of electronic and information technology takes into account the needs of all end users – including people with disabilities. The statutory language of section 508 is available online by accessing <http://www.section508.gov>.

Section 508 enhances the ability of federal employees with disabilities to have access to and use of information and data that is comparable to that provided by others. EIT products include products that store, process, transmit, convert, duplicate, or receive electronic information. Examples of included products are copiers, computers, fax machines, information kiosks, software, operating systems, websites and telecommunications products.

Section 508 requires that when agencies develop, procure, maintain or use information technology - (1) individuals with disabilities who are employees have access to and use of information and data that is comparable to the access to and use of the information and data by employees who are not individuals with disabilities; and (2) individuals with disabilities who are members of the public seeking information or services from an agency to have access to and use of information and data that is comparable to the access to and use of the information and data by such members of the public who are not individuals with disabilities. Comparable access is not required if it would impose an undue burden on an agency. The law is not limited to assistive technologies used by people with disabilities, but applies to the development, procurement, maintenance, or use of all electronic and information technologies.

The United States Architectural and Transportation Barriers Compliance Board (Access Board) is responsible for developing information and communications technology.

Pursuant to this goal, the Access Board issued a final rule that updated accessibility requirements covered by Section 508, and refreshed guidelines for telecommunications equipment subject to Section 255 of the Communications Act. The final rule went into effect on January 18, 2018. The final rule with the revised Section 508 standards can be reviewed at: <https://www.access-board.gov/guidelines-and-standards/communications-and-it/about-the-ict-refresh/final-rule/single-file-version>.

### 10.3.2 VITA's authority to promulgate regulations pertaining to Section 508

VITA has statutory authority to promulgate regulations to ensure that all procurements of information technology of every description meet the electronic and information technology accessibility standards of the Rehabilitation Act of 1973 (29 U.S.C. § 794d), as amended.

In order to maintain maximum flexibility for the Commonwealth and in light of the ever- changing information technology market, VITA has chosen to implement the electronic and information technology accessibility standards of Section 508 through policy. VITA is committed to ensuring that all procurements of information technology purchased by VITA or on behalf of other agencies meet, to the greatest extent possible, the electronic and information technology accessibility standards of Section 508. Refer to VITA's IT accessibility compliance websites for detailed guidance at: [IT Accessibility Standards](#), [Web Site Standards](#), [Web Site Guidelines](#). Also, refer to [ITRM Standard GOV103-00](#).

### 10.3.3 Section 508 standards

Section 508 standards are technical specifications and performance-based requirements which focus on the functional capabilities covered by technologies. These standards are organized into six sections:

- Software applications and operating systems
- Web-based intranet and internet information and applications
- Telecommunications goods and services
- Video and multimedia goods and services
- Self-contained, closed goods and services
- Desktop and portable computers

Section 508 affects what the Commonwealth acquires (i.e. the requirements development process) but not how the information technology is acquired (source selection). Section 508 applies to both goods and services. Section 508 does not require suppliers to manufacture EIT products that meet the Access Board, standards. However, by requiring the federal government to purchase EIT products that meet the Access Board's standards, Section 508 provides an incentive for EIT manufacturers and designers to ensure that their products are usable by people with disabilities.

### 10.3.4 Defining requirements under Section 508

When developing requirements for any IT procurement, the agency should be familiar with Section 508 requirements and determine which technical provisions apply to the IT goods or services being procured. In addition, market research should be performed to determine the availability of products and services that meet the applicable technical provisions. The agency should determine if Section 508 products or services are available in the marketplace or if the product or service would be eligible for an exception such as non-availability or undue burden.

### 10.3.5 IT Procurements not applicable to Section 508

Section 508 does not apply to all IT goods and services which may be procured for the Commonwealth or public bodies. These exemptions may apply:

- *Built-in assistive technology is not required where it is not needed.* Section 508 does not require that every EIT product to be fully accessible for persons with disabilities. Products such as desktop computers do not have to have refreshable Braille displays, but must be compatible with refreshable Braille displays so

that a blind individual can use the agency's standard workstation if needed as a reasonable accommodation.

- *Undue burden.* Agencies do not have to procure EIT products that satisfy the Section 508 standards if doing so would create an undue burden on the agency. "Undue burden" generally means "significant difficulty or expense." If an agency invokes the undue burden exception, Section 508 requires that information and data be provided to individuals with disabilities by an alternative means of access. Agencies should not alter their technical requirements to comply with Section 508 if the alteration would result in the agency procuring IT that did not meet its needs.
- *Non-availability.* This refers to circumstances where no Section 508 commercial items are available to meet the agency's IT procurement needs.

### 10.3.6 Section 508 exception

All IT goods and services procured by the Commonwealth must comply with the accessibility standards of Section 508. The one exception to IT accessibility is if the agency includes a written explanation in the procurement file signed by the agency head which explains why, and to what extent, the standards impose an undue burden or exception. All contracts for IT goods and/or services should contain the term and condition which requires that any goods or services provided by the contractor under the contract are Section 508-compliant.

### 10.3.7 Suggested solicitation language to ensure Section 508 compliance

The following statement is recommended to be included in all RFPs: "All electronic and information technology (EIT) procured through this Request for Proposal (or Invitation for Bid) must meet the applicable accessibility standards of Section 508 of the Rehabilitation Act of 1973, as amended, and is viewable at the following URL: <http://www.section508.gov>."

### 10.3.8 Suggested contractual language to ensure Section 508 compliance

Contracts signed with information technology suppliers should contain the provision set forth below or substantially similar language: "Supplier hereby warrants that the products or services to be provided under this agreement comply with the accessibility requirements of section 508 of the Rehabilitation Act of 1973, as amended (29 U.S.C. § 794d), and its implementing regulations set forth at Title 36, Code of Federal Regulations, part 1194. Supplier agrees to promptly respond to and resolve any complaint regarding accessibility of its products or services which is brought to its attention. Supplier further agrees to indemnify and hold harmless the Commonwealth of Virginia or any agency thereof using the supplier's products or services from any claim arising out of its failure to comply with the aforesaid requirements. Failure to comply with these requirements shall constitute a breach and be grounds for termination of this agreement." This language puts the burden and expense of Section 508 compliance on the supplier supplying IT goods and services to the Commonwealth.

## 10.4 Technology Access Clause

### 10.4.1 Overview

As required by the Information Technology Access Act ([§§ 2.2-3500 et seq.](#) of the *Code of Virginia*), all contracts for the procurement of information technology by, or for the use of, agencies all covered entities as defined by [§ 2.2-3501](#), shall include the technology access clause which requires compliance with the non-visual access standards established in [§ 2.2-3503\(B\)](#). "Covered entity" means all state agencies, public institutions of higher education, and political subdivisions of the Commonwealth.

### 10.4.2 Procurement requirements

The technology access clause specified in clause (iii) of [§ 2.2-3502](#) of the *Code of Virginia* shall be developed by the Secretary and shall require compliance with the nonvisual access standards established in subsection B of [§ 2.2-3503](#). The clause shall be included in all future contracts for the procurement of information technology by, or for the use of, entities covered by this chapter on or after the effective date of this chapter. At a minimum, the nonvisual access standards shall include the following: (i.) the effective, interactive control and use of the technology (including the operating system), applications programs, and format of the data presented, shall be readily achievable by nonvisual means; (ii.) the technology equipped for nonvisual access shall be compatible with information technology used by other individuals with whom the blind or visually impaired individual interacts; (iii.) nonvisual access technology shall be integrated into networks used to share communications among employees, program participants, and the public; and (iv.) the technology for nonvisual access shall have the capability of providing equivalent access by nonvisual means to telecommunications or other interconnected network services used by persons who are not blind or visually impaired. A covered entity may stipulate additional specifications in any procurement.

### 10.4.3 Exceptions to nonvisual access standards

Compliance with the nonvisual access standards shall not be required if the head of the procuring agency determines that (i) the information technology is not available with nonvisual access because the essential elements of the information technology are visual and (ii) nonvisual equivalence is not available. Visit these VITA websites: [IT Accessibility Standards](#), [Web Site Standards](#), [Web Site Guidelines](#) for more information.

### 10.4.4 EO 47- Expanding Opportunities for Virginians with Disabilities

Executive Order 47 reaffirms and expands upon the Commonwealth's commitment to the increased inclusion of, and expansion of opportunities for, individuals with disabilities.

This includes ensuring that the Commonwealth's websites are readily accessible to individuals with disabilities.

VITA supports the effort set forth in Executive Order 47, and continues to work with other state agencies to improve the accessibility of the Commonwealth's websites for Virginians with disabilities. VITA encourages Suppliers to support the advancement of opportunities for disabled Virginians by expanding and improving upon accessibility of the Commonwealth websites.

## 10.5 Commonwealth security requirements for IT solicitations and contracts

[Section 2.2-2009](#) of the *Code of Virginia* mandates that the Chief Information Officer (CIO) is responsible for the development of policies, standards, and guidelines for assessing security risks, determining the appropriate security measures and performing security audits of government electronic information. Such policies, standards, and guidelines shall apply to the Commonwealth's executive, legislative, and judicial branches and independent agencies. Further, it requires that any contract for information technology entered into by the Commonwealth's executive, legislative, and judicial branches and independent agencies require compliance with applicable federal laws and regulations pertaining to information security and privacy. While agencies are required to comply with all security policies, standards and guidelines (PSGs), Security Standard SEC525 provides agency compliance requirements for non-CESC hosted cloud solutions. These PSGs are located at this URL: <https://www.vita.virginia.gov/it-governance/itrm-policies-standards/>

Furthermore, [§ 2.2-2009](#) requires the CIO to (i) conduct an annual comprehensive review of cybersecurity policies of every executive branch agency, with a particular focus on breaches in information technology that occurred in the reviewable year and any steps taken by agencies to strengthen cybersecurity measures, and (ii) issue a report of his findings to the Chairmen of the House Committee on Appropriations and the Senate Committee on Finance.

In addition to Security Standard SEC525, for any procurements for third-party (supplier- hosted) cloud services (i.e., Software as a Service), since agencies have \$0 delegated authority to procure these types of solutions, there is a distinct process for obtaining VITA approval to procure. At the link above, refer to the Third Party Use Policy. Your agency's Information Security Officer or AITR can assist you in understanding this process and in obtaining the required documentation to include in your solicitation or contract. There are specially required Cloud Services terms and conditions that must be included in your solicitation and contract, and a questionnaire that must be included in the solicitation for bidders to complete and submit with their proposals. You may also contact: [enterpriseservices@vita.virginia.gov](mailto:enterpriseservices@vita.virginia.gov).

### 10.5.1 Discrimination prohibited

The *Code of Virginia* prohibits discrimination based on race, religion, color, sex, age, disability, or national origin in procurement transactions as well as discrimination against ex-offenders, small, women and minority-owned businesses and faith-based organizations. All businesses and citizens are to have equal access to the Commonwealth's procurement opportunities.

### 10.5.2 Small businesses owned by women, minorities, service disabled veterans and micro businesses

To the extent allowed by law, this public body does not discriminate against faith-based organizations in accordance with the *Code of Virginia*, [§ 2.2-4343.1](#) or against a bidder or offeror because of race, religion, color, sex, national origin, age, disability, sexual orientation, gender identity or expression, political affiliation, or status as a service disabled veteran or any other basis prohibited by state law relating to discrimination in employment.

### 10.5.3 Small Business Enhancement Program

[Section 2.2-4310](#) of the *Code of Virginia* provides that any enhancement or remedial measure authorized by the Governor for state public bodies may allow for small businesses certified by the Department of Small Business and Supplier Diversity or a subcategory of small businesses established as a part of the enhancement program



to have a price preference over noncertified businesses competing for the same contract award, provided that the certified small business or the business in such subcategory of small businesses does not exceed the low bid by more than five percent

#### **10.5.4 Ex-offenders**

In the solicitation or awarding of contracts, no agency shall discriminate against a bidder or offeror because the bidder or offeror employs ex-offenders unless the state agency, department or institution has made a written determination that employing ex-offenders on the specific contract is not in its best interest.

#### **10.5.5 Faith-based organizations**

[Section 2.2-4343.1](#) of the *Code of Virginia* provides that agencies may enter into contracts with faith-based organizations on the same basis as any other nongovernmental source without impairing the religious character of such organization, and without diminishing the religious freedom of the beneficiaries of assistance provided under this section. For the purposes of [§ 2.2-4343.1](#), "faith-based organization" means a religious organization that is or applies to be a contractor to provide goods or services for programs funded by the block grant provided pursuant to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P.L. 104-193. To the extent allowed by law, agencies in procuring IT goods or services or in making disbursements pursuant to this section, shall not (i.) discriminate against a faith-based organization on the basis of the organization's religious character or (ii.) impose conditions that (a) restrict the religious character of the faith-based organization, except as provided in subsection F, or (b) impair, diminish, or discourage the exercise of religious freedom by the recipients of such goods, services, or disbursements.

All public bodies shall ensure that all invitations to bid, requests for proposals, contracts, and purchase orders prominently display a nondiscrimination statement indicating that the public body does not discriminate against faith-based organizations.

### **10.6 Posting IT Solicitations and Awards**

All IT solicitations, addenda and notices of award (including emergency and sole source awards) for IT goods and services over \$30,000 shall be posted on [eVA](#). When a solicitation is cancelled or amended, the notice of cancellation or amendment must be publicly posted on [eVA](#). Written solicitation notices up to \$30,000 are not required to be posted. Invitation for Bids (IFBs) notices over \$30,000 may be also published in a newspaper of general circulation for ten (10) days prior to the date for receipt of bids.

When an RFP is issued for an amount in excess of \$30,000, the solicitation shall be posted on [eVA](#) for at least 10 days and may also be published in a newspaper of general circulation in the area in which the contract is to be performed. If the RFP is cancelled or amended, a copy of the cancellation notice or addendum must be publicly posted on [eVA](#).

Award notices for all IT contracts in excess of \$30,000 must be posted for ten (10) days following the date of the award.

Emergency contract awards must state that the contract is being issued on an emergency basis. Sole source awards must state that only one source was determined to be practicably available. Both emergency and sole

source award postings should state what is being procured, the contractor selected, and the date on which the contract was or will be awarded. All award notices shall be posted on [eVA](#) for ten days following the date of the award. Subsequent/additional bid or proposal for same procurement

A supplier who submits a subsequent bid or proposal before the due date that is not specifically identified as an amendment to a previously submitted bid or proposal, shall be treated as having submitted a new bid/proposal in response to the original solicitation.

### **10.7 Subsequent/Additional Bid or Proposal for Same Procurement**

A supplier who submits a subsequent bid or proposal before the due date that is not specifically identified as an amendment to a previously submitted bid or proposal, shall be treated as having submitted a new bid/proposal in response to the original solicitation.

### **10.8 Prohibited Participation**

[Section 2.2-4373](#) of the *Code of Virginia* provides the following regarding participation in bid preparation and limitation on submitting bid for same procurement: "No person who, for compensation, prepares an invitation to bid or request for proposal for or on behalf of a public body shall (i) submit a bid or proposal for that procurement or any portion thereof or (ii) disclose to any bidder or offeror information concerning the procurement that is not available to the public. However, a public body may permit such person to submit a bid or proposal for that procurement or any portion thereof if the public body determines that the exclusion of the person would limit the number of potential qualified bidders or offerors in a manner contrary to the best interests of the public body."

### **10.9 Contract and Purchase Order Modification Restrictions**

A contract or purchase order may not be renewed, extended or otherwise modified unless provided for in the original contract. The contract price may not be increased nor additional consideration given because of a contract renewal or extension unless such increase is specifically authorized under the original contract. As provided in [§ 2.2-4309](#) of the *Code of Virginia*, no fixed price contract may be increased by more than 25% of the original amount of the contract or \$50,000, whichever is greater, without the advance written approval of the Governor or his designee. Additionally, if the contract renewal must undergo certain VITA approvals (Project Governance Request (PGR) or ECOS Assessment approvals, the agency must obtain those approvals prior to issuing a contract renewal. See this link for more guidance: <https://www.vita.virginia.gov/supply-chain/scm-policies-forms/>. Refer to section 10.12 which discusses prohibited contracts. The same prohibitions will apply for any contract renewals.

### **10.10 Contract Pricing**

As provided in [§ 2.2-4331](#) of the *Code of Virginia*, VITA may award IT contracts on a fixed price or cost reimbursement basis, or on any other basis that is not prohibited by this section with the following exceptions: "Except in case of emergency affecting the 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 for 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."

## 10.11 Order Splitting Prohibition

Placing multiple orders to one or more suppliers for the same IT goods or services in order to avoid conducting a competitive procurement or to purchase such items to remain within an agency's delegated procurement authority limit is prohibited.

## 10.12 Prohibited contracts

The *Code of Virginia* prohibits the Commonwealth from entering into certain types of contracts and to contract with individuals or businesses who have defaulted on some obligation to the Commonwealth. These prohibitions are as follows:

[Section 2.2-4331](#) of the *Code of Virginia* provides that no contract shall be awarded by the Commonwealth on the basis of cost plus a percentage of cost except in the case of emergency affecting the public health, safety or welfare. Contracts may be awarded on a fixed price or cost reimbursement basis, or any other basis that is not prohibited.

[Section 2.2-4321](#), [§ 2.2-4321.1](#), and [§ 2.2-4311.2](#) of the *Code of Virginia* prohibit agencies from contracting with any supplier or affiliate of the supplier who:

- Fails or refuses to collect and remit sales tax
- Fails or refused to remit any tax due unless the supplier has entered into a payment agreement with the Department of Taxation to pay the tax and is not delinquent under the terms of the agreement or has appealed the assessment of the tax and the appeal is pending. The determination of whether a source is a prohibited source shall be made by the Department of Taxation after providing the prohibited source with notice and an opportunity to respond to the proposed determination. The Department of Taxation shall notify the Department of General Services of its determination.
- Is not authorized to transact business in the commonwealth.
- Is included on the Commonwealth of Virginia's Debarment List at the time of award.

Additionally, an agency may not award a contract to a supplier, including its affiliates and all subcontractors if they are excluded on the federal government's System for Award Management (SAM) at <https://www.vita.virginia.gov/supply-chain/scm-policies-forms/#sam>; or, who is not registered in eVA at time of award.

[Section 2.2-5514](#) of the *Code of Virginia* prohibits agencies from using, whether directly or through work with or on behalf of another public body, any hardware, software, or services that have been prohibited by the U.S. Department of Homeland Security for use on federal systems.

Except for the [§ 2.2-5514](#) prohibitions specified above, agencies may contract with these sources in the event of an emergency or if contractor is the sole source of needed goods and services.

## 10.13 VITA Mandatory Contract Terms and Conditions for Public IT Contracts

A complete list of the VITA Mandatory Contract Terms and conditions is available on VITA's website at: <https://www.vita.virginia.gov/supply-chain/scm-policies-forms/mandatory-contract-terms/>. The terms and

conditions at this URL are subject to change according to legislative updates or change in VITA policy. Users are encouraged to review the URL(s) periodically to ensure compliance with the current version.

## 10.14 Employment Discrimination by Contractor Prohibited

As stated in [§ 2.2-4311](#) of the *Code of Virginia*, all public bodies shall include in every contract of more than \$10,000 the following provisions:

- “1. To the extent allowed by law, 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, sexual orientation, gender identity or expression, national origin, age, disability, status as a service disabled veteran or other basis prohibited by state law relating to discrimination in employment, except where there is a bona fide occupational qualification reasonably necessary to the normal operation of the contractor. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the 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 paragraphs a, b and c in every subcontract or purchase order of over \$10,000, so that the provisions will be binding upon each subcontractor or vendor.”

### 10.14.1 Drug-free workplace to be maintained by contractor

[Section 2.2-4312](#) specifies that “all public bodies shall include in every contract over \$10,000 the following provisions:

During the performance of this contract, the contractor agrees to (i.) provide a drug-free workplace for the contractor’s employees; (ii.) post in conspicuous places, available to employees and applicants for employment, a statement notifying employees that the unlawful manufacture, sale, distribution, dispensation, possession, or use of a controlled substance or marijuana is prohibited in the contractor’s workplace and specifying the actions that will be taken against employees for violations of such prohibition; (iii.) state in all solicitations or advertisements for employees placed by or on behalf of the contractor that the contractor maintains a drug-free workplace; and (iv.) include the provisions of the foregoing clauses in every subcontract or purchase order of over \$10,000, so that the provisions will be binding upon each subcontractor or vendor.

For the purposes of this section, ‘drug-free workplace’ means a site for the performance of work done in connection with a specific contract awarded to a contractor in accordance with this chapter, the employees of whom are prohibited from engaging in the unlawful manufacture, sale, distribution, dispensation, possession or use of any controlled substance or marijuana during the performance of the contract.”

#### 10.14.2 Payment clauses

Any contract awarded by any state agency, or any contract awarded by any agency of local government in accordance with [§ 2.2-4354](#), shall include:

- “A payment clause that obligates the contractor to take one of the two following actions within seven days after receipt of amounts paid to the contractor by the agency or local government for work performed by the subcontractor under that contract:
  - Pay the subcontractor for the proportionate share of the total payment received from the agency attributable to the work performed by the subcontractor under that contract; or
  - Notify the agency and subcontractor, in writing, of his intention to withhold all or a part of the subcontractor’s payment with the reason for nonpayment.
- A payment clause that requires (i) individual contractors to provide their social security numbers and (ii) proprietorships, partnerships, and corporations to provide their federal employer identification numbers.
- An interest clause that obligates the contractor to pay interest to the subcontractor on all amounts owed by the contractor that remain unpaid after seven days following receipt by the contractor of payment from the state agency or agency of local government for work performed by the subcontractor under that contract, except for amounts withheld as allowed in subdivision 1.
- An interest rate clause stating, “Unless otherwise provided under the terms of this contract, interest shall accrue at the rate of one percent per month.”
- “Any such contract awarded shall further require the contractor 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. A contractor’s obligation to pay an interest charge to a subcontractor pursuant to the payment clause in this section shall not be construed to be an obligation of the state agency or agency of local government. A contract modification shall not be made for the purpose of providing reimbursement for the interest charge. A cost reimbursement claim shall not include any amount for reimbursement for the interest charge.”

#### 10.14.3 Insurance

Contractors are required to have current workers’ compensation, employer’s liability, commercial general liability and automobile liability insurance policies when work is to be performed on state owned or leased property or facilities. In certain types of IT service contracts and to mitigate certain risks, professional liability/errors and omissions insurance and/or cyber liability insurance coverage is also required. The Commonwealth of Virginia must be named as an additional insured when requiring a contractor to obtain commercial general liability coverage.

In some specific 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 Insurance is required if an employer has employees who are paid a wage or salary. Employer's liability insurance 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.

All agreed upon and statutorily mandated insurance must be obtained by the supplier prior to commencing work and must be maintained during the entire term of the contract.

Documentation confirming the contractor's insurance shall be included in the procurement file.

In IT services and solutions contracts, Errors and Omissions Insurance should always be required by Suppliers, except for simple computer-off-the-shelf (COTS) software products. This insurance covers a Supplier's performance errors and intentional or accidental omissions in their performance obligated by the contract's technical/functional requirements. The coverage amount is based on the complexity of your procurement. For instance, if a Supplier is developing a custom solution for the agency, or if the procurement is providing a critical business continuity service to citizens, or if the Supplier is providing a cloud service (i.e., Software as a Service), then a higher amount of coverage should be required. Typical language to include in a contract is: "Supplier shall carry errors and omissions insurance coverage in the amount of \$2,000,000 per occurrence."

For cloud service procurements, it is recommended to require Supplier to also provide coverage for Cyber Security Liability Insurance to assist in data loss or security breach, which can result in losses valued in excess of millions of dollars. This is a relatively new type of insurance that some Suppliers will not have. Often they will say it is included in their Errors and Omissions insurance. If that is the case, you should require a higher coverage in the Errors and Omissions requirement and ask them to confirm how their insurance provider will cover incidents of data loss and security breach. Get the facts in writing and include applicable language in your contract. The typical language to include in your contract requirement for this is: "Supplier shall carry Cyber Security Liability insurance coverage in the amount of \$5,000,000 per occurrence. The coverage amount can be increased based on your risk factor and project complexity and data/security sensitivity. The minimum coverage amount required by VITA Security remains at \$5,000,000. Any reduction must be approved by VITA Security and/or the CIO."

## 10.15 Computer Equipment Performance Specifications

[Section 2.2-2012\(E\)](#) of the *Code of Virginia* provides that if VITA, or any executive branch agency authorized by VITA, elects to procure personal computers and related peripheral equipment pursuant to any type of blanket purchasing arrangement under which public bodies, as defined in [§ 2.2-4301](#), it may purchase such goods from any supplier following competitive procurement but without the conduct of an individual procurement by or for the using agency or institution, and that it shall establish performance-based specifications for the selection of equipment. Establishment of such contracts shall emphasize performance criteria including price, quality, and delivery without regard to "brand name." All vendors meeting the Commonwealth's performance requirements shall be afforded the opportunity to compete for such contracts.

## 10.16 Taxes

### 10.16.1 Excise tax

The Commonwealth of Virginia is generally exempt from paying federal excise taxes.

### **10.16.2 State sales tax**

The Commonwealth of Virginia is generally exempt from paying Virginia's sales taxes on purchases of tangible personal property for its use or consumption. Agencies may receive requests for a tax exemption certificate or exemption number. When taxes are improperly included on the face of a bid, the bidder will be given the opportunity to delete them.

Requests for exemptions from state sales taxes should be routed to: [scminfo@vita.virginia.gov](mailto:scminfo@vita.virginia.gov).

### **10.16.3 Sales and use tax for state government and political subdivisions**

Virginia's sales and use tax does not apply to sales of tangible personal property to the Commonwealth of Virginia or to its political subdivisions, for their use or consumption, if the purchases are pursuant to required official purchase orders to be paid for out of public funds. The tax applies when such sales are made without the required purchase orders and are not paid for out of public funds. No exemption is provided for state or local government employee purchases of meals or lodging whether purchases are pursuant to required official purchase orders or not.

### **10.16.4 Sales and use tax for contractors**

Persons who contract with the Commonwealth or its political subdivisions to perform an IT service and in providing the service also provide some tangible personal property are the consumers of such property and are not entitled to a sales or use tax exemption. This is true even though title to the property provided may pass to the Commonwealth and/or the supplier may be fully and directly reimbursed by the government.

## **10.17 Commodity Codes**

The list of commodity codes for IT products and services is posted on the VITA web site at the following link: <https://www.vita.virginia.gov/media/vitavirginiagov/supply-chain/pdf/NIGP-code-updates-eff-July-2017.pdf>.

## **10.18 Freight**

Freight and delivery charges shall be included in the pricing schedule, if needed, in all bids and proposals. When necessary, freight and delivery charges are used in the evaluation and award and should be clearly reflected on all documentation in the procurement file.

By signing an IFB, suppliers certify that the bid prices offered for F.O.B destination include only the actual freight rate costs at the lowest available rate and such charges are based upon the actual weight of the goods to be shipped.

F.O.B. destination. – F.O.B. destination literally means “free on board.” It is the place at which ownership (title) of the goods passes to the buyer and usually, but not always, the point at which the buyer is responsible for the shipping costs. F.O.B. destination means that all freight charges are paid by the supplier who owns and assumes all risk for the goods until they are accepted by the Commonwealth at the designated delivery point. Unless there is a specific finding that F.O.B. destination is not appropriate for a particular IT procurement, F.O.B. destination is the Commonwealth’s preferred method of freight. The cost of shipping the goods may be included in the quoted price or by the bidder or offeror as a separate line item.

F.O.B. origin – Under F.O.B. origin, the supplier is required to select the most economical method of shipment consistent with the required delivery date. The supplier will prepay the freight charge and add it to the invoice.

Regardless of the F.O.B. point, the Commonwealth accepts title only when goods are received. Under F.O.B. origin, the total cost for freight to destination, shipping and handling charges shall be included in determining the lowest responsive and responsible bidder. The cost of the freight, shipping and/or handling should be reflected as a line item on the purchase order.

In the table below, the first entry (F.O.B. destination) is the most beneficial to the Commonwealth, while the others increase the expense and risk to the state. Remember that when ownership passes to the agency at the point of origin, the agency owns the merchandise in transit. The agency would then be obligated to pay for lost or damaged shipments. There may be times when accepting a lower bid requires an agency to pay the shipping costs and accept the risk of loss for merchandise in transit. The following table summarizes commonly used shipping terms and their implications. When you see the term "Freight Allowed", it means the seller pays the freight bill and absorbs the costs.

Terms of sale	Payment of initial freight charge	Bears final freight cost	Owns goods in transit	File claims, if any
F.O.B. destination, freight prepaid	Seller	Seller	Seller	Seller
F.O.B. destination, freight collect		Buyer	Seller	Seller
F.O.B. destination, freight prepaid and added (charged back to buyer on invoice)	Seller	Buyer	Seller	Seller
F.O.B. shipping point, freight prepaid	Seller	Seller	Buyer	Buyer
F.O.B. shipping point, freight collect		Buyer	Buyer	Buyer
F.O.B. shipping point, freight prepaid and added (charged back to buyer on invoice)	Seller	Buyer	Buyer	Buyer

## 10.19 Used Equipment

Used equipment can be a viable source of technology provided it is certified acceptable for manufacturer's maintenance. All such costs for certification must be borne by the seller and must be included in the bid or



proposal pricing. The same VITA review and approval that applies to new IT equipment (refer to [Chapter 1](#) of this manual) also applies to used IT equipment.

## 10.20 Evaluation Products and Testing

Evaluation products may be requested to verify quality levels or to test equipment to determine conformance with the specifications stipulated in a solicitation and/or to determine ability to interface with existing equipment. Evaluation products may only be requested when conducting a formal solicitation. A request for an evaluation product must be clearly indicated in the solicitation. Return of evaluation products submitted will be at supplier's risk and expense. Evaluation products required in a bid or proposal must be submitted prior to the solicitation due date. Failure to submit requested evaluation products may result in rejection of bid or proposal. Evaluation products should be properly labeled, stored and controlled by the receiving public body until no longer needed. All evaluation products submitted are subject to testing. Those not destroyed during testing may be returned at the bidder's or offeror's expense. Evaluation products of the successful supplier may be held for comparison with deliveries.

If, after 30 days, the evaluation products have not been picked up and suppliers fail to provide disposition instructions, evaluation products may be offered to other agencies or internal operating departments for use. Evaluation products not picked up by bidder within 30 days of award will become the property of the Commonwealth. If the items have significant reusable utility value, they should be disposed of using established property disposal procedures. The procurement file must be documented as to disposition of all evaluation products.

## 10.21 Guarantees and Warranties

The following guidelines should be taken into account when deciding the appropriate warranty or guarantee terms and conditions to include in IT solicitations and the final negotiated contract:

- Determine if procuring agency wants to specify the length of time the warranty is to run;
- Determine if warranty is needed to prevent damage to existing resource information from computer viruses or shut down devices;
- Select the guarantee or warranty special term and condition that best suits the needs of the agency for the particular solicitation; and
- When considering a non-industry standard warranty, the agency should obtain the appropriate cost associated with the desired warranty; a written justification for the desired warranty and any additional cost to be included in the procurement file.

Many IT suppliers will agree to provide greater than 90-day warranty periods during negotiation, or even a 12-month for solution/development type contracts. Computer-off-the-shelf manufacturers generally offer 30 or 60-day warranty periods. Larger IT companies often provide 90-day warranty periods. Agencies should not have to reimburse a supplier for errors corrected or fixes made during a warranty period. The warranty period should start after final acceptance by the agency, while any procured annual maintenance or support would begin once the warranty period is over. For a more in-depth discussion of warranties refer to [Chapter 25](#) of this manual, IT Contract Formation:

## 10.22 Procurements Which Require FCC Licensing

All facilities, equipment and services that require Federal Communications Commission (FCC) licensing (e.g., uplinks, television and radio broadcast frequencies, microwave, two- way radio), etc., are the responsibility of VITA to coordinate and acquire. All agencies, whether in scope or not, must submit all supporting documentation to the agency or institution's assigned agency telecomm coordinator (ATC) or submit a request through VCCC prior to any acquisition of telecommunications equipment or service. There is no dollar amount associated with this requirement. Any device requiring FCC authorization or licensing must be approved by VITA. If the equipment or services are on a current VITA state contract, VITA will approve the procurement and return the request with the appropriate written approval. If the equipment or services are not currently available through an existing contract process, VITA will acquire the requested goods or services on behalf of the requesting agency or institution.

## 10.23 Unsolicited Proposals

VITA encourages its suppliers to submit new and innovative technology ideas by submitting unsolicited proposals. The submission of these proposals allows for VITA to consider unique and innovative ideas or approaches that have been developed in the private sector and to bring those innovations into state government. Any supplier who is considering submitting an unsolicited proposal to VITA for IT should adhere to the following rules:

- The IT idea or concept being proposed must be innovative and unique.
- The technology concept or idea must be independently originated and developed by the offeror submitting the unsolicited proposal.
- All unsolicited proposals must be prepared without Commonwealth assistance, endorsement, direction or involvement.
- The unsolicited proposal must include sufficient detail to permit a determination if it would be worthwhile for the Commonwealth to study and/or consider.
- The unsolicited proposal cannot be an advance proposal for a known agency or Commonwealth requirement that can be acquired through competitive methods. The proposal should not address a previously published agency requirement or need.
- All solicited and unsolicited proposals and all solicited and unsolicited ideas for innovation or improvement are submitted at the risk of and expense of the offeror, and create no financial or legal obligation on the part of the Commonwealth.
- Any ideas or information contained in an unsolicited proposal may be used freely by the Commonwealth and no restriction on the Commonwealth's use of such ideas, proposals or the information contained therein shall arise in connection with such submission.
- A favorable comprehensive evaluation of an unsolicited proposal by VITA does not, in itself, justify awarding a contract without providing for competition. No preference shall be given to any offeror that initially offers the unsolicited proposal. If it is determined by the evaluation that goods or services required by the agency and offered in an unsolicited written proposal are practicably available from only one source, a buyer may negotiate and award a contract following the VITA's sole source procedures. The buyer shall post a notice of award for ten (10) calendar days.

All unsolicited proposals for IT and are submitted to VITA with the following proviso(s):

- All unsolicited proposals are submitted at the risk of and expense of the offeror and with no obligation on the part of the VITA or the Commonwealth.
- Unsolicited proposals must contain no restrictions on the Commonwealth's or VITA's use of any ideas, proposals or the information contained in such proposals.
- VITA may charge a fee for review of an unsolicited proposal.
- A minimum fee of \$1,000 (or greater) may be charged for review of unsolicited proposals under a specified amount (\$50,000) and an increased fee schedule over that amount. Proposals requiring technical review would be billed on an hourly basis as appropriate for time spent in review.
- All unsolicited proposals will be evaluated for their participation and encouragement of small businesses including women and minority-owned businesses and businesses owned by service-disabled veterans.

Unsolicited proposals shall be submitted in writing directly to VITA's Supply Chain Management Division at [scminfo@vita.virginia.gov](mailto:scminfo@vita.virginia.gov). Favorable evaluation by VITA or the Commonwealth of an unsolicited proposal does not in itself justify procurement or awarding a contract without VITA first putting out the proposal for competition and providing for competitive negotiation or competitive sealed bidding, as required.

#### **10.24 Use of Brand Names**

Use of a brand name or equal specification should only be used to indicate a desired quality level and should be based upon one or more supplier's commodity description(s), model number(s) and quality level. The supplier's commodity numbers should be easily identifiable in a current publication that is available to most suppliers. Commodity descriptions must be sufficiently detailed and specify only the required features needed. As provided in [§ 2.2-4315](#) of the *Code of Virginia*, "Unless otherwise provided in the Invitation to Bid, the name of a certain brand, make or manufacturer shall not restrict bidders to the specific brand, make or manufacturer named and shall be deemed to convey the general style, type, character, and quality of the article desired. Any article that the public body in its sole discretion determines to be the equal of that specified, considering quality, workmanship, economy of operation, and suitability for the purpose intended, shall be accepted."

#### **10.25 Supplier Advertising Prohibition**

Without the express written consent of VITA, IT suppliers are prohibited from advertising or utilizing sales material which states that a Commonwealth agency has purchased a supplier's IT product or service.

#### **10.26 Public-Private Education Facilities and Infrastructure Act (PPEA) Procedures for State Agencies and Institutions**

The Public-Private Education Facilities and Infrastructure Act of 2002 – [§§ 56-575.1 et seq.](#) of the *Code of Virginia* (the "PPEA") – allows VITA to create public-private partnerships for the development of a wide range of projects for public use if VITA determines the project serves a public purpose and that private involvement may provide the project in a timely or cost-effective fashion. The [PPEA](#) allows VITA to develop innovative public-private partnerships with its suppliers through solicited and unsolicited proposals for projects for which VITA determines there is a public need. The PPEA serves as an alternative procurement method for IT in certain circumstances.

The PPEA is designed to bring private funding and/or private risk to public projects in the Commonwealth. The PPEA is intended to provide a faster mechanism for the funding and completion of projects that are time sensitive. Like the Public Private Transportation Act, the PPEA allows for creative financing and allows private entities to bring innovative thinking and vision to public projects.

The PPEA authorizes responsible public entities to use the PPEA procurement process. These entities include state agencies, public educational institutions, counties, cities and town and public authorities.

In order for a project to be eligible under the PPEA, it must meet the definition of a qualifying project. For IT, the PPEA establishes the following as qualifying projects: "... (vi) technology infrastructure, services and applications, including, but not limited to, telecommunications, automated data processing, word processing and management information systems, and related information, equipment, goods and services; (vii) any services designed to increase productivity or efficiency through the direct or indirect use of technology, (viii) any technology, equipment, or infrastructure designed to deploy wireless broadband services to schools, businesses, or residential areas. . ." ([§ 56-575.1](#) of the *Code of Virginia*) The PPEA establishes requirements for the review and approval of proposals received pursuant to the PPEA. In addition, the PPEA specifies the criteria that must be used to select a proposal and the contents of any comprehensive agreement between VITA and the private entity.

[Section 56-575.16.2](#) of the *Code of Virginia*, provides, in part: " 2. A responsible public entity may enter into a comprehensive agreement in accordance with guidelines adopted by it that are consistent with the procurement of "other than professional services" through competitive negotiation as set forth in [§ 2.2-4302.2](#) and subsection B of [§ 2.2- 4310](#). Such responsible public entity shall not be required to select the proposal with the lowest price offer, but may consider price as one factor in evaluating the proposals received. Other factors that may be considered include (i) the proposed cost of the qualifying facility; (ii) the general reputation, industry experience, and financial capacity of the private entity; (iii) the proposed design of the qualifying project; (iv) the eligibility of the facility for accelerated selection, review, and documentation timelines under the responsible public entity's guidelines; (v) local citizen and government comments; (vi) benefits to the public; (vii) the private entity's compliance with a minority business enterprise participation plan or good faith effort to comply with the goals of such plan; (viii) the private entity's plans to employ local contractors and residents; and (ix) other criteria that the responsible public entity deems appropriate.

### **10.26.1 PPEA process**

The PPEA process can be initiated in two ways. An agency may issue a solicitation for PPEA proposals, like a traditional RFP, or an agency may receive an unsolicited proposal (see subsection 10.23 above) where a private entity submits a proposal not in response to a solicitation or notice. When an agency is considering issuing a notice for solicited proposals, it must first make a determination that it reasonably expects the PPEA process to be more beneficial than traditional procurement processes under the VPPA. A public notice soliciting PPEA

proposals must allow for at least forty-five (45) days for proposals to be submitted. Notice must be posted on [eVA](#).

If an agency receives an unsolicited PPEA proposal, it must make a threshold decision as to whether the proposal fits with the agency's business objectives and should be pursued. If the agency decides to accept the unsolicited PPEA proposal, it must post a public notice for at least forty-five (45) days which details the subject matter of the proposal and requests that competing proposals be submitted. Notice must be posted on [eVA](#). If the agency decides not to accept the unsolicited PPEA proposal, the agency should return the proposal to the private entity.

The PPEA may be a useful tool to achieve certain objectives but it is just another procurement method. Most PPEA proposals involve costly, high profile projects so it is imperative that agencies closely follow the PPEA procurement procedures to ensure a fair competitive process. See Commonwealth of Virginia PPEA Guidelines and Procedures. <https://dgs.virginia.gov/globalassets/business-units/deb/documents/ppea-administration-guidelines-2008.pdf>.

#### **10.26.2 Fees for proposal review**

Under [§ 56-575.4](#), agencies may charge a reasonable fee to cover the costs of processing, reviewing and evaluating proposals and charge for reasonable attorney's fees and fees for financial, technical, and other necessary advisors or consultants. Such sums shall be paid with certified funds and shall be deposited in the State Treasury on the books of the Comptroller in a special statewide fund known as the PPEA Fund.

If the cost of reviewing the proposal is less than the established proposal fee, the Agency may refund the excess to the proposer. If during the initial review the Agency decides not to proceed to conceptual-stage review of an unsolicited proposal, the proposal fee, less any direct costs of the initial review, shall be refunded to the private entity.

If the Agency chooses to proceed with evaluation of proposal(s) under the PPEA, it shall not do so until the entire, non-refundable proposal fee has been paid to the Commonwealth in full.

#### **10.26.3 Proposal format for submission of proposals**

**Proposal format for conceptual proposals.** Proposals shall provide a straightforward, concise delineation of capabilities, experience and approach. Elaborate brochures and/or excessive promotional materials are not required or desirable. Firms that submit proposals may be required to make an oral presentation of their proposal with participation by key personnel. All information requested in the Section VI (A) "FORMAT FOR SUBMISSION OF CONCEPTUAL PROPOSALS" must be included in any proposal submitted to VITA. In addition, all submitted proposal should also contain the following in addition to the requirements of the Model Procedures:

- Project Characteristics:
  - Proposal should include sufficient data, analysis and information sufficient to satisfy VITA that the project would serve a public purpose as required by the PPEA.
  - Provide information about how the project is aligned with Virginia's strategic goals for technology.

- Financing:
  - Proposal must include sufficient financial information, which evidences the proposer's financial stability and an ability to provide financing to support the project.
  - The financial plan for the proposed project must contain enough detail, including cost benefit and tax analysis studies, so that an analysis will reveal whether the proposed financing is feasible.
- References:
  - Each proposal should provide reference information for three to five successful relevant projects completed by the proposer.
  - References should include the following information:
    - Project owner/sponsor (business name and address)
    - Owner's project manager (name, telephone and fax numbers)
    - Project summary, budget and final cost
    - Project schedule (proposed and actual)
- Lawsuits or arbitration proceedings:
  - Each proposal should include a list and explanation of all lawsuits and arbitration proceedings during the past three years involving any of the proposing firms or any of its principles.

**Proposal format for detailed proposals.** A detailed proposal should not depart significantly from the technical approach or financing plan described in the conceptual proposal. If a proposer departs significantly in either respect, VITA may reject the detailed proposal as non-compliant. In particular, adoption of significant aspects or characteristics of a competing conceptual proposal will normally result in disqualification and rejection of a detailed proposal. At any time during the detailed stage, VITA may ask a proposer to provide additional information, data, analysis or any other information needed to sufficiently review the project. If necessary to protect additional confidential proprietary information, which may be included in the detailed proposal, VITA and the proposer will modify the previously executed agreement on protection of confidential information as needed.

**Requirements for both conceptual and detailed proposals.** All PPEA proposals (conceptual phase and detailed phase) should follow the following format:

- All submitted proposals shall be clearly marked as a "PPEA Proposal."
- To be considered, one original and five (5) copies and one electronic copy of any unsolicited or solicited proposals must be submitted.
- The applicable fee must be paid to VITA for all unsolicited proposals.
- The cover page must include the title of the proposal, the name and address of the proposing entity, the individual authorized to act on behalf of the proposer and his or her telephone and facsimile numbers and email address.
- An authorized representative of the firm or consortium making the proposal must sign the proposal.
- Each proposal should include an executive summary, which includes a summary of organizational structure, size of the firm(s), brief history, and areas of expertise which qualify the firm for the work and full range of services required for the proposed project.
- All pages of the proposal should be consecutively numbered.
- The proposal should contain a table of contents which cross references the requirements by category.

- Each copy of the proposal should be bound or otherwise contained in a single volume where practicable.
- All proposal documentation for which a claim of confidentiality is made should be submitted in a separately bound clearly marked volume for convenience of review by VITA and to reduce the potential for inadvertent disclosure.
- All PPEA proposals should be submitted via mail or hand delivery to:

Chief Information Officer C/O VITA, PPEA Proposals 11751 Meadowville Lane  
Chester, VA 23836

#### **10.26.4 PPEA proposals and the Freedom of Information Act**

Upon the receipt of a written request for protection of documents, the responsible public entity shall determine whether the documents contain (i) trade secrets, (ii) financial records, or (iii) other information that would adversely affect the financial interest or bargaining position of the responsible public entity or private entity in accordance with Section D.1. The responsible public entity shall make a written determination of the nature and scope of the protection to be afforded by the responsible public entity under this subdivision. If the written determination provides less protection than requested by the private entity, the private entity should be accorded an opportunity to withdraw its proposal. Nothing shall prohibit further negotiations of the documents to be accorded protection from release although what may be protected must be limited to the categories of records identified in Section D.1. Once a written determination has been made by the responsible public entity, the documents afforded protection under this subdivision shall continue to be protected from disclosure when in the possession of the responsible public entity or any affected local jurisdiction, or the Public Private Partnership Advisory Commission as provided for in [§ 30-281](#) of the *Code of Virginia*, to which such documents are provided. Cost estimates relating to a proposed procurement transaction prepared by or for a responsible public entity shall not be open to public inspection.

Protection from mandatory disclosure for certain documents produced by the responsible public entity.

Memoranda, staff evaluations, or other records prepared by or for the responsible public entity, its staff, outside advisors or consultants, exclusively for the evaluation and negotiation of proposals may be withheld from disclosure if the disclosure of such records required by the PPEA would adversely affect the financial interest or bargaining position of the responsible public entity or private entity, and the basis for the determination of adverse effect is documented in writing by the responsible public entity.

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

If a private entity fails to designate confidential or proprietary information, records or documents for protection from disclosure, such information, records or documents shall be subject to disclosure under FOIA. A responsible public entity (RPE) may not withhold from public access:

- (a) procurement records other than those subject to the written determination of the responsible public entity;
- (b) information concerning the terms and conditions of any interim or comprehensive agreement, service contract, lease, partnership, or any agreement of any kind executed by the responsible public entity and the private entity;



- (c) information concerning the terms and conditions of any financing arrangement that involves the use of any public funds; or
- (d) information concerning the performance of any private entity developing or operating a qualifying project.

However, to the extent that access to any procurement record or other document or information is compelled or protected by a court order, then the RPE must comply with such order.

#### **10.26.5 Agreement on protection of confidential information**

If VITA should decide to accept a proposal for consideration at the conceptual phase, VITA and the proposer will execute a written confidentiality agreement designating specifically what confidential proprietary information within the proposal will be excluded from public disclosure.

#### **10.26.6 VITA's reservation of rights**

In connection with any proposal or qualifying project, VITA shall have all rights available to it by law in administering the PPEA proposals that it receives, including without limitation the following:

- Right to reject any or all proposals at any time, for any reason, solely within the discretion of VITA. Proposers shall have no recourse against VITA for such rejection. Proposers will be notified in writing of such rejection.
- Terminate evaluation, review or consideration of any and all proposals at any time and reserve the right to issue an RFI or RFP for the proposed project.
- Suspend, discontinue and/or terminate comprehensive agreement negotiations with any proposer at any time before the actual authorized execution of a comprehensive agreement by all parties.
- Negotiate with a proposer without being bound by any provision in its proposal.
- Decline to return any fee required to be paid by proposers hereunder, except for initial fees paid by proposers with an unsolicited conceptual proposal where VITA declines to accept the proposal for consideration.
- Request revisions to conceptual or detailed proposals at any time during the conceptual or detailed review stages.
- Submit a proposal for review by outside consultants or advisors selected by VITA without notice to the proposer. Such consultants or advisors shall be contractually required to be bound by the agreement on protection of confidential information between the proposer and VITA.

VITA recognizes that it may receive proposals, which have certain characteristics in common yet differ in meaningful ways. In such cases, VITA reserves the right, in its sole discretion, to treat such a proposal or any portion of such proposal received after the original proposal, as either a competing proposal or a noncompeting unsolicited proposal, and to proceed accordingly.

#### **10.26.7 Additional VITA provisions**

Under no circumstances shall VITA be liable for, or reimburse any cost incurred by a proposer, whether or not selected for negotiations, in developing a proposal, submitting additional requested information to VITA or in negotiating a comprehensive agreement.



Any and all information VITA makes available to proposers shall be as a convenience to the proposer and without representation or warranty of any kind. Proposers may not rely upon any oral responses to inquiries. If a proposer has a question or needs clarification on any matter during the PPEA process, the proposer must submit the question in writing and VITA will respond in writing as it deems appropriate.

#### **10.26.8 When is a similar proposal a competing proposal?**

In the event a potential proposer is unsure whether its planned proposal will be sufficiently similar to the proposal which was the subject of a notice to be deemed a competing proposal, such proposer may submit to VITA a written request for a preliminary determination of whether its project would be deemed a competing proposal in whole or in part. VITA will respond to such request with a preliminary determination as to whether or not the proposal would be a competing proposal or that it has received insufficient information to make a determination. In the event VITA elects to treat a proposal, or part of a proposal, received within the posting period as a noncompeting proposal, VITA will follow the forty-five (45) day posting period (or longer depending on the scope and complexity of the proposed project) to permit competing proposals to be submitted, including from the proposer whose proposal triggered the original notice.

#### **10.26.9 PPEA proposal steps**

For unsolicited PPEA proposals, please refer to procedures at: <https://dgs.virginia.gov/globalassets/business-units/deb/documents/ppea-administration-guidelines-2008.pdf>.

#### **10.26.10 Applicability of other laws**

Virginia's constitutional and federal and state statutory requirements governing appropriation and expenditure of public funds apply to any comprehensive agreement entered into between VITA and any proposer under the PPEA. Accordingly, the processes and procedural requirements associated with the expenditure or obligation of public funds by VITA shall be incorporated into any PPEA proposal.

Although the VPPA ([§§ 2.2-4300 et seq.](#) of the *Code of Virginia*) does not apply to qualifying projects submitted pursuant to the PPEA, the requirements of state and federal appropriations acts do apply wherever appropriated funds will be involved in the financing of a qualifying project. Proposals incorporating the use of state and/or federal funds should address how those proposals are consistent with the legal restrictions imposed in appropriations acts.

In soliciting or entertaining proposals under the PPEA, agencies shall comply with all applicable federal, state and local laws not in conflict with the PPEA. Likewise, in submitting proposals and in developing, executing or operating facilities under the PPEA, Private entities shall comply with all applicable federal state and local laws. Such laws may include, but not necessarily be limited to, contractual obligations which require Workers Compensation insurance coverage, performance bonds or payment bonds from approved sureties, compliance with the Virginia Prompt Payment Act, compliance with the Ethics in Public Contracting Act and compliance with environmental laws, workplace safety laws, and state or local laws governing contractor or trade licensing, building codes and building permit requirements.

Departments, agencies and institutions of the Commonwealth of Virginia are constitutionally prohibited from expending funds that are not appropriated by the Virginia General Assembly. Therefore, expenditure of state funds in support of an interim or comprehensive agreement requires and must be conditioned upon such appropriation of funds.

Proposals should avoid the creation of state-supported debt; however, should a proposal include such debt, procedures to secure specific approval by the Governor, General Assembly, the Department of Planning and Budget, the Department of the Treasury, and any other appropriate entities must be included in the proposal. In addition, a clear and detailed alternative if such approval is not achieved must be provided.

Any Agency considering construction of facilities through solicited or unsolicited proposals shall be responsible for ensuring compliance with the provisions of [§ 10.1-1188](#) of the *Code of Virginia* as it regards environmental issues and the need for an Environmental Impact Report.

In accordance with existing state law, or pursuant to directive from the Governor's Office, other Agencies may also have a right and/or responsibility with respect to the project and the Contractor's compliance with the terms of the comprehensive agreement.

While procedures incorporated in these guidelines are consistent with those of [§§ 2.2-4301](#) et seq. of the *Code of Virginia*. Under [§ 56-575.1](#), the VPPA shall not apply to actions under the Public-Private Education Facilities and Infrastructure Act.

### Chapter highlights

- **Purpose:** This chapter discusses information technology (IT) procurement planning, which include efforts by all personnel responsible for significant aspects of an IT project to ensure that they are coordinated and integrated in a comprehensive manner.
- **Key points:**
  - As an IT procurement best practice, comprehensive IT procurement planning is proven to provide multiple benefits to public procurement.
  - Market research is central to sound IT procurement planning and market research results should be understood by the entire procurement project team.
  - Strategic procurement planning helps the Commonwealth optimize performance, minimize price, increase achievement of socio-economic acquisition goals, evaluate total life cycle management costs, improve supplier access to business opportunities, and increase the value of each IT dollar.
  - VITA may have an existing mandatory-use or optional-use statewide contract that would serve your IT procurement need. Agencies subject to VITA's IT procurement authority must determine whether one is available as a first step in the procurement planning process.

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## 11.0 Introduction

Effective information technology (IT) procurement planning produces more efficient and economical acquisitions which result in cost-efficient and timely contracts for IT products or services. Procurement planning is the process by which all personnel responsible for significant aspects of a project have adopted specific roles and responsibilities and are integrated in a comprehensive manner. Procurement planning begins with the recognition of a specific IT business need. Procurement planning includes identification of what is needed, when it is needed, how it will be acquired and by whom. The amount of time necessary for the planning process is dependent upon the dollar value, risk, complexity and criticality of the proposed purchase. Procurement planning must also include budget planning. In general, the more costly and complex the IT procurement is, the more essential the need will be for a rigorous, well-planned, structured and disciplined procurement process.

VITA may have an existing mandatory-use or optional-use statewide contract that would serve your IT procurement need. Agencies subject to VITA’s IT procurement authority must determine whether one is available as a first step in the planning process. Using a statewide contract(s) may significantly reduce the time and cost for the IT acquisition, as these contracts are competitively procured as a result of the VPPA-required procurement process and the contracts are VPPA compliant. Current VITA statewide contracts may be found at this link: <https://vita.cobblestonesystems.com/public/>

In addition, the procurement planning process must allow for the time necessary to comply with all Code-required VITA, CIO, Project Management Division (PMD), Enterprise Cloud Oversight Services (ECOS), Security and approvals and governance and oversight requirements for agency IT procurements covered in [§ 2.2-2007](#) through [§ 2.2-2021](#) of the *Code of Virginia*.

### 11.1 Various IT procurement scenarios

A variety of IT procurement scenarios are possible, some of which are described below:

- **The IT procurement is of low value, easy to define and supported by several supplier alternatives.** In this situation, the procurement approach is similar to buying a commodity and can be fast-tracked using [eVA](#) Quick Quotes or an Invitation for Bid in accordance with VITA’s procurement guidelines.
- **The IT procurement is of low value, but is hard to define or seems to have only one supplier.** In this situation, a Request for Information (RFI) may be made of potential suppliers. An RFI is an informal effort to seek ideas, perspectives, costs and information from potential suppliers so that a formal project scope and set of requirements can be developed. An RFI will also enable agencies to determine the number of suppliers in the market available to provide the needed IT solution. Agencies should also conduct a market analysis to determine what suppliers are available and the prices and/or deals those suppliers have offered to other similar customers.

- **The IT procurement is of high value, but is easy to define or is supported by a range of alternatives.** In this situation, a structured procurement approach, usually based on a request for proposal (RFP), is recommended. For more information on RFPs, please refer to [Chapter 24](#) of this manual, Requests for Proposals.
- **The IT procurement is of high value, but is hard to define and scope, or the extent of available alternatives is not known.** In this situation, it may be advisable to consider an RFI as part of the market research, followed by an RFP.

## 11.2 IT procurement planning principles

Here are several key IT procurement planning principles:

- Sourcing should be consistent with market capabilities and available spend rather than driving solutions toward prescriptive requirements.
- Strive for quick and easy IT solutions.
- IT solutions should be forward facing and positioned for future supportability.
- Procurement planning can prepare agencies for negotiating mutually collaborative agreements with IT suppliers. These agreements should reflect the best agreements in the marketplace.
- Agency stakeholders including the business owner, project manager, information security officer and procurement lead should be in constant collaboration.
- Consider all required processes and approvals (VITA, federal, other) in your procurement timeline for a realistic versus reactive procurement process.

## 11.3 Benefits of IT procurement planning

As an IT procurement best practice, IT procurement planning has been proven to generate multiple benefits for public procurement. IT procurement planning enables agencies to implement strategic IT sourcing concepts during the procurement process. Planning will also enable agencies to leverage the Commonwealth's purchasing power to obtain lower costs and better value. Developing a thorough IT procurement plan which assigns roles and responsibilities to the procurement project team members and defines the process steps will facilitate a better-value IT procurement. The IT procurement planning process should be a collaborative and synergistic effort between procurement project team members.

Proven benefits of procurement planning include:

- Development of a strong communication framework and structure for cross-functional information sharing.
- Improved schedule success through workload and resource planning and the assignment of roles and responsibilities for each procurement project team member.
- Increased project discipline by demanding systematic documentation of business needs, timelines, and costs while providing sufficient lead time and resources in the selection of appropriate procurement types and development of innovative contracting methods.
- Requiring a baseline commitment from the supplier community to adhere to the response parameters set forth in the solicitation.

- Enhanced structure and control over the amount of time and resources required to accomplish the objectives.
- Speedier negotiations and contract execution because contractual requirements are defined at the beginning of the project.
- Reduced miscommunication and disputes during the evaluation phase.
- Improved savings and cost efficient IT assets for the Commonwealth by utilizing planning to encourage consolidation of requirements to achieve greater IT economies through innovative price reductions and/or quantity discounts.

#### **11.4 IT Procurement planning roles and responsibilities**

The agency's sourcing specialist or assigned procurement lead is responsible for the preparation and delivery of the procurement plan to the procurement project team. As an example, the following responsibilities are delegated to the various roles listed below which ensure that duties are performed by the appropriate subject-matter experts and procurement team members. These roles vary for each project but are considered critical to the success of the procurement plan. For complex major IT procurements, the agency may require VITA PMD and other VITA technical experts be involved. The planning and sourcing process is intended to be collaborative as many steps are shared among team members. For a more in-depth discussion on these roles, go to [Chapter 24](#) of this manual, Requests for Proposals.

Procurement role	Responsibilities
Agency procurement lead/sourcing specialist	<ul style="list-style-type: none"> <li>• Be knowledgeable about the scope of work and the technical and business objectives of the project.</li> <li>• Determine if VITA has a statewide IT contract that satisfies the IT business need, thereby eliminating a new procurement process.</li> <li>• Develop procurement plan methodology and framework.</li> <li>• Define and assign roles and responsibilities for the duration of the procurement process to each team member.</li> <li>• Act as single point of contact (SPOC) for the team; the evaluation team, if different group; steering committee, if applicable; suppliers and procurement process oversight.</li> <li>• Coordinate and participate in assessing all potential project risks and including mitigation methods and RFP/contract language with appropriate stakeholders; i.e., business owner, project manager, information security officer, budget analyst.</li> <li>• Participate with team in establishing well-defined evaluation criteria.</li> <li>• Participate with team to develop a clear, concise scoring plan.</li> <li>• Choose best contract type for project success.</li> <li>• Obtain and maintain all confidentiality/non-disclosure agreements from team members, subject matter experts and evaluation team, if different group.</li> <li>• Prepare RFP/solicitation and evaluation documents. VITA sourcing specialists must use VITA templates.</li> <li>• Preside over the bidder/pre-proposal conference if held.</li> <li>• Post solicitation documents and respond to supplier questions.</li> <li>• Obtain clarification of supplier proposals if necessary.</li> <li>• Along with team, participate in supplier product demonstrations and oral presentations, if held.</li> <li>• Provide and maintain control of the price information from proposers.</li> <li>• Participate in and lead proposal evaluations and contract negotiations.</li> <li>• Serve as chairperson of evaluation team.</li> <li>• Review and approve evaluation recommendation.</li> <li>• Help tailor the contract to the unique needs of the project.</li> <li>• Protect and manage the integrity of the project and the ability to get work done.</li> <li>• Protect and manage the relationship with potential suppliers.</li> </ul>
Procurement role	Responsibilities
	<ul style="list-style-type: none"> <li>• Ensure the overall integrity of the procurement process through fair and open competition.</li> <li>• Coordinate legal and/or CIO review and approval of procurement documentation required before release/execution.</li> <li>• Award and post contract.</li> <li>• Ensure the procurement file is complete.</li> </ul>

Business owner	<ul style="list-style-type: none"> <li>• Define requirements.</li> <li>• Define budget, requested timeline and other possible constraints.</li> <li>• Ensure that the procurement aligns with the agency's and Commonwealth's IT strategic plan(s).</li> <li>• Define conditions of performance satisfaction and final acceptance.</li> <li>• Identify business needs such as: <ul style="list-style-type: none"> <li>◦ demonstrations</li> <li>◦ bonding/acceptance testing</li> <li>◦ service levels</li> <li>◦ milestones/payment terms</li> <li>◦ required supplier technical and professional standards and certifications (agency, VITA, Commonwealth, federal, etc.)</li> </ul> </li> <li>• Support negotiations to ensure that final contract supports business needs and agency requirements.</li> <li>• Serve on evaluation team to evaluate the supplier responses.</li> <li>• Coordinate VITA PMD participation and PGR approval process.</li> </ul>
Agency Information Security Officer or AITR	<ul style="list-style-type: none"> <li>• Ensure solicitation includes all appropriate agency and VITA security policy requirements, including ECOS, if the procurement is or may be a cloud-based solution.</li> <li>• Collaborate with the SPOC and VITA security and ECOS stakeholders.</li> </ul>
Subject matter expert (SME)	<ul style="list-style-type: none"> <li>• Possess expert technical, industry-, commodity- or service-specific competence and/or knowledge for the project.</li> <li>• May be a member of team or a resource to the team.</li> </ul>
External consultant	<ul style="list-style-type: none"> <li>• External consultant technical, industry-, commodity- or service-specific competence and/or knowledge not available from an internal resource.</li> <li>• Provide advice or assistance to sourcing team members.</li> <li>• Function as a non-voting resource to the sourcing team.</li> <li>• Prohibited from benefiting from outcome of any award or participating in preparation of solicitation.</li> </ul>
Evaluation team members	<ul style="list-style-type: none"> <li>• Individuals designated/responsible to make award recommendation.</li> <li>• The procurement project team/evaluation team would typically include an agency representative (business owner), SMEs and be led by the agency procurement lead/sourcing specialist.</li> <li>• Each member participates to provide business, legal, technical and financial input according to their area of expertise. The members only evaluate their area of expertise as assigned.</li> </ul>
Single point of contact (SPOC)	<ul style="list-style-type: none"> <li>• Agency procurement lead/sourcing specialist serves this role. (See role responsibilities above.)</li> <li>• Is the designated resource for communications with suppliers and all others during the solicitation process?</li> </ul>



## 11.5 Market research

Market research is central to sound procurement planning and must be addressed and understood by the entire procurement project team. Market research sources must be substantial, credible, current and supportable and aligned with the project's business and functional objectives.

### 11.5.1 The purpose of market research

When little or no knowledge exists for the desired IT product, service or solution or available supplier resources, market research helps identify:

- Products, services or solutions available in the marketplace to address the business problem.
- Appropriate requirements based on how others have procured similar solutions.
- Realistic cost estimates and schedules.
- Customary practices such as warranty, financing, discounts for the IT product, service or solution.
- Distribution and support capabilities of potential suppliers including alternative arrangements and cost estimates.
- Availability and status of potential supplier sources.
- Lessons learned and implementation pitfalls and/or resolutions.
- The best deals/prices that have been obtained by other customers when acquiring a similar IT product, service or solution.

### 11.5.2 Methods of market research

The procurement project team may utilize any of (or a combination of) the following methods to conduct market research:

- Acquire information about products, trends, product availability, business practices, product/service reliability and prices.
- Perform a Porter's Five Forces Industry Analysis and/or a Strengths, Weaknesses, Opportunities and Threats (SWOT) analysis to identify opportunities.
- Contact knowledgeable individuals in government and industry regarding market capabilities to meet requirements.
- Review the results of recent market research undertaken to meet similar or identical requirements.
- Conduct unbiased industry briefings or pre-solicitation discussions with potential suppliers to discuss requirements and obtain recommendations.
- Analyze the purchase history of requirements to determine the level of competition, prices and performance results.
- Research technical analysis publications.
- Publish a formal RFI to survey the market on the complete and final requirements.
- Research the status of applicable technology and the extent and success of its commercial application.

## 11.6 Key steps and milestones of IT procurement planning

For a full discussion on the principles and background of complex IT solution procurements, technical and functional requirements definition, evaluation guidelines, etc., refer to [Chapter 24](#) of this manual, Requests for

Proposals. For the purpose of this chapter, however, the high-level key steps in developing a thorough IT procurement plan are shown in subsections 11.6.1 through 11.6.4 below.

### 11.6.1 Define business objectives

Step	Action
1.	Define scope and conditions of acceptance. The desired outcome of the objective is a clearly defined statement of the business problem(s) and the need(s) being procured, including the current technology and user environments. Considerations in defining the scope and conditions of acceptance include: Requirements for compatibility with existing or future systems, programs, strategic plans or initiatives, Cost, schedule and capability or performance constraints, or any enhancement phasing, Stability of the desired technology or requirements, Delivery and performance-based requirements, and Potential risks and trade-offs.
2.	Prepare market analysis to gain awareness of products/services/solutions readily available in the marketplace for purchase.
3.	Perform a “make vs. buy” analysis.
4.	Estimate investment costs: set established cost goals for the project and the rationale supporting them; discuss related cost concepts to be employed, including, when appropriate: Life cycle costs including repair parts, upgrades and maintenance. Fair cost estimate: develop a cost estimate given the requirements and current market trends. This estimate may be used as a benchmark for the evaluation of the reasonableness of the prices proposed.
5.	Create procurement project team.
6.	Define and assign team member roles and responsibilities.
7.	Develop a project plan/schedule.
8.	Discuss technical, cost and schedule risks and describe efforts to reduce risks and consequences of failure to achieve goals.
9.	Discuss any special security, data and/or confidentiality needs (i.e., HIPAA, VITA Security or Enterprise Solutions and Governance, SAS 70 audits, etc.).
10.	Address protections and remedies such as payment holdbacks, performance bonds, warranty provisions, liquidated damages provisions, intellectual property or insurance (i.e., errors and omissions, cyber security) requirements.
11.	Commit to the source-selection objectives for the procurement including the timing for submission and evaluation of proposals and the relationship of evaluation factors to the agency business needs.
12.	Prepare statement of objectives for the business owner/steering committee, if appropriate, and obtain business owner sign-off.

## 11.6.2 Develop requirements

Step	Action
1.	Develop and agree upon product, service and/or solution requirements.
2.	Utilize approved solicitation documents and templates as discussed in <a href="#">Chapter 24</a> , RFPs and Competitive Negotiations, and <a href="#">Chapter 25</a> , IT Contract Formation.
3.	Establish evaluation criteria that provide clear, concise definitions for each criterion.
4.	Develop a detailed scoring plan that explains how proposals will be evaluated and provides the specific meaning of the scoring methodology.
5.	Determine if a pre-bidders/pre-proposal conference is justified.
6.	Identify major project milestones and deliverables and identify the key logistic milestones that may affect competition. Determine if supplier payments should be tied to the major milestones or deliverables and if any holdback is required prior to final acceptance.
7.	Identify if there are other related project interdependencies that may affect the project's schedule.
8.	<p>Discuss which contract type is appropriate or whether a specialized contract is needed and any specific terms and conditions. For cloud/SaaS procurements, see additional information and recommended solicitation language here:  <a href="https://www.vita.virginia.gov/media/vitavirginiagov/supply-chain/docs/ECOSProcedureChecklistforCloudSolutionSolicitationsandContracts20180307.docx">https://www.vita.virginia.gov/media/vitavirginiagov/supply-chain/docs/ECOSProcedureChecklistforCloudSolutionSolicitationsandContracts20180307.docx</a></p> <p>Regardless of the amount, if the procurement involves an off-premise (cloud hosted) solution, agencies must follow the <a href="#">Enterprise Cloud Oversight Services (ECOS) process</a> and <a href="#">Third Party Policy Workflow</a>. A Security Assessment of the cloud service will need to be completed by the supplier and approved by ECOS, via a work request 1-003, and special Cloud Services Terms &amp; Conditions must be included in the contract prior to award.</p> <p>The VITA Minimum Contractual Requirements for "Major" Technology Projects and Delegated Procurements identifies specific terms and conditions for agency delegated procurements and those requiring CIO approval and can be found on VITA <a href="#">SCM's web site</a>.</p>
9.	Identify or determine what business-based service levels are needed to develop a performance-based contract and apply desired remedies.
10.	Develop a change management plan to manage expectations and communications.
11.	Create Request for Proposal/Invitation for Bid package, including any attached specifications, diagrams, etc.
12.	Obtain any necessary review and/or approvals (i.e., legal, CIO, PMD) prior to solicitation release.

### 11.6.3 Issue and conduct solicitation

Step	Action
1.	Issue an RFP or IFB and fulfill all VPPA posting requirements.
2.	Answer questions received from suppliers in a public forum/posting.
3.	Receive bids/proposals.
4.	Facilitate collaborative team evaluation of bids/proposals.
5.	Evaluate and score each proposal received.
6.	Perform a price or cost analysis.
7.	Recommend top supplier(s).
8.	Negotiate contract(s).
9.	Prepare procurement files and award/post contract.
10.	Brief business owner/steering committee (as applicable), contract manager and de-brief team for solicitation closeout.
11.	Archive solicitation documents and procurement files.
12.	Conduct post-award orientation meeting with supplier and key stakeholders.

### 11.6.4 Manage and administer contract

Step	Action
1.	Determine the processes by which the contract will be managed and administered including: Contract status reporting requirements. Preliminary, production and/or cutover technical reviews/testing Acceptance process and how inspection and acceptance corresponding to the statement of work's performance criteria will be monitored and enforced. Invoice review process. Product or service deficiency reporting. Contract changes and amendments process. Service level agreements and performance metrics including how such service levels will be monitored, measured, and reported. VITA governance and oversight compliance
2.	Manage product warranties.
3.	Direct change management: administer changes, budget changes, contract modifications, etc.
4.	Resolve contract disputes.
5.	Create realistic and justifiable remedies for non-performance, non-conformance of deliverables and/or unmet service level commitments. A portion of the work may be accepted or all of the work may be rejected. Work may be accepted with provisions for corrections in the future. Ensure that all project requirements are complete.

6.	Terminate/expire contract: Terminate contract for default. Supplier may fail to deliver or fail to make progress. Terminate contract for convenience.
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Make sure that the contract file includes all required backup and supporting data according to your agency's record retention policies and the Virginia Freedom of Information Act's requirements.

## 11.7 Other considerations affecting the IT procurement planning process

### 11.7.1 Lease vs. buy analysis

Public bodies may acquire IT equipment by lease or purchase. The decision to lease should be the result of a careful financial analysis of all factors involved, especially the total cost of ownership to the Commonwealth for the expected period of use. Purchase costs are usually lower than lease costs if equipment is used for an appreciable portion of its useful life. One major disadvantage of a purchase is that the public body is "locked into" the acquisition; whereas, leasing provides a measure of flexibility. Lease vs. buy cost analyses are based on the "contract or program life" of the items being purchased. "Contract or program life" is the anticipated life cycle of the requirement for which the equipment is used, less any reasonable estimated length of time when a lower cost substitute capability becomes available. When the analysis indicates leasing is the least costly acquisition method, public bodies may enter into a lease contract. The terms of such contract should be equal to the predicted "contract or program life."

### 11.7.2 Build vs. buy analysis

Computer systems and software seem to go out of date as soon as they hit the market. This presents agencies with the dilemma of whether it makes more sense to build a custom system or buy a packaged solution. When building or buying a new IT system, there are a number of things to consider. For a custom system design, an agency will have to deal with hard costs such as development, testing and implementation. For off-the-shelf packages, there is initial package cost, ongoing license fees, and possibly costs to customize, configure, modify, test and maintain. For application service provider, software-as-a-service or other cloud-based solutions, consider the security and data privacy requirements to determine if hosting should really be provided by the agency or VITA, or if a private cloud is required vs. a public one, and consider all associated costs for the different data hosting and data storage environments. Build vs. buy decision points are the same regardless of the procurement:

- Cost
- Time to market
- Market conditions
- Architecture
- Support costs
- Availability of skilled resources
- Strategic value

Additionally, Major IT supplier consolidation has led to new pricing models and bundling options that give business owners much greater leverage. Open source software may deliver the best of both worlds, with hybrid approaches that combine purchased and custom-built components. When evaluating whether to build or buy, an agency must understand the total costs during the software life cycle, which are typically seven or eight years. Research studies show that 70% of software costs occur after implementation. A rigorous lifecycle analysis that realistically estimates ongoing maintenance by in-house developers often shows that it is cheaper to buy than create a solution. In addition, as more cost-effective, attractive market solutions become available, it may be more favorable to replace aging proprietary applications with proven commercial solutions. When conducting a build vs. buy analysis, there are some decision points which can help with the analysis:

- Decide what the system requirements will be, based on the system's ultimate use. These requirements will dictate the points to consider during the build vs. buy analysis.
- Research the types of available market products available to meet the requirements. Analyze these products' strengths and weaknesses versus the requirements and how they compare to the design and implementation of a custom-built system.
- Develop a decision analysis spreadsheet for each product rated on cost, customization, schedule, supplier support, etc.
- Evaluate intangible factors that are hard to quantify. If the system needs repair or modification, it may be easier to find developers to support generic languages such as MS Visual Basic or Oracle than specialty programming languages. It is beneficial to own the source code so developers can work on the system. With a custom system, an agency can own the code if the contract is written correctly. With a packaged system, an agency will have to pay licensing fees and may not be able to obtain access rights to key parts of the code.
- Avoid purchasing more capability than is needed. Many packaged software systems have more features than an agency may need.

## 11.8 IT spend management

Strategic sourcing begins with a spend analysis and identification of commodities. Spend analysis is the structured process of critically analyzing a public body's IT spend and then using this information to make business decisions about to acquire needed commodities and services effectively and efficiently. This process helps optimize performance, minimize price, evaluate total life cycle management costs, and increase the value of each IT dollar spent. Spend management in conjunction with procurement planning may be used to achieve the following procurement objectives:

- Understanding the potential for savings with a higher degree of certainty.
- Revising sourcing approaches to generate savings.
- Improving procurement processes and practices.

A broad overview of the spend management assessment process includes these steps:

- Examine and collect data and establish baselines on what is being bought in current spending. (What is being bought where and for how much?)

- Assess the supply market. (Who offers what?)
- Identify leverage opportunities by evaluating top spending areas.
- Identify savings opportunities and demand management opportunities.

## 11.9 Outcomes of IT procurement planning

IT procurement planning may drive different expected results such as:

- Reduction in the number of overall contract awards
- Understanding and managing total cost of ownership
- More purchasing options—lease vs. buy
- Data-driven decision making
- Improved risk mitigation prior to award
- More identification of opportunities where suppliers can add value
- Increased understanding of the IT industry—procurement staff become more knowledgeable about supply chains and costs.
- Performance driven contracts—data driven supplier performance (i.e., automated and electronic tracking systems).
- Improved relationships with suppliers—more communication, face-to-face meetings (quarterly review sessions).

### Chapter Highlights

- **Purpose:** This chapter covers the preparation of statement of scope and statement of work (SOW) documents used in the acquisition of information technology goods and services.
- **Key points:**
  - The importance of complete, clear and well-developed requirements definition, scope statement, and statement of work documents for information technology (IT) solicitation and contract documents cannot be overstated.
  - Since the winning supplier will perform the contract following the SOW's requirements, it is critical to include and state all technical, functional, performance and project management requirements and expectations clearly and without ambiguity in the SOW.
  - The SOW content and detail will depend on the nature of the procurement and can range from extremely simple—buying packaged software—to extremely complex—procuring a solution or system design.

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## 12.0 Introduction

The importance of complete, clear and well-developed requirements definition, scope statements, and statement of work documents for information technology (IT) solicitation and contract documents cannot be overstated. The complexity of the IT acquisition will affect the depth and breadth of these documents. Simple IT hardware or computer-off-the-shelf (COTS) procurements will generally have fewer requirements and more straightforward statements of work than a solution-based acquisition, which may combine requirements for software (COTS or newly developed), hardware and/or services. Performance-based contracts will generally include meatier requirements for gathering, validating and reporting performance metrics since performance results will be tied to supplier payments or other incentives. However, performance-based contracts will generally have less restraining statements of work and requirements documents since they are more concerned with results and outcomes than with how the work is performed. These are two examples of how requirements and statements of work may vary in complexity and size, but the need to carefully develop these documents does not vary. The agency information technology resource (AITR) and project management representative (<https://www.vita.virginia.gov/it-governance/contact-it-governance/>) for your agency can be contacted for assistance in these activities, whether the project is within your agency's procurement authority or must undergo VITA's delegation and Procurement Governance Review (PGR) and CIO approval process.

## 12.1 Defining the IT procurement's scope

The procurement's scope will be defined from the results of the needs assessment/requirements definition/specifications development (refer to [Chapter 8](#)). A written scope statement is a preliminary step before developing the statement of work. It will be used in the solicitation document to set the boundaries of the procurement and will serve after contract award to restrain the agency and the supplier from allowing contract scope creep. Scope is often used to describe the high-level parameters of the IT



acquisition; i.e., “a solution to provide data management and automatic routing for incoming requests over a public website,” or “a server to accommodate 50 locations of XYZ agency, or “100 scanners that will be distributed to multiple locations around the state.”

A template for creating an IT project’s scope statement for projects under VITA’s oversight, delegation authority or those requiring CIO approval, is provided by Commonwealth Project Management and is available at this URL: <https://www.vita.virginia.gov/it-governance/project-management/project-management-templates-tools/>. Once this document is finalized, the statement of work is prepared.

## 12.2 Preparing a quality IT statement of work (SOW)

Once the project scope is completed, the project team will build the SOW, which is the basis for a supplier’s proposal response and contract performance. Including a SOW in the solicitation gives each supplier the information from which to prepare its offer. Since the winning supplier will perform the contract following the requirements in the SOW, it is critical to include and state all technical, functional, performance and project management requirements and expectations clearly and without ambiguity in the SOW. VITA SCM provides a SOW template and SOW Change Order template for authorized users to use when ordering from a VITA statewide contract at this location under the section called “Tools:” <https://www.vita.virginia.gov/supply-chain/scm-policies-forms/>. This template and the guidance in this chapter are best practice recommendations. You may use the template, the following guidance, or any combination—as best suited for the size and complexity of your procurement. IT projects that require CIO approval and/or VITA oversight will require following Commonwealth Project Management standards and policies provided at this URL: <https://www.vita.virginia.gov/it-governance/project-management/>.

The SOW must be written as a concise, declarative document as it is a statement of the agency’s requirements and the supplier’s performance commitment. In non-performance-based SOWs the supplier may be required to perform the work in a specific way, using detailed specifications, specifying key personnel to be provided and methods to be used for service contracts. A well-written SOW should:

- Be a stand-alone document.
- Be crafted in a general-to-specific fashion.
- Be an expansion of detail tailored from the requirements definition results and the approved scope statement and free of inconsistencies and/or conflicting requirements.
- Be individually tailored to consider the period of performance, deliverable items, if any, and the desired degree of performance flexibility.
- Not repeat material that is already included in other parts of the solicitation/contract.
- Describe in detail what the supplier is to accomplish through addressing the following four elements:
  - What is to be done and what are the deliverables/milestones?
  - Who is going to do what (agency, supplier, third party CoVA agent, etc.).
  - When is it going to be done by deliverable and/or milestone?
  - Where will it be done?
  - How will it be done and how will the agency know when it is done (i.e., testing and acceptance)?

The SOW content and detail will depend on the nature of the procurement and can range from extremely simple—buying packaged software—to extremely complex—procuring a solution or system design. The needs assessment/requirements definition/specifications development details (refer to [Chapter 8](#)) should be duplicated in certain relevant areas of the SOW. All SOWs should minimally include the following components:

- **Introduction**—a general description of the procurement.
- **Background**—information that helps suppliers to understand the nature and history of the agency,

the project, the audience being served and the purpose of the new requirements. When applicable, include the current and desired technology environment (architecture) and interfaces with graphic and textual descriptions.

- **Scope**—overview of the SOW that relates the parameters and important aspects of the requirements, taken from the scope statement.
- **Applicable directives** (if any)—referenced documents, standards, specifications or directives that are either mandatory or informational for the procurement.
- **Performance requirements**—what is required to be accomplished, the performance standards and the acceptable quality levels.
- **Deliverable requirements**—Technology products, services, software, project and other reports, testing and all deliverables and formal requirements that must be submitted by the supplier during the contract.
- **Quality assurance and acceptance criteria**—Acceptance is the agency's formal, written process to acknowledge that the deliverables conform to applicable contract quality, quantity and other requirements. Acceptance may or may not involve quality assurance processes and typically precedes payment. The procedure for formal acceptance should be provided for any milestone deliveries, as well as final acceptance.

Below is a comprehensive list that provides a selection of considerations for SOW content ranging from simple to complex procurements—from a single IT component to a major systems design. The project team may glean useful reminders from this list even though all of them may not be pertinent to a particular procurement. Many of the details may be pulled from the requirements definition document to ensure completeness and accuracy.

Depending on the project's size, complexity, delegation and approval thresholds, the business owner must ensure compliance with any Commonwealth Project Management standards and requirements for building SOWs, located at this URL: <https://www.vita.virginia.gov/it-governance/project-management/>.

Introduction	This is a general description of the procurement.
Background	Provide information on the agency, the project/program and/or the services that are affected by this procurement. Include graphics of the user environment/flow of information/current business and operating environment.
Scope statement	Retract from the scope statement prepared in step 2 of this process.
Summary of technical, functional and performance objective(s)	Provide a general description of these objectives.
Summary of technical, functional and performance requirements	Provide a general description of these requirements including all desired solutions, products and/or services.
Specific technical, functional and performance requirements	Specific and detailed requirements must be fully described and include desired agency operating architecture/user environment, if known. If supplier will provide this as part of their proposal, then these requirements will be negotiated and finalized as the contract's definitive SOW exhibit. These would include all technical and functional requirements for all software and hardware, the solution and/or the system being procured and include any related services. If requirements development/system design is a deliverable, then this would be finalized prior to final development, implementation and testing and would become a separate deliverable under the SOW.

Requirements development	If this is part of what the supplier will do, so state and include references in the project's milestone schedule and the deliverables listing.
Custom development and test system environment	Same as previous item
Business design and technical design	Same as previous item
Interface/ integration/legacy systems requirements	Same as previous item. The solicitation must provide all known information about these so suppliers can sufficiently estimate and propose an approach and these requirements should be included in the final contract's SOW, milestone schedule and list of deliverables.
Data conversion	The agency should know and relay the condition of data that requires conversion. Typically, this can be a high cost and/or performance risk vulnerability area.
Bill of material	List all components of software and hardware and expected delivery dates
Testing	Include requirements for any installation, configuration, system, functional, product, beta/production testing and final acceptance testing. Consider carefully the testing duration and environment to emulate a true-to-life test.
Acceptance criteria and acceptance procedures	Include specific acceptance criteria for all deliverables from paper reports to final system turnover. It is advisable to define the agency approval time, supplier resubmit time and so on. Make sure that no conflicting information is provided here and/or in the actual contract language.
Risk management process	Include written requirements/procedures for contract duration and enhance frequency and risk areas (cost, schedule, design/development, interface, etc.) for monitoring/reporting depending on the complexity of the procurement. Written reports/deliverables may also be required. Establishing an escrow account may also be necessary for protecting ongoing
	use of supplier software in the case of supplier bankruptcy or other business change that could interrupt business continuity.
Quality control/assurance requirements	Describe all requirements for quality control by the supplier, quality assurance and monitoring by the agency or an independent IV&V resource, including all required plans, scheduled reporting and details around the how and when of metrics capture/validation. See <a href="#">Chapter 21</a> of this manual for an entire discussion of performance-based contracting and service level agreements.
Configuration/change management/engineering decision traceability requirements	Describe/list all required schematics, engineering drawings, plans, documents and other traceability deliverables to continue agency operational independence if necessary and to capture historical experience for future reference.
Project management requirements	Depending on the complexity of the procurement, these requirements can be simple or severe. Project management responsibilities can be shared between agency and supplier or performed by only one of the parties; however, it should be clearly stated. Certain Commonwealth project management standards may be required for major projects and those requiring VITA oversight.

Training and documentation requirements	May include offsite or onsite training as best-suited for the agency's budget. Include the number of participants, locations, type of training to be accomplished and all details as to trainer-led, train the trainer, classroom, computer or web-based, etc.
Meetings/reviews (design/project status/reviews)	Use for project control and to maintain project integrity and accountability. The supplier may or may not be required to attend; however, if they are they will include travel in their pricing. Virginia Department of Accounts per diem regulations do apply.
Maintainability and reliability and/or support and maintenance requirements	Include all requirements for maintenance and support while under warranty and for any out-years as budgeted and included in the contract. The related support services will normally be based on the supplier's regular commercial offering, unless otherwise negotiated.
Performance/functionality requirements	Include fault isolation, min-max tolerance parameters, mean- time-between failures, environmental conditions, etc. Service level expectations and incentives for meeting them may be included and monitored, for full payment or established percentage reductions to the supplier as necessary to encourage successful performance.
Contract deliverables	List all hardware, software, system/solution, and paper deliverables such as QA/QC plans, configuration control plans, test plans, IV&V plans/reports, monthly status reports, risk assessment plans, project/milestone plans, GANTTs, etc. Include date due, quantity, any required format, media (paper, electronic, CD, DVD, etc.), when due, to whom/where for submission, days agency has to review/accept.
Standards/specifications/directives	Include all required agency/VITA/COVA/federal, commercial or industry, standards for SEI process, IT accessibility/508 compliance, HIPAA, environmental, packaging, size, format, etc., and specify if these are available for viewing or included
	as attachments. Be sure to include any baseline drawings or specs, glossary of technical terms, organizational charts, etc. Be sure not to overlook or exclude relevant Commonwealth standards located at this URL: <a href="https://www.vita.virginia.gov/it-governance/itrm-policies-standards/">https://www.vita.virginia.gov/it-governance/itrm-policies-standards/</a>
Govt. or supplier provisions	Specify any equipment, facilities, materials and resources that will be provided by the Commonwealth to the supplier or vice versa for contract performance. Include provide-by dates, transmittal requirements and return procedures.
Project schedule requirements/period of performance	Provide overall term and a milestone schedule (or request a proposed one from suppliers that will be included in any resultant contract) with expected or definite dates (calendar or "days after award"). Take project planning and milestone to the lowest level to best monitor performance status. Consider any project dependencies that may affect milestones and the overall schedule.

Place of performance	If other than supplier location, state the locations and percentage of time at offsite premises; include meeting attendance for supplier. If performance to take place at VITA or other authorized user location, be specific in expectations for attendance, background checks, office access, etc.
Special/key personnel requirements	If a requirement is in the solicitation for supplier to provide resumes of key personnel, these individuals can be named in the final negotiated SOW with a requirement for agency written approval for any replacements during the contract term. Include all this language then in the solicitation. If certain personnel are key to project success, name them specifically and designate how they will be replaced and when if they leave the project for any reason.
Pricing type	Identify that performance will be based on time & material and/or fixed price; however, the actual pricing schedule will be a stand-alone exhibit to the contract.
Technical point(s) of contact	Provide the names and contact information for the designated project managers and/or technical representatives, updating by contract modification as necessary during contract performance.
Any special warranty requirements	Make sure these do not duplicate any general warranty terms placed elsewhere in the contract document.
Security and/or access requirements	Include all agency/VITA/Commonwealth physical access and data access (hardcopy and electronic) and hosting requirements. VITA security requirements are located at this website: <a href="https://www.vita.virginia.gov/it-governance/itrm-policies-standards/">https://www.vita.virginia.gov/it-governance/itrm-policies-standards/</a> and reference to it should be included in the SOW, if applicable to the IT procurement. Dialogue with your VITA AITR/Project Management representatives regarding this is crucial to building any of these requirements.
Enterprise Cloud Oversight (ECOS) Requirements	Check the VITA statewide contract being used to issue this SOW. If it is <u>not</u> a Cloud Services or Software as a Service (SaaS) contract and does <u>not</u> include required Cloud/SaaS terms, or if the contract scope does <u>not</u> authorize and the product list does <u>not</u> include SaaS products, contact <a href="mailto:scminfo@vita.virginia.gov">scminfo@vita.virginia.gov</a> before going any further to determine next steps. If the contract does include the required Cloud/SaaS terms, contact <a href="mailto:enterpriseservices@vita.virginia.gov">enterpriseservices@vita.virginia.gov</a> to determine if the particular SaaS product has been ECOS approved or not and to determine next steps.

### 12.3 Unique IT procurements

For a full discussion on **solution-based procurements** (subsection 12.3.1 below) please go to [Chapter 24](#) of this manual. For a full discussion on **performance-based contracting** (subsection 12.3.2 below) read [Chapter 21](#) of this manual. Valuable information is also provided in [Chapter 8](#). It is highly recommended that procurement officials refer to these additional chapters to follow specific technical/functional/performance requirements and solicitation guidance that is not duplicated here, but that will greatly impact the approach and time for developing the requirements definition, scope statement and SOW documents.

### 12.3.1 Solution-based and complex IT procurements

Solution-based RFPs ask suppliers to propose an IT business solution to an agency's identified problems and requirements. Solution-based RFPs briefly state the business need, describe the technology problem to be solved, and/or provide minimal specification requirements. The use of solution-based RFPs allows suppliers who are technology subject matter experts to use their broad-spectrum market knowledge, creativity and resources to propose innovative cost-effective technology solutions. Solution-based RFPs may request suppliers to provide a solution for only part of a business problem or to propose high-level concept-type solutions which are evaluated based on a supplier-provided detailed set of requirements.

By their nature, specifications and requirements set limits and thereby eliminate or restrict the items or solutions available for the supplier to include in its proposal. Technology specifications should be written to encourage, not discourage, competition consistent with seeking overall economy for the purpose and technology solution intended. An agency is then able to identify the technology solution, not a particular product or service, which will best meet its technology or business need. Part of the decision-making process of when to use a Solution-based procurement involves performing a risk analysis whereby the project team resolves the following questions:

- Does the technology business problem present an opportunity for mutually beneficial risk sharing between us and a supplier?
- What factors could significantly impact the probability of completing our project on time and within budget?
- Is it possible to evaluate the proposed solutions equally?
- Can the solution(s) be evaluated based on a total cost of ownership analysis incorporating the anticipated cost of supporting the proposed solution and other financial options?

When preparing a solution-based SOW, some components will be different than a non- solution-based SOW. A solution-based SOW should include:

- The agency's organizational background and current business environment,
- A specific list of processes and procedures related to the project, legal or business mandates,
- Any project procedural or process documentation,
- The project's funding source,
- A clear definition of the agency's current technical environment including all current hardware and software being used, could be used or should be used to address the project requirements,
- A definition of the business or technology problem to be solved, but not a definition of the desired solution or the problem in terms of a desired solution,
- Specifications that describe the characteristics of a technology product, service or solution being sought.

Use technology questions to drive specifications instead of including mandatory requirements in the solicitation. The goal is to invite maximum reasonable competition while procuring the best technology solution for the Commonwealth. Pose questions to suppliers in the solicitation to drive requirements, such as: "What is the industry standard for this product and does your product(s) meet or exceed such standard?" The proposed definitive responses, as negotiated, will then become part of the final SOW in the contract.

### 12.3.2 Performance-based IT procurements

Performance-based contracting (PBC) is a procurement method that structures all aspects of the procurement around the purposes of the work to be performed instead of describing the manner by which the work is to be performed. PBC allows agencies to acquire products and/or services via contracts that define what is to be achieved, not how it is done. PBC gives suppliers the freedom to bring new approaches to the project. When a contract is based on performance, all aspects of the procurement are structured

around the mission of the project, rather than the manner in which it is to be done. The procurement seeks to elicit the best performance the private sector has to offer, at a reasonable price or cost, by stating the project's objectives and giving suppliers both latitude in determining how to achieve them and incentives for achieving them.

The SOW will provide performance standards, rather than spell out what the supplier is to do. PBCs normally contain a plan for control and a plan for quality assurance surveillance. In addition, the contract typically includes positive and negative performance incentives. This is accomplished through clear, specific, and objective contract requirements and measurable outcomes, instead of dictating the manner by which the work is to be performed or broad and imprecise statements of work. PBC describes the work in terms of the results to be achieved and looks to the supplier to best organize the workforce to achieve those results.

Additional suggestions for preparing the PBC-based SOW include:

- Express desired performance outputs in clear, concise, commonly used, easily understood, measurable terms.
- Do not include broad or vague statements, overly technical language or detailed procedures that dictate how work is to be accomplished.
- Structure the SOW around the project's objective(s) or purpose of the work to be performed; (i.e., what is to be performed rather than how to perform it). (Example: instead of requiring that the lawn be mowed weekly or that trees be pruned each Fall, state that the lawn must be maintained at a height of 2-3" or that tree limbs not be allowed to touch utility wires or buildings.)
- Performance requirements should enable assessment of work performance against measurable performance standards; rely on the use of measurable performance standards and financial incentives in a competitive environment to encourage competitors to develop and institute innovative and cost-effective methods of performing the work.

The most important element of a PBC, and what distinguishes it from other contracting methods, is the results that are desired. Many procurements are directed by the agency in the form of exact specifications or requiring "key personnel" to be assigned to a service contract. Attempts by the supplier to suggest alternative ways of approaching the work are usually rejected with the suspicion that the supplier is trying to reduce costs to increase profits resulting in an inferior outcome. The key attributes of PBC are—outcome oriented; clearly defined objectives; clearly defined timeframes; performance incentives, and performance monitoring. By describing requirements in terms of performance outcomes, and not requiring detailed specifications, agencies can help achieve the following objectives:

- Maximize performance—allow a supplier to deliver the required service based on its own best practices and the customer's desired outcome;
- Maximize competition and innovation—encourage innovation from the supplier base using performance requirements;
- Minimize burdensome reporting requirements and reduce the use of contract provisions and requirements that are unique to the state;
- Shift as much risk as possible to suppliers so they are responsible for achieving the objectives in the Statement of Work through the use of their own best practices and processes; and
- Achieve cost savings through performance requirements.

## 12.4 Final quality check of the SOW

The following questions will help in the final quality review of the statement of work:

- **Overall:** Does the SOW clearly define and support all agency/project requirements? Is it consistent with the requirements definition and statement of scope documents and does it include specific tasks, work breakdown structure requirements, deliverables, and milestone/schedule requirements?



- **Technical, functional and performance requirements:** Are the technical, functional and performance requirements complete and adequately detailed, described and consistent with all agency/project needs and requirements to motivate supplier understanding and success? Are all necessary agency/VITA/Commonwealth of Virginia/federal security, confidentiality, accessibility, technology and/or best-practice specifications, standards and directives included?
- **Deliverables:** Do all required deliverable(s) support the project's needs? Are they necessary? Are all deliverables including hardware, software, design/development, testing, services, reports, project reporting, status, metrics, etc. specified, as well as when, where, how they should be delivered? Should deliverables be tied to the technical requirements, milestones, and/or supplier payments? Should any payment retentions be included to incentivize supplier to meet the deliverables' or milestones' schedule, and/or as a mitigation for overall project non-performance or non-acceptance?
- **Key personnel:** Does the project require and does the SOW identify key personnel or are other supplier staff qualifications and levels needed? Have project points of contact and information for both agency and supplier been clearly identified?
- **Processes and resources:** Have the business and technical processes, resources and/or facilities to ensure satisfactory performance been properly identified and addressed? Are supplier process plans for evaluating or measuring supplier performance and status necessary?
- **Inspection and testing:** Does the project warrant inspection and/or testing? Have we addressed the need for this based on the effort's technical requirements, performance specifications, level of compliance, and the need for mitigating performance risks?
- **Supplier Audits:** Will supplier-required licensing or other customer compliance audits be allowed; and, are all your agency-specific, Commonwealth or VITA access requirements or restrictions for such audits included?
- **Acceptance and testing:** Are sufficient testing and/or acceptance criteria, including acceptance of deliverables, testing and final acceptance included? Are performance-based requirements, metrics and measurements being used for this procurement and are they adequately described? Is it necessary to define if testing or acceptance must occur at varying phases or subsystem completions, prior to implementation/cutover or at the end of performance or on a per deliverable basis? Do these support the technical requirements and performance specifications? Who should develop the test plans, conduct the tests, and verify test results? How long will the agency have to test or approve the deliverable(s), services or solution prior to final written acceptance and has the length of time supplier will have to remedy been included?
- **Project schedule:** Does the project's overall schedule and/or milestone schedule support the project's requirements? Are the requirements reasonable for the work being accomplished? Does the schedule include downtime for changes, unforeseen problems or other schedule slips? What is the likelihood of schedule slippage due to interdependency, interface, or conversion issues? Does the SOW consider increased labor or production (and related costs) to meet a non-flexible schedule? Does the agency need to address any urgency or contingency information relating to schedule?
- **Reliability and maintainability (RAM):** Are there requirements for RAM or integrated logistics support or upgrades and enhancements? Have these requirements been adequately defined and do they need to include performance specifications?
- **Maintenance/service/training:** Are there requirements for training, ongoing technical support, extended or special warranties, maintenance and/or service? Have all of these and their respective duration and



location needs been clearly addressed? Are there any potential conflicts between these requirements and the standard business offerings within the market area of this project?

- **Project reviews and supplier performance management:** Are program reviews or supplier surveillance necessary for monitoring performance? Does the SOW include sufficient requirements for periodic project status reviews, design reviews, or access to supplier's facilities for surveillance visits? Are there clear performance objectives and service levels, if required? Does the SOW establish clear and attainable positive and negative incentives to those performance objectives and service levels? Does the SOW include a requirement for a quality control plan from the supplier and/or quality assurance surveillance plan for agency monitoring? Does the solicitation address the need for an independent IV&V resource if one is intended?

### Chapter highlights

- **Purpose:** This chapter explains the importance of developing a strong IT Procurement Project Team (PPT) with the right resources, the right skills and the time needed to complete the job.
- **Key points:**
  - The PPT should assemble as much knowledge as possible to ensure the best qualified supplier is selected.
  - PPT members/evaluators will be required to complete a Confidentiality and Conflict of Interest Statement.

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### 13.0 Introduction

Utilizing a procurement project team (PPT) throughout the IT procurement process is an identified IT procurement best practice. Use of a PPT will help ensure:

- Project needs are addressed in a timely manner.
- Requisite project disciplines are represented.
- Resources, roles and responsibilities are available, clearly identified and assigned up-front.
- The cumulative benefits of each team member's experience are maximized.
- A level playing field is maintained for all contending suppliers.
- Accountability and responsibility of the team members.
- Efficient use of everyone's time.

PPTs need the same widespread and diverse variety of skill sets as any other team. It is often a challenge to identify those persons with the right types of skill and experience when building the team. Selecting valuable members is particularly important when working with cross-functional teams. The procurement lead/sourcing specialist will work with the project's business owner to facilitate the development of this team, assign roles and responsibilities, and lead the team through the procurement process. Usually the PPT is also the evaluation team; however, there may be instances where the composition of these teams will differ.

### 13.1 Selecting PPT members

The key to building a strong PPT is finding resources with the right skill sets and the time needed to complete the procurement project. These people should be stakeholders in the

final product or service and/or individuals who have knowledge and skills to fill a particular area of expertise or project discipline.

There are four main project skill sets or knowledge areas that the PPT should possess:

- Functional: expertise in the business needs of the project
- Technical: expertise in the IT or technical aspects of the project
- Financial: expertise in financial analysis of potential suppliers
- Contractual: IT expertise in development and review of the solicitation and contract documents

It is important to select team members who fully understand the needs of the public body acquiring the IT goods and/or services and the desired outcome of the procurement. The PPT should possess as much valuable knowledge as possible to ensure the best qualified supplier is selected. It is recommended that the PPT provide input into the solicitation document, especially the evaluation criteria. The team members should fully understand the requirements of the solicitation and must be able to critically read and evaluate responses.

Beyond covering the four major project skill sets, the following are important qualities to look for when considering members for your PPT:

- Strategic thinking ability to understand and conceptualize the potential improvement in an IT service area(s).
- IT project management and technical skills to convert strategic thought into practical plans for the project's total IT life-cycle.
- Understanding of the Commonwealth's and the public body's strategic IT objectives to foster those objectives and to deter potential short- and long-term conflicts.
- Risk assessment and mitigation skills to help reduce potential IT technical, schedule, cost, security, confidentiality, and/or contractual obstacles and issues.
- Procurement skills for the specialized complexity associated with IT acquisitions.
- Negotiation skills for IT products/services/solutions with the competency to arrive at a satisfactory conclusion.
- Enthusiasm and drive to see the project succeed.
- Objectivity to ensure that all proposals will be viewed equally based on their merits.

The PPT should be formed and functioning soon after the agency business need is identified. Input from all those responsible for significant aspects of the acquisition should be obtained as early in the process as possible. This is particularly important for procurements with critical time requirements. Early planning serves to shorten the acquisition process.

## **13.2 Defining roles and responsibilities**

The recommended size of a PPT is three to five members; however, some projects may require additional members due to the nature or complexity of the procurement.

Coordination and management of the evaluation phase of the procurement process becomes more difficult as the size of the team increases. To avoid potential individual bias, the evaluation team should not have less than three members. There will be instances where the evaluation team is comprised of a different group of individuals than the PPT, due to the need for temporary, non-voting subject matter experts or consultants, or due to non-participation by a PPT member(s).

After the PPT is in place, the business owner and procurement lead/sourcing specialist will discuss the goals and business needs of the project with the team. The procurement lead/sourcing specialist describes the sourcing process and the roles and responsibilities of

the PPT and/or evaluation team members. Please refer to [Chapter 11](#), IT Procurement Planning and Strategic Sourcing, which provides a detailed table defining the roles and responsibilities of each member of the PPT.

The procurement lead/sourcing specialist assigned as the procurement's single point of contact (SPOC), the business owner and the technical subject matter experts (SMEs) will work together to create evaluation criteria based on the Commonwealth's or agency's business needs. The evaluation criterion allows the PPT to collect the necessary data to evaluate the suppliers' proposals. For example, evaluation criteria might include factors such as total cost of ownership, quality of goods or service, performance history of suppliers, risk assessment, availability and level of technical support. For more in-depth discussion of this, refer to [Chapter 24](#) of this manual, Requests for Proposals. PPT/evaluation members are requested to complete and submit the survey in Appendix B at the close of each procurement where an evaluation was conducted. The SPOC should provide members with the survey form and submission details. VITA SCM is collecting and sharing lessons learned. Commonwealth IT procurement professionals and project managers may contact [scminfo@vita.virginia.gov](mailto:scminfo@vita.virginia.gov) if interested in obtaining and/or sharing evaluation team lessons learned.

### 13.3 Confidentiality

The PPT and/or evaluation team have planning and source selection sensitive information and supplier proposal information that must be marked and treated confidentially and must not be released outside the PPT/evaluation team. It is imperative that all members of the PPT and/or evaluation team fully understand they must not disclose any such confidential information to any person not authorized to receive the information nor to any person who has not signed a confidentiality and conflict of interest statement. Generally, only the team members and certain selected personnel with a need to know have access to the procurement information. All information and documentation relative to the development of a specification or requirements document, the solicitation documents and the contractual documents will be deemed confidential in nature until a contract is awarded.

PPT members/evaluators and anyone given access rights to the confidential information will be required to complete a confidentiality and conflict of interest statement (see Appendix A). The SPOC is responsible for obtaining and maintaining all signed agreements. All PPT members/evaluators must agree to the following:

- Agrees that no gift, benefit, gratuity, or consideration will be accepted or a personal or financial interest in a party who is bidding or proposing or associated with a bidder/proposer initiated on a project or procurement. (Refer to [Chapter 5](#) of this manual, Ethics in Public Procurement.)
- Certifies that all information concerning the planning, processes, development or procedures of the project or procurement will be kept confidential and secure.
- Certifies that no copy or disclosure of info will be made to any other party who has not signed a copy of this confidentiality agreement.
- Understands that the information to be kept confidential includes specifications, administrative requirements, contractual terms and conditions and includes concepts and discussions as well as written and electronic materials.
- Understands that if he/she leaves the procurement team before a contract is awarded that all information must still be kept confidential.
- Agrees that any instructions provided by the sourcing specialist relating to the confidentiality of information will be strictly followed.
- Agrees to immediately advise the SPOC in the event that he/she learns or has reason to believe that any person who has access to confidential procurement information has or intends to disclose that information in violation of their agreement.
- Certifies that he/she has no personal or financial interest and no present or past employment or activity which would be incompatible with participation in any activity related to the planning or procurement processes for the procurement.

**Appendix A**  
**Procurement Project/Evaluation Team Confidentiality**  
**and Conflict of Interest Statement**

This form is available on VITA SCM's website at the following URL:

[http://www.vita.virginia.gov/uploadedfiles/VITA\\_Main\\_Public/SCM/Templates/Confidentiality\\_ConflictOfInterest\\_Statement.doc](http://www.vita.virginia.gov/uploadedfiles/VITA_Main_Public/SCM/Templates/Confidentiality_ConflictOfInterest_Statement.doc)

## **Appendix B**

### **Evaluation Team Survey**

This form is available on VITA SCM's website at the following URL:

[http://www.vita.virginia.gov/uploadedfiles/VITA\\_Main\\_Public/SCM/Templates/eval\\_team\\_survey.doc](http://www.vita.virginia.gov/uploadedfiles/VITA_Main_Public/SCM/Templates/eval_team_survey.doc)

### Chapter highlights

- **Purpose:** The purpose of this chapter is to provide information technology (IT) purchasing professionals with descriptions of various IT procurement methods and when to use these methods.
- **Key points:**
  - Fair and open competition is the core concept behind the Virginia Public Procurement Act. The procurement methods available that utilize competition are quick quotes, competitive sealed bidding, competitive negotiation and auctions.
  - There are circumstances where competitive procurements are not practical. There are times when only one supplier is practicably available or when an emergency must be addressed immediately.

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14.1	Competitive procurement methods
14.2	Non-competitive procurement methods

#### 14.0 Introduction

Virginia Information Technologies Agency's (VITA) Authority and Delegation policy can be found at this URL: <https://www.vita.virginia.gov/supply-chain/scm-policies-forms/scm-policies/>. The policy states: "Use of VITA's statewide contract is mandatory for the acquisition of all IT goods and services. If there is not a VITA statewide contract available for the needed IT good or service, a competitive procurement will be conducted. To browse VITA's statewide contracts, see: <https://vita.cobblestonesystems.com/public/>.

If an agency determines after searching available statewide contracts that none exist to service its current need, a method must be determined as to how best to procure the desired information technology (IT) acquisition. Procurements that are equal to or exceed \$100,000 will either be delegated to the agency or VITA will conduct the procurement on behalf of the agency for statewide use. It is in the best interest of the Commonwealth to maximize supplier competition to the greatest extent possible when making any IT acquisition; however, other methods are available and can be applied as circumstances dictate.

#### 14.1 Competitive procurement methods

Fair and open competition is the core concept behind the Virginia Public Procurement Act, [§ 2.2-4300\(C\)](#). Choosing the correct procurement method enables the procuring agency to achieve maximum fair and open competition. The procurement methods available that utilize competition are quick quotes, competitive sealed bidding, competitive negotiation and auctions. The dollar amount, overall complexity and level of risk associated with the IT procurement are factors to consider in choosing the appropriate competitive procurement method. The procurement lead/sourcing specialist or procurement project team (see manual

[Chapter 13](#), Procurement Project Team, for more information, [Chapter 13](#) should define the business need and select which procurement method would be most appropriate for the type of IT product, solution or service desired. An overview of when to use the respective competitive procurement methods is outlined in the following table. Remember that a VITA statewide contract shall be used first, if available, for any procurement method listed in this table (See section 14.0).

Method	When to use	Where to learn more
Quick quotes	<ul style="list-style-type: none"> <li>Total procurement value ranges from \$10,000-100,000</li> <li>Any IT purchases expected to exceed \$30,000 in total value require posting a public notice on <a href="#">eVA</a>. Contact VITA at <a href="mailto:scminfo@vita.virginia.gov">scminfo@vita.virginia.gov</a> for software licenses not available on a statewide contract</li> <li>Quick quotes up to \$10,000 will be set aside for micro businesses, with a minimum of one quote, if available (refer to VITA Policy for Small, Women and Minority Businesses for additional guidelines)</li> <li>Quick quotes from \$10,000 to \$100,000 will be set aside for DBSBD-certified small businesses, with a minimum of four quotes, if available (refer to VITA Policy for Small, Women and Minority Businesses for additional guidelines)</li> </ul>	<a href="#">eVA</a>  <a href="#">Chapter 7</a>
Competitive sealed bidding: Invitation For Bid (IFB)	<ul style="list-style-type: none"> <li>Total value of the IT procurement is greater than \$100,000. Needs and requirements are clearly defined</li> <li>Price is the determining factor</li> <li>Terms and conditions are not complex and are not negotiable</li> <li>Procurements over \$250,000 must be conducted by VITA unless delegated to agency by VITA</li> </ul>	<a href="#">Chapter 22</a>
Competitive sealed bidding: IFB or two-step IFBs	<ul style="list-style-type: none"> <li>Must have clearly defined requirements with an established threshold for pass/fail</li> <li>Technical and pricing proposals are evaluated separately</li> <li>Invite and evaluate technical offers to determine their acceptability to fulfill the requirements</li> <li>Allows for discussions to clarify the technical offer and requirements</li> <li>Negotiations are not allowed</li> <li>Procurement over \$250,000 must be conducted by VITA unless delegated to agency by VITA</li> </ul>	<a href="#">Chapter 23</a>
Competitive negotiation: RFP	<ul style="list-style-type: none"> <li>Total value of the IT procurement is greater than \$200,000</li> <li>Needs and requirements are complex and/or are not clearly defined; seeking a solution</li> <li>Price is not the sole determining factor</li> <li>Terms and conditions are complex and will likely require negotiation</li> </ul>	<a href="#">Chapter 24</a>



Method	When to use	Where to learn more
	<ul style="list-style-type: none"> <li>Procurement over \$250,000 must be conducted by VITA unless delegated to agency by VITA</li> </ul>	
Public and online auctions	<ul style="list-style-type: none"> <li>Does not apply to software</li> <li>Contact VITA at <a href="mailto:scminfo@vita.virginia.gov">scminfo@vita.virginia.gov</a> if interested in procuring IT through an auction including on-line public auctions</li> <li>Must have CIO approval in advance</li> </ul>	<a href="#">Chapter 19</a>
Reverse auctions	<ul style="list-style-type: none"> <li>Commercial commodity buys with well-defined specifications and universally accepted standards</li> <li>Products with a well-qualified and established base of suppliers</li> <li>Aggregate small buys for multiple users</li> <li>Must have CIO approval in advance</li> </ul>	<a href="#">Chapter 19</a>

## 14.2 Non-competitive procurement methods exceptions

There are circumstances where competitive procurements are not practical, when only one supplier is available or when an emergency procurement exists. An overview of when to use non-competitive procurement methods is outlined below.

Method	When to use	Where to learn more
Sole source procurements	<ul style="list-style-type: none"> <li>There is only one solution practicably available</li> <li>Product or service is only practicably available from a single supplier</li> <li>Total value of the IT procurement exceeds \$10,000</li> </ul>	<a href="#">Chapter 16</a>
Emergency procurements	<ul style="list-style-type: none"> <li>There is a serious or urgent situation requiring immediate action to protect persons or property.</li> <li>Utilize competition to the extent practicable</li> </ul>	<a href="#">Chapter 17</a>
Joint and Cooperative procurements (including GSA)	<ul style="list-style-type: none"> <li>Can provide expedited acquisition</li> <li>Other public body's contract must have been jointly and cooperatively procured and allow for purchase by other public bodies</li> <li>Contract was solicited "on behalf of other public bodies"</li> <li>Item is not available on an existing statewide contract or available through a DSBSD-certified small business</li> <li>Supplier must agree to all of VITA's standard terms and conditions</li> <li>Requires CIO approval</li> </ul>	<a href="#">Chapter 20</a>

### Chapter highlights

- **Purpose:** This chapter defines information technology (IT) and telecommunications small purchase guidelines.
- **Key points:**
  - Set asides are required for micro businesses for all procurements under \$10,000 when the price quoted is fair and reasonable and does not exceed five percent (5%) of the lowest responsive and responsible non-certified bidder. Set asides are required for DSBSD-certified small businesses, for all procurements up to \$100,000 when the price quoted is fair and reasonable and does not exceed five percent (5%) of the lowest responsive and responsible noncertified bidder.
  - Reviewing available statewide contracts for IT or telecommunications goods and services allows agencies and institutions to determine if the technology product or service needed can be purchased through a statewide contract.
  - A Quick Quote or RFP may be used for small purchases up to \$200,000.
  - All procurements for cloud-based solutions (Software as a Service), regardless of dollar amount, are subject to agency compliance with the requirements in [VITA's Third-Party Use Policy](#).

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15.1	Competitive requirements

## 15.0 Introduction

The Virginia Information Technologies Agency (VITA) has procurement authority for all information technology (IT) goods and services for agencies and non-exempt institutions of higher education. See [Chapter 1](#) of this manual, Purpose and Scope, for further information on VITA's IT procurement authority as well as VITA's Authority and Delegation Policy for IT procurements and exemptions.

An IT procurement is considered a "small purchase" when the aggregate or sum of all phases of the procurement is not expected to exceed \$200,000. Emergency procurements of goods and services available on an existing statewide contract are not subject to VITA's small purchase requirements.

The delegated authority for IT goods and services is provided in the Authority and Delegation Policy located at the following URL: <https://www.vita.virginia.gov/supply-chain/scm-policies-forms/scm-policies/>

- All agencies have up to \$250,000 in delegated authority for IT that is out of scope to VITA (e.g. agency specific applications). For a list of in scope and out of scope goods and services, please visit the "How to Place an Order" page at this URL: <https://www.vita.virginia.gov/supply-chain/place-an-order/>
- Procurements between \$200,000 (small purchase limit) and \$250,000 (VITA's delegated authority amount) must be procured competitively utilizing competitive sealed bidding or competitive negotiation.

- Delegated authority for IT that is in scope to VITA varies as follows:
  - All agencies have \$0 in delegated authority for Cloud Services (Software as a Service (SaaS), Platform as a Service (PaaS), and Infrastructure as a Service (IaaS)).
  - Agencies that are not in scope to VITA services have \$250,000 in delegated authority for infrastructure and enterprise applications.
  - Agencies that are in scope to VITA services have \$0 in delegated authority for infrastructure and enterprise applications.

Procurement requests and orders shall not be split to circumvent delegation limits.

Before performing a small dollar purchase for IT goods or services, agencies and institutions should search the IT statewide contracts available on VITA's Web site at: <https://vita.cobblestonesystems.com/public/>.

Reviewing VITA's available statewide contracts allows agencies and institutions to determine if the technology product or service needed can be purchased through an existing competitively procured IT statewide contract. Use of VITA's statewide contracts is mandatory for the acquisition of all IT goods and services, including small purchases. If there is not a VITA statewide contract available for the needed IT good or service, a procurement will be conducted. At any time, an agency may request that a small dollar technology purchase be procured on its behalf by VITA by completing and e-mailing the requisition form, which can be found by logging into your agency's eVA account at: <http://www.eva.virginia.gov/>.

Agencies shall utilize eVA for e-Mall, quick quote and catalog purchasing to meet the number of quotations ultimately required for each dollar threshold limit. As required by [§2.2-4303\(G\)](#) of the *Code of Virginia*, purchases that are expected to exceed \$30,000 shall require a written informal solicitation of a minimum of four bidders or offerors. eVA's functionality can provide the needed minimum written quotes required by [§2.2-4303 \(G\)](#).

Agencies and institutions may also utilize eVA's e-Mall, quick-quote, and catalog purchasing functionality as well as DSBSD's Web site for solicitations where the transaction is between \$5,000 and the dollar limit (\$250,000).

All procurements for cloud-based solutions (Software as a Service), regardless of dollar amount, are subject to agency compliance with the requirements in VITA's Third Party

Use Policy located at this URL: <https://www.vita.virginia.gov/it-governance/itrm-policies-standards/>.

## 15.1 Competitive requirements

The following competitive requirements shall be followed for all small IT purchases, regardless of delegation:

- Procurements up to \$10,000 – In accordance with [Executive Order 35 \(2019\)](#), all procurements up to \$10,000 are set aside for DSBSD certified micro businesses when the price quoted is fair and reasonable and does not exceed five percent (5%) of the lowest responsive and responsible noncertified bidder. Micro businesses are those businesses that have been certified by the Department of Small Business and Supplier Diversity (DSBSD) that have no more than twenty-five (25) employees and no more than \$3 million in average annual revenue over the three-year period prior to their certification. Quotes shall be solicited from a minimum of one DSBSD-certified micro business via eVA.
- Procurements over \$10,000 up to \$100,000 – eVA Quick Quotes shall be solicited from at least four (4) DSBSD-certified small business sources, including small businesses owned by women, minorities and service-disabled veterans and micro businesses, if available, in writing. In the procurement selection process for these set-asides, at least one of the proposals/bids shall be

obtained from a micro business unless upon due diligence no micro business in a particular category exists or was willing to submit a proposal/bid. If two or more DBSBD-certified small business sources cannot be identified as qualified to set aside the procurement under \$100,000, the procurement file shall be documented with VITA's efforts through eVA to obtain the number of required sources. An award may be made to a qualified, reasonably ranked DSBSD-certified small business, including minority-, women-, or service disabled veteran-owned small business or micro business offerors, if available, that is other than the highest ranking offeror if the price submitted is fair and reasonable and does not exceed five percent (5%) of the lowest responsive and responsible noncertified bidder. If an informal RFP is utilized in lieu of Quick Quote the award shall be made to the highest ranking and qualified small business, including small woman-, minority-, service disabled veteran-owned or micro business offeror. If the procurement is set aside and the agency or institution receives no acceptable bids or offers, the set aside may be withdrawn and the procurement resolicited utilizing non-set-aside procedures. In estimating the total cost of the procurement, all possible renewal periods on a term contract must be considered to determine if the procurement will not exceed \$100,000.

### Chapter highlights

- **Purpose:** This chapter defines sole source IT procurements and outlines sole source policies.
- **Key points:**
  - Sole source Information technology (IT) procurements are defined as procurements where there is *only* one solution to meet an agency's IT needs, and only one supplier can provide the technology goods and/or services required for the solution.
  - Proprietary IT solutions do not justify a sole source procurement. Proprietary procurements are defined as those in which there is only one solution available to meet an agency's IT needs; however, multiple suppliers may provide the technology goods and/or services required for the solution.

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16.6	How to negotiate sole source contracts
16.7	How to complete the sole source procurement file
Appendix A	IT goods and services sole source procurement approval request form
Appendix B	Price reasonableness determination form

## 16.0 Introduction

Sole source information technology (IT) procurements are defined as procurements where only one solution exists to meet an agency's IT needs and only one supplier can provide the technology and/or services required for the solution. Competition is not available for sole source procurements. When a sole source procurement is contemplated for a technology purchase and the estimated total amount of the purchase exceeds an agency's delegated purchase authority, the Sole Source Justification Form (see Appendix A) should be signed by the agency head or designee and submitted to VITA for approval at: [scminfo@vita.virginia.gov](mailto:scminfo@vita.virginia.gov) prior to the agency taking any further action.

## 16.1 Sole source procurement justifications

As fair and open competition is the preeminent consideration in Commonwealth procurement, any agency making a sole source procurement must clearly and convincingly demonstrate the need for doing so. Examples of circumstances which could necessitate sole source procurement for technology goods or services include:

- Products that are unique and possess specific characteristics or have a unique capability to provide a particular function and such products are only available from only one supplier.
- A law or grant requires a single source.
- Recovery from a disaster or emergency.

Examples of circumstances which do not justify a sole source procurement for technology goods or services include:

- Single supplier's capability to deliver in the least amount of time.
- Small purchase procurements under \$10,000.
- Proprietary solutions. Proprietary procurements are defined as those in which there is only one solution available to meet an agency's needs; however, multiple suppliers may provide the technology goods and/or services required for the solution. Proprietary solutions exist when the compatibility of equipment, replacement parts or service is the paramount consideration, but they should be procured using competition.

## 16.2 Sole source procurement process requirements

Below is a table of process requirements for sole source procurements of varying budget levels:

Sole source procurement	Condition	Process
Any amount	Off-premise (cloud hosted) solution	<u>Enterprise Cloud Oversight Services (ECOS) process.</u> Regardless of the amount, if the Sole Source Procurement involves an off-premise (cloud hosted) solution, agencies must follow the <u>ECOS Process</u> and <u>Third Party Policy Workflow</u> . A Security Assessment of the cloud service will need to be completed by the supplier and approved by ECOS, via a work request 1-003, and special Cloud Services Terms & Conditions must be included in the contract prior to award.
Under \$10,000	Not applicable	Not applicable
\$10,000 To \$250,000	Must be a Non-Infrastructure Related Procurement Agency/Institution	Must be approved in advance by the agency head or designee.  Complete a Sole Source Procurement Approval Request Form (see Appendix A), signed by the agency head or designee.

Sole source procurement	Condition	Process
\$250,000 or more	Any agency IT project that (has a total estimated cost of \$1 million or more has been designated a major information technology project by the Chief Information Officer (CIO). (See <a href="#">§ 2.2-2006</a> of the <i>Code of Virginia</i> .)	<p>Complete the Sole Source form and attach to your Procurement Governance Request (PGR). For more See here: <a href="https://www.vita.virginia.gov/supply-chain/scm-policiesforms/summary-of-vitas-procurement-delegation/">https://www.vita.virginia.gov/supply-chain/scm-policiesforms/summary-of-vitas-procurement-delegation/</a></p> <p>The Chief Information Officer (CIO) must approve the sole source procurement prior to the commencement of the actual procurement.</p>

### 16.3 How to conduct sole source procurements

The Virginia Public Procurement Act, [§ 2.2-4303\(E\)](#), requires the following steps in conducting sole source procurements:

- Prepare a written determination that there is only one source practicably available. Appendix A, Sole Source Procurement Approval Request Form, fulfills this requirement.
- Conduct determination of Price Reasonableness.
- Issue a written award notice that states:
  - only one source is practicably available
  - what is to be procured
  - name of selected supplier
  - date the contract was or will be awarded
- Post the award notice on [eVA](#). The notice may also be published in a newspaper of general circulation on the day the public body awards the contract. Posting on [eVA](#) is required by all state public bodies. Local public bodies are encouraged to utilize [eVA](#).

Sole source IT procurements that include a renewal provision, for which approval for multi- years was originally obtained, do not need to be re-approved until expiration of that renewal term.

### 16.4 Sole source procurements resulting in “high risk contracts”

Section [2.2-4303.01](#) of the *Code of Virginia* defines “high risk contracts” and outlines review and evaluation criteria for all public procurements which may result in a high risk contract.

Any IT procurement that is anticipated to result in a high risk contract must be reviewed by VITA and the Office of the Attorney General (OAG) prior to contract award. Reviews of the high risk contracts will be conducted within 30 business days and evaluate the following:

- The contract’s compliance with state law and policy.
- The inclusion of distinct and measurable supplier performance metrics
  - With clear enforcement provisions, including clearly outlines penalties and

- incentives, to be sued in the event that contract performance measures are not met.
- The legality and appropriateness of the contract terms and conditions.

Agencies are required to contact VITA's Supply Chain Management Division (SCM) at: [scminfo@vita.virginia.gov](mailto:scminfo@vita.virginia.gov) during the contract preparation stage for assistance with preparing and evaluating the proposed contract's terms and conditions.

VITA's High Risk Contracts Policy can be found on our website, accessible through the following link: <https://www.vita.virginia.gov/supply-chain/scm-policies-forms/scm-policies/>. Also see [Chapter 25](#) of this manual, "IT Contract Formation".

## 16.5 How to determine price reasonableness

The agency should conduct careful research when conducting a sole source procurement to determine the fair market price of the IT good or service being procured and document the findings. To substantiate price reasonableness, review previous prices paid by other consumers and observe whether the market has remained stable or fluctuated for that particular IT or telecommunications good or service. Complete a Price Reasonableness Determination Form (see Appendix B) for the procurement file. Also see [Chapter 9](#) of this manual, "Determining Price Reasonableness".

## 16.6 How to negotiate sole source contracts

In sole source procurements, a contract is negotiated and awarded without competitive sealed bidding or competitive negotiation. Therefore, it is the agency's responsibility to negotiate a contract that is in the Commonwealth's best interest. To be successful, the agency should have extensive knowledge of the market, the supplier's position in the market and substantiated price reasonableness information for the technology or service being procured. Written documentation of the negotiations shall be included in the procurement file incorporating the Price Reasonableness Determination Form found in Appendix B.

## 16.7 How to complete the sole source procurement file

An executed contract and/or [eVA](#)-issue purchase order is required for sole source purchases. The procurement file for sole source procurements over \$10,000 should contain the following documentation to support the sole source contract award:

- Written quote from offeror
- Sole Source Procurement Approval Request Form (Appendix A)
- Price Reasonableness Determination Form (Appendix B)
- Written negotiations documentation
- Written award notice
- Documentation of public posting of sole source award in a newspaper of general circulation, if any.
- Copy of [eVA](#) posting.
- Executed contract, if applicable, and copy of [eVA](#) purchase order.



**Appendix A**  
**Sole Source Procurement Approval Request Form**

This form is available on VITA SCM's website at the following URL:  
<https://www.vita.virginia.gov/supply-chain/scm-policies-forms/>

## **Appendix B**

### **Price Reasonableness Determination Form**

This form is available on VITA SCM's website at the following URL:

[https://www.vita.virginia.gov/media/vitavirginiagov/supply-chain/docs/Price\\_Reasonableness\\_Determination\\_Form.doc](https://www.vita.virginia.gov/media/vitavirginiagov/supply-chain/docs/Price_Reasonableness_Determination_Form.doc)

### Chapter highlights

- **Purpose:** This chapter defines emergency information technology (IT) procurements and outlines emergency procurement policies.
- **Key points:**
  - Any agency can make emergency procurements when an urgent situation arises and the particular IT need cannot be met through normal procurement methods. The agency head must approve the emergency procurement in writing.
  - An emergency is a serious or urgent situation requiring immediate action to protect persons or property. An emergency can be a threat to public health, welfare or safety caused by floods, epidemics, riots, equipment failure, fire loss or such other reason.
  - The agency is required to first search VITA's statewide contracts to determine if existing sources are available to fulfill the emergency procurement, since these contracts have been competed and negotiated.

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## 17.0 Introduction

This chapter covers policies for the procurement of IT goods and services in an emergency situation. All executive branch agencies and non-exempt institutions of higher education are subject to these policies and procedures when procuring IT goods and services, except those agencies and institutions explicitly exempted by the *Code of Virginia*. An emergency is a serious or urgent situation requiring immediate action to protect persons or property. An emergency can be a threat to public health, welfare or safety caused by floods, epidemics, riots, equipment failure, fire loss or such other reason. The existence of such conditions creates an immediate and serious need for supplies or services that cannot be met through normal procurement methods and schedules. Further, the lack of these supplies or services could seriously threaten government functioning, property preservation and/or the protection, health or safety of any person. Emergency procurements shall be limited to those supplies, services or items necessary to meet the emergency. The potential loss of funds by an agency at the end of a fiscal year is not an emergency.

## 17.1 Competition requirements in emergency IT procurements

Agencies should solicit as much competition as practical for emergency procurements; however, emergency procurements may be conducted without competition. The agency is required to first search VITA's statewide contracts at: <https://vita.cobblestonesystems.com/public/> to determine if existing sources are available to fulfill the emergency procurement, since these contracts have been competed and negotiated.

## 17.2 Emergency IT procurement requirements

The *Code of Virginia*, § 2.2-4303(F), details the following requirements for conducting emergency

procurements:

- The procurement file shall include a written determination of the basis for the emergency and the reason for selecting the specific supplier. The written determination must be signed by the agency head or his or her designee.
- The procuring agency may authorize a supplier to commence performance or delivery in the event of an emergency prior to a contract or purchase order being prepared and should prepare a purchase order or contract as soon as practicable.
- The procuring agency shall post a notice stating that the contract is being awarded on an emergency basis, identifying that which is being procured, the supplier selected and the date on which the contract was or will be awarded. The notice shall be posted on [eVA](#). The procuring agency may also elect to post notice in a newspaper of general circulation on the day the public body awards or announces its decision to award the contract. Posting on [eVA](#) is required by all state public bodies. Local public bodies are encouraged to utilize [eVA](#).

### **17.3 Documentation for the emergency IT procurement file**

The procurement file should include the following documentation:

- Copy of the Emergency Procurement Notification Form located in Appendix A of this chapter, with Agency Head or designee signature.
- Supporting documentation for:
  - the basis for the emergency
  - steps taken to ensure as much competition as practicable was taken
  - an explanation of why a particular supplier was selected
- Written quote from the selected supplier.
- Purchase order and/or executed contract.
- Copy of the posted [eVA](#) notice stating that the contract is being awarded on an emergency basis, identifying that which is being procured, the contractor selected and the date of contract award.

The form and copies of all documentation supporting the emergency procurement award for IT goods and services should be forwarded to VITA at [scminfo@vita.virginia.gov](mailto:scminfo@vita.virginia.gov) within five days of the contract award.

## **Appendix A**

### **Emergency Procurement Notification Form**

This form is available on VITA SCM's website at the following URL:

<https://www.vita.virginia.gov/media/vitavirginiagov/supply-chain/docs/EmergencyProcurementNotificationForm.doc>

### Chapter highlights

- **Purpose:** This chapter provides guidance for conducting requests for information, prequalification of suppliers and receipt of unsolicited proposals.
- **Key points:**
  - A request for information (RFI) is a standard business process to collect written information about the capabilities of various suppliers.
  - Prequalification is a procedure to qualify products or suppliers and limit consideration of bids or proposals to only those products or suppliers which have been prequalified.
  - An unsolicited proposal is a proposal received that is not in response to any agency or institution-initiated solicitation.

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## 18.0 Introduction

This chapter provides an overview of requests for information, prequalification of suppliers or products and unsolicited proposals for the procurement of information technology (IT) goods and services.

## 18.1 Requests for information

A request for information (RFI) is a standard business process to collect written information about the capabilities of various suppliers to provide identified IT solutions, services or products. The RFI acts as a formal inquiry to the marketplace to determine which suppliers and/or IT products, services or solutions are available in the market to solve an agency's IT business problem. The information obtained through an RFI may be used in developing a subsequent purchase requisition, invitation for bid (IFB) or request for proposal (RFP) after determining that IT suppliers or solutions are available which can satisfy the IT business problem. An RFI is not a procurement method and the results of an RFI cannot be made into a contract. Responses to an RFI will assist the agency in determining an appropriate course of action that may or may not involve a new procurement to solve their IT need. An RFI can be best described as a formal effort to seek ideas, perspectives and information on the proposed IT procurement from potential suppliers so that a formal project scope and set of requirements may be developed.

### 18.1.1 When to use an RFI

Generally, an RFI is used when reliable knowledge is needed regarding the availability of unique IT suppliers, solutions, services or products and little is known about them in the general market or IT industry. There are certain specific instances where the use of an RFI can be helpful:

- When an agency lacks in-house expertise or resources qualified to determine what type of solution may achieve its IT project's business goals and/or what types of solutions are available in the marketplace.
- When supplier responses to an RFI will assist an agency in developing future IFB or RFP requirements. Suppliers may propose multiple solutions in response to an RFI inquiry and need not be limited to proposing one solution. Each solution proposed may be an option for consideration and may help an agency shape their requirements.
- When suppliers can educate an agency on available options that will help mitigate risks and/or reduce overall technical needs.

### 18.1.2 General guidelines for developing an RFI

While each project's business objectives are unique and the resulting RFI should be aligned with those unique needs, there are general recommended guidelines to follow in preparing a successful RFI:

- Be concise and include a clear statement of the problem for which a solution may be solicited in the future.
- Request that suppliers respond to questions concerning the particular IT topic, business need or solution being considered.
- Ask suppliers to provide information on their qualifications, experience and ability to solve the IT problem posed by the RFI.
- Ask suppliers to provide lessons learned, white papers or other credible data regarding the solution being considered to obtain sound information, facts and knowledge-share.
- Do not ask for any cost or pricing information as such information could create an unfair solicitation environment.
- Do not use the RFI to select an IT supplier or a solution.
- Any subsequent IFB or RFP may not be written to a particular supplier, product, service or solution discovered during the RFI process.

## 18.2 Prequalification of suppliers or products

Prequalification is a procedure to qualify products or suppliers and limit consideration of bids or proposals to only those products or suppliers which have been prequalified.

§ 2.2-4317(A) of the *Code of Virginia* provides that: "Prospective contractors may be prequalified for particular types of supplies, services, insurance or construction, and consideration of bids or proposals limited to prequalified contractors."

Prequalification does not guarantee that a particular supplier will receive a contract or award, but rather qualifies a supplier to submit a bid or propose a solution for a specific solicitation under agreed-upon terms and conditions. Agencies may prequalify IT products or suppliers and then only solicit those who have been determined to have met the prequalification criteria. In such cases, a qualified contractors list (QCL) and/or a qualified products list (QPL) may be created. A QCL is a list of suppliers whose capability to provide an IT service has been evaluated and approved based on written prequalification procedures. A QPL is a list of IT products and/or services that have been tested and approved based on written prequalification criteria. The prequalification process allows for the listing of an unlimited number of potential IT suppliers that have agreed to meet the

agency's specific technology requirements and have agreed to the terms and conditions as defined in the prequalification document. If the prequalification document includes terms and conditions which are not required by law, regulation or policy, those terms and conditions may be subject to negotiation before issuance of a solicitation.

#### 18.2.1 Prequalification procedure

Agencies may contact VITA at [scminfo@vita.virginia.gov](mailto:scminfo@vita.virginia.gov) to inquire about current prequalified IT suppliers and products or conduct a contract search of existing statewide contracts <https://vita.cobblestonesystems.com/public/> that may serve their IT need(s). Any custom prequalification procedure utilized by an agency shall be established in writing and posted publicly and in [eVA](#), sufficiently in advance of its implementation, to allow potential suppliers a fair opportunity to understand and complete the prequalification process. The following prequalification procedure should be followed:

- Prior to the issuance of an IT solicitation, the agency will post a pre-qualification notice in [eVA](#) with the prequalification form attached. The form will set forth the criteria by which qualifications will be evaluated and when and to whom the form must be returned.
- Any prequalification notice will provide that all information voluntarily submitted that is labeled as trade secret or proprietary information by the supplier shall be considered a trade secret or proprietary information for the purposes of the prequalification.
- A prequalification notice may include a nondisclosure agreement, request for supplier's financial data and intent to bid/propose form which clarifies the supplier's point of contact information.
- At least thirty (30) days before the date established for submission of the bids or proposals under the prequalification solicitation, the agency shall advise those potential suppliers that submitted a prequalification application whether that supplier has been prequalified for that procurement. The agency will be the sole judge of when prequalification of IT suppliers, products or services is desired or required.

#### 18.2.2 Criteria for denying a supplier prequalification

In the event a supplier is denied prequalification, the agency shall provide written notification to the supplier stating the reasons for the denial of prequalification and the factual basis of such reasons. The supplier may elect to appeal the agency's prequalification decision as provided in [§ 2.2-4357](#) and [§ 2.2-4364](#) of the *Code of Virginia*. An agency may deny prequalification to an IT supplier only if one of the following applies:

- The supplier does not have sufficient financial ability to perform the contract that would result from such procurement. If a bond is required to ensure performance of a contract, evidence that the supplier can acquire a surety bond from a corporation included on the United States Treasury list of acceptable surety corporations in the amount and type required by the public body shall be sufficient to establish the financial ability of the contractor to perform the contract resulting from such procurement.
- The supplier does not have the appropriate background, experience or skills to perform the IT project in question.
- The supplier or any of supplier's officers, directors or owners has had judgments entered against them within the past ten years for the breach of contract(s) for governmental or nongovernmental projects.
- The supplier has been in substantial noncompliance with the terms and conditions of prior contracts with a public body without good cause. A public body may not utilize this provision to deny prequalification unless the facts underlying the supplier's substantial noncompliance were documented in writing in the prior project or contract file and such information was provided to the supplier at that time, with the opportunity to respond.



- The supplier's failure to satisfactorily meet SWaM spend commitments supplier's variance from such planned spend, supplier's inability or refusal to certify compliance with such plan, or failure to report monthly spend information as required by an agency, during performance of an existing or current contract.
- The supplier or any of its officers, directors, owners, project managers, procurement managers or chief financial officials have been convicted within the past ten years of a crime related to governmental or nongovernmental contracting, including, but not limited to, a violation of (i) Article 6 ([§ 2.2-436.7](#) et seq.) of this chapter, (ii) the Virginia Governmental Frauds Act ([§ 18.2-498.1](#) et seq.), (iii) Chapter 4.2 ([§ 59.1-68.6](#) et seq.) of Title 59.1, or (iv) any substantially similar law of the United States or another state.
- The supplier or any of supplier's officers, directors or owners is currently debarred pursuant to an established debarment procedure from bidding or contracting by any Commonwealth public body, agency of another state or agency of the federal government.
- The supplier is not authorized to conduct business in the Commonwealth [§ 2.2-4311.2](#) of the *Code of Virginia*.
- The supplier failed to provide the information in a timely manner to the procuring agency concerning any information requested by the public body relevant to any of the above provisions.

### 18.3 Unsolicited proposals

An unsolicited proposal is a proposal received that is not in response to any agency-initiated solicitation. This policy for unsolicited proposals applies only to IT goods and services.

Agencies may encourage the supplier community to submit unsolicited proposals offering new and innovative technology goods, services and solutions including those which would provide significant cost savings to the Commonwealth. Unsolicited proposals allow suppliers to introduce unique and innovative ideas or approaches that have been developed outside of government to be made available to agencies.

#### 18.3.1 How unsolicited proposals are submitted and evaluated

Unsolicited proposals shall be submitted in writing directly to those agencies who establish a primary point of contact to coordinate the receipt and handling of unsolicited proposals. A favorable comprehensive evaluation of an unsolicited proposal by the agency does not alone justify awarding a contract. All contracts must be awarded through competition or other Virginia Public Procurement Act (VPPA) compliant mechanisms. No preference shall be given to the potential supplier that initially offered the unsolicited proposal should a subsequent solicitation be issued for the same product, service or solution; nor should the solicitation be written in favor of that supplier or its technical approach or specifications. All unsolicited proposals submitted to any agency should be subject to the following conditions:

- All unsolicited proposals are submitted at the risk of and expense of the potential supplier.
- An unsolicited proposal is submitted with no obligation on the part of the agency or the Commonwealth.
- Unsolicited proposals must contain no restrictions on the agency's use of any ideas or information contained in such proposals or the Commonwealth.
- The agency may charge a fee for review of an unsolicited proposal. Such fee should be posted by the agency in advance of receiving any unsolicited proposal to give the proposer adequate notice that payment of such fee is required. Proposals requiring technical review may be billed on an hourly basis as appropriate for time spent in review.

- All unsolicited proposals will be evaluated for their participation and inclusion of small businesses including small businesses owned by women, minorities and service-disabled veterans, as well as micro businesses.
- If the unsolicited proposal contains an offer to loan or provide goods or services to an agency at no cost or little cost, and this offer would tend to create a need for subsequent procurements, the requirement for such goods or services and any additional needs shall be offered for competition in accordance with the VPPA. Potential suppliers shall be afforded an opportunity to participate in the resulting procurement process.

In order to constitute a true unsolicited IT proposal, the proposal must meet the following criteria to be accepted and reviewed by an agency:

- The unsolicited proposal must be innovative and unique;
- The proposal must be independently originated and developed by the supplier presenting the proposal to the agency.
- The proposal must have been prepared without government supervision, endorsement, direction or involvement
- The proposal must include sufficient detail to permit a determination by the agency if consideration and review of the proposal would be worthwhile.
- The proposal must not be an advance proposal for a known agency IT requirement that can be acquired through competitive methods.
- The proposal must not address a previously published agency IT requirement.
- All proprietary information included in the proposal which the supplier wishes to remain confidential shall be marked as proprietary. If the entire unsolicited proposal is marked proprietary, it will not be considered for review by an agency.

### 18.3.2 Requirements for awarding an unsolicited proposal

Any resulting contract award and related award documents of unsolicited IT proposals by an agency must adhere to the VITA delegation and CIO review and approval requirements.

Normally, competition should be used. However, if it is determined by an objective evaluation process that the IT goods or services required by an agency and offered in an unsolicited written proposal are practicably available from only the unsolicited source, the agency may negotiate and award a contract following the sole source procedures, including budget and VITA delegation requirements, conditions and approvals. Any notice of award shall be posted in [eVA](#) for ten (10) calendar days.

### Chapter highlights

- **Purpose:** This chapter contains policies and guidelines pertaining to the acquisition of information technology (IT) goods through the use of public, online and reverse auctions.
- **Key points:**
  - The purchase of IT goods and nonprofessional services from a public auction sale shall be permitted by any authority, department, agency or non-exempt institution of higher education if approved in advance by the Chief Information Officer (CIO) of the Commonwealth.
  - A reverse auction is a procurement method where suppliers 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 supplier.

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### 19.0 Introduction

The policies and guidelines in this chapter are applicable to procuring information technology (IT) goods and services utilizing public, online and reverse auctions. Agencies may purchase IT goods from public auctions and online public auctions upon a determination made in advance by the agency and set forth in writing that the purchase of IT goods from a public auction sale is in the best interest of the public. (Refer to [§ 2.2-4303\(H\)](#) of the *Code of Virginia*.) Section [§ 2.2-4303\(I\)](#) of the *Code of Virginia* states: "The purchase of goods or nonprofessional services, but not construction or professional services, may be made by reverse auctioning. However, bulk purchases of commodities used in road and highway construction and maintenance, and aggregates shall not be made by reverse auctioning."

The purchase of IT goods and nonprofessional services from a public auction or reverse auction sale shall be permitted by any authority, department, agency or non-exempt institution of higher education if approved in advance by the Chief Information Officer (CIO) of the Commonwealth.

## 19.1 Public and online auctions

When agencies look at the price of IT auction items, the savings may seem substantial; however, often the reasons for the low price(s) at auctions are a result of disadvantages such as:

- Limited warranty or no warranty,
- No return policy,
- Advance payment requirements,
- Items of uncertain history or conditions,
- All auction items are purchased on an “as is/where is” basis.

Usually a day or two before an auction, the auction house (if a public auction) or an auction website will set aside the day(s) for review and evaluation of the IT goods that will be auctioned. Agencies should take advantage of this pre-auction inspection period to confirm that what appears to be a good value online or in a catalog is really as represented. This preview period can avoid costly technology mistakes.

Before bidding, agencies should become familiar with the rules and practices of an auction house or online auction site. Buyers should determine what protections the auction site offers auction purchasers. Some auction sites provide free insurance or guarantees of items if they are not delivered, not authentic or not what the seller claims. Buyers should make certain that the auction house/auction site offers some protection against purchasing defective or erroneously described merchandise. All agencies should be keenly aware of exactly which technology items they are bidding on during the auction. Look for words like “refurbished,” “close out,” “discontinued” or “off-brand” to get a better idea of the condition of the technology item. Buyers should try to determine the relative value of a technology item before their bids are placed.

Agencies should avoid doing business with sellers that they cannot identify or sellers who try to lure buyers off regulated auction sites with promises of a better deal. Buyers should check on the seller’s return policy. Make sure that it is possible to return an item for a full refund if the agency is not satisfied with it. Determine if the agency will be required to pay shipping costs or a restocking fee.

When purchasing technology through an online auction or auction house, buyers should consider whether the item comes with a warranty and whether follow-up service is available if needed. Buyers should document and understand fully all warranties and other protections offered by the seller or auctioneer. Many online and auction sellers do not have the expertise or facilities to provide services or maintenance for the goods they are selling. Agencies should decide if they are willing to forfeit support, warranties and maintenance services before placing a bid.

When bidding, buyers should establish a top price for the technology item desired and stick to it. This will enable the agency to get a fair price and protect it from “shill bidding.” (Shill bidding is when fraudulent sellers or their partners, known as “shills” bid on sellers’ items to drive up the price.) Buyers should not bid on any item that they do not intend to buy. If the agency is the highest bidder, the agency is obligated to follow through with the transaction. Remember to save all transaction information regarding any technology auction purchase.

Print and save the seller’s identification, the item description, and the time, date and price of the bid. Also, print and save every e-mail that is sent and received from the auction company or the seller.

## 19.2 Reverse auctions

### 19.2.1 General Information about reverse auctions

A reverse auction is a procurement method where suppliers 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 supplier. Suppliers must be prequalified to participate in a reverse auction. During the bidding process, suppliers' prices are revealed and suppliers have the opportunity to modify their bid prices for the duration of the time period established for bid opening. (Refer to [§ 2.2-4301](#) of the *Code of Virginia*.)

In a reverse auction, something is purchased from the lowest responsive and responsible supplier (which is the "reverse" of a normal auction, wherein something is sold to the highest bidder). A reverse auction is typically conducted via the Internet (usually through an e-procurement site) where prequalified suppliers anonymously bid against each other for an item or group of items for which an agency has a requirement. Bidding takes place at a specified date and time and continues for a specified amount of time to allow suppliers to reduce their bids during the auction period until no more bids are accepted.

Reverse auctions can allow agencies to minimize the cost of IT goods and services purchased while maximizing the value received. Reverse auctions provide an unbiased method to procure IT as it avoids the appearance of unethical or compromising practices in relationships, actions and communications. Reverse auctions also provide benefits through automating the sourcing process and increasing the agency's purchasing efficiency.

To begin the reverse auction process, an agency will post a procurement opportunity for suppliers to qualify to participate in the reverse auction event. Suppliers will submit a summary of their products and/or services as well as their qualifications without prices. This prescreening of suppliers is done carefully to ensure that the agency does not contract with irresponsible suppliers offering lower quality products. Suppliers who prequalify are invited to participate in the reverse auction event. Suppliers who were not selected to participate in the reverse auction should be notified by the purchasing agency. The selected suppliers will be contacted and trained on set-up and use of the selected auction tool.

During the course of the auction, suppliers submit progressively lower prices electronically until the lowest bid is submitted. After the lowest price is obtained, the agency reviews the suppliers' submittals for responsibility, starting with the supplier who submitted the lowest price until the lowest responsible supplier is selected for award.

### 19.2.2 Traditional auction vs. reverse auction

The table below shows the primary differences between traditional and reverse auctions.

Traditional auction	Reverse auction
Item(s) offered for sale	Items required to be purchased
Multiple buyers compete for the purchase	Multiple suppliers compete for the sale
Price is driven up	Price is driven down

### 19.2.3 Benefits of reverse auctions

Reverse auctions appeal to buyers for many reasons, including:

- Buyers may realize average price reductions of 15 percent utilizing reverse auctions. Reported price reductions range from five percent to 90 percent.

- Buyers perceive reverse auctions to be a much faster way to get to the final, best price from a qualified group of suppliers. Price bidding occurs during a time-limited online event. Even though buyers spend more time qualifying suppliers for participation and preparing for the reverse auction, the time savings for price bidding shortens the overall process.
- The sourcing and supplier selection process becomes more transparent, reducing the influence of personal relationships and sales force efforts.
- Reverse auction software is inexpensive to install and easy to use. In addition, auction functionality is increasingly included with business software systems, making it available on the desktops of individual buyers.
- The Internet provides a low-cost, easily accessible way to connect a buyer with multiple qualified suppliers.
- Spending analysis programs aggregate purchasing volume into quantities that make participation attractive to many suppliers.

Reverse auctions complement strategic procurement strategies and have been shown to effectively leverage volume purchasing and drive real IT savings. Reverse auctions work best when they are used to procure the following IT goods and services:

- Commercial technology commodity buys with well-defined specifications and universally accepted standards.
- Bulk technology or telecommunications purchases.
- Items of definite quantity and definite delivery.
- Technology and services which have a well-qualified and established base of suppliers.
- Technology purchases which have big-dollar volume actions for individual customers.
- Aggregated small buys for multiple users.

#### 19.2.4 Guidelines for using reverse auctions

When considering the use of a reverse auction, agencies should carefully consider the following guidelines:

- Think beyond price. While buyers may feel good about getting the lowest price, ultimately it is the greatest value that matters. Price is only one element of the buyer's value equation. Buyers should also consider quality, reliability and supplier's value-added services. These considerations should be built into the prequalification criteria and specifications.
- Use reverse auctions only when appropriate. Reverse auctions are appropriate for IT transactional situations characterized by one-time purchases, typically for common commodity products available from multiple suppliers. Reverse auctions are generally not appropriate for sourcing of differentiated parts and components where suppliers may need to have specialized capabilities and few suppliers can meet quality and reliability standards.
- Understand the hidden costs of reverse auctions. Savings from the first few reverse auctions an agency conducts can overstate the eventual savings. There is a big difference between the savings measured at the time the auction closes and the savings measured at the end of the transaction. Buyers should account for both direct and indirect losses that may arise during the course of the procurement cycle. Pilot auction programs may project that the agency will achieve much higher savings because suppliers may engage in "loss-leader pricing" (A loss leader is a product sold at a low price (at cost or below cost) to stimulate sales) to get the buyer's business. These prices may not be sustainable because suppliers will look for opportunities to raise prices or add hidden costs once they have won the business.

- Agencies which do not have sufficient time to detail their specifications and develop their prequalification criteria should think twice before utilizing reverse auctions. The specifications and prequalification of suppliers protects the agency by only allowing suppliers who can provide the exact product needed to participate in the reverse auction.
- There is insufficient competition among suppliers. Reverse auctions only work in highly competitive markets where there are multiple suppliers who can provide the same commodity.
- Agencies should require a clear and concise statement of requirements for all products or services being procured through a reverse auction.
- Agencies may require that all auction sellers submit initial price proposals.
- Suppliers' identities must be protected.
- Suppliers must give permission before their prices may be disclosed.

#### 19.2.5 "Best value" reverse auctions

"Best value" reverse auctions, when properly utilized, can result in agencies being able to procure a better overall technology value for certain IT commodities. Agencies can realize technology cost savings through "real time" competition during the course of a reverse auction.

Best value technology procurements place importance on factors other than price, such as total cost of ownership (TCO). The agency may establish source selection criteria in advance of the reverse auction with potential suppliers. By doing so, the agency can be assured of being able to efficiently evaluate the bids received to determine which bid represents the "best value" for the Commonwealth. In utilizing "best value" reverse auctions, agencies should follow these guidelines:

- "Best value" source selection and evaluation criteria may be established with input from potential qualified suppliers in advance of the reverse auction.
- Source selection criteria will be made available to all prequalified or potential suppliers prior to the auction.
- Potential qualified suppliers will provide standardized offerings electronically in advance of the reverse auction for all factors other than price.
- Agencies will evaluate factors other than price prior to the reverse auction.
- The agency then performs an integrated evaluation of both price and factors other than price to quantify which supplier is offering the best value.

#### 19.2.6 "Lowest price" reverse auctions

A "lowest price" reverse auction may be utilized to achieve procurement savings for general technology commodities, where there is little product and supplier differentiation and where product price is the only selection criterion. "Lowest price" reverse auctions should be utilized when:

- There is little concern about production specifications or the performance history of the qualified suppliers participating in the auction.
- Comparable bids are expected to be tendered from many suppliers.
- A complete invitation to qualify (IFQ) has been performed which prequalified suppliers based on ability to deliver known technology product.

Potential suppliers are invited to bid on specified technology goods and services through real-time electronic bidding. The IFQ is a solicitation process similar to a request for bid or request for proposal, through which potential suppliers are prequalified to participate in a

reverse auction. Only those suppliers that meet the requirements of the IFQ and agree to the terms and conditions contained therein are invited to participate in the reverse auction. Some terms and conditions may be negotiated before the invitations to qualify are issued to potential suppliers.

In a low price reverse auction suppliers may be given 10 calendar days' notice of reverse auctioning opportunities through [eVA](#). Potential suppliers will receive detailed specifications and requirements, along with the terms and conditions relevant to the technology goods or services being purchased. If an IFQ is utilized, the agency should notify responding suppliers as to whether they have met the qualifications and criteria to be prequalified to participate in the reverse auction. Names of those suppliers that have been invited to or prequalified for the reverse auction will not be disclosed until after the reverse auction has occurred.

#### **19.2.7 Reverse auction terms and conditions**

Contractual terms and conditions will be defined up front with reverse auctioning opportunities. If there is needed negotiation on a particular term and condition, such negotiation will include all potential suppliers and will be finalized before the reverse auctioning opportunity solicitation is finalized. Suppliers must agree to the reverse auction solicitation's finalized terms and conditions before they will be eligible to participate in the reverse auction. Clarifications, negotiations, and acceptance of all specifications, requirements, terms and conditions, etc., will occur before the agency invites a supplier to participate in a reverse auction event. No changes to the specifications or terms and conditions will be allowed after bidding if the changes in a submitted bid would have rendered the bid unresponsive.

#### **19.2.8 The reverse auction schedule**

The reverse auction will run for a set duration. The auction duration may be extended based on a low price entered in the last minute of the auction. A minimum price reduction will be required to extend the auction. Agencies may, utilize a "minimum bid step" wherein each successive bid must differ from the previous bid by an amount known as a minimum bid step. For example, a further reduction of a certain percentage amount or greater in price is required to extend the auction period. The minimum bid step amount will be determined by the agency in advance of the auction and may be different depending on what is being auctioned. In most cases, the minimum bid step will be an amount less than ("bid decrement") the previous bid. The minimum bid step will be included in the posted reverse auction solicitation. However, in some cases, such as when bids are given as a percent off manufacturer's list price, the minimum bid step will be an amount greater than ("bid increment") the previous bid (e.g., 15 percent off is a better price than 10 percent off).

Agencies may also utilize an "extension activation period" (EAP) during its reverse auction procurements. The EAP is defined as the number of minutes before the end of an auction, during which, if a bid is received, the agency may choose to extend the auction by a pre-defined number of additional minutes ("the extension"). For example, if the auction parameters are: EAP for three minutes, Extension for five minutes, if a bid is placed within the last three minutes of an auction, the auction would be extended for an additional number of minutes. This process would continue until no more bids were received.

The award will be made to the lowest responsive and responsible supplier immediately after the auction is completed. The award will be posted on [eVA](#) for a minimum of ten (10) calendar days. There is no mandatory public opening of the IFQ responses if an IFQ is held prior to the reverse auctioning event. There is also no mandatory public viewing of the



reverse auction event. However, IFQ responses and reverse auction logs are considered public record. Upon request, they will be made available to the public after an award has been made.

Clarifications, negotiations, and acceptance of all specifications, requirements, terms and conditions, etc., will occur before the supplier is invited to participate in a reverse auction event. After the auction, the agency will permit such changes only with the limitation that the change(s) do not alter the scope or content of the original reverse auction solicitation to a degree that will affect the justification that was used to eliminate other industry partners from being included in the reverse auction. Changes to the specifications or terms and conditions will not be accepted after bidding if those changes in a submitted bid would have rendered the bid unresponsive.

### Chapter highlights

**Purpose:** This chapter covers policies related to sponsoring and using joint and/or cooperative procurements, and the use of GSA Schedule 70 contracts by public bodies, for the procurement of information technology (IT) goods and services.

**Key points:**

- The joint and/or cooperative procurement is formed when multiple parties identify common requirements suitable for a joint and/or cooperative procurement arrangement and sign a written agreement to jointly and cooperatively procure.
- The CIO must approve all joint and/or cooperative procurement arrangements for the procurement of IT goods and services and all purchases from jointly and cooperatively procured contracts, including GSA Schedule 70 contracts, regardless of the amount of the IT purchase.
- Joint and/or cooperative contracts, including GSA contracts, typically should not be used for procurements involving intellectual property rights (e.g., software purchases, custom systems development) or that include service level agreements.
- If the joint and/or cooperative procurement involves an off-premise (cloud hosted) solution, agencies must follow the [Enterprise Cloud Oversight Services \(ECOS\) Process](#) and [Third Party Policy Workflow](#).

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## 20.0 Introduction

The *Virginia Public Procurement Act* (VPPA) addresses joint and/or cooperative procurements in [§2.2-4304](#) and [§2.2-2012\(B\)](#). Joint and/or cooperative procurement contracts can provide convenient vehicles for agencies to buy IT goods and services. Instead of seeking quotes, bids or proposals, public bodies select products and services from the joint and/or cooperative contract catalog, saving considerable time and effort. Agencies can also be assured that the contract was conducted in accordance with the sponsoring state's or locality's procurement laws or regulations. Most joint and/or cooperative procurement arrangements utilize rigorous standards when establishing contracts. Joint and/or cooperative procurement arrangements can save significant time and money in obtaining an information technology (IT) product or service and may result in lower pricing through the power of aggregation. Joint and/or cooperative procurements may also help realize supplier diversity initiatives.

All public bodies including agencies and institutions must request CIO approval—

- To sponsor, conduct or administer a joint and/or cooperative procurement arrangement for IT goods and services regardless of the amount of the resulting contract.
- To purchase IT goods and services from GSA Schedule 70 or other approved GSA Schedule regardless of the amount of the planned purchase.

Joint and/or cooperative purchasing also allows for the General Services Administration (GSA) to provide states and localities access to certain items offered through the GSA's Federal Supply Schedule 70, Information Technology (IT), and Consolidated Schedule contracts, containing IT special item numbers (SINs). The information technology (IT) available to state and local governments includes automated data processing equipment (including firmware), software, supplies, support equipment, and services.

## **20.1 Purchases from joint and/or cooperative procurements (non-GSA Schedule 70)**

### **20.1.1 Characteristics of good joint and/or cooperative procurements**

Some IT commodities and services have certain characteristics that make them more suitable for joint and/or cooperative purchasing arrangements than others. Commodities that are purchased in large volume and/or are routinely purchased may be purchased successfully from a joint and/or cooperative contract. Most joint and/or cooperative purchasing efforts involve bulk commodities with standard specifications (i.e., standard desktop computers). Wide geographic availability and adequate distribution channels are important for the contract to appeal to a large group of purchasers. The use of local suppliers to provide support may be utilized to make a joint and/or cooperative contract more convenient and provide business opportunities for local suppliers. Multiple purchasers and common use between agencies will contribute to wider contract usage and drive deeper pricing discounts.

### **20.1.2 Benefits of joint and/or cooperative procurement arrangements**

Joint and/or cooperative IT procurement arrangements can provide many benefits including significant savings as volume purchasing lowers pricing, reduces the need for specification development, and provides convenience and flexibility, as well as providing IT contracts with qualified suppliers and proven products. By standardizing IT products and services and aggregating requirements, public bodies can benefit from the combined economies of scale achieved when partnering with multiple government organizations. By joining together and using specialized requirement or specification writers, procurement professionals and technical evaluation committee members, governments may be able to produce better contracts for higher quality products and services. Smaller public bodies benefit from the combined resources of larger government agencies and from the market share leveraged by larger government consumers. With one procurement process and one contract serving multiple governments, joint and/or cooperative contracts can reduce administrative costs because the preliminary work has already been done and administrative efforts and costs are spread across multiple governments.

### **20.1.3 Before using a joint and/or cooperative contract**

A prudent buyer should do the following before utilizing a joint and/or cooperative IT contract:

- Review the joint and/or cooperative IT contract for conformance with state or local procurement laws and best practices.
- Analyze the product or service specifications, price, terms and conditions and other factors to ensure that the joint and/or cooperative IT contract reflects the market place and best value.
- Contact the joint and/or cooperative lead agency or public body to verify contract application and eligibility.

- Compare contracts if there are multiple contracts available for the required IT product or service.
- When buying large quantities of goods, verify whether the contract permits negotiation of additional price concessions.
- If a purchase agreement or sign-up agreement is required, confer with an IT procurement professional, VITA or your agency's legal counsel to determine whether the agreement is acceptable.

#### 20.1.4 Challenges in using or establishing a joint and/or cooperative contract

All government purchasing organizations operate under some form of procurement or statutory code intended to achieve best value for its citizens, protect against fraud and abuse, and ensure fairness, equity and transparency and to maintain public trust. However, there may be differences that impact your agency's ability to use or participate in creating a joint and/or cooperative IT contract. This list offers some examples:

- **Legal compliance:** Although most procurement laws are similar, there may be differences in government procurement statutory requirements or procedures. Some governments require strict compliance with their own procurement laws when using joint and/or cooperative contracts awarded by other governments. Communication and participation in the procurement process by joint and/or cooperative members will help the joint and/or cooperative contract achieve universal compliance.
- **Buy local laws:** Many jurisdictions have laws that favor or give preference to local suppliers. These laws may interfere with the ability of a public body to develop and award a joint and/or cooperative contract or may prevent agencies from using a joint and/or cooperative contract.
- **Open competition:** Many government procurement programs maintain lists of suppliers who register to compete for contracting opportunities and are required to post public advertisements for invitations for bids or proposals. Notifying local suppliers of the joint and/or cooperative IT contract solicitation and advertising the solicitation in local publications will ensure that local suppliers have an opportunity to compete for the joint and/or cooperative IT contract. Commonwealth agencies are required to post all solicitations and awards on [eVA](#) and may publish solicitations in a paper of general circulation, while our localities are only encouraged to post on [eVA](#).
- **Small business participation:** Some small businesses including small businesses owned by women, minorities, and service-disabled veterans, as well as micro businesses, may be able to handle business for one state or local jurisdiction, but may not be able to handle the combined requirements or needs of multiple governments. Encouraging local delivery and service networks and utilization of small business subcontractors will provide opportunities for these small businesses to continue to serve joint and/or cooperative members.
- **Forms and terms:** With the exception of federal statutory regulations, most state and local governments use unique procurement contract terms and conditions, therefore, a joint and/or cooperative IT contract awarded by one jurisdiction may not conform to the required terms and conditions of another.

There are several methods to address contractual differences, including development of standard terms and conditions for joint and/or cooperative members, inclusion of all government contract variations in the solicitation and negotiation of participation agreements between the government and supplier. Differences in state or local requirements can be addressed in a contract addendum; as long as the sponsoring agency agrees up front in the solicitation that participants may have their own terms and conditions addressed in it. An example of a statutory regulation that may be unique to the Commonwealth is the requirement for suppliers to be and remain authorized to transact business in our state through the State Corporation Commission for the life of any contract.

- **Attention to pricing:** Although most joint and/or cooperative contracts generate considerable cost savings for governments, not all joint and/or cooperative contracts achieve best value. Suppliers may offer higher prices because many of the joint and/or cooperative members are small or located in remote areas. If contract usage estimates are inaccurate, price may be based on much lower than actual usage. Pricing is much more likely to be unfavorable in piggyback contracts because usage is difficult to estimate beforehand. In addition, the supplier may price the contract high because of high administrative costs associated with the joint and/or cooperative agreement.
- **Time and resources:** It takes more time and effort to award a contract that serves multiple governments and agencies than it does for a contract that serves one agency. In theory, joint and/or cooperative IT contract time and resource investments are more than recovered by using joint and/or cooperative IT contracts awarded by other public bodies. Time and resource requirements can also be reduced by using volunteers from other governments to assist with the procurement, draft specifications or participate in the evaluation process.
- **Watch piggybacking:** Since "piggyback" contracts are not based on aggregated volume, agencies "piggybacking" on another entity's contract may not benefit from true economies of scale. Piggybacking off of another public entity's contract does not always produce best value. In some cases, entities may piggyback off of an existing joint and/or cooperative but fail to notify the lead state or complete a participating addendum to the contract. This can result in undocumented contract activity and volume and impact volume discounts.
- **Fees:** Many joint and/or cooperative purchasing programs assess usage and access fees to other governmental entities to use their joint and/or cooperative contracts. Fees range from one time or annual enrollment fees to transaction fees ranging from less than 1% to 2% of the value of every purchase. These fees may be collected directly by the joint and/or cooperative lead contract administering entity or from the supplier.

### 20.1.5 Types of joint and/or cooperative procurements

Joint and/or cooperative IT procurements are formed when multiple parties identify a common technology requirement suitable for a joint and/or cooperative procurement arrangement and sign a written agreement to jointly and cooperatively procure. The lead agency or government solicits proposals and awards the joint and/or cooperative IT

contract. The contract is then available for use by all signature parties and other public bodies if the solicitation provided for use by other public bodies. The participating entities may sign an agreement or a "participating addendum" in the specific contract. The participating addendum may be necessary to include the user's statutory requirements in its agreement with the supplier and for the lead entity to administer effectively.

There are three types of joint and/or cooperative procurement arrangements that can be used for IT:

Type	Description
True (or "pure")	Where two or more organizations combine their requirements and solicit bids or offers. This type of joint and/or cooperative is based on statutory or regulatory authority. The relationship between the issuing agency and the contract users is based on this legal agreement or authority. Contract users are bound by the issuing agency's terms and conditions, unless they take exception in a separate document.
Piggyback	Where statutory authority permits a governmental entity to use "any contract issued by any other governmental entity." The key to a piggyback joint and/or cooperative is that the contract is issued by a single entity (usually without any other participation). There is relationship between the contract users and the supplier or the entity that established the contract. The contract will include an option for other organizations to "ride," "bridge" or "piggyback" the contract as awarded, even if they did not participate in the original solicitation. It is important to remember in a piggyback situation, that any relationship between the supplier and a user should be based on a separate contract, not the piggyback contract, since there is no other legal relationship involved. The federal government uses this structure through its GSA contracts.
Third- party aggregator	When one organization brings together multiple organizations to represent their requirements and manage the resulting contract. Contract users will not realize the benefit and leverage of the full volume use of the contract. The supplier may only offer a minimal discount when participation and usage exceed original contract estimates. An example of a third-party aggregator situation is where a joint and/or cooperative procurement is spearheaded by a group (i.e., U.S. Communities, etc.) that is not a governmental entity but it gathers interest and commitments from others and then turns around and buys for the whole group. Some "third party aggregators" may not be non-profit entities and their fee structure may be for profit.

#### 20.1.6 Before issuing joint and/or cooperative solicitations

It is important to research VITA statewide contracts found here: <https://vita.cobblestonesystems.com/public> to ensure that no current contracts exist to satisfy your agency's technology needs. You may contact [scminfo@vita.virginia.gov](mailto:scminfo@vita.virginia.gov) with

any questions or to request a meeting with a VITA sourcing specialist to discuss your IT needs and plans or to obtain advice.

These important actions should be completed before issuing joint and/or cooperative IT solicitations:

- Apply for and receive CIO approval to conduct a joint and/or cooperative IT procurement
- Designate a lead agency to conduct the procurement, with qualified procurement and technical staff and commitment to perform the joint and/or cooperative procurement through completion.
- Require joint and/or cooperative members to sign an agreement that includes the policies and procedures under which the joint and/or cooperative will work.
- Invite joint and/or cooperative members, including technical specialists, to participate in the development of specifications, reporting needs and contract terms and conditions. Ensure all pertinent agency, local, state and federal statutory and other requirements for all joint and/or cooperative members are included in the solicitation.
- Provide for delivery, service, maintenance and other value-added services to be provided by designated local suppliers and small businesses including small businesses owned by women, minorities, and service-disabled veterans as well as micro business suppliers.
- Utilize a competitive solicitation process to obtain the best-value contract.
- Survey joint and/or cooperative members and research their history on buying patterns and estimated requirements.
- Circulate draft solicitations among joint and/or cooperative members and prospective IT suppliers for comments and suggestions.

#### 20.1.7 Sourcing and issuing the solicitation

In order to maximize efforts intended to increase supplier responsiveness, take these actions when issuing joint and/or cooperative solicitations:

- Use supplier sourcing lists from all prospective joint and/or cooperative purchasing members.
- Advertise the procurement in all participating localities, regions or states in accordance with their prevailing laws or regulations.
- Designate and provide contact information for a single point of contact for supplier inquiries and communication.

#### 20.1.8 Evaluating and negotiating offers

Proposal evaluations and negotiations should be fair and objective using the following guidelines:

- Invite participating joint and/or cooperative members to participate in technical evaluations.
- Negotiate terms and conditions that conform to legal requirements of each participating jurisdiction.



- Carefully evaluate the proposed supplier's ability to service all public bodies involved in the joint and/or cooperative procurement in a quality manner.
- Contracts are based on free and open competition, not sole source; however, sometimes a single award is the best option.

#### 20.1.9 Contract award and administration

Once a decision has been made to award a joint and/or cooperative IT contract, the lead agency should do the following:

- Notify participating members of the award and provide electronic copies of the entire contract.
- Provide written guidelines for contract administration and contract management.
- Maintain a list of all authorized contract users.
- Contractual disputes relating to a particular purchase order should be handled by the affected joint and/or cooperative member and those relating to the contract as a whole by the lead governmental entity.
- Establish a supplier performance reporting system for all members to report and monitor supplier performance on a regular basis. Many public bodies have additional reporting requirements including statutory reporting (i.e., SWaM and non-SWaM subcontractor reporting) identified in the contract.
- Require the supplier to provide periodic contract sales reports. The lead contracting agency should obtain a volume purchase report for the term of the contract from the supplier prior to contract expiration or renewal action. This data can be used to support estimated usage for the next solicitation or when evaluating contractor requested price adjustments.
- Invite participating members to comment on proposed contract extensions, renewals and amendments.
- Negotiate deeper discounts based on projected volume sales or if actual purchases exceed estimates.
- Provide plenty of time for procuring replacement contracts

#### 20.1.10 Joint and/or cooperative procurements resulting in high risk contracts

[Section 2.2-4303.01](#) of the *Code of Virginia* defines "high risk contracts" and outlines review and evaluation criteria for all public procurements which may result in a high risk contract.

Any IT procurement that is anticipated to result in a high risk contract must be reviewed by VITA and the Office of the Attorney General (OAG) before the solicitation can be issued.

Solicitations and contracts anticipated to meet the criteria of "high risk", as defined in [§ 2.2- 4303.01\(A\)](#) of the *Code of Virginia* will be reviewed by VITA and OAG. Reviews of high risk solicitations and contracts will be conducted within 30 business days and evaluate the following:

- The solicitation's/contract's compliance with state law and policy.
- The inclusion of distinct and measurable supplier performance metrics
  - with clear enforcement provisions, including clearly outline penalties and incentives, to be used in the event that contract performance measures are not met.
- The legality and appropriateness of the solicitation/contract terms and conditions.

Agencies are required to contact VITA's Supply Chain Management Division (SCM) at: [scminfo@vita.virginia.gov](mailto:scminfo@vita.virginia.gov) during the contract preparation stage for assistance with preparing and evaluating the proposed contract's terms and conditions.

VITA's High Risk Contracts Policy can be found on our website, accessible through the following link: <https://www.vita.virginia.gov/supply-chain/scm-policies-forms/scm-policies/>. Also see [Chapter 25](#) of this manual, "IT Contract Formation".

#### 20.1.11 Documentation for the procurement file

All solicitation, negotiation and award documentation should be included in the master procurement file, including any supplier-certified representations. A complete procurement file should be maintained for each purchase transaction and should contain all the information necessary to understand the why, who, what, when, where and how of the transaction, including the contract from which the good or service is being procured.

## 20.2 Purchases from federal GSA Purchasing Schedule 70 (technology)

### 20.2.1 Background and description

In 2003, Congress opened GSA Schedule 70 (Information Technology and Telecommunications Hardware, Software and Professional Services) for state and local government use. GSA Schedule 70 is a catalog of supplier contracts used by federal agencies when they need to purchase information technology products. GSA Schedule 70 suppliers are selected through an open and continuous qualification process instead of competitive bids or proposals. GSA users seek competition from GSA contractors at the point of sale by obtaining quotes. GSA requires most favored customer pricing, which provides state and local governments with a price advantage based on federal purchasing economies of scale.

GSA contracts are based on price ceilings and contractors are allowed by GSA to offer further discounts to states and localities. GSA encourages state and local governments to establish separate contract arrangements with the GSA supplier. Each Schedule 70 contract price includes an industrial funding fee (IFF), which is represented in the prices paid by ordering activities and passed on to GSA by schedule contractors. The IFF reimburses GSA for procurement and administrative costs incurred to operate the GSA Schedules Program.

Only suppliers with a COOP/PURCH logo next to their names on the GSA Schedule 70 have agreed to extend their pricing to state and local governments.

Multiple award schedules (MASs) under GSA Schedule 70 can be used to meet an agency's IT needs. For large or complex requirements, MAS suppliers can join with other schedule contract holders and submit a total solution under a team arrangement. A GSA schedule contractor team arrangement (CTA) is an arrangement between two or more GSA Schedule suppliers to work together to meet a customer's requirements. If two or more GSA suppliers have teamed up to provide an IT solution, they will enter into a written agreement (CTA agreement) detailing the responsibilities of each supplier. The CTA allows the GSA suppliers to meet the customer's needs by providing a total solution that combines the supplies and/or services from the team suppliers' separate GSA schedule contracts. It permits them to complement each other's capabilities to compete for orders for which they may not independently qualify.

A customer benefits from a CTA by buying a solution rather than making separate buys from various suppliers. A CTA relationship is different from a prime contractor-subcontractor relationship. In prime-sub arrangements, the relationship is very tightly defined and controlled by the prime contractor; whereas in CTAs, the roles and responsibilities are defined by the team, as accepted by the purchasing body.

GSA suppliers are allowed to modify their contracts at any time during the contract period, allowing the addition of new IT items regularly. This assures the latest technology is always available to the customer. Incidental items not listed in the GSA contract may be added to a schedule delivery order as long as it results in the lowest overall cost, the appropriate procurement regulations have been applied, and the price has been determined fair and reasonable.

The [Local Preparedness Acquisition Act \(Public Law 110-248\)](#), authorized state and local governments access to [Federal Supply Schedule 84, Total Solutions for Law Enforcement, Security, Facilities Management, and Fire and Rescue](#). As GSA Schedule 84 does not include information technology, it is not addressed in this Manual.

#### **20.2.2 Benefits of purchasing from GSA Schedule 70**

Purchasing IT from a GSA contract may lessen a procuring agency's administrative burden, shorten procurement lead time and may, in some cases, offer lower pricing than an agency could obtain from its own procurement. Refer to subsection 20.1.2 of this chapter for a broader discussion on benefits for these types of joint and/or procurements.

#### **20.2.3 Challenges of purchasing from GSA Schedule 70**

Since GSA is based on maximum pricing, many state and local contracts reflect lower pricing than the federal prices. Commonwealth agencies and institutions must place GSA orders through [eVA](#), after approval is received from the CIO.

#### **20.2.4 Contractual terms and conditions**

Agencies and institutions will usually find it necessary to modify GSA contract terms to meet state statutory requirements. When an agency purchases from a GSA Schedule 70, the terms and conditions of the underlying GSA contract are incorporated by reference in the state's contract with the GSA supplier. Agencies may add terms and conditions to the GSA contracts if they are required by statute, regulation, etc., to the extent that they do not conflict with GSA Schedule 70 terms and conditions; however, if a required state term and condition conflicts with a GSA term, then an agency cannot purchase from that GSA supplier. Please obtain guidance on this from OAG.

#### **20.2.5 Voluntary use of schedules by suppliers**

Schedule 70 suppliers have a five-day period in which to decline or accept an agency's purchase order and will generally make this decision on two levels. First, on the contract level, they will decide which IT items they want to offer under the GSA joint and/or cooperative procurement contract and will enter into a mutual agreement with GSA to modify the contract and reflect their contract item list. Second, even after an existing

contract is modified or a new contract awarded, a Schedule 70 supplier will retain the right to decline orders received from state or local government entities on a case-by-case basis.

Schedule 70 suppliers may decline an order, for any reason, within a five-day period after receipt of the order; however, credit card orders must be declined within 24 hours.

#### 20.2.6 GSA supplier performance

If the supplier does not perform acceptably under a GSA Schedule 70 purchase order issued by a state or local entity, GSA will not take corrective measures against that supplier.

Acceptance of an order by the Schedule 70 supplier constitutes the formation of a new contract between the agency and the Schedule 70 supplier. The ordering agency's contracting officer is responsible for all contract administration under the new contract.

While the majority of the terms and conditions of the supplier's Schedule 70 contract are incorporated by reference into the ordering agency's purchase order, the federal government is not liable for the supplier's performance or non-performance. Disputes that cannot be resolved between the parties may be litigated in any state or federal court with jurisdiction, using the principles of federal procurement law and the Uniform Commercial Code, as applicable and appropriate. State and local government entities may submit information concerning a supplier's performance to the GSA contracting officer for consideration when evaluating the supplier's overall performance under the GSA Schedule 70 contract.

#### 20.2.7 Ordering from GSA Schedule 70

Prior to initiating a GSA Schedule 70 order, ensure there are no existing VITA statewide contracts available for that IT good or service: <https://vita.cobblestonesystems.com/public/> All orders from GSA Schedule 70 suppliers shall use the procedures in Federal Acquisition Regulation (FAR) [8.405-2](#) when ordering Schedule 70 contract services priced at hourly rates. The applicable services will be identified in Schedule 70 publications and contractors' Schedule 70 price lists. When ordering Schedule 70 contract supplies and fixed-price services for a specific task, where a Statement of Work is not required (e.g., installation, maintenance, and repair), ordering activities shall use the procedures in FAR [8.405-1](#), Ordering Procedures for Supplies, and Services Not Requiring a Statement of Work (SOW). Contact [scminfo@vita.virginia.gov](mailto:scminfo@vita.virginia.gov) for assistance with GSA ordering.

#### 20.2.8 When ordering IT goods utilizing GSA Schedule 70

All orders for GSA Schedule 70 purchases shall use [eVA](#) and state the GSA number in the contract number field. The [eVA](#) order will be routed for CIO review. To ensure a best value determination is made, the agency should survey at least three Schedule contractors through the online shopping service [GSA Advantage!®](#) or review the catalogs or price lists of at least three Schedule contractors, and seek additional price reductions where appropriate. Ensure the following actions are completed:

- Based upon the initial evaluation, seek additional price reductions from the Schedule suppliers considered to offer the best value.
- Select the best value; and
- Submit the [eVA](#) order.

#### 20.2.9 When ordering Cloud/Software as a Service goods or services from GSA Schedule 70 or any other authorized Cooperative Agreement

If the Joint and/or Cooperative Procurement involves an off-premise (cloud hosted) solution, agencies must follow the [Enterprise Cloud Oversight Services \(ECOS\) Process](#), and [Third Party Policy Workflow](#). A Security Assessment of the cloud service will need to be completed by the supplier and approved by ECOS, via a work request 1-003, and special Cloud Services Terms & Conditions must be included in the contract prior to award. The Security Assessment form and Cloud Services Terms & Conditions should be included in the request for quote document package sent to supplier(s) for supplier(s) to complete and submit with its proposal and to provide their redlines/exceptions to any of the Cloud Terms & Conditions.

#### 20.2.10 Procurement file documentation

The procurement file for a GSA order should include:

- The Schedule contracts considered, noting the contractor from which the service was purchased;
- A copy of the CIO approval;
- A description of the service purchased;
- The amount paid;
- The evaluation methodology used in selecting the GSA supplier to receive the order;
- The rationale for any tradeoffs in making the selection;
- The best value determination.

## **Appendix A**

### **Joint and/or Cooperative Procurement Quick Facts**

Joint and/or Cooperative procurement approvals required:

- CIO must approve all IT joint and/or cooperative procurement arrangements and all IT procurements from jointly and cooperatively procured contracts regardless of the amount of the IT purchase.
- Enterprise Cloud Oversight Services (ECOS) process. Regardless of the amount, if the Joint and Cooperative Procurement involves an off-premise (cloud hosted) solution, agencies must follow the [ECOS Process](#) and [Third Party Policy Workflow](#). A Security Assessment of the cloud service will need to be completed by the supplier and approved by ECOS, via a work request 1-003, and special Cloud Services Terms & Conditions must be included in the contract prior to award.
- Public body can sponsor, conduct or administer an IT joint and/or cooperative procurement arrangement on behalf of other public bodies, agencies, institutions, or localities of several states for combining requirements to increase efficiency and reduce administrative expenses if approved by the CIO.
- A public body may purchase from another public body's contract even if it did not participate in the RFP or IFB, if the RFP or IFB specified that the procurement was being conducted on behalf of other public bodies and the procurement is approved by the CIO.
- Any authority, department, agency may participate in, sponsor conduct or administer a joint and/or cooperative procurement arrangement with public bodies, private health or educational institutions or with public agencies of the several states, territories of the U.S. or D.C. for the purposes of combining requirements to effect cost savings or reduce administrative expense in any acquisition of IT goods and services upon CIO approval.
- Sponsoring a joint and/or cooperative procurements
- All public bodies including agencies must request CIO approval to sponsor, conduct or administer joint and/or cooperative procurement arrangements regardless of the amount of the resulting contract. In order to obtain CIO approval, agencies and institutions should forward a completed [IT Joint and/or Cooperative Procurement Approval Request Form](#) to [scminfo@vita.virginia.gov](mailto:scminfo@vita.virginia.gov).
- If a joint and/or cooperative procurement arrangement is approved, the agency must specify in the solicitation that the procurement is being conducted on behalf of other public bodies. The inclusion of this language allows additional agencies and institutions not named in the solicitation to purchase from the resulting contract.
- An agency that sponsors a joint and/or cooperative procurement must serve as the contract manager and administrator for the contract.
- Using jointly and cooperatively procured contracts.
- Agencies desiring to purchase IT from jointly and cooperatively procured contracts must request CIO approval before doing so regardless of the amount of the purchase. In order to obtain CIO approval, agencies should forward a completed [IT Joint and/or Cooperative Procurement Approval Request Form](#) to [scminfo@vita.virginia.gov](mailto:scminfo@vita.virginia.gov).
- Agencies are not permitted to procure IT from jointly and cooperatively procured contracts if the same items are available on an existing statewide contract or an Office of Small Business Assistance and Certification-certified small business, including small businesses owned by women, minorities, and service-disabled veterans as well as micro businesses, is available to provide the goods or services at fair and reasonable prices.
- Jointly and cooperatively procured contracts, including GSA contracts, typically should not be used for procurements involving intellectual property rights (e.g., software purchases or custom

systems development) or that include service level agreements.

## **Appendix B**

### **Steps for Ordering IT Services Utilizing GSA Schedule 70**

When ordering IT services from GSA Schedule 70, contact VITA's SCM Division at [scminfo.vita.virginia.gov](mailto:scminfo.vita.virginia.gov) prior to completing the following:

1. Prepare a request for quotation (RFQ) that includes:

- **Statement of work:** Include detail on the work to be performed, the location of the work, the period of performance, the deliverable schedule, the applicable performance standards and any special requirements (e.g., security clearances, reports, travel, and special knowledge).
- **Evaluation criteria:** At a minimum, include evaluation of a project plan for performing the task, price, experience and past performance.
- **Pricing:** A firm-fixed price order shall be requested, unless the ordering agency makes a determination that it is not possible to estimate accurately or with any reasonable degree of confidence the extent or duration of the work or costs. When such a determination is made, a labor-hour or time-and-materials quotation may be requested. The firm-fixed price of the order should also include any travel costs or other direct charges related to performance of the services ordered. A ceiling price must be established for labor-hour and time-and-materials orders.
- **Special pricing:** A requirement for pricing information that ties the offered prices to the Schedule 70 contract prices and seeks additional price reductions where appropriate.

2. Transmit the RFQ to GSA Schedule 70 contractors

- **Obtain three quotes:** Provide the RFQ (including the statement of work and evaluation criteria) to at least three Schedule 70 suppliers that offer the IT services requested and to any other Schedule 70 suppliers that request copies.

**Note:** Each Schedule 70 contract has a maximum order threshold, which will vary by special item number. The maximum order threshold represents the point where, given the dollar value of the potential order, the ordering activity shall seek a price reduction.

3. Evaluate responses and place the order or establish the blanket purchase agreement

- **Conduct evaluations:** Evaluate all responses received using the evaluation criteria in the RFQ. GSA has already determined that the hourly rates for services contained in the supplier's Schedule 70 price list are fair and reasonable. However, the customer is responsible for considering the level of effort and the mix of labor proposed to perform a specific task being ordered, and for determining that the total firm-fixed price or ceiling price is fair and reasonable.
- **Make award:** Place the purchase order with the Schedule 70 supplier that represents the IT best value.



**Appendix C**  
**IT Joint and/or Cooperative Procurement Approval Request Form**

This form is available on the VITA SCM website at the following URL:

<https://www.vita.virginia.gov/media/vitavirginiagov/supply-chain/docs/IT-Joint-Coop-Procurement-Approval-Request-form-2017-12-13.docx>

### Chapter highlights

- **Purpose:** This chapter covers performance-based contracting and service level agreements used in the acquisition of information technology goods and services.
- **Key points:**
  - Performance-based contracting (PBC) is a procurement method that structures all aspects of the procurement around the purposes of the work to be performed instead of describing the manner by which the work is to be performed.
  - The most important element of a PBC, and what distinguishes it from other contracting methods, is the results that are desired.
  - The agency should determine at least one performance indicator and standard for each task and deliverable and link them to a description of acceptable quality.
  - Performance incentives may be positive or negative and may be monetary or non-monetary—based on cost control, quality, responsiveness or customer satisfaction.

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## 21.0 Introduction

The Virginia Public Procurement Act (VPPA) does not include requirements for the use of performance-based contracting by the Commonwealth's agencies. Within the technology industry, however, government procurement officials recognize this procurement method as an extremely valuable way to procure information technology goods and services.

Performance-based contracting allows government to better control its functional, technical, schedule and budgetary objectives and outcomes for a particular procurement. This is accomplished by the use of performance surveillance and the application of positive and negative incentives to motivate the supplier.

## 21.1 Performance-based contracting

Performance-based contracting (PBC) is a procurement method that structures all aspects of the procurement around the purposes of the work to be performed instead of describing the manner by which the work is to be performed. PBC allows agencies to acquire products and/or services via contracts that define what is to be achieved and gives the supplier the freedom to bring new approaches to the project. The procurement seeks to elicit the best performance the supplier has to offer, at a reasonable price or cost, by stating the project's objectives and giving suppliers both latitude in determining how to achieve them and incentives for achieving them.

A statement of work (SOW) should provide performance standards, rather than spell out what the supplier is to do. PBCs normally contain a plan for control and a plan for quality assurance surveillance. In addition, the contract typically includes performance incentives. This is accomplished through clear, specific, and objective contract requirements and measurable outcomes, instead of dictating the manner by which the work is to be performed or broad and imprecise statements of work.

### 21.1.1 PBC is results-oriented

The most important element of a PBC, and what distinguishes it from other contracting methods, is the results that are desired. Many IT procurements are traditionally directed by the customer in the form of exact specifications or requiring key personnel to be assigned to a service contract. Attempts by the supplier to suggest alternative ways of approaching the work are usually rejected with the suspicion that the supplier is trying to reduce costs to increase profits resulting in an inferior outcome. In performance-based contracting, the results required of the supplier are described using a statement of work or a statement of objective. The key attributes of PBC are:

- Outcome oriented
- Clearly defined objectives
- Clearly defined timeframes
- Performance incentives
- Performance monitoring

### 21.1.2 PBC objectives

By describing requirements in terms of performance outcomes, and not requiring detailed specifications, agencies can help achieve all of the following objectives:

- Maximize performance—allow a supplier to deliver the required service based on its own best practices and the customer's desired outcome;
- Maximize competition and innovation—encourage innovation from the supplierbase using performance requirements;
- Minimize burdensome reporting requirements and reduce the use of contract provisions and requirements that are unique to the state;
- Shift risk to suppliers so they are responsible for achieving the objectives in the Statement of Work through the use of their own best practices and processes;and
- Achieve cost savings through performance requirements.

## 21.2 Elements of PBCs

At a minimum, there are four elements of performance-based contracting:

- **Statement of work (SOW):** a written document describing the technical, functional and/or service requirements and customer expectations in terms of measurable outcomes rather than by means of prescriptive methods.
- **Measurable performance standards:** written definition of what is considered acceptable performance to determine whether performance outcomes are met.
- **Quality control plan:** a written document describing how the supplier's actual performance will be monitored and measured against the contractually established performance standards.
- **Incentive plan:** written procedures addressing how met and unmet contractual performance standards will be resolved, escalated, remediated and/or remunerated. Incentives may be linked to price or fee adjustments. While not mandatory, incentives can be used, where appropriate, to encourage performance that will exceed the established performance standards.

### 21.2.1 Developing a PBC Contract

In a PBC relationship, the contract must include:

- Everything you are buying (covered by the contract).
- Volume assumptions for the service (particularly if there are large variable costs involved).
- Reliability, availability and performance (RAP) requirements, methods of dealing with operational problems (escalation, help desk, hot line and severity levels) and conditions of use or change of use conditions/restrictions.
- Any dates/deadlines where specific deliverables are due at initial switch on, ramp up, ramp down, or upgrade of service; e.g. year end, implementation dates, delivery of upgrades, legislation changes.
- The method of delivery (e.g. paper/fax/personal delivery/electronic means/source or object code).
- Time after which the deliverables must be consumed or tested and still supported (obsolescence limits).
- Documentation/manuals and standards.
- Definition of what is considered a service failure and what is considered an enhancement to the service; e.g., what is a software bug and what is an enhancement.

### 21.2.2 PBC success factors

PBC shifts the cost and performance risks from the customer to suppliers, while giving suppliers more latitude for determining the methods of performance and more responsibility for the quality of performance. Agencies that utilize PBC may find that many areas of contract disputes are eliminated. Since the supplier is responsible for methods and results, disputes over ambiguities in specifications and accountability for performance failures will likely be minimized. Agencies which develop quality control plans (QCPs) that allow the supplier to determine how the work will be done may significantly reduce the need for agency oversight of supplier performance. When designing a PBC the following factors can be critical to your success:

- Provide clear strategic and program logic for the agency/project.
- Clearly determine the scope of work and what performance measures will be used.
- Define agency baseline and what level of performance is expected.
- Include provisions for flexibility and incentives.
- Canvass providers/suppliers to find out:
  - What measures would they propose?
  - What incentives would they want? How?
  - How would they want to report performance data?
- Craft a performance-based statement of work for the contract that:
  - Includes mechanisms for measurement, reporting, monitoring and supplier feedback.
  - Defines a system for revisions and reconciling deviations in expected performance.
  - Considers a transition period "hold harmless" clause.
  - Monitors performance with regular reporting requirements.
  - Can be adjusted when needed.
- Identify factors that might impact performance.
- Devise corrective action plans for deviations.
- Benchmark and compare.
- Revise performance targets to continue to achieve progress.
- Provide comparative performance data for suppliers; create a "race to the top" culture.
- Communicate and reward success.

### 21.2.3 Defining performance needs and incentives

When preparing a PBC, be creative about how the contract can best accomplish the agency's business needs. Below are some guidelines:

- Think creatively.
- Avoid rewarding suppliers for simply meeting contract requirements.
- Recognize that developing clear, concise, objectively measurable technical performance incentives will be challenging and may take additional planning time.
- Create a proper balance of objective incentives—cost, schedule and technical.
- Ensure the performance incentives focus the supplier's efforts on the most important objectives.
- Make performance incentives challenging and attainable.
- Ensure that incentives motivate the supplier to follow measurable quality control processes.
- Consider linking on-time delivery to technical performance by establishing delivery targets based on project goals and metrics. You can then monitor performance success by looking at how these objectives were met by the supplier.
- Encourage open communications and permit suppliers to comment on the performance-based work statement.

- Identify the magnitude of technical, cost and schedule risks and create mitigation solutions.
- Consider procurement history—factors that contributed to past successes and failures in meeting goals and fulfilling needs.
- Be sure to include incentives for quality, even though they might be difficult to describe.
- Consider including socio-economic incentives.
- Use clear, objective formulas for determining technical performance incentives.
- Include incentives for overhead cost control.
- Involve users, program, technical, procurement and financial staff in incentive planning.
- Make sure that incentives are closely related to the performance objectives.
- Keep the focus on performance; limit other requirements.
- Keep the structure and administration as simple as possible.
- Remember that subjective evaluation has its place in encouraging and recognizing outstanding performance.
- For Cloud Services/Software as a Service (SaaS) contracts, the SLA requirements will need to align with your agency business continuity needs in serving your stakeholders, including the public, if applicable. Contractual remedies for non-performance should be strong and in the best interest of the commonwealth.

### 21.3 Performance measures

In PBC, the customer states all desired results or outcomes and the supplier is responsible for producing them. To encourage even higher levels of performance when using PBC, performance incentives are made a part of the contract. They may be monetary or non-monetary and should be SMART as follows:

- Specific
- Measureable
- Accountable
- Results oriented
- Time-bound

For PBC to be successful, the actual performance of the supplier must be measured against specific standards established by the agency before the solicitation is issued so that suppliers can propose in a way that will meet the standards. There are two types of performance measures:

- Performance indicators specify essential characteristics of performance that are acceptable.
- Performance standards describe a definite level or degree of quality for measuring performance. Performance standards must be measurable, achievable, relevant, and controllable.

The agency should determine at least one performance indicator and standard for each task and deliverable and link them to a description of acceptable quality. An acceptable quality level (AQL) must be determined by the agency so that the supplier can be evaluated against this pre-established level as work on the contract proceeds. The AQL establishes a maximum allowable variation, or error rate, from the standard. The AQL must be realistic and determinable. Quality surveillance methods are used to evaluate whether the contract's performance standards have or have not been met. PBC performance measures should measure what is important including:

- Total cost of ownership
- Quality of goods/services

- Proposed technical performance
- Financial stability
- Cost of training
- Qualifications of individuals employed/utilized by supplier
- Risk assessment
- Availability and cost of technical support
- Past performance
- Cost/price

Performance analysis assigns a performance requirement to each task, which involves determining how a product/service can be measured and what performance standards and quality levels apply. The performance standard establishes the performance level required by the agency. Correspondingly, the AQL establishes a maximum allowable error rate or variation from the standard. Agencies should insure that each standard is necessary, is carefully chosen and not unduly burdensome. Failure to do so can result in unnecessarily increased contract costs. There are often established industry performance standards for repeatable services, uptime/downtime reliability, hardware and packaged software that the market providers publish online or with their documentation. These can be used as a guide for agencies in developing a project's specific performance needs versus the agency's specific or unique business needs.

Agencies should carefully and methodically establish the quality level at which performance standards are set. The minimum acceptable performance standard should rarely be 100 percent, since the standard directly affects the cost of the service. Conversely, if the quality level is too low, it may act as disincentive to good contract performance. Where appropriate, agencies may provide either a specific performance standard or allow the supplier the option to propose different target levels of standards of service along with the appropriate price adjustment. This allows suppliers an opportunity to propose what they consider to be the most cost-effective performance standard level. In order to properly evaluate alternative levels of standards proposed by the supplier, agencies need to do market research into the feasibility of accepting these alternative levels, i.e., discuss contracting methods and acceptable levels of standards for the same type of service with other commercial entities.

Standards may be published or well recognized, industry-wide standards, or may be developed by the agency. Agency standards should have industry input to ensure they are realistic and effective. This may be done through public meetings, public comment on proposed standards, or Requests for Information.

#### **21.3.1 Data gathering**

Agencies may incorporate a performance requirement in the statement of work for the incumbent supplier to capture and report accurate workload data. This information can be used to help develop the baseline for future contract work estimates.

#### **21.3.2 Cost analysis**

Estimated costs must be computed for each service or output based on available data. These costs are used in preparing the agency's estimate, evaluating proposals and determining positive and negative performance incentives.

#### **21.3.3 Performance measurement and metrics**

A core strength of PBC is that it places the agency in a position to objectively evaluate performance. By clearly defining the performance metrics against which success will be measured, personalities and other subjective influences are taken out of the equation. Successful PBC allows for measurement of metrics in three stages:

- A baseline period allowing for due diligence by both parties;
- A ramp-up period, typically 90 days;
- Full execution of the metrics and associated incentives/disincentives.

An excellent example of a tiered measurement approach is the help desk, one of the most common performance-based contracts in effect today. By monitoring metrics such as call length and wait times, and applying those metrics to clearly defined baseline, ramp-up, and execution periods, procurement officials can create a firm foundation from which to negotiate if requirements change. Everything is up-front, in writing, and lasts the life of the project.

One critical caveat regarding metrics in contracting is the importance of adequate infrastructure. With the advent of metrics-driven, performance-based contracting, agency procurement management teams must have the capability to properly evaluate metrics in order to accurately evaluate success or the lack thereof.

#### **21.3.4 Payment for performance**

An effective payment to performance incentive structure is to stipulate a maximum total payment, for example, and the supplier would get components of that based on meeting certain metrics. Performance-based metrics change over the length of the contract and must be continually reassessed.

A prudent guideline is to always tie payment to performance, not just by the use of incentive and award fees, but also by tailoring the acceptance provisions (and thus payment) for contract deliverables to performance objectives. If the requirement is framed as a series of deliverable products or specific services, then performance and acceptance precede payment. This is in sharp contrast to time-and-materials contracts, labor-hour type contracts, and some task orders. If an agency sets a goal for the procurement, such as savings in operations, some of the supplier's payment could be a percentage of the savings achieved by the project. Timelines and quality improvements could be other options for performance-based payments. All those options require good service-level agreements.

### **21.4 The PBC statement of objective (SOO)**

When developing a PBC solicitation or request for quote under a VITA statewide contract, consider including a statement of objective (SOO) where the agency defines results to be achieved, but outputs are not predetermined. The SOO will include performance incentives tied to achievement of performance results (impact of outputs) and may include cost, timeliness, quality and impact of outputs associated with the supplier's technical solution. The SOO allows maximum flexibility to the supplier on what work is to be done providing opportunity for innovation. A SOO provides the same information to each potential supplier, but then each supplier responds with the specifics as to how it will meet the desired objectives. For the successful supplier, the description of how it will meet the SOO will become a part of the contract, or order issued under a VITA statewide contract. The SOO business or mission objectives become the core of the solicitation, or request for quote under a VITA statewide contract. Suppliers then become responsible to describe how they will achieve the agency's objectives.

### **21.5 The PBC statement of work (SOW)**

Agencies should use an interdisciplinary team approach in developing the PBC SOW, including at a minimum, the business owner, assigned contracting officer and a technical



representative. This team approach will result in a better final SOW, and limit the potential for disagreements prior to award and during performance. It also serves to involve program personnel early in the procurement process. Including a SOW in the solicitation, or the request for quote issued under a VITA statewide contract, gives each supplier the same information from which to prepare its offer. The winning supplier will then perform the contract or order following the final, negotiated SOW's requirements.

#### 21.5.1 General guidelines for SOW preparation

The PBC SOW must be written as a concise, declarative, verb-driven document as it is a statement of the customer's required goods/services in terms of outcomes and includes a measurable performance standard(s) and an acceptable quality level for each outcome. In non-performance-based SOWs the supplier is usually required to perform the work in a specific way, using detailed specifications for production items, specifying key personnel to be provided and methods to be used for service contracts. Best practices PBC SOWs, however, describe the work in terms of the results to be achieved and look to the supplier to determine how the results will be achieved and how best to organize the supplier workforce to achieve those results. A well-written PBC SOW should:

- Be a stand-alone document.
- Define requirements in clear, concise language identifying specific work to be accomplished.
- Be individually tailored to consider the period of performance, deliverable items, if any, and the desired degree of performance flexibility.
- Not repeat material that is already included in other parts of the solicitation or contract.
- Express desired performance outputs in clear, concise, commonly used, easily understood, measurable terms.
- Not include broad or vague statements, overly technical language or detailed procedures that dictate how work is to be accomplished.
- Be structured around the project's objective(s) or purpose of the work to be performed, i.e., what is to be performed rather than how to perform it. For example: instead of requiring that the lawn be mowed weekly or that trees be pruned each Fall, state that the lawn must be maintained at a height of 2-3" or that tree limbs not be allowed to touch utility wires or buildings.

A SOW will minimally include the following components:

- **Introduction:** a general description of the procurement.
- **Background:** information that helps suppliers understanding the nature and history of the requirements.
- **Scope:** overview of the SOW that relates the important aspects of the requirements.
- **Applicable directives (if any):** referenced documents, specifications or directives that are either mandatory or informational for the procurement.
- **Performance requirements:** what is required to be done, the performance standards, and the acceptable quality levels. Performance requirements should enable assessment of work performance against measurable performance standards; they rely on the use of measurable performance standards and financial incentives in a competitive environment to encourage competitors to develop and institute innovative and cost-effective methods of performing the work.
- **Information requirements:** reports, software, deliverables, and formal requirements that must be submitted as part of the engagement.
- **Quality assurance and acceptance criteria:** Acceptance is the agency's formal, written process to acknowledge that the goods/services conform to the applicable SOWs quality, quantity and other requirements. Acceptance may or may not involve quality

assurance processes and typically precedes payment. The procedure for formal acceptance should be provided for any milestone deliveries, as well as final acceptance.

The PBC SOW should describe in detail what the supplier is to accomplish through addressing the four elements—what, who, when, where and how. The how element should allow flexibility and allow the supplier to propose its approach for how the results or outcomes will be achieved by their firm. These four elements should include:

- What is to be done and what are the deliverables/milestones.
- Who is going to do what (agency, supplier, third party CoVA agent, etc.).
- When is it going to be done by deliverable and/or milestone?
- Where will it be done?
- How will it be done and how will the agency know when it is done (i.e., testing and acceptance)?

#### 21.5.2 Developing performance requirements and standards

In describing the specific requirements which must be met in performance of the contract, the customer will provide a standard of performance for each required task and identify a quality level the agency expects the supplier to provide for each task. The QCP (see 21.6 below), which directly corresponds to the performance standards and measures supplier performance, is needed to determine if supplier services meet contract SOW requirements. Positive and/or negative performance incentives based on QCP measurements should be included. Application of only selected aspects of the total PBC methodology is not likely to be successful and may even cause a reduction in the value of goods/services provided. Federal agencies report negative experiences due to the failure to: define work in completion terms, to develop or enforce measurable agency quality control plans, and to place sufficient financial risk on the supplier. For performance-based services the SOW should establish:

- A statement of required services in terms of output, referred to as performance requirements;
- A measurable performance standard for output; and
- An acceptable quality level (AQL) or allowable error rate.

Required services should be described in terms of output and should identify only those outputs that are essential. The performance requirements should be written clearly and succinctly, yet with sufficient flexibility for the supplier to determine the best manner in which to perform the work. It is critical to set forth a measurable performance standard for output which establishes the performance or service level required by the agency/project. The performance standards are the criteria used to assess whether the supplier has satisfied the performance requirements. The performance standards should also be written to provide “what, when, where, how many, and how well the work is to be performed.”

Be sure that the standards are not only clearly defined, but also necessary, not unduly burdensome, and carefully chosen. The agency should include an AQL or a maximum allowable error rate which establishes what variation from the performance standard is allowed. For example, in a requirement for software as a service, a performance standard might be “the response time for technical assistance requests must be within 4 hours of any email request and the AQL might be a 2% per incident one-time reduction in the monthly subscription fee, to be calculated on the next month’s invoice.” The “minimum acceptable performance standard” should rarely be 100 percent, since the standard directly affects the cost of the service. Conversely, if the quality level is too low, it may act as a disincentive to good contract performance.

## 21.6 Quality control plan (QCP)

A QCP is a written document that establishes what the customer must and will do to ensure the supplier performs in accordance with the agreed-upon performance standards set forth in the contract. A QCP helps to ensure the supplier delivers and the customer receives the quality of services stipulated in the contract. It will also support that the customer pays only for the delivered services that are acceptable by conforming to the contract's requirements. A QCP forms the basis for establishing appropriate performance incentives. Since the SOW, QCP and incentives are "interdependent," they should be "compatible in form, style, and substance, and be cross-referenced." In summary, these elements should make sense when read together and be well referenced throughout the performance based contract.

What the agency must do to ensure that the supplier has performed in accordance with the SOW performance standards can range from a one-time inspection of a product or service to periodic in-process inspections of on-going product or service deliveries. A successful QCP should include a surveillance schedule and clearly state the surveillance method(s) to be used. The QCP also establishes how resources will be used to ensure that the contract requirements are fulfilled by allowing the agency to clearly define the amount of contract administration resources needed.

The detail in the QCP regarding a particular task should:

- Be proportionate to the importance of the task.
- Focus on the level of performance, quality, quantity, timeliness, etc. of the performance outputs to be delivered by the supplier.
- Not focus on the methodology, steps or procedures used by the supplier to provide the products/services or achieve the required level of performance.
- Recognize the responsibility of the supplier to carry out its quality control obligations.
- Contain measurable inspection and acceptance criteria corresponding to the performance standards in the SOW.

## 21.7 Quality assurance surveillance plan (QASP)

The QASP is the guide that will be followed by both agency and supplier as the engagement is managed. It provides the methodology for monitoring performance against standards for required work. It provides for scheduling, observing, and documenting supplier performance against standards; accepting service; determining causes for deficiencies; and calculating payment due (formulas). Similar to the QASP is the supplier's quality control plan (QCP).

The QCP will be developed by the supplier and will be submitted as part of the proposal for evaluation by the agency. After award, the QCP will be the plan the supplier is to follow during the performance of the contract. These two documents, the QASP and the QCP, are the control documents for the engagement.

Selecting the most appropriate surveillance method for the effort involved is important. Agencies should take into consideration task criticality, task lot size, surveillance period, performance requirements and standards, availability of quality assurance data, surveillance value in relation to task cost/criticality, and available resources. Careful selection of appropriate surveillance methods enables the agency to determine the amount of resources and associated costs needed to perform the surveillance task.

Surveillance results may be used as the basis for contract actions, including payment deductions, if provided in the contract or SOW. Acceptable surveillance methods include:

- **100 percent inspection:** This method, where performance is inspected/evaluated at each deliverable occurrence, is too expensive to be used in most cases. It is usually most appropriate for:
  - infrequent tasks
  - for small quantity but highly important products or services, or
  - when there are written deliverables and stringent requirements such as tasks required by law, safety or security.
- **Random sampling:** This is usually the most appropriate method for recurring tasks. With random sampling, services are sampled to determine if the level of performance is acceptable. Random sampling works best:
  - frequent tasks
  - when the number of instances of the services being performed is very large and a statistically valid sample can be obtained.
  - for large quantity, repetitive activities with objective and measurable quality attributes.
- **Periodic inspection:** This method, sometimes called "planned sampling" uses a comprehensive evaluation of selected outputs. Inspections may be daily, weekly, monthly, quarterly or unscheduled. Sample results are applicable only for the specific work inspected.
- **Direct observation:** This method can be performed periodically or through inspection(s).
- **Management information systems:** This method evaluates outputs through the use of management information reports.
- **User survey:** The user survey method combines elements of validated user complaints and random sampling. Random surveys are conducted to solicit user satisfaction. It is appropriate for high quantity activities.
- **Validated user/customer complaints:** This method is highly applicable to services provided in quantity and where quality is highly subjective. It relies on system or contract users to identify supplier performance deficiencies where complaints are then investigated and validated.
- **Progress or status meetings:** Scheduled reoccurring meetings with contract users and suppliers are conducted to discuss progress made, problems encountered, problems resolved and/or plans for the next reporting period.
- **Supplier progress reports:** The agency conducts analyses on regularly occurring progress reports delivered by the supplier.
- **Performance reporting:** The agency evaluates performance or other required metrics for a specific time period.

## 21.8 Developing performance incentives

Performance incentives should be incorporated into the contract to encourage suppliers to increase efficiency and maximize performance. These incentives should be applied selectively and correspond to the specific performance standards in the QASP and be capable of objective measurement. Incentives should apply to the most important aspects of the work, rather than every individual task. Fixed-price contracts are generally

appropriate for services that can be defined objectively and for which the risk of performance is manageable. Incentives are not penalties, but should be developed and used to encourage superior performance in areas of particular importance or to motivate supplier efforts that might not otherwise be emphasized.

Performance incentives may be positive or negative and may be monetary or non-monetary; i.e., based on cost control, quality, responsiveness or customer satisfaction. Care must be taken to ensure that the incentive structure reflects both the value to the agency of the various performance levels and a meaningful incentive to the supplier. Performance incentives should be challenging, yet reasonably attainable. The goal is to reward suppliers for outstanding work with a positive incentive for the supplier's benefit, and equitably, a negative incentive for the customer's benefit, when supplier performance does not meet the contractual schedule, quality standards or service levels. The incentive amount should correspond to the difficulty of the task required, but should not exceed the value of the benefits the agency receives. Agencies need to monitor to ensure that desired results are realized; i.e., that incentives actually encourage good performance and discourage unsatisfactory performance.

Where negative incentives are used, the deduction should represent as close as possible the value of the service lost. Negative incentives are deductions for failure to perform a required task up to required quality levels or for failure to timely meet a time-sensitive deliverable or milestone. Negative incentives generally represent a percentage price reduction tied to the magnitude that performance fails to meet the AQL. For example, if a given task represents 10 percent of the contract costs, then 10 percent will be the potential maximum deduction in the event of task failure.

Similarly, if a task is not performed to the AQL stated in the quality standards of the contract, deductions are computed based upon tables or formulas designed to reflect the value of substandard output. For instance, the AQL may require the supplier to perform a task correctly 95 percent of the time. Rather than withhold contract payment for anything less than 95 percent performance, the contract could provide that for every percent that performance falls below 95 percent, payment for the task will be reduced by 20 percent. Incentives, both positive and negative, can be a powerful tool to ensure superior contract performance results.

Verifying and validating the effectiveness of the contractual incentives used is important. Agencies need to monitor the effectiveness of incentives throughout the course of the contract to ensure that the incentives are resulting in enhanced performance or discouraging unsatisfactory performance. Incentive payments should be selectively applied. Remember that in a PBC situation, the agency should have already built in an incentive for successful performance by basing contract payments on achieving an acceptable or minimum level of quality or meeting certain deliverables and/or milestones.

The table below provides information on various types of incentives:

Type of incentive	Description
Cost-based	Relate profit or fee to results achieved by the supplier in relation to identified cost-based targets.
Award fee	Allows suppliers to earn a portion (if not all) of an award fee pool established at the beginning of an evaluation period.

Type of incentive	Description
Share-in-savings	Supplier pays for developing an end item and is compensated from the savings it generates. Established baseline of costs is extremely important.
Share-in-revenue	Generates additional revenue enhancements; compensation based on sharing formula.
Balanced scorecard	Used when performance is less tangible, i.e., quality of lead personnel or communication and resolution of issues.
Past performance	Information used as part of the decision process to exercise contract options or to make contract awards.
Non-performance Incentives	Specified procedures for reductions in payment when services are not performed or do not meet contract requirements.

## 21.9 Selecting the PBC incentive strategy

Agencies should carefully select procurement and contract administration strategies, methods, and techniques that best provide the proper contract motivations to encourage high-quality supplier performance. One way to accomplish this business goal is to craft procurement strategies that make effective use of incentives. The appropriate selection and use of incentives can “make-or-break” procurement success—especially when acquiring IT services. There are seven broad types of incentives that agencies should consider in developing a performance-based procurement strategy:

- Use of incentive contracts
- Modular strategies
- Options as incentives
- Multiple awards
- Payment strategies
- Value engineering
- Past performance evaluation and recognition

### 21.9.1 Use of incentive contracts

The agency’s obligation is to assess its requirements and the uncertainties involved in contract performance and select a contract type and structure that places an appropriate degree of risk, responsibility and incentives on the supplier. There are various types of incentive contracts including:

- **Fixed-price incentive contracts:** the final contract price and profit are calculated based on a formula that relates final negotiated cost to target cost. These may be either firm target or successive targets.
- **Fixed-price contracts with award fees:** used to motivate a supplier when supplier performance cannot be measured objectively, making other incentives inappropriate.

Incentives need not be limited to cost, but can vary depending on the procurement and performance goals, requirements and risks. For example, agencies can incorporate delivery incentives and performance incentives—the latter related to supplier performance and/or specific products’ technical performance characteristics, such as speed or responsiveness. Incentives should be based on target performance standards instead of minimum contractual requirements. However, the VPPA prohibits the awarding of contract with pricing based on the supplier’s cost plus a percentage of cost, so care should be taken in

structuring incentives to comply with the statutory requirements. Refer to [§ 2.2-4331](#) of the *Code of Virginia*.

The decision about the appropriate type of contract to use is closely tied to the agency's needs and can go a long way to either motivate superior performance or contribute to poor performance and results. In general, when using PBCs an agency has wide discretion in determining the contract type, pricing structure and degree of risk that will be placed on the supplier. Under PBC, suppliers may propose a range of staffing options and technical solutions, and it is the agency's job to determine which proposal will produce the best results. The decision on contract type is not necessarily either-or. Hybrid contracts, those with both fixed-price and incentives, are becoming more common, especially when procurements are constructed modularly.

#### **21.9.2 Modular strategies**

Modular contracting is an important incentive strategy. Rather than awarding mega contracts that give suppliers a lock on huge amounts of agency business for years, the agency instead constructs its procurement strategy in successive "chunks." In a mega contract, the incentive is to win the contract, not necessarily to provide superior performance after award. Under modular contracting, future business is much more dependent on successful contract or task performance, and suppliers have an increased incentive to perform at a high level so they are awarded the next task, option, or contract. Modular contracts lend to easier project governance and control, and in some cases, to annual budget constraints. Likewise, if a supplier is under performing, terminating a part of a project may be less detrimental to all parties than terminating a mega contract in the middle of its term. If the project is part of a larger federal or state technology initiative, the modular approach allows time for the project to align with any legacy or interfacing dependencies and schedules so the agency isn't at risk of a schedule slip wherein a supplier would demand some remuneration for its need to put resources or other dedicated project assets on hold for the Commonwealth. So, concurrent with the contract-type decision, is the consideration of whether modular strategies are appropriate.

#### **21.9.3 Options as incentives**

An option is the agency's unilateral right in a contract and within a specified time to purchase, or not to purchase, additional supplies or services or to extend, or not to extend, the term of the contract. To increase supplier incentive and motivation, the solicitation and contract should indicate that the agency's future decision to exercise contractual options for additional quantities, services, or contract term is contingent on the supplier's successful performance. The more specific the standards of performance, the more likely the supplier will achieve them because both successful performance evaluation and additional business are at stake.

#### **21.9.4 Multiple awards**

An agency may consider making multiple awards to increase competition among suppliers and to generate incentivized response by multiple suppliers contracted for the same products and/or services, where they bid against each other for purchases under the multiple-award contract. If this is a selected strategy for the agency, it must be included in the solicitation as a stated intention of award.

#### **21.9.5 Payment strategies**

A payment strategy is not limited to incentive or award fees, but may include payments tied to performance and acceptance. For instance, a payment incentive schedule may include 100% payment for on-time deliveries that are validated to exceed or conform to performance requirements; while delinquent deliveries or those with diminished

performance may have payment reductions based on calculated increments or percentages tied. See sections 21.3.4, 21.5. 2 and 21.8 for other examples.

An award fee is earned incrementally during performance and is in addition to and separate from any other fees available under the contract, and is available only when the supplier earns a performance rating of excellent for the award fee period. The amount of the fee earned is based upon a formula established by the contract, and no fee can be earned during any period when the actual contract costs exceed the should-cost estimate. Also the VPPA prohibits the awarding of contract with pricing based on the supplier's cost plus a percentage of cost. (Refer to [§ 2.2-4331](#) of the *Code of Virginia*.)

Another payment incentive strategy is to include a set withholding percentage from each milestone deliverable, with payment of the retained amount is paid to supplier after final acceptance, billed to the agency on the final invoice. The holdback can be any percentage, but it is advisable to begin with no less than 10-15%. This holdback incentivizes supplier to perform well all the way through to the end so it is ensured to get the held back amount. It also acts as a protection to the agency, should the supplier not perform well, not satisfy all contractual requirements, or slip schedule and/or budget.

#### 21.9.6 Value engineering

Value engineering, sometimes referred to as "value methodology," is a well-planned and thought out, structured approach to analyzing function to cost in order to achieve cost savings without compromising performance. This evaluation looks at the life cycle of the project, what is to be achieved and how costs can be reduced by eliminating unnecessary expenditures, thereby adding value, but without losing the required performance, quality and reliability of the goods/services/systems being procured. This methodology offers concepts like engineering re-use that the supplier and/or the agency can utilize to avoid duplicative expenses for existing or repeatable engineering, software or products instead of paying for it all over again for the new project. An incentive fee may be much less costly than paying for something that the supplier may have done for another customer and that they have the rights to use for their other customers. From the agency perspective, another state may have a reusable technology component they allow other states to reuse at no cost, but by simply signing an agreement with that state. In this case, there would not be any incentive to the supplier, but a direct cost savings to the project's budget. Refer to section 21.10.3 of this chapter for more discussion of reusable technology as it relates to technology transfers.

#### 21.9.7 Past performance evaluation and recognition

Past performance fact-gathering should reflect adherence to performance requirements and provides better data for evaluation of past performance under other contracts. A powerful incentive of excellence and customer satisfaction is created when suppliers know their performance will also influence future award decisions.

Due to the increased importance agencies now place on past performance in selecting suppliers for award, contract performance evaluation has become a powerful incentive. If possible, agencies should determine supplier's history of reasonable and cooperative behavior and commitment to customer satisfaction, and business-like concern for the interest of the agency. To the extent possible, the agency's approach to evaluating these measures of conformance and quality, timeliness, cost control, responsiveness and customer satisfaction should be described in the solicitation and contract.



## 21.10 Service level agreement (SLA)

A service level agreement (SLA) is a document of requirements, either part of an overall contract or a standalone agreement, which specifies in measurable terms the services to be provided, the standards to be attained in the execution of those services, and the consequences that occur in the event the standards are not met. SLAs often include:

- Percent of time services should be available
- Number of users to be supported
- Performance benchmarks
- Schedule for advanced notification of system changes, upgrades, downtime
- Help desk response time
- Usage statistics

### 21.10.1 Key points to developing a successful SLA

Agencies should undertake due diligence when developing and negotiating effective SLAs. This will allow an opportunity to verify costs of services, identify hidden costs, reveal consumption patterns, ensure legality of software licenses, and conduct benchmarking tests on systems. SLAs should include flexibility for changes in scope and technology.

The contract will stipulate that the supplier will be paid according to predetermined performance criteria such as availability, response time, number of downtime occurrences, etc. SLAs should include specifications regarding financial penalties in the event the supplier is unable to meet the SLA performance levels. If the supplier relies on partners or sub suppliers, the SLA can also apply to these second-level service providers. The primary supplier may have a network of service providers to provide their service responsibilities. In this instance, the SLA should contain a clause that stipulates the primary supplier is accountable for any damages caused by third party partnerships.

In developing and negotiating a successful SLA, the following elements should be considered and included:

- Definition of the agency's business goals, requirements and scope of services being procured.
- A detailed service description, duration of services, installation timetable, payment terms, terms and conditions and legal issues such as warranties, indemnities and limitations of liability.
- A repeatable process, with solid and accurate metrics' capture and analysis, to measure the supplier's progress and monitor performance.
- A documented reporting process that includes the type, amount, format and a schedule of information to be reported by the service provider and procedures for how the customer will oversee the agreement and ensure the performance measures are met.
- Agreed upon procedures for non-performance in case of unforeseen circumstances.
- Detailed service expectations, performance levels, positive and negative incentive structure, escalation procedures and legal ramifications; i.e., breach and default.
- An executed contract that binds the agency and the service provider; the SLA will be a part of this contract.

### 21.10.2 Internal SLAs

In many circumstances it is advantageous to provide SLAs for internal as well as external services that are used during contract performance, or upon which supplier performance will depend. From the point of view of the service provider it establishes norms and expectations and can justify the existence or enhancement of the service, particularly if

measures of performance are maintained. From the point of view of the service consumer it also establishes agreed-upon needs, norms and expectations.

### 21.10.3 SLAs in a technology transfer relationship

Refer to [Chapter 27](#), Software Licensing and Maintenance, for a comprehensive discussion of intellectual property. In relation to technology transfers from U.S. federally funded resources, you may want to become familiar with the Bayh–Dole Act or Patent and Trademark Law Amendments Act that deal with intellectual property arising from federal government-funded research. Technology transfers are more likely to be used in projects by universities and institutions, including technology and knowledge transfers between colleges and non-profit organizations; however, they may also occur between states and the federal government for major initiatives like health, medical, social services, homeland security and such. In rare cases, technology transfers may be used in projects where the agency business owner is familiar with existing technology from other states.

In all technology transfers, an agreement of associated usage, transfer, access, modification, etc. rights and restrictions between the transferor (granting source) and transferee (agency) will be required to actually use the technology in your project. It is advisable to have the Commonwealth's Office of Attorney General review any such agreement your agency may need to sign prior to confirming the technology transfer in your project strategy. Be sure to pass on any restrictions of use, confidentiality, etc., to all involved suppliers and agency agents like VITA. Also, your agency may need to discuss using the technology with VITA's Enterprise Architecture division to ensure any infrastructure compatibilities, limitations, dependencies, governance requirements or approvals.

SLAs are critical to a technology transfer relationship because they provide accountability and serve as the basis for measuring the supplier's performance. The closer the application is to the core of an agency's business processes, the more important the service level agreement becomes. Such agreements should detail the specific quality, availability, performance levels and support services the agency can expect from its service provider. In addition, the SLA should address the factors that directly affect the agency's business, such as expected response times for computer applications, system capacity and interface compatibility.

Response time metrics are often developed in contract negotiations. The minimum threshold in negotiating performance expectations in the service level agreement may be the existing service levels the agency is receiving from its prior technology. In addition, particularly where the supplier is developing new technology, the agency should consider involving user groups for establishing metrics. Suppliers are typically hesitant to provide warranties regarding response times because of the effect of external factors such as hardware, software and telecommunications. The contract should specify a system's components. Once the equipment is clearly identified, the supplier may commit to certain performance levels based upon use of the specified equipment. The supplier also may be willing to give a terminal response time warranty if the hardware and software configurations are stated with specificity. Agencies may seek financial penalties for failure to meet established minimum requirements, or offer positive incentives based on performance. Response time terms also protect an agency from the effects of a successful supplier's inevitable difficulties in handling growing business. Below are special considerations for including in technology SLAs:

- **Software functionality:** A technology transfer agreement should describe in detail the functionality of the software. Functional specifications should outline the business

operations that are to be performed. If these specifications are determined prior to the signing of the final contract, they should be included as part of the contract. Otherwise, the agreement typically should establish milestones for development goals. The agreement should also call for delivery of documentation. User documentation provides essential operating instructions and identifies the functions of the computer system, while systems documentation provides a computer programmer with the information necessary to modify the computer software (assuming that the user can negotiate modification rights). Documentation is often a neglected step in software development as the developer strives to meet its schedule and stay within its budget. While there is no industry standard for the quality of computer documentation, the technology transfer agreement should explicitly specify the minimum documentation required, including documentation for changes to the technology. Future changes to the technology received in the transfer could impact your use of it either negatively or positively, or could render your use of it obsolete, invalid, etc.

- **System configuration:** Compatibility between an agency's existing system and the products selected by the supplier is essential to the efficacy of any technology transfer relationship. The agreement should specify the compatibility requirements of the supplier's system with the agency's existing system. For example, in an outsourcing deal, the supplier may transfer the customer's existing software and hardware operations to its more powerful operating system, which is used in common by a number of the supplier's clients. The contract should allocate the responsibilities to ensure a proper flow of operations. Another important element that must be included in an agreement is a specification of the system's capacity. A system should have room to grow as the user's needs expand, without having to replace the system or otherwise spend unreasonable amounts of money and time.
- **Software development:** Specifications governing the development and creation of new software are often the most critical part of any technology transfer agreement. There are many factors to be addressed in contracting for software development, including software functionality, implementation schedules, acceptance testing, trial periods and payment schedules. At the outset, the agency's specific needs and requirements, such as data analysis, data processing and output must be specified to ensure both parties clearly understand their duties.
- **Anti-vaporware protection:** Vaporware can be defined as software or another computer product that is promised but never delivered. To protect against losing money or time because of vaporware, the parties should identify where products stand in the development cycle: designed, coded, built out, alpha tested, beta tested or in production. In addition, the agreement should set forth contingency plans if the products are never developed or if they fail to satisfy the stated specifications.

### **21.11 PBC and SLA post-award management**

Always manage and monitor the supplier's performance. Management starts with the performance and incentives structure. It is recommended that an agency maintain a team-based management approach to PBC and develop a structured means and capacity for collecting, analyzing, validating and reporting performance information in accordance with the contract's requirements. An agency may obtain an objective third-party independent validation and verification (IV&V) resource for this purpose, if so stated in the solicitation.

When changes occur be sure to follow documented change management procedures, including any SLA revisions, from the kick-off meeting, through the transition period and roll-out. The agency should benchmark and compare while continuously pushing the

supplier for improvement and savings and/or exercising the established corrective action and escalation mechanisms when the supplier's performance is non-conforming.

For more information how to develop service level agreements (SLAs) for the procurement of IT goods and services, please see the Service Level Agreement Tool (SLA) here:

<https://www.vita.virginia.gov/supply-chain/scm-policies-forms/>

### Chapter Highlights

- **Purpose:** This chapter covers both policies and guidance for competitive sealed bidding and the invitation for bid (IFB) procurement method used in the acquisition of information technology (IT) goods and services, excluding professional services.
- **Key points:** In competitive sealed bidding, it is important that the IT goods or services being procured are capable of being specifically described so that bids can be evaluated against the description in the IFB. Terms and conditions in an IFB are nonnegotiable. It is imperative that the IFB include all mandatory, statutory, special IT and other terms and conditions required by the Commonwealth and by the procuring agency.
  - Public opening and announcement must be made of all bids received.
  - Award is made to the lowest responsive and responsible bidder.

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## 22.0 Introduction

Competitive sealed bidding is a method of bidder selection, other than for professional services ([§ 2.2-4302.1](#)). The types of IT contracts resulting from competitive sealed bidding are usually those that provide for one-time purchases that are agency-specific and term contracts that reflect repetitive purchases of IT goods by agencies over a period of time. An invitation for bid selection (IFB) process should not be used for procuring Cloud/Software as a Service (SaaS) solutions. IFBs can also be used to solicit multiple award contracts that list more than one bidder of similar IT items. Refer to [Chapter 1](#), Purpose and Scope, of this manual, for VITA authority and delegation approval requirements for the IFB procurement method.

[§ 2.2-4302.1](#) of the VPPA includes the following elements in competitive sealed bidding:

- Issuance of a written IFB containing, or incorporating by reference, the specifications and contractual terms and conditions applicable to the procurement.
- Unless bidders have been prequalified for the procurement, the IFB shall include a statement of any requisite qualifications of potential bidders.
- State public bodies must post IFBs on eVA for at least 10 days prior to the date set for the receipt of bids. Public bodies may elect to publish IFBs in a newspaper of general circulation and bids may be solicited directly from potential bidders. Local public bodies are encouraged to post IFBs on eVA in addition to their other postings.
- Public opening and announcement of all bids received.
- Evaluation of the bids based on the requirements set forth in the invitation, which may include special qualifications of potential bidders, 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.
- Award is then made to the lowest responsive and responsible bidder.

In competitive sealed bidding, it is important that the IT goods or services being procured are capable of being specifically described so that bids can be evaluated against the description in the IFB. After evaluation, an award is made to the lowest responsive and responsible bidder, or if multiple awards are so provided in the IFB, awards may be made to the lowest responsive and responsible bidders. Award may be made to a reasonably priced Department of Small Business and Supplier Diversity (DSBSD)-certified small businesses, including those small businesses owned by women, minorities, service-disabled veterans and micro businesses, that is other than the lowest priced bidder when the provision for such an award is specifically included in the IFB.

## **22.1 Preparing and issuing an IFB**

Competitive sealed bidding includes the issuance of a written IFB containing IT specifications, scope of work/purchase description and the contractual terms and conditions applicable to the procurement. Before developing an IFB, agencies are urged to first check the VITA website for available statewide contracts which may serve their procurement need(s). These are available at this URL:

<http://vita.cobblestonesystems.com/public/>. Each agency may have and use its own preferred IFB document template. Subsections below highlight special areas of consideration when developing an IT IFB.

### **22.1.1 Terms and conditions**

Terms and conditions in an IFB are non-negotiable. It is imperative that the IFB include all mandatory, statutory and other terms and conditions required by the Commonwealth and by the procuring agency. Additionally, the IFB must include any special IT terms and conditions required by VITA or any Federal grant mandatory flow down. The terms or conditions must also include how the agency will publicly post the notice of award or announce a decision to award the contract. IFBs should include a statement that "Any vendor-supplied terms that are in addition to or at variance with the Commonwealth's will be of no effect." It is recommended NOT to issue any IFB for cloud services solutions, since IFBs are non-negotiable and the required Additional Cloud Services Terms and Conditions are often negotiated.

### **22.1.2 Small business requirements**

As part of the Commonwealth's commitment to promote and encourage the participation of

small businesses in public procurement, procurements of IT goods and services up to \$100,000 shall be set aside for qualified DBSBD-certified IT small business participation to achieve the Commonwealth's goal that 42% of its purchases be made from small businesses. Further, VITA is committed to enable a minimum of three percent (3%) participation by service disabled veteran businesses as defined in [§ 2.2-2000.1](#) and [§ 2.2- 4310](#) of the *Code of Virginia* when contracting for goods and services. If available, four (4) qualified DBSBD-certified small business sources including at least one micro business. If two or more DBSBD-certified small businesses cannot be identified as qualified to set aside the procurement under \$100,000, the procurement file shall be documented with VITA's efforts through eVA to obtain the number of required sources. An award may be made to a qualified, reasonably ranked small business, including a service-disabled veteran, minority- or women-owned small business or micro business offeror, if available, that is other than the highest-ranking offeror if the price submitted is fair and reasonable and does not exceed 5 percent (5%) of the lowest responsive and responsible noncertified bidder.

All procurements between \$0 and \$10,000 are to be set aside for micro businesses. A minimum of one quotation from a qualified DBSBD-certified micro business, if available, is required and the award shall be made to that DBSBD-certified micro business if the price is fair and reasonable and does not exceed 5 percent (5%) of the lowest responsive and responsible noncertified bidder. If more than one quote is solicited, the award will be made to the lowest responsive and responsible qualified DBSBD-certified micro business bidder. If the agency or institution receives no acceptable bids or offers from micro businesses, the procurement may be awarded to the lowest responsive and responsible small business bidder if the price is fair and reasonable. If there is no small business bidder available, the procurement shall be awarded to the lowest responsive and responsible non-small business bidder.

IT IFBs over \$100,000 shall include a requirement for offerors to submit, as part of their bid, a Supplier Procurement and Subcontracting Plan (see Appendix B).

If a bidder is a DBSBD-certified small business, the bidder shall so indicate in its bid response. DBSBD-certified small businesses include DBSBD-certified women-, minority-, service disabled veteran-owned businesses, and micro businesses that meet the small business definition and have received the DBSBD small-business certification. If the bidder is not a DBSBD-certified small business, the bidder is required to identify the portions of the contract the bidder plans to subcontract to DBSBD-certified small business by completing and returning the Supplier Procurement and Subcontracting Plan. Refer to Virginia Public Procurement Act (VPPA) [§ 2.2-4310\(E\)](#) for definitions of small, women-, minority- and service disabled veteran-owned businesses. A micro business is defined in Executive Order 35 (2019) at: <https://www.governor.virginia.gov/executive-actions/>

If the bidder is not a DBSBD-certified small business, small woman-owned, minority-owned, service disabled veteran-owned business, or a micro business, and will not have an opportunity to subcontract any portion of the requirements being solicited, the bidder still must complete the Supplier Procurement and Subcontracting Plan and designate that there will be no small business subcontracting.

For more detailed policy requirements refer to the following VITA policies: Small Purchase Policy and IT Procurement Policy for Enhancing Opportunities for Small, Women- and Minority-Owned Businesses, found at this location: <https://www.vita.virginia.gov/supplychain/scm-policies-forms/scm-policies/>



### 22.1.3 Technical and functional requirements and specifications

The IT IFB may include special requirements including life-cycle costing, value analysis and other criteria such as testing, quality, workmanship, delivery and suitability for a particular purpose to help determine acceptability. These requirements should be described accurately and completely. Unless the public body has provided for prequalification of bidders, the IT IFB shall also include any requisite qualifications of potential bidders. The following guidelines apply when writing IFB technical and functional requirements:

- Verify that the requirements/specifications accurately define the IT goods or services being procured. An error or omission can be costly, so it is important to validate them before the IFB is posted.
- Perform a requirements/specifications validity check. Do the goods or services specified provide the functions which best support the business owner's needs?
- Perform a requirements/specifications consistency check to ensure there are no conflicts.
- Requirements and specifications should be checked for completeness. Are all functions required by the business owner included? Are all federal, Commonwealth or VITA IT requirements, standards or specifications included?
- Perform a reality check. Can the requirements be implemented given the project's or business owner's available time, budget, resources and technology? Are the requirements realistically testable?
- Are the requirements written so that they can be properly understood?
- Can the requirements be changed without a large impact on other requirements?

An IFB for technology goods or services should include requirements that are broad enough to encourage free and open competition and that are compatible with industry-standard technology products and services. The bidder has a responsibility, however, to advise the procuring agency if the requirements restrict or limit the procurement to a single source.

Such notification should be provided in writing at least five business days before the official bid opening date.

### 22.1.4 Used or new products

A bid must offer new items of new or current design unless the IFB specifies that used, reconditioned or remanufactured products are acceptable.

### 22.1.5 Prohibition on the use of certain products and services

[§ 2.2-5514](#) of the *Code of Virginia* provides that no "public body" may use, whether directly or through work with or on behalf of another public body, any hardware, software or services that have been prohibited by the U.S. Department of Homeland Security for use in federal systems.

### 22.1.6 Use of brand names/substitutions

When a bid contains a brand name, trade name, catalog number, "or equal" or "as per sample" other than that specifically named in the IFB's specifications and the bidder proposes to furnish this equal substitute commodity, such fact shall be noted on the bid sheet or on a separate page attached to the bid. Information or descriptive literature explaining the substitution item must be attached to the bid. Failure to provide literature for substitutions may be grounds for rejection of the bid. When the IFB's specified item(s) must be compatible with or fit into an existing installation, or due to other essential reasons, the business owner may decide that a substitution cannot be accepted. However, the bulleted directives below must be adhered to when developing the IFB's requirements/specifications

and for making a determination that a substitute is unacceptable.

- **Brand name or equivalent specifications:** [§ 2.2-4315](#) of the *Code of Virginia* directly addresses the use of brand names in specifications: "Unless otherwise provided in the Invitation to Bid, the name of a certain brand, make or manufacturer shall not restrict bidders to the specific brand, make or manufacturer named and shall be deemed to convey the general style, type, character, and quality of the article desired. Any article that the public body in its sole discretion determines to be the equal of that specified, considering quality, workmanship, economy of operation, and suitability for the purpose intended, shall be accepted." Brand name or equivalent specifications may be used when it is determined that:
  - No other design, performance, or qualified product list is available.
  - Time does not permit the preparation of another form of specification or purchase description which does not include a brand name specification.
  - The nature of the product or the nature of the requirements makes use of a brand name or equivalent specification suitable for the procurement.
  - Use of a brand name or equivalent specification is in the Commonwealth's best interests.
- **Designation of several brand names:** Brand name or equivalent specifications shall seek to designate three or as many different brands as practicable, as "or equivalent" references and shall state that substantially equivalent products to those designated may be considered for award.
- **Required characteristics:** If the procuring activity determines the essential characteristics of the brand name included in the specifications are commonly known in the industry or trade, the brand name or equivalent specifications shall include a description of the particular design, functional, or performance characteristics required.
- **Nonrestrictive use of brand name or equivalent specifications:** When a brand name or equivalent specification is used in an IFB, the IFB shall contain explanatory language that the use of a brand name is for the purpose of describing the standard of quality, performance and characteristics desired and is not intended to limit or restrict competition.
- **Determination of equivalents:** Any prospective bidder may apply in writing to the procuring agency for a pre-bid determination of brand name equivalence. If sufficient information is provided by a prospective bidder, the agency may make written determination prior to the bid opening time that the bidder's proposed product would be equivalent to the brand name used in the IFB.
- **Specifications of equivalents required for bid submittal:** Bidders proposing equivalent products must include in their bid submittal the manufacturer's specifications for those products. Brand names and model numbers are used for identification and reference purposes only.

Performance-based specifications when procuring personal computers and related peripheral equipment pursuant to any type of blanket purchasing arrangement shall be established without regard to brand name.

[§ 2.2-2012\(E\)](#) of the Code of Virginia provides as follows:

"If VITA, or any executive branch agency authorized by VITA, elects to procure personal computers and related peripheral equipment pursuant to any type of blanket purchasing arrangement under which public bodies, as defined in [§ 2.2-4301](#), may purchase such goods from any vendor following competitive procurement but without the conduct of an individual procurement by or for the using agency, it shall establish performance-based specifications for the selection of equipment. Establishment of such contracts shall emphasize performance criteria including price, quality, and delivery without regard to 'brand name.' All bidders meeting the Commonwealth's performance requirements shall be afforded the opportunity to compete for such contracts."

#### **22.1.7 Price**

Unless the IFB specifies otherwise, a bidder shall submit a firm, fixed price for the goods and services being purchased for the term of the contract. Net unit prices, including transportation and delivery charges, F.O.B. destination, must be provided as they will prevail during evaluation and any award. Bidders must extend unit price to fractions. The price a bidder submits in response to an IFB shall include all travel expenses for the bidder to perform the contract in accordance with the Commonwealth's authorized per diem rates published by the Department of Accounts and available at: <http://www.doa.virginia.gov/>. The Commonwealth will not pay travel expenses that are not included in the bid price. Also, unless otherwise specified in the IFB, all items are bid F.O.B. destination.

If price negotiations may be a possibility due to budget constraints, such negotiations may be undertaken with the apparent low bidder only under conditions and procedures described in writing in the IFB and approved by the public body prior to issuance of the IFB.

#### **22.1.8 Reporting, inspection and testing requirements**

The IFB should clearly state requirements for reporting, inspection, testing, examination, etc.; for example, "all items are subject to inspection and testing." Items that do not meet specifications or requirements will be rejected. Failure to reject upon receipt, however, does not relieve the bidder of liability. When subsequent tests are conducted after receipt and reveal failure to meet the specifications, the purchasing body may seek damages regardless of whether a part or all of the items have been consumed.

#### **22.1.9 Pre-bid conferences/site visits**

All pre-bid conferences and/or site visits shall be described in the IFB. If attendance at such a conference or site visit is a prerequisite for bidding, the public notice period shall be long enough to provide adequate opportunity for potential bidders to obtain a copy of the IFB and attend. Mandatory pre-bid conferences scheduled during a period of suspended State business operations should be rescheduled to a date and time which will permit notification to all potential bidders.

#### **22.1.10 Bidder samples**

Bidders generally shall not be required to furnish bid samples unless there are characteristics of a product that cannot be described adequately in the IFB's specifications. Bid samples will only be used to determine the responsiveness of the bid and will not be used to determine a bidder's ability to produce the required items. Samples may be requested to verify quality levels or to test equipment to determine conformance with the specifications stipulated in an IFB and/or to determine ability to interface with existing equipment. When bidders are requested by language included in the IFB or by request

during the evaluation process to provide sample supplies or equipment or examples of work, they should be advised that it is at their own expense. Such requests shall fully describe the samples required; state the number of samples required; if appropriate, the size of the samples to be submitted; state that examination or testing will be conducted; and, list all the characteristics for which the samples will be examined or tested. All samples are subject to test. Submitted samples must clearly identify the bidder's name, the bid number and the item the sample represents in the bid.

Samples required in the IFB must be submitted prior to the bid opening date and be accompanied by a descriptive invoice indicating if bidder desires return of sample(s) not used or made useless through tests. Samples should be properly labeled, stored, and controlled by the receiving agency until disposal or return to the bidder. Failure to submit samples when requested may result in rejection of a bid. Bids will be rejected as nonresponsive if the samples fail to conform to each of the characteristics listed in the invitation. Unsolicited samples submitted in response to an IFB will not be evaluated and the agency may dispose of these samples.

Return of submitted samples that are not destroyed in testing will be at bidder's risk and expense upon the bidder's request. Samples belonging to bidder(s) awarded a contract(s) may be retained by the procuring agency for comparison with deliveries until the completion of the contract(s). Samples not picked up by non-awarded bidders within 30 days of award will become the property of the purchasing body. If, after 60 days of award, non-awarded bidders have not picked up their samples or provided disposition instructions, samples may be offered to other agencies or internal operating departments for use. If the items have significant reusable utility value, they should be disposed of using established property disposal procedures.

#### **22.1.11 Descriptive literature**

Bidders should not be required to furnish descriptive literature unless it is needed before award to determine whether the product(s) offered meet the specification and to establish exactly what the bidder proposes to furnish. If required for bid response, however, the IFB should clearly state what descriptive literature the bidders must furnish, the purpose for requiring the literature, the extent of its consideration in the evaluation of bids and the rules that will apply if a bidder fails to furnish the literature before the specified closing date of the IFB.

The procuring agency should document in the procurement file the reasons why product acceptability cannot be determined without the submission of descriptive literature.

## **22.2 Validity period of bids**

Unless stated otherwise in the IFB, once opened all bids are irrevocable for 90 calendar days. Beyond 90 days, bidders will have the option to honor their bid or to make a written request to withdraw their bid from consideration.

## **22.3 IFB sources**

Sources for IFBs can be located from conducting an industry market analysis as well as by performing a "Small, Women and Minority (SWaM) Vendor Search" from the list made available by DSBSD (refer to <https://www.sbsd.virginia.gov/>).

IT solicitations up to \$100,000 shall be set aside for qualified DSBSD-certified small businesses including those small businesses owned by women, minorities, service-disabled

veterans and micro businesses. If available, four (4) qualified DSBSD-certified small business sources including at least one micro business should be solicited. In estimating the total cost of the procurement, all possible renewal periods on a term contract must be considered to determine if the procurement will exceed \$100,000. Set asides do not apply to orders placed against an optional use or mandatory use statewide contracts.

If two or more DSBSD-certified small businesses cannot be identified as qualified to set aside the procurement under \$100,000, the procurement file shall be documented with efforts made through eVA and DSBSD to obtain the number of required sources. An award may be made to a qualified, reasonably ranked small business, including a minority- disabled veteran-owned or women-owned small business offeror, if available, that is other than the highest-ranking offeror if the price submitted is fair and reasonable and does not exceed five percent (5%) of the lowest responsive and responsible noncertified bidder. If the set-aside is withdrawn and the procurement awarded to other than a DSBSD-certified small business, the reason shall be documented in the procurement file.

An eVA quick quote will normally be used to solicit bids for IT goods and services (with the exception of telecommunications) for purchases up to \$10,000. If available, two or more qualified DSBSD-certified microbusiness sources should be solicited in writing or via eVA Quick Quote. The agency is responsible for determining price reasonableness; refer to [Chapter 9](#) of this manual, Determining Fair and Reasonable Pricing. If no acceptable bids or offers are received, the set-aside may be withdrawn and the requirement re-solicited using competitive, non-set-aside, procedures. If the agency is unable to proceed with the planned set-aside for a micro business, the agency shall document the procurement file to that effect, including stating the basis for that determination.

Purchases over \$250,000, unless delegated, shall be conducted by VITA. These procurements may be set-aside, in whole or in part, for qualified DSBSD-certified small businesses. If these procurements are set aside, a minimum of six (6) qualified DSBSD- certified small businesses, if available, shall be solicited. If the procurement is set aside and the agency receives no acceptable bids or offers, the set-aside may be withdrawn and the procurement re-solicited utilizing non-set-aside procedures.

In addition to the public notice, bids may be solicited directly from potential bidders. Any such direct IFBs shall include businesses selected from a list made available by DSBSD (refer to <https://www.sbsd.virginia.gov/>).

## **22.4 Modifications, clarifications, and revisions to the IFB**

### **22.4.1 Modifications to the IFB**

When it becomes necessary to issue an amendment to a posted IFB, the amendment must be made by written amendment, which will be posted in eVA. Amendments should be issued to make any modifications to the original IFB including quantity, purchase descriptions, delivery schedules, opening dates or to correct defects or ambiguities in the IFB. Amendments should furnish to other bidders information given to one bidder if the information will assist other bidders in submitting bids or if the lack of information would be inequitable to other bidders. When an addendum is issued that extends the time for the bidder to prepare an IFB response, the opening date should be extended not less than 10 days after the issue date of the addendum. Any amendments to an IFB should meet the following guidelines:

- Be a legitimate change that is necessary due to unforeseen circumstances or

- predicaments which occur as the procurement progresses. This change must have been unforeseen at time of the IFB posting and not be an attempt to evade competition.
- Be within the scope of the original IFB.

#### **22.4.2 Bidder requested IFB clarifications**

If a bidder discovers an inconsistency, error or omission in the IFB, the bidder should request clarification from the issuing agency. Such clarification request should be made to the agency single point of contact (SPOC). Bidders should make their requests for clarification a minimum of five (5) working days before the date of the bid opening unless otherwise noted in the IFB. No other form of clarification request is acceptable. Failure of a bidder to comply may result in the bidder being deemed non-responsive.

#### **22.4.3 Extension of bid acceptance period**

Should difficulties be encountered by an agency after bid opening which may delay award beyond bidders' acceptance periods, the several lowest bidders should be requested, before expiration of their bids, to extend the bid acceptance period (with consent of sureties, if any) in order to avoid the need for re-advertisement.

#### **22.4.4 Postponement of bid opening**

If it becomes necessary to postpone a bid opening, the agency shall issue the appropriate amendments postponing or rescheduling the bid opening. When the procuring agency is closed due to force majeure, the bid opening will be postponed until the same time on the next official business day.

### **22.5 Cancelling an IFB**

An IFB may be canceled or rejected at any time prior to contract award. An agency may cancel any IFB before or after the due date of the bid responses, and may cancel before or after receiving bids. Nothing can compel the award of a contract. The reason for cancellation of the IFB must be documented and made a part of the procurement file. A public body may not cancel or reject an IFB, a request for proposal, any other IFB, bid or proposal to avoid awarding a contract to a particular responsive and responsible bidder or offeror. ([§ 2.2- 4319](#) of the *Code of Virginia*)

#### **22.5.1 Cancelling an IFB before receipt of bids**

If the IFB has been issued but the due date specified in the IFB has not arrived, the agency may cancel the IFB. The issuing agency shall utilize the following procedure in such instances:

- A cancellation notice must be posted promptly in eVA. If the IFB was advertised in a newspaper, the cancellation should also be published in the same newspaper. Notice shall also be provided to agency personnel responsible for receipt and opening of bids to prevent responses from being unintentionally opened.
- Any bids received should be returned unopened to the bidder.
- The reasons for cancellation or rejection of the IFB shall be documented and be made part of the procurement file.

#### **22.5.2 Cancelling an IFB after receipt of bids**

When it is determined after bid opening and prior to award that the requirements relating to the availability and identification of specifications have not been met by any bidder(s), the IFB shall be cancelled. Such determination by the agency should be based on one or more of the following criteria:

- Inadequate or ambiguous specifications were cited in the IFB.
- Specifications have been revised.
- The supplies or services being procured are no longer needed.
- The IFB did not provide for consideration of all factors of cost.
- Bids received indicate that the agency needs can be satisfied by a less expensive article differing from that on which the bids were invited.
- All otherwise acceptable bids received are at unreasonable prices.
- The bids were not independently arrived at in open competition, were collusive or were submitted in bad faith.
- For other reasons, cancellation is in the agency's best interests.

If the determination is made to cancel the IFB, the bids may be rejected and the IFB canceled using the following procedures:

- A cancellation notice must be posted promptly in eVA and all websites displaying the IFB at the time the decision to cancel the IFB has been reached.
- Bidders should be notified in writing that the IFB has been cancelled and that duplicate bids, if provided, will be destroyed unless the bidder requests their return, at the bidder's expense.
- The opened bids will remain as part of the procurement file.
- The reasons for cancellation or rejection shall be made part of the procurement file.

## 22.6 Receipt and opening of sealed bids

If bids are scheduled to be received during a period of suspended State business operations, schedule the receipt and opening for the same time on the next regular business day. All sealed bids received by the procuring agency in response to an IFB must be held unopened in a secure area until the specified date and time for opening. All sealed bids shall be publicly opened at the date, time and location specified in the IFB. Facsimile bids shall not be considered unless permitted by the IFB. The bidder is responsible for arranging the third party involvement and for faxing the complete bid to the third party, not just a summary or the cover sheet. The agency may request the original bid be provided. If the original bid is requested, it must be received within five (5) business days of the request. No employee or agent of an agency should accept a facsimile bid on the bidder's behalf and offer to place the bid in a sealed envelope. The SPOC assigned for the procurement shall only read the following information from each bid aloud:

- Names of bidders.
- Unit prices or low prices.
- Brand names and model numbers, if specifically requested by the attendees.
- Discounts but only if the IFB specifically asks for bidders to include discounts in their bid and the discount will be used to determine the award.

Other questions or bid concerns should not be answered until the evaluation phase is complete and the award decision has been made.

## 22.7 Late bids

Sealed bids received after the date and time specified for receipt in the IFB cannot be accepted or considered and must be marked "late" and returned unopened to the bidder.

## **22.8 Bid responses**

Agencies assume no responsibility for costs incurred by the bidder prior to the award of any contract resulting from an IFB. In addition, an agency will not compensate a bidder for damages arising from inaccurate or incomplete information in the IFB specifications or from inaccurate assumptions based on the specifications. An agency will not be liable for any damages incurred by a bidder based on inaccurate or incomplete information in the IFB.

### **22.8.1 Acceptable bid signatures**

The bid and all addenda submitted by the bidder by facsimile or any other means must be signed. The original bid must be signed by a person authorized by the bidder's company to do so. Typewritten or stamped signatures are not acceptable. The person signing must include his or her title, and if requested, must verify his or her authority to bind the company to a bid and contract. Failure to sign the face of the bid in the space provided will result in rejection of the bid unless the unsigned bid is accompanied by other signed documents indicating the bidder's intent to be bound.

### **22.8.2 Responsiveness of bids**

To be considered for award, a bid must comply in all material respects with the IFB. Such compliance enables bidders to stand on an equal footing and maintain the integrity of the sealed bidding system. Bids should be filled out, executed and submitted in accordance with the instructions in the IFB.

Acknowledgment of receipt of any IFB addenda must be returned prior to the time set for receipt of bids, or accompany the bid. Failure to acknowledge receipt of any addendum may be cause for rejection of the bid.

Bidders are required to comply with all terms and conditions in the IFB, regardless of whether the bidder has knowledge of the terms and conditions or not, or has included any statement or omission in its bid that indicates a contrary intention. The agency cannot agree to any additional or inconsistent terms or conditions proposed by the bidder as the terms and conditions of the IFB are non-negotiable.

### **22.8.3 Alternate bids**

Unless the IFB specifically prohibits alternate bids, a bidder may submit alternate bids. An alternate bid is a bid submitted in knowing variance from the IFB's specifications and may provide opportunity for a bidder to incorporate the latest in technology or suggest alternative pricing and efficiencies. An alternate bid must be clearly distinguished and marked by the bidder as an alternate bid. The alternate bid must be a complete bid and not refer to information in the bidder's primary bid or any other alternate bid. The agency will decide whether or not to accept alternate bids. It may be discovered that an alternate bid suggests a revised specification or additional features that should be included in the original IFB. In this case, the agency may decide to reject all bids and rebid the requirement with a revised specification incorporating features of the alternate.

## **22.9 Evaluating bids**

Following public opening and announcement of bids received, the agency shall evaluate the bids received based upon the requirements set forth in the IFB. (See [§ 2.2-4302.1](#) of the *Code of Virginia*.) During the evaluation period, bidders are not allowed to contact the procuring agency. The designated SPOC may contact a bidder for clarification, if needed, during the evaluation period. Any resulting contract must be awarded to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the IFB. No bid shall be evaluated for any requirements or criteria that are not disclosed in the IFB. Bid responses are evaluated to determine compliance with all specifications and



the ability of the bidders to perform.

#### **22.9.1 Determining a responsive bidder**

A responsive bidder is defined in the VPPA as “a person who has submitted a bid that conforms in all material respects to the Invitation to Bid.” (Refer to [§ 2.2-4301](#) of the *Code of Virginia*.) A bidder is responsive if its bid responds to the bid specifications in all material aspects and contains no irregularities or deviations from the specifications in the IFB that would affect the amount of the bid or otherwise give the bidder an unfair competitive advantage. When evaluating a responsive bid, consideration is given to price, technical acceptability, conformity with specifications, purposes for which the technology goods and/or services were required and the quality of the goods or services offered.

#### **22.9.2 Determining a responsible bidder**

A bidder who is responsible and submits a responsive bid is one who clearly indicates compliance with the IFB without deviation from the IFB’s terms and conditions and who possesses the experience, facilities, reputation and financial resources to perform the requirements of the IFB at the time of contract award. A responsible bidder is defined in the VPPA as a “a person who has the capability, in all respects, to perform fully the contract requirements and the moral and business integrity and reliability that will assure good faith performance, and who has been prequalified, if required.” (See [§ 2.2-4301](#) of the *Code of Virginia*.) Agencies utilizing IFBs to purchase technology goods and services should use the following factors to determine whether a bidder is responsible:

- experience
- financial condition
- conduct and performance on previous contracts
- facilities
- management skills
- ability to execute the contract properly
- whether bidder has ever been disbarred by the federal government or Commonwealth.
- records of evaluation of performance as well as verifiable knowledge of agency business, contracting or audit personnel.
- determinations of violations of federal, state or local law or regulation.
- information supplied by the bidder, including bid or proposal information or financial data
- pre-award survey or information reports
- any other publicly available information
- Localities may include a determination of whether a bidder possesses the moral and business integrity and reliability that will assure good faith performance in order to determine bidders’ responsibility

Failure of bidder to provide specifically requested relevant information may be grounds for a determination of non-responsiveness.

#### **22.9.3 Determining the lowest bidder**

The lowest bidder is the bidder who offers the lowest-cost goods or services in comparison to all other bidders. Discounts and incentives should not be considered in determining the

lowest bidder unless the IFB specifically asked bidders to propose discounts and incentives and bidders are informed that the discount or incentive offered will be used to determine the award. Prompt payment discounts should normally not be considered in determining the lowest responsive bidder. After it is determined that the apparent low bidder is also responsive and responsible, the agency may proceed with an award to that lowest priced, responsive and responsible bidder. (See [§ 2.2-4301](#) and [§ 2.2-4302.1](#) of the *Code of Virginia*.) The agency may determine that the apparent low bidder is not responsive or responsible and thus not eligible for award.

- **If only one bid received in response to an IFB:** If only one responsive bid is received in response to an IFB, award may be made to the single bidder if the agency determines that the submitted price is fair and reasonable, and that either other prospective bidders had reasonable opportunity to respond, or the agency does not have adequate time for reissuing the IFB. Otherwise, the bid may be rejected by the agency, the procurement cancelled and a new IFB may be posted. If the agency received only one or no bids due to the IFB being set aside for the participation of small businesses, the procurement file should be documented accordingly. The IFB can then be reissued as a non-set aside procurement. The receipt of only one bid in response to an IFB undermines the Commonwealth's commitment to competition. To ensure competitive pricing and bidders, bids should be received from a number of qualified bidders consistent with the size and nature of the procurement. In order for competition to operate effectively, responsive bids should be received from at least two responsive and responsible bidders.
- **If tie bids are received:** If two or more bidders offer the same price for the IT goods or services being procured and both bidders have been determined to be responsive and responsible, the agency may do the following. (Refer to [§ 2.2-4324](#) of the *Code of Virginia*.)
  - Give preference to goods produced in Virginia or goods and services provided by Virginia persons, firms or corporations.
  - Award to a resident bidder if the identical low bids are submitted by a resident bidder and a nonresident bidder.
  - 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.
  - If identical low bids are submitted by two resident bidders, the issuing agency should perform a coin toss. The coin toss must be witnessed and the results recorded by a supervisor above the level of the buyer.
  - Award(s) are to be made in favor of the Virginia bidder for tie line items and multiple purchase orders or contracts placed as required. Copies of tie bids resulting from competitive sealed bidding shall be forwarded to the Anti-Trust Section of the Office of the Attorney General.
  - Award by lottery to one of the identical low bidders.
  - Reject all bids and issue a new IFB.
  - Where identical low bids include the cost of delivery, award the contract to the bidder with the lowest delivery cost.
  - Award the contract to the identical bidder who received the previous award and continue to award succeeding contracts to the same bidder as long as all low bids are identical.
  - If price is considered excessive or for other reason the bids are unsatisfactory, reject all bids and re-solicit.

Preference for Virginia bidders: For this section, a resident of Virginia bidder is a Virginia person, firm or corporation that is organized pursuant to Virginia law or maintains a principal place of business within Virginia. Whenever the lowest responsive and responsible bidder is a resident of any other state and such state under its laws allows a resident bidder of that state a percentage preference, then a like preference shall be allowed to the lowest responsive and responsible bidder who is a resident of Virginia and is the next lowest bidder. If the lowest responsive and responsible bidder is a resident of any other state and such state under its laws allows a resident contractor of that state a price-matching preference, a like

preference shall be allowed to responsive and responsible bidders who are residents of Virginia. If the lowest bidder is a resident bidder of a state with an absolute preference, the bid shall not be considered. The *Code of Virginia* requires the Department of General Services to post and maintain an updated list of state-by-state reciprocal preference data on its website, (select the section titled "State by State Reciprocal Preference Data.") on the eVA page at: <https://eva.virginia.gov/i-buy-for-virginia.html>.) For purposes of compliance with this section, all public bodies may rely upon the accuracy of the information posted on this website.

Award may be made to other than the lowest responsive and responsible bidder when the provision for such an award is included in the IFB. For procurements over \$100,000 such awards must be approved in writing by VITA's Supply Chain Management Director or designee before issuance of such award. In those instances, where an award is made to other than the lowest price bidder or highest ranked offeror, the award shall be made to the lowest responsive and responsible bidder or highest ranking, qualified DSBSD-certified small business offeror. If the IFB is a set-aside for small business participation only, award to other than the lowest bidder clause would not be necessary.

#### **22.9.4 Determining a bidder is non-responsible and protests of non-responsibility determinations**

After evaluation of criteria, an agency may determine that the apparent low bidder is not responsible (refer to [§ 2.2-4359, Code of Virginia](#)). If a bidder who otherwise would have been awarded a contract is found to be non-responsible, a written determination of non-responsibility setting forth the reasons for the finding shall be prepared by the agency and included in the procurement file. Prior to the issuing a written determination of non-responsibility, the agency shall notify the low bidder of this finding, disclose the factual support for the finding and allow the low bidder an opportunity to inspect any documents that relate to the finding of non-responsibility.

The bidder will have five (5) business days after receipt of the notice to request an opportunity to inspect any documents that relate to the finding of non-responsibility. Within ten (10) business days after receipt of the notice, the bidder may submit rebuttal information to the agency challenging the non-responsibility determination.

Within five (5) business days of receiving the rebuttal information from the bidder, the agency shall issue its written determination of responsibility based on all information in its possession, including any rebuttal information provided by the bidder. The agency shall notify the bidder in writing of its determination. Such writing shall be delivered to the bidder by the agency through electronic means and through a certified mailing with return receipt requested.

The agency's written determination of a bidder's non-responsibility shall state the basis for the determination. The agency's determination of non-responsibility shall be final unless the bidder appeals the agency's or determination within 10 days after receipt of the notice.

Bidder may appeal the agency's non-responsibility determination by invoking VITA's alternative dispute resolution procedures (<https://www.vita.virginia.gov/supply-chain/sellto-vita/alternative-dispute-resolution-procedure/>) which is an administrative appeals procedure meeting the standards of [§ 2.2-4365](#) of the *Code of Virginia* or in the alternative by instituting legal action against the agency as provided in [§ 2.2-4364](#) of the *Code of Virginia*.

[§ 2.2-4365](#) does not apply to procurements involving prequalification of bidders and the rights of any potential bidders under such prequalification to appeal a decision that such bidders are not responsible.

If, upon appeal pursuant to [§ 2.2-4364](#) or [§ 2.2-4365](#), it is determined that the agency's determination of non-responsibility was not an honest exercise of discretion but was arbitrary and capricious or not in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms or conditions of the IFB, and the award of the contract has not yet been made, the sole relief shall be a finding that the bidder is a responsible bidder for the contract in question or directed award as provided in [§ 2.2-4364\(A\)](#) or both.

If the award has been made when it is determined that the agency's determination of a bidder's non-responsibility was not an honest exercise of discretion but arbitrary and capricious (refer to [§ 2.2-4360](#) of the *Code of Virginia*), the agency can choose between several available options under the VPPA:

- If the award has not been made, the bidder's sole relief shall be that the bidder is a responsible bidder for the contract in question.
- If the award has been made but performance not yet begun, performance may be enjoined.
- If the award has been made and performance has begun, the agency may declare the awarded contract void upon a finding that to do so is in the public body's best interest. Where a contract is declared void, the performing bidder will be compensated for the cost of performance up to the time of contract termination but in no event shall the performing bidder be entitled to lost profits.

If an agency determines or it is determined through the alternative dispute resolution process that there is probable cause to believe that the agency's decision to award was based on fraud or corruption or a violation of Ethics in Contracting, the agency may enjoin the award of the contract to a particular bidder.

If the bidder institutes legal action in the appropriate circuit court challenging the agency determination of non-responsibility and the court finds the bidder to be a responsible bidder, the court may direct the public body to award the contract to such bidder in accordance with the [§ 2.2-4364](#) of the *Code of Virginia* and the Invitation to Bid. [§ 2.2-4364](#) of the *Code of Virginia* provides that a court can reverse an agency's finding of nonresponsibility only if the bidder is able to establish that the decision was not (i.) an honest exercise of discretion but rather was arbitrary and capricious; (ii) in accordance with the Constitution of Virginia, applicable state law or regulation or consistent with the terms and conditions of the IFB.

### **22.9.5 Bidder ineligibility**

Any bidder who is refused permission to participate or disqualified from participation in public contracts shall be notified by the agency in writing ([§ 2.2-4357](#), *Code of Virginia*). Prior to the issuance of a written determination of disqualification or ineligibility, the agency shall:

- Notify the bidder in writing of the results of the evaluation.
- Disclose the factual support for the determination.

- Allow the bidder an opportunity to inspect any documents that relate to the determination, if bidder requests within five (5) business days after receipt of the notice.

Any bidder may challenge the agency's determination by submitting rebuttal information within ten (10) business days after receipt of the determination notice. The agency shall issue its written determination of disqualification or ineligibility based on all information in its possession, including any rebuttal information, within five (5) business days of the date the agency received such rebuttal information.

If the agency's evaluation reveals that the bidder should be allowed to participate in the procurement, the agency will cancel the disqualification action. If the agency's evaluation reveals that the bidder should be refused permission to participate, or should be disqualified from participation in the procurement, the agency shall notify the bidder. The notice shall state the basis for the determination, which shall be final unless the bidder appeals the decision within ten (10) days of receipt of the notice by invoking VITA's alternative dispute resolution procedures (<https://www.vita.virginia.gov/supply-chain/sell-to-vita/alternativedispute-resolution-procedure/>) which meet the standards of [§ 2.2-4365](#) of the *Code of Virginia*, or in the alternative by instituting legal action as provided in [§ 2.2- 4364](#) of the *Code of Virginia*. If upon appeal, it is determined that the agency's determination of a bidder's ineligibility was arbitrary and capricious or not in accordance with the Constitution of Virginia, applicable state law or regulations, the sole relief shall be restoration of eligibility.

## 22.10 Rejection of bids

[§ 2.2-4319](#) of the *Code of Virginia* provides: "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. A public body shall not cancel or reject an Invitation to Bid, a Request for Proposal, any other solicitation, bid or proposal pursuant to this section solely to avoid awarding a contract to a particular responsive and responsible bidder or offeror." An agency may reject any bid, in whole or in part, if any of the following circumstances exist:

- Bid offers supplies or services not in compliance with the requirements, specifications, or terms and conditions stated in the IFB.
- The price of the lowest responsive and responsible bid is excessive in comparison with market conditions or with the agency's available funds.
- The agency determines that awarding any item is not in its best interest.
- Forms required in the IFB do not contain complete information and the bid may be considered non-responsive. Information supplied by the bidder is not provided in the format specified in the IFB.
- The bid fails to acknowledge receipt of or comply with any IFB amendment(s).

- Bidder states in its IFB response that it will not accept an award unless the IFB terms and conditions are modified or altered.
- Bidder states it will only accept an award for all line items when the IFB allows award by line item or aggregate grouping of line items.
- The offer and award sheet of the IFB is not signed and there is no indication that the bidder is officially responding.
- A bid item does not meet the stated specifications in the IFB and the bidder has not indicated the item bid is an alternate.

## 22.11 Withdrawal of bids and bid mistakes, alterations and amendments

Refer to [§ 2.2-4330](#) of the *Code of Virginia* for additional guidance on withdrawal of bids.

### 22.11.1 Withdrawal of bid before bid opening

A bidder may withdraw its bid, by written request, any time after the agency receives the bid and before the bid opening.

### 22.11.2 Withdrawal of bid after bid opening

A bidder may withdraw its bid within two business days after conclusion of the bid opening by written request if there is reasonable proof that an inadvertent mistake was made and the correction cannot be determined with reasonable certainty. Inadvertent means inattentive or unobservant, due to oversight or without intention. If the agency suspects that the lowest bid contains a mistake, the SPOC may ask the bidder for written confirmation of its bid. If the lowest responsive bid is 25% (or more) lower than the next low bid, the bidder should be contacted to confirm the bid price. This does not relieve a bidder from the responsibility for the submission of a correct bid. If the bidder then alleges a mistake in bid and can verify to the agency satisfaction that it was a nonjudgmental mistake, the bid may be withdrawn.

### 22.11.3 Appeal of denial of withdrawal of bid

[§ 2.2-4358](#) of the *Code of Virginia* provides: “A decision denying withdrawal of bid under the provisions of [§ 2.2-4330](#) shall be final and conclusive unless the bidder appeals the decision within ten days after receipt of the decision by invoking administrative procedures meeting the standards of [§ 2.2-4365](#), if available, or in the alternative by instituting legal action as provided in [§ 2.2-4364](#).” [§ 2.2-4364](#) of the *Code of Virginia* addresses the use of legal action:

“A bidder denied withdrawal of a bid under [§ 2.2-4358](#) may bring an action in the appropriate circuit court challenging that decision, which shall be reversed only if the bidder establishes that the decision of the public body was not (i.) an honest exercise of discretion, but rather was arbitrary or capricious or (ii.) in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms or conditions of the Invitation to Bid.”

Any bidder who requests in writing that a bid be withdrawn in accordance with [§ 2.2-4358](#) will receive a written notice from the public body if that request is denied. The denial of bid withdrawal will be final unless the bidder, within ten (10) days after receipt of the notice denying withdrawal, institutes an appeal by invoking VITA’s alternative dispute resolution procedures (<https://www.vita.virginia.gov/supply-chain/sell-to-vita/alternative-dispute-resolution-procedure/>) or appeals to the appropriate circuit court in accordance with *Code of Virginia*, [§ 2.2-4364](#). If after VITA’s Alternative Dispute Resolution procedures are implemented, it is determined that the decision refusing withdrawal of the bid was arbitrary or capricious, the sole relief shall be withdrawal of the bid.

If no bid bond was posted, prior to appealing, the bidder must deliver to the agency a certified check payable to the Treasurer of Virginia, or a cash bond naming the Commonwealth of Virginia as obligee, in the amount of the difference between the bid sought to be withdrawn and the next low bid. The bid bond shall be released only upon the final determination that the bidder was entitled to withdraw the bid or upon acceptance of the awarded contract by the appealing bidder. The security shall be forfeited to the Commonwealth if the final decision is adverse to the appealing bidder who then fails to accept and enter into the contract or to appeal to a circuit court. In the event the bidder appeals to a circuit court and that court issues a decision adverse to the bidder upholding the Board's decision, the security shall be forfeited.

#### **22.11.4 Minor informalities or irregularities in bids**

[§ 2.2-4319 \(B\)](#): A public body may waive informalities in bids. A minor informality or irregularity is one that is merely a matter of form and not of substance. It also pertains to some immaterial defect in a bid or variation of a bid from the exact requirements of the invitation that can be corrected or waived without being prejudicial to other bidders. The defect or variation is immaterial when the effect on price, quantity, quality, or delivery is negligible when contrasted with the total cost or scope of the supplies or services being acquired. The agency either shall give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive the deficiency. Examples of minor informalities or irregularities include:

- Failure to return the number of copies of signed bids required by the invitation.
- Failure to furnish required information concerning the number of its employees.
- Failure to sign its submitted bid, but only if—
  - The unsigned bid is accompanied by other material indicating the bidder's intention to be bound by the unsigned bid (such as the submission of a bid guarantee or a letter signed by the bidder, with the bid, referring to and clearly identifying the bid itself); or
  - The firm submitting a bid has formally adopted or authorized, before the date set for opening of bids, the execution of documents by typewritten, printed, or stamped signature and submits evidence of such authorization and the bid carries such a signature.

#### **22.11.5 Occurrence of bid change**

A bidder who desires to change a bid already submitted shall withdraw the submitted bid and submit another bid before the closing date.

- **Correction of bid before bid opening:** If a bidder withdraws its bid and resubmits it with revisions, the revisions should be clearly identified and signed or initialed by the bidder. The omission of a bidder's signature or initials to a modification may result in the bid being determined non-responsive. Prior to submission of a bid, alterations may be made, but must be initialed by the person signing the bid. A single line must be drawn through the information to be changed, insert the desired information and initial the change. Smudged and smeared erasures, strikeovers or opaque fluid on the bid that affects unit price, quantity, quality or delivery may result in the rejection of the line item or information involved in the bid. A bidder may correct mistakes, amend and/or withdraw a response if the procuring agency receives a written request before the due date and hour. The request must be signed by a person authorized to represent the

firm or entity that submitted the bid.

- **Correction of bid after bid opening but before award:** A public body may permit a bidder alleging an inadvertent error to correct its bid after bid opening only if the mistake and the correction do not affect the amount of the bid or otherwise give the bidder an unfair competitive advantage. Examples of inadvertent, minor informalities are provided in subsection 22.10.4 above. A minor defect or variation of a response from the exact requirements of the IFB, which does not affect the price, quality, quantity, or delivery schedule for the goods, and services, being procured, may, in the sole discretion of the issuing agency, be waived or the bidder may be permitted to correct it, whichever procedure is in the best interest of the Commonwealth. Examples of minor defects, mistakes or variations include but are not limited to: failure to return the number of pages requested in the IFB or failure to sign, as instructed, in the space provided, but only if the unsigned response is accompanied by other signed documents indicating the bidder intent to be bound. Responses may not be withdrawn if the mistakes are attributable, such as the following:
  - **Judgment errors:** Where errors are attributed, in the sole discretion of the issuing agency, to be errors in judgment, such errors may not be corrected.
  - **Errors where the intended correct response is evident:** Errors and mistakes such as typographical errors, errors extending unit prices, transposition, and arithmetical, or instances where the mistake and the intended correct response are clearly evident in the response document. Such errors shall be corrected to the intended correction and may not be withdrawn. Responses may be withdrawn if the intended correct response is not evident. A bidder may be permitted to withdraw a response if a mistake, in the sole discretion of the issuing agency, is clearly evident in the response document submitted and/or in comparison with other responses.
- **Bid mistakes discovered after award:** Bids containing mistakes shall not be corrected or withdrawn after award of a contract or issuance of an order. No plea or claim of mistake in a bid or resulting contract shall be available as a defense in any legal proceeding brought upon a contract or purchase order awarded to a bidder as a result of the breach or nonperformance of such contract or order. Mistakes shall not be corrected after award of the contract.

## 22.12 Request for clarification information from bidders

The agency may request additional information to evaluate a bidder's responsiveness to the IFB or to evaluate a bidder's responsibility. If a bidder does not provide the requested information, it may adversely affect the evaluation of the bidder's responsiveness and responsibility.

## 22.13 Negotiation with the lowest bidder

After the agency has evaluated the technology product or service for acceptability as set forth in the IFB, the bids are then evaluated to determine which bidders offer the lowest cost in accordance with the evaluation criteria set forth in the IFB. Only objectively measurable criteria that are set forth in the IFB shall be applied in determining the lowest bidder. Examples of such criteria include, but are not limited to, transportation cost and ownership or life-cycle cost formulas. Evaluation factors need not be precise predictors of actual future costs, but such evaluation factors shall be reasonable estimates based upon information the agency has available concerning future use and shall provide for the equitable treatment of all bids. Pricing for optional supplies or services or for renewal terms



may not be considered, particularly when the pricing for such items or terms is unbalanced when compared to other pricing in the bid.

In accordance with the *Code of Virginia*, [§ 2.2-4318](#), 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 public body may negotiate with the apparent low bidder to obtain a contract price within available funds. However, the negotiation may be undertaken only under conditions and procedures described in writing and approved by the public body prior to issuance of the IFB and summarized therein.

## **22.14 Posting of award**

After evaluation, award is made to the lowest responsive and responsible bidder. When the terms and conditions of multiple awards are so provided in the IFB, awards may be made to more than one bidder. Awards are to be posted on eVA for a minimum of ten (10) calendar days, but should only be posted after all required written approvals are received by the agency from a federal sponsor, Office of Attorney General and/or Commonwealth Chief Information Officer.

## **22.15 Cancellation of award prior to performance**

When an agency determines after an award has been made but before performance has begun that its requirements for the technology goods and services have changed since the IFB was issued, the award or contract may be canceled and either re-awarded or a new IFB may be issued if it is determined in writing that one or more of the following circumstances occurred:

- Inadequate or ambiguous specifications were cited in the IFB.
- Specifications included in the original IFB have since been revised.
- Supplies or services being procured through the original IFB are no longer required.
- The IFB did not provide for consideration of all factors of cost.
- The bids received in response to the IFB indicate that the needs of the agency can be satisfied by a less expensive article differing from the specifications included in the original IFB.
- The bids received did not appear in the agency's opinion to be not independently arrived at or in open competition. The bids were collusive or were submitted in bad faith.
- An administrative error of the issuing agency was discovered prior to performance.
- The agency has decided that cancellation of the award is in the best interest of the public.

## **22.16 Procurement file documentation requirements**

The procurement file for competitively sealed bid procurements should contain:

- A copy of the printed IFB document
- Proof of posting – eVA
- Bid tabulation
- Signed, original tabulation sheet
- Identification of date, time and place of bid opening and attendees
- List of all bids received
- List of bids ranked numerically with the lowest bidder at number one
- Documentation of any negotiations

- Any bid protest correspondence
- Documentation to support the inability to set-aside the procurement for a small business or a small business owned by a disabled veteran.  
Documentation of factual support explaining why a bidder is determined to be nonresponsive or non-responsible, including any protest/decision documentation and evidence of having supplied written notification to bidder
- Documentation showing verification of non-debarred status with the DGS Commonwealth debarred list and with the federal EPLS system
- Documentation covering receipt and disposition of samples
- Documentation as to any amendments, cancellations, denial of bid withdrawals, etc.

## **Appendix A**

### **IT IFB Process Overview**

If you prefer that VITA conduct any particular technology procurement on your behalf contact: [scminfo@vita.virginia.gov](mailto:scminfo@vita.virginia.gov). Otherwise, please refer to VITA's Authority and Delegation Policy at: <https://www.vita.virginia.gov/supply-chain/scm-policies-forms/scmpolicies/> for IT procurement authority delegation and approval thresholds and compliance requirements. The following table provides a step-by-step reference for the IFB procurement process:

STEP	PROCESS
1	Review the statewide technology contracts available on VITA's website ( <a href="https://vita.cobblestonesystems.com/public/">https://vita.cobblestonesystems.com/public/</a> ) to determine that there is no statewide technology contract available for the particular technology good or service to be procured. Statewide contracts can offer significant price discounts over individual procurements.
2	Prepare the IFB document and include IT terms and conditions, technical and functional requirements and specifications, reporting or inspection requirements and any bidder qualifications.
3	Post the IFB in <a href="#">eVA</a> , and if desired, a newspaper of general circulation for at least 10 days prior to due date set for receipt of bids. Bids may be solicited directly from potential bidders.
4	Host a pre-bid conference, if applicable.
5	Issue any amendments that are necessary in eVA and answers to all questions received during bid period.
6	Receive and keep sealed bids until date and time stated in the IFB. Late bids shall not be considered.
7	Publicly open the bids on the specified date and time given in the IFB.
8	Read the bids aloud, including announcement of all bids received. Log the respondents' names and bid totals.
9	Responsiveness of bids based upon the requirements set forth in the solicitation
10	Determine if bids responsive, bidders responsible. The lowest responsive bidder is then evaluated to determine if the firm is responsible.
11	Award to the lowest responsive and responsible bidder. If the provision for award to other than the lowest priced bidder was included in the IFB, the award may be made to a reasonably priced DSBSD-certified small business bidder that is other than the lowest responsive and responsible bidder so long as it does not exceed 5 percent (5%) of the noncertified bidder. If the award is made to other than the lowest priced bidder, the award shall be made to the next lowest responsive and responsible DSBSD certified small business bidder.
12	Issue award.
13	Post award in <a href="#">eVA</a> .
14	Await 10-day protest period.
15	Manage and administer the contract.

**Appendix B**  
**Small Business (SWaM) Procurement Plan or**  
**Supplier Procurement and Subcontracting Plan**

For agencies, the plan may be called Small Business (SWaM) Subcontracting Plan. VITA calls the plan Supplier Procurement and Subcontracting Plan. This form is available on VITA SCM's website at the following URL:

<https://www.vita.virginia.gov/supply-chain/scm-policies-forms/scm-policies/>

### Chapter highlights

**Purpose:** This chapter discusses two-step competitive sealed bidding for procuring information technology (IT) goods and services.

**Key points:**

- Two-step competitive sealed bidding is a combination of competitive procedures designed to obtain the benefits of sealed bidding when adequate specifications are not available.
- There is no negotiation in the two-step competitive bid process.

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### 23.0 Introduction

This chapter discusses two-step competitive sealed bidding for the acquisition of information technology (IT) goods and services. Competitive sealed bidding" is the method of contractor selection set forth in [§ 2.2-4302.1](#). Two-step competitive sealed bidding is usually used when it is impractical to prepare initially a purchase description to support an award based on price. Accordingly, 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. Two-step competitive sealed bidding should not be used for procuring Cloud Services/Software as a Service (SaaS) solutions.

Two-step competitive sealed bidding is a combination of competitive procedures designed to obtain the benefits of sealed bidding when adequate specifications are not available. The objective of two-step sealed bidding is to permit the development of a sufficiently descriptive but not unduly restrictive statement of the agency's IT requirements, including adequate technical requirements, so that subsequent acquisitions may be made by

conventional sealed bidding. This method is especially useful in acquisitions requiring technical proposals, particularly those for complex IT items. The two-step competitive sealed bidding procurement method is designed to obtain the benefits of competitive sealed bidding by award of a contract to the lowest, responsive, responsible bidder while also allowing competitive sealed negotiation-like procedure through solicitation of technical offers and the conduct of discussions to arrive at technical offers. There is no negotiation in the two-step competitive bid process. Agencies may request additional information from bidders to clarify material contained in their technical proposals. Such requests for additional information should always occur before the priced bids are considered.

All other invitation for bid (IFB) procedures such as notice, form, etc., that apply to an IFB also apply to a two-step IFB and combined two-step IFB solicitation.

### **23.1 when to use two-step competitive sealed bidding**

Unless other factors require the use of competitive sealed bidding, two-step sealed bidding may be used when any of the following situations exist:

- There is a need to evaluate technical offers for acceptability in fulfilling the IT procurement requirements.
- There is a lack of adequate specifications or when rapid changes in technology make it more advantageous to request unpriced technical proposals before making any award based on price.
- To facilitate understanding of the technical offers and purchase description requirements through discussion; and, where appropriate, obtain supplemental information or permit amendments to the solicitation and technical offers.
- Available specifications or purchase descriptions are not definite or complete.
- Definite criteria do exist for evaluating technical proposals.
- More than one technically qualified supplier is expected to be responsive.
- There is sufficient lead time available to complete a two-step competitive sealed bidding procurement.
- A firm-fixed-price contract or a fixed-price contract with economic price adjustment is desired.

None of the following situations would preclude the use of two-step sealed bidding:

- Multi-year contracting
- Agency-owned facilities to be made available to the successful bidder a Department of Small Business and Supplier Diversity (DSBSD)-certified small business, including small businesses owned by women, minorities and service disabled veterans as well as micro businesses set-aside requirement
- A first or subsequent production quantity (if hardware) is being acquired under a performance specification

### **23.2 Two-step competitive sealed bidding process options**

Two-step competitive sealed bidding is a process consisting of two separate bid phases— technical and price—and can occur in one of two ways:

#### **23.2.1 Combined two-step competitive sealed bidding**

Using this method, the two-step competitive sealed bidding process is combined to require simultaneous submission of the technical and price bids, but in separately sealed envelopes.

The envelopes must be labeled "Technical Proposal" and "Bid Price" and each must include the bidder's name, address and the bid reference number. The envelopes containing the technical proposals are opened and evaluated first. The technical proposals which meet the bid criteria and are deemed acceptable after evaluation are selected. The envelopes containing the bid prices for those acceptable proposals are then opened and an award is made to the lowest responsive and responsible bidder. The envelopes containing the bid prices for those technical proposals determined to be unacceptable will be returned to the suppliers unopened.

### 23.2.2 Uncombined two-step competitive sealed bidding

Using this method, simultaneous technical proposals and price bids are neither requested nor accepted, but rather two separate IFBs are issued. For the first step, the agency issues an IFB for unpriced technical proposals. The objective is to first determine the acceptability of the supplies or services offered. This step evaluates whether the offeror's bid conforms to the technical requirements, but does not determine whether the supplier is responsible.

After completing the technical evaluations, the procuring agency, for the second step, will issue another IFB for pricing bids, but only to those bidders whose unpriced technical offers were qualified as acceptable and responsive. The pricing offers submitted in this second step are evaluated and award(s) is then made in accordance with [§ 2.2-4302.1](#) of the *Code of Virginia*, to the lowest responsive and responsible bidder.

## 23.3 Conducting two-step competitive sealed bids

### 23.3.1 Step one: unpriced technical proposals

**Prepare the unpriced technical IFB:** Prepare an IFB requesting unpriced technical proposals which includes the following content, along with the procuring agency's custom content. This is intended as a partial content guide, as each agency has its own IFB template with appropriate sections to present such content.

Recommended IFB section	Content description
Cover sheet	Statement of intent to use the two-step method.
	Explanation of the two-step competitive sealed bidding procedure with emphasis that technical proposals must not include prices or pricing information. However, if price bids are to be submitted at the same time as unpriced technical offers (i.e., combined two-step IFB) instruct that the price bids shall be submitted in a separately sealed envelope marked "Bid Price."
	Inclusion of any small business set-aside requirements; or if it is intended that award may be made to other than the lowest priced bidder, inclusion of language explaining that "An award may be made to a qualified, reasonably ranked DSBSD-certified small business, including a small minority-, women- or service disabled veteran- owned and micro business offeror, if available, or one that is other than the highest ranking offeror if the price submitted is fair and reasonable so long as it does not exceed five percent (5%) of the lowest responsive and responsible noncertified bidder."
Proposal instructions	Indicate if a pre-bid conference will or will not be held. If one will be held provide date/time/location details and state if attendance is mandatory.

Recommended IFB section	Content description
	For combined two-step competitive IFBs, the instructions must specify that responses must be submitted in two separate sealed envelopes—one marked “Technical Proposal” and the other “Bid Price”—and bidders must identify both envelopes with the bidder’s name, company name and address, and bid reference number.
	Include a statement that either: (1) only one technical proposal may be submitted by each offeror, or (2) that multiple technical proposals may be submitted. When specifications permit different technical approaches, it is generally in the agency’s best interest to authorize multiple proposals.
	If the agency intends to make this a DSBSD-certified small business or micro business set-aside procurement, the set-aside provision must be included in the IFB.
Introduction/ background	Provide high-level information about your agency and project.
Statement of need(s)	Provide a general description of the IT supplies or services required.
Proposal requirements	Require that technical proposals must describe how the bidder intends to meet the agency’s requirements and what goods, equipment and services will be furnished.
	Specify mandatory technical and functional data, specifications and requirements; schedules; inspection or testing; optional information desired; required bid samples, descriptive literature, technical data or other material to be submitted; etc.
	Provide information on any delivery or performance requirements to assist bidders in determining bid/no-bid
	Emphasize that the IT goods or services being procured shall be furnished by the bidder in accordance with the bidder’s technical offer, if found to be acceptable by the agency, and that they shall meet the requirements of the IFB.
	Include all required general, special and IT/VITA specific terms and conditions and include a statement that these are non-negotiable.
Supplier Procurement and Subcontracting Plan	Require that all solicitations, regardless of amount, include a Supplier Procurement and Subcontracting Plan. The form can be found here: <a href="https://www.vita.virginia.gov/media/vitavirginiagov/supply-chain/docs/Small_Business_Procurement_Plan.doc">https://www.vita.virginia.gov/media/vitavirginiagov/supply-chain/docs/Small_Business_Procurement_Plan.doc</a>
	Include a statement that any award document shall incorporate by reference the terms and conditions of the solicitation and the supplier’s technical proposal.
Evaluation criteria	Discuss the evaluation criteria to be used in the evaluation of the unpriced technical offers including all factors and any significant sub-factors.
	Include a statement that the agency may make a final determination regarding a proposal’s acceptability solely on the basis of the proposal as submitted.



Recommended IFB section	Content description
	State that the agency may proceed with the second step without requesting further information from any bidder; however, additional information or discussion may be requested from bidders whose proposals are considered reasonably susceptible of being acceptable.
	State that a notice of unacceptability will be forwarded to bidders upon completion of evaluations and final determination of unacceptability.
	State that in conducting the second step, price bids will be requested only from those bidders whose technical proposals were determined to be acceptable, either initially or as a result of discussions.
Proprietary information	Request that bidders designate those portions of the unpriced technical offers which contain trade secrets or other proprietary information that must remain confidential.

**Amendments to the IFB:** Amendments may be made by the issuance of an addendum to the IFB prior to the time set for receipt of step 1 technical responses. Acknowledgment of receipt of an addendum must be returned prior to the time set for receipt of bids or proposals, or accompany the bid or proposal. Failure to acknowledge receipt of an addendum may be cause for rejection of the bid or offer. I. After receipt of unpriced technical offers, amendments to the two-step IFB shall only be distributed to bidders who submitted unpriced technical offers. Bidders shall be allowed to submit new unpriced technical offers or to amend those submitted in response to an IFB amendment. If a proposed amendment will significantly change the nature or scope of the original procurement in the agency's opinion, the IFB should be cancelled and a new one issued.

**Bid mistakes or corrections:** Mistakes in an unpriced technical offer may be corrected, or the offer withdrawn, during step one of the two-step IFB if done before the unpriced technical offers are evaluated. Also, corrections or withdrawals are allowed when responding to any amendment to the IFB.

**Receipt of unpriced technical offers:** Upon receipt of the unpriced technical offers, the agency procurement officer shall conduct the following activities:

- Publicly open the technical offers and announce the names of submitting firms.
- Safeguard technical offers against disclosure to unauthorized persons. Technical offers will be kept confidential by the agency until award. The agency should accept and handle data that is marked confidential or proprietary by the bidder as required in [Chapter 10](#) of this manual.
- Remove any reference to price or cost.

**Evaluation of technical offers:** Evaluation of technical offers shall be based on the criteria provided in the solicitation. The evaluation team will evaluate and select those proposals which meet its needs, based on the mandatory criteria specified in the solicitation. The evaluators may request written or oral discussions from bidders to request additional information or clarification regarding the technical information included in the offer. The contents of the technical offer are not subject to negotiation and must be evaluated as

submitted. They are not ranked but are categorized on their ability to meet an agency's needs as follows:

- **Acceptable:** The proposal meets the requirements of the IFB.
- **Unacceptable:** Any proposal which modifies or fails to conform to the essential requirements and specifications of the IFB shall be considered nonresponsive and categorized as unacceptable. The procurement lead should prepare a written basis for determining an unpriced technical offer "unacceptable" for the procurement file.

After evaluations are completed, the agency may proceed directly to step two if there are sufficient acceptable technical offers to ensure adequate price competition. When a technical proposal is found unacceptable (either initially or after clarification), the agency shall promptly notify the bidder of the basis of the determination and that a revision of the proposal will not be considered. Upon written request, the agency may debrief unsuccessful bidders. Only those responsive bidders whose technical proposals were determined to be acceptable will be invited to submit a bid price.

Localities may include a determination of whether a bidder possesses the moral and business integrity and reliability that will assure good faith performance in order to determine bidders' responsibility

**Request for additional information or clarification:** In initiating requests for additional information, the agency shall fix an appropriate time for bidders to submit all additional information, and incorporate such additional information in their offers. Such time may be extended at the discretion of the agency. If the additional information incorporated as part of a proposal within the time posted by the agency establishes that the proposal is acceptable, it shall be so categorized. Otherwise, it shall be categorized as unacceptable.

**Discussion of unpriced technical offers:** Discussions may be held between the agency and any bidder who submits an acceptable or potentially acceptable unpriced technical offer. The agency shall not disclose any information derived from one unpriced technical offer to any other bidder.

**If only one acceptable offer received:** If only one responsive bid is received in response to a two-step IFB, an award may be made to the single bidder if the agency finds that the price submitted is fair and reasonable and that other prospective bidders had reasonable opportunity to respond, or there is not adequate time for re-solicitation. Otherwise, the bid may be rejected, the procurement cancelled and a new solicitation issued.

**Cancellation of two-step sealed bidding due to lack of acceptable technical offers:** If, in the agency's opinion, there are not sufficient acceptable unpriced technical offers to assure effective price competition without modification or alteration of the offers, the agency can issue an amendment to the IFB or cancel the solicitation. If it is necessary to discontinue two-step sealed bidding, the agency shall include a statement of the facts and circumstances in the procurement file. Each bidder shall be notified in writing.

### 23.3.2 Step two: pricing offers

Prepare the pricing IFB: Prepare an IFB requesting price proposals which includes the following content, along with the procuring agency's custom content. This is intended as a

partial content guide, as each agency has its own IFB template with appropriate sections to present such content. When requesting pricing proposals, competitive sealed bidding procedures shall be followed except that invitations for price bids shall be issued only to those offerors submitting acceptable technical proposals in step one.

Recommended IFB section	Content description
Cover page	Include a reference to the request for technical proposal title and number and set a specific date and time for receipt of sealed pricing bids.
Proposal instructions	Provide the location for receipt and date, or date and hour, by which the bids must be received.
	If the agency intends to award to other than the lowest priced bidder the set-aside provision must be included in the IFB.
	Prominently state that the bidder's price proposal shall comply with the specifications and the bidder's technical proposal.
	For "combined" two-step competitive IFBs, the instructions must specify that the responses must be submitted in two separate sealed envelopes—one marked "Technical Proposal" and the other "Bid Price"—and bidders must identify both envelopes with the bidder's name, company name and address, and bid reference number.
Proposal requirements	Include a pricing schedule based on the specifications in the bidder's technical proposal.
	Include a reference to the required and non-negotiable general, special and IT/VITA-specific terms and conditions that were included in the technical proposal solicitation.
	Include a statement that the award document shall incorporate by reference the terms and conditions of the solicitation, the bidder's technical proposal, and the bid price.

Receipt and opening of pricing proposals: After the pricing proposals are received a public opening is held via [eVA](#).

- **Uncombined Two Step Competitive Sealed Bids:** Bids are tabulated and the contract is awarded to the lowest responsive and responsible bidder. However, if the provision for award to other than the lowest priced bidder was made in the solicitation, the award may be made to a reasonably priced DSBSD-certified small business including small businesses owned by women, minorities and service disabled veterans or a micro business bidder that is other than the lowest priced bidder.
- **Combined Two-Step Competitive Sealed Bids:** After the technical proposals are opened and evaluated, the price envelopes for those technical proposals selected as acceptable are opened. The envelopes containing the price bids for those proposals determined to be not acceptable will be returned to the bidders unopened. The award is made to the lowest responsive and responsible bidder. However, if the solicitation included a provision for award to other than the lowest priced bidder, the award may be made to a reasonably priced DSBSD-certified small business including small businesses owned by women, minorities and service disabled veterans or a micro business bidder that is other than the lowest priced bidder.

### **23.4 Award document**

The award document shall incorporate in full text or by reference the terms and conditions of the IFB, the bidder's technical proposal, and the bid price.

### **23.5 Procurement file**

The procurement file for a two-step IFB or a combined two-step IFB should contain the following:

- Request for unpriced technical proposals (IFB)
- Confirmation of IFB posting in [eVA](#)
- Any amendments to the IFB
- Copy of notices to bidders whose unpriced technical offers were found to be unacceptable and the basis for such finding
- Written determination to cancel solicitation, if applicable
- Evaluation of unpriced technical offers
- Tabulation of bid pricing through [eVA](#)

Contract award document to lowest responsive and responsible bidder (or, a reasonably priced DSBSD-certified small business including small businesses owned by women, minorities and service-disabled veterans as well as micro business).

## **Appendix A**

### **Two-Step and Combined Two-Step Competitive Sealed Bidding Process Quick Sheet**

#### Two-step IFB process

- Prepare an IFB requesting unpriced technical offers only.
- Post IFB in <https://eva.virginia.gov/>.
- Post any amendments to IFB in <https://eva.virginia.gov/>.
- Receive unpriced technical offers.
- Evaluate unpriced technical offers.
- Identify acceptable unpriced technical offers.
- Invite offerors who submitted acceptable unpriced technical offers to submit pricing offers.
- Pricing bids are tabulated via eVA.
- Contract is awarded to the lowest responsive and responsible bidder unless solicitation provides for set aside to a reasonably priced DSBSD-certified small business including small businesses owned by women, minorities and service disabled veterans as well as micro businesses.

#### Combined two-step IFB process

- IFB requires bidders to submit technical proposals and price bids in response to IFB.
- Offerors are submitted in separate envelopes labeled "technical proposal" and "bid price."
- Technical proposals are evaluated and acceptable technical proposals are identified.
- "Bid price" envelopes for those technical proposals identified as acceptable are opened.
- Award is made to the lowest responsive and responsible bidder unless set aside to a reasonably priced DSBSD-certified small business including small businesses owned by women, minorities and service disabled veterans as well as micro businesses provision was included in the solicitation.

### Chapter highlights

**Purpose:** This chapter presents guidance for planning, issuing, evaluating and negotiating information technology (IT) requests for proposals (RFPs) based on competitive negotiations. It also provides general information on solution-based and performance-based IT projects.

**Key points:**

- Competitive negotiation is VITA's recommended procurement method when an agency has a defined IT need and is requesting suppliers to propose the best solution to meet that need.
- Commit adequate time and resources to gather data for developing the RFP's business, functional and technical requirements.
- It is essential that IT procurement professionals understand the complete cost of a technology-based business solution.

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## 24.0 Introduction

Requests for proposals (RFPs) using competitive negotiation is the recommended procurement method when an agency has defined an information technology (IT) business need and is requesting suppliers to propose the best solution(s) to meet that need.

Competitive negotiation is the result of an RFP acquisition process rather than an invitation for bid (IFB). RFPs using competitive negotiations should always be the procurement method used when the following factors or circumstances exist regarding the business or technology problem—the acquisition need(s) is complex; the project specifications cannot

be clearly defined; factors other than cost need to be evaluated; or there is a need to negotiate.

All RFPs for IT-related goods and services shall be developed with “best value” methodology as the foundation for determining the best supplier.

## **24.1 Pros and Cons of RFPs and Competitive Negotiations**

RFPs promote creative competition among suppliers and allow agencies to comprehensively consider and evaluate all proposed technical approaches and state-of-the-art solutions to fulfill their business need(s). RFP preparation promotes “needs definition” by the business owner, which enables suppliers to provide best-value solutions. The only “con” in the RFP lifecycle is the significant time commitment involved. The RFP process can take anywhere from 6 to 9 months to complete.

## **24.2 Solution-based RFPs and Performance-based Contracting**

### **24.2.1 Solution-based RFPs**

Solution-based RFPs ask suppliers to propose an IT business solution to solve an agency’s identified problems and goals. Solution-based RFPs briefly state the business need, describe the technology problem, and demand minimal specifications and requirements. Suppliers are allowed to use their broad-spectrum technology market expertise, creativity and resources to propose innovative, cost-effective solutions. Solution-based RFPs may request suppliers to provide a solution for only part of a business problem or to propose high-level concept-type solutions which are evaluated based on a detailed set of requirements.

Agencies should strive to minimize requirements and specifications to allow flexibility in the types of solutions being proposed. Specifications and requirements set limits and may eliminate or restrict the items or solutions available for the supplier to include in its proposal. Technology specifications should be written to encourage, not discourage, competition while also attempting to seek economy for the purpose and technology solution intended. An agency is then able to identify the technology solution, not a particular product or service, which will best meet its technology or business need.

Part of the decision-making process of when to use a solution-based RFP involves performing a risk analysis. As part of the risk analysis, the procurement project team resolves the following questions:

Does the technology business problem present an opportunity for mutually beneficial risk sharing between the agency and a supplier?

- What factors could significantly impact the probability of completing our project on time and within budget?
- Is it possible to evaluate the proposed solution equally?
- Can the solution(s) be evaluated based on a total cost of ownership analysis incorporating the anticipated cost of supporting the proposed solution and other financial options?

When preparing a solution-based RFP, some components of the RFP will be different than a non-solution-based RFP. A solution-based RFP should include:

- The agency’s organizational background and current business environment,
- A specific list of processes and procedures related to the project, legal or business mandates,
- Any project procedural or process documentation,
- A clear definition of the agency’s current technical environment including all current



hardware and software being used, that could be used or should be used to address the project requirements,

- A definition of the business or technology problem to be solved, but not a definition of the desired solution or the problem in terms of a desired solution,
- Specifications that describe the characteristics of a technology product, service, or solution being sought.

In a solutions-based RFP, agencies should use technology questions to drive specifications instead of including mandatory requirements in the RFP. The goal is to invite maximum reasonable competition, while procuring the best technology solution for the Commonwealth. VITA utilizes solution-based RFPs for establishing statewide contracts and procuring technology solutions to provide best-value for the Commonwealth. Pose questions to suppliers in the RFP to drive requirements, such as: "What is the industry standard for this product and does your product(s) meet or exceed such standard?"

The goal of a competitively negotiated RFP acquisition is to invite maximum and reasonable competition among the supplier community while procuring the best-value technology solution for the Commonwealth.

#### **24.2.2 Performance-based contracts**

Solution-based RFPs and performance-based contracts go hand in hand. Solution-based RFPs lead to the formation of performance-based contracts and allow suppliers to propose solutions that provide tangible benefits to both the agency and themselves such as:

- Offering a risk-sharing partnership to achieve the optimum solution.
- Suggesting clear, tangible and fair metrics to gauge when the supplier has achieved success and trigger the agency's obligation to pay for performance.
- Offering procedures for price and/or fee reductions when requirements or performance milestones are not met.

### **24.3 Pre-RFP Activities**

#### **24.3.1 Putting together the procurement project team (PPT) and evaluation team (ET)**

It is important to create PPTs and ETs of various stakeholders and perspectives when working on a complex IT procurement. These individuals bring input and guidance for developing a sound RFP; participate in the proposal evaluations and/or subsequent negotiation strategy planning. The table below sets forth VITA's recommendations for the "key" PPT and ET members and their roles during the RFP process. There may be a need to have other participants (e.g., technical, functional, contractual, legal, financial subject matter experts) involved in the evaluation who may not be included in the actual procurement project team and vice versa. Depending on the type and complexity of the project, the Single Point of Contact for the procurement (SPOC) and business owner may choose not to include some procurement project team members in the evaluation process and/or negotiation. It is recommended, however, that these four corners of expertise be represented on the evaluation team: business area, technical area, legal area and financial area.

## Key Procurement Project Team (PPT) and Evaluation Team

Business owner (agency/customer)
<ul style="list-style-type: none"> <li>• Responsible for the “why” justification for the project.</li> <li>• Identifies the business or functional need(s) for products or services.</li> <li>• Ensures compliance with VITA’s (Procurement Governance Review (PGR), project management and/or project governance processes and procedures, as applicable to the project’s complexity and dollar value. Refer to: <a href="https://www.vita.virginia.gov/it-governance/project-management/">https://www.vita.virginia.gov/it-governance/project-management/</a></li> <li>• As applicable, contacts VITA Supply Chain Management Division sourcing staff to discuss engagement in project at: <a href="mailto:SCMinfo@vita.virginia.gov">SCMinfo@vita.virginia.gov</a></li> <li>• Documents background, scope and information related to the business need(s).</li> <li>• Identifies contact names and potential resources available for the project.</li> <li>• Identifies and documents overall objectives, significant events and time frames.</li> <li>• Obtains sourcing project commitment, sponsorship and funding.</li> <li>• Provides input and project accountability.</li> <li>• Assists team with developing the functional and technical requirements and evaluation scorecard.</li> <li>• Coordinates with VITA Enterprise Architecture, Data Standards, Security, Enterprise Cloud Oversight Services (ECOS), as applicable, and Project Management groups and their own information security officer (ISO) to include applicable IT standards and policies into the project/procurement’s mandatory requirements or facilitate any waiver or exception process.</li> <li>• Participates as part of the evaluation team.</li> <li>• Identifies negotiation objectives and participates in negotiations.</li> <li>• Collaborates with the assigned procurement lead to ensure compliance with the Virginia Public Procurement Act, with VITA procurement policies and guidelines and any VITA review processes.</li> </ul>
Subject matter expert(s) (SMEs)
<ul style="list-style-type: none"> <li>• Responsible for the “what” aspect of the sourcing decision.</li> <li>• Develops and documents the RFP’s technical requirements and specifications.</li> <li>• Assists sourcing staff in developing the evaluation criteria and determining the must have or mandatory requirements. May participate in proposal evaluation and determining the short list of suppliers.</li> <li>• SMEs who are Commonwealth employees may participate in the evaluation and supplier selection. Non-Commonwealth employee SMEs may provide information to the ET, but cannot score.</li> <li>• May assist business owner/customer in conducting evaluation-phase tests/pilot programs.</li> </ul>

### Assigned agency procurement lead or sourcing specialist single-point-of- contact (SPOC)

- Responsible for the “who and how” aspect of the sourcing decision
- Leads the sourcing process.
- Facilitates required confidentiality, conflict of interest and/or non-disclosure compliance and documentation.  
Coordinates equal access to PPT and ET and gate-keeps data and information needed by suppliers prior to proposal submission. All suppliers communicate all information associated with RFP and all questions associated with RFP through SPOC. Executive steering committee communicates all information through SPOC.
- Provides pre-established tools and processes (i.e., RFI, RFP, contract, etc.) through the provision of templates, etc.
- Develops the Procurement Project Plan assisted by the business owner and the SMEs.
- Facilitates RFP development, assists with documenting requirements and evaluation criteria, ensures all statutory contract terms are included, and for agencies other than VITA, ensures completion of the SCM Minimum Requirements Matrix for Major and Delegated procurements.
- Completes the RFP package and issues/posts RFP in [eVA](#).
- Updates the executive steering committee and/or PPT and ET on progress
- Facilitates the pre-proposal conference, if held.
- Facilitates the evaluation process to determine the short list of suppliers.
- Leads the negotiation process.
- Ensures compliance with ECOS policies, if applicable.
- Provides financial analysis and performance management support.
- Confirms and documents supplier pre-award compliance with pertinent statutory requirements, etc.
- The Supplier's responsibility to satisfactorily meet requirements of the Supplier Procurement and Subcontracting Plan, including Supplier's variance from planned spend in the Supplier Procurement and Subcontracting Plan, Supplier's inability or refusal to certify compliance with the Plan – or for VITA statewide contracts, failure to report monthly spend information to VITA through the [Supplier Reporting System \(SRS\)](#) – during performance of the Contract.
- Maintains contract form agreements and, for VITA, coordinates contract issues with VITA's SCM policy and governance and executive managers.
- Prepares contract for execution and updates contracts database.
- Conducts contract kick-off/orientation meeting.
- For VITA statewide contracts, VITA SPOC facilitates creation of [eVA](#) catalog.

### SCM contracts and governance management

- Provides RFP review/approval and guidance on contractual issues.
- Responsible for compliance with Virginia law and VITA policy requirements.
- Responsible, as applicable to cloud procurements, for compliance with ECOS policy and processes.
- Responsible for the “compliance” aspect of the RFP process and related documents.

#### 24.3.2 Is an executive steering committee needed?

An executive steering committee may be created in support of any project as determined by the business owner; however, for major IT projects and large enterprise procurements, an executive steering committee may be required. The executive steering committee is usually comprised of business owners and executives who serve in an advisory role and may assist in developing business needs and requirements. The executive steering committee will not be involved in the evaluation process. This committee provides management oversight to the PPT while also validating the project's business objectives, funding, requirements and supplier selection.

If an executive steering committee is used to oversee the IT procurement, the committee will interact with the PPT & ET at several stages during the procurement process. Prior to issuing the RFP, the SPOC and/or others on the PPT will prepare and present the final RFP package, other required information and an executive summary to the executive steering committee. The SPOC and other PPT participants are responsible for ensuring and documenting that the executive steering committee reviews and approves the RFP prior to its formal posting and release.

The PPT and ET determine which negotiation issues are important to the executive steering committee and ensure they are included in the negotiation plan. The business owner should obtain preliminary funding approval before issuing an RFP for any project that does not have approved funding. This practice will send the message to the supplier community that the sourcing agency is serious about the project and is respectful of the supplier's time and money.

#### 24.3.3 Develop the RFP time table

The RFP time table is the project plan for completing the sourcing phase of the project. This timeline is often a subset of a larger project initiative. The SPOC will work with the project's SMEs to formally establish deliverable dates for the PPT. This will take into consideration the time and availability of resources required to:

- Develop, review and finalize the RFP package and evaluation matrix
- issue the RFP
- Evaluate the responses
- Test the product and/or conduct site visits
- negotiate
- Have an ECOS assessment conducted, if applicable
- Obtain approval of final contract from Office of Attorney General (OAG), if applicable
- Review and obtain final CIO approval to award, if applicable

The SMEs and other team resources will provide input into the sourcing process timeline which meets the business owner's expectations. This time table acts as a completed Procurement Project Timeline available for internal distribution to the PPT. The overall project documentation should be updated to reflect this time table. The availability of the business owner, SMEs, SPOC and other resources should be verified and scheduled as appropriate. It is important to manage the resource risk factor by identifying all team members and documenting their roles and responsibilities before going any further. See Appendix F, VITA SCM RFP Timeline Template (provided as an example).

#### 24.3.4 Determination to utilize a request for information (RFI) or request for qualifications (RFQ) prior to the RFP

There may be instances when many unknowns exist regarding the project—the types of solutions or software available in the market, industry data, market pricing or critical information and so forth. Likewise, there may be desired solutions or software for the project for which suppliers that can provide such needs cannot be located. In these cases, it may be in the project's best interest to issue an RFI or RFQ as a preliminary data gathering step, rather than beginning with RFP issuance. Read [Chapter 18](#), "Requests for Information", Prequalification of Suppliers, Unsolicited Proposals, for more instruction on this preliminary procurement method.

#### 24.3.5 Determination if the procurement should be set aside for DSBSD-certified small businesses.

All procurements under \$100,000 shall be set-aside for award to small businesses, including those owned by women, minorities, service-disabled veterans and may include micro businesses when the price quoted is fair and reasonable and does not exceed 5% of the lowest responsive and responsible bidder. While it is unlikely that an RFP would be developed for a procurement under \$10,000, if that is the case, the RFP shall be set aside for micro businesses. (See Executive Order 35).

#### 24.3.6 Determining if the RFP can be prepared in a manner to enhance small business participation.

The following should be considered in order to remove any potential barriers or limitations that could discourage a DSBSD-certified small business to submit proposals:

- Unbundling requirements
- Relaxing the requirement for mandatory attendance at pre-proposal meetings
- Expanding response time for proposal submission
- Relaxing any requirements for on-site demonstrations
- Streamlining required paperwork and/or documentation

## 24.4 Confidentiality

#### 24.4.1 Communications with potential suppliers prior to RFP posting/release

It might be useful to exchange information with potential suppliers prior to posting the RFP to improve the supplier community's understanding of the project's requirements. Pre-solicitation exchange of information between the procuring agency and the supplier community can identify and resolve concerns regarding the project's acquisition strategy (Is it appropriate for the type of solution or product being procured?) or the proposed contract type. Suppliers can also provide input regarding the feasibility of the requirements anticipated for inclusion in the RFP, including performance requirements, statements of work and data requirements.

Section [2.2-4373](#) of the *Code of Virginia* (Participation in bid preparation; limitation on submitting bid for same procurement) provides that: "No person who, for compensation, prepares an invitation to bid or request for proposal for or on behalf of a public body shall

(i) submit a bid or proposal for that procurement or any portion thereof or (ii) disclose to any bidder or offeror information concerning the procurement that is not available to the public. However, a public body may permit such person to submit a bid or proposal for that procurement or any portion thereof if the public body determines that the exclusion of the person would limit the number of potential qualified bidders or offerors in a manner contrary to the best interests of the public body."

#### **24.4.2 Confidentiality during RFP development**

During RFP document development and prior to RFP posting, the specific content and requirements shall remain confidential. The SPOC shall coordinate the execution of formal confidentiality/non-disclosure agreements with all PPT and ET members and SMEs. The SPOC will maintain the executed confidentiality agreements in the procurement file. A VITA-approved confidentiality agreement template, called the Procurement Project/Evaluation Team Confidentiality and Conflict of Interest Statement, is available in Appendix A of this chapter.

#### **24.4.3 Confidentiality of RFP and proposals prior to proposal opening**

All PPT and ET members, SMEs and any others participating in proposal evaluations will execute a Procurement Project/Evaluation Team Confidentiality and Conflict of Interest Statement prior to receiving proposals. A template of this Agreement is available in Appendix A. The SPOC will maintain the executed agreements in the procurement file.

#### **24.4.4 Confidentiality during the evaluation of proposals**

The SPOC should instruct PPT and ET members to take all precautions to prevent unauthorized access to supplier proposals. Team members should not discuss proposal content with anyone, except for other ET members during team evaluation time or with SMEs who have signed a confidentiality agreement for the procurement. All clarifications submitted by any supplier during the proposal evaluation phase are also held as confidential as the original proposal.

If, during the proposal evaluation process, the contents of any proposal become intentionally or unintentionally exposed to a third party outside of the ET, the affected supplier must be notified of such exposure. If the contents of any proposal become intentionally or unintentionally exposed to an internal third party who is internal to the agency but not a member of the ET, the third party must execute a Procurement Project/Evaluation Team Confidentiality and Conflict of Interest Statement (Appendix A) and must be instructed on the importance of proposal confidentiality.

### **24.5 Preparing an RFP**

When preparing an RFP, resolve the issues and questions in Appendix B, Checklist of Issues to Resolve Before and During RFP Preparation, and follow these best practice recommendations:

- The RFP planning and the RFP document should be comprehensive. The RFP should be written in plain, straight-forward language avoiding ambiguous, conflicting and undefined terms. All acronyms and other critical terms should be defined.
- VITA SCM Only: Use the technology sourcing process (TSP) model for preparing and evaluating an RFP.
- Use a standard and/or authorized RFP template. This helps ensure all project needs are identified and clearly communicated to suppliers. The RFP template includes a “laundry list” of typical issues that need to be addressed to trigger productive thought processes and ensure that no requirements are overlooked. VITA has developed an RFP template for use by VITA sourcing specialists. Training for customer agencies on the use of this template will become available from VITASCM at a future date and should be undertaken prior to first-time use.
- Provide all information needed for any outside party to understand the current situation or business need, the desired solution and the terms and conditions of the future relationship.

- Use extra diligence in preparing questions for suppliers which shape technical and functional requirements. These are the “meat” of the RFP.
- Address quality assurance, performance standards and measures, service level expectations, etc.
- Address upgrades, enhancements, expansions, modifications, disaster recovery, business assurance, training as well as environmental, confidentiality and federal, state and local security and data privacy standards.
- Include appropriate requirements, the proposed IT contract template (see [Chapter 25](#), IT Contract Formation.) (Other agencies: see box text below.) This places the burden of understanding on the suppliers to have a handle on the project’s requirements and prepare fully responsive proposals. Include distinct and measurable performance metrics and clear enforcement provisions, including penalties or incentives in the draft contract that is prepared with the RFP.

VITA has developed and approved IT contract templates that are customized for the specific type of IT acquisition: Services, Software, Solution, Hardware, Hardware Maintenance, Cloud, and EULA license addendum. Other agencies should be trained in using these prior to use. Until that occurs, agencies should use their own templates and ensure the Minimum VITA Requirements for Agency Delegated RFPs/Contracts provisions are included in the RFP. This can be found on SCM’s website at this location under the Forms section: <https://www.vita.virginia.gov/supply-chain/scm-policies-forms/>

Refer to [Chapter 28](#) for more information on required security and cloud related terms and conditions.

Once the requirements are completed, in addition to the agency’s general contract terms, appropriate IT terms should be included, as well as any special terms to cover any extraordinary risk(s) associated with the project. VITA sourcing specialists will use the approved template or master definitions and terms that match the procurement type, while agencies should include all necessary provisions that relate to the IT procurement such as necessary terms related to services, hardware, or software that may include: Ownership of Intellectual Property, Third Party Acquisition of Software, Software Upgrades, Software Disposition, Source Code, Term of Software License, special warranties, etc. Agencies who have received delegated authority to conduct their own IT procurements may request assistance for complex solution, application service provider, and/or software as a service type IT procurements by contacting SCM at the following address: [scminfo@vita.virginia.gov](mailto:scminfo@vita.virginia.gov).

If an agency is planning to publish an RFP for a procurement that is anticipated to result in a “high risk contract”, as defined by [§ 2.2-4303.01](#) of the *Code of Virginia*, VITA and the OAG must review the RFP prior to publication. Such reviews will be conducted within 30 business days, and include an evaluation of the extent to which the RFP complies with applicable state law, as well as an evaluation of the appropriateness of the RFP’s terms and conditions.

Agencies are required to contact VITA’s Supply Chain Management (SCM) at: [scminfo@vita.virginia.gov](mailto:scminfo@vita.virginia.gov) during the procurement planning stage prior to the issuance of a solicitation. SCM will provide assistance to the agency in preparing and evaluating the RFP and identifying and preparing the required performance measures and enforcement provisions.

A project that is part of a larger federal initiative or one funded with federal money may require including specific terms that must be flowed down from the funding sponsor or from federal statute. Examples are: the HITECH and HIPAA Acts for health records related



projects. Obviously, this type of project or a project related to data within any Commonwealth agency that processes private health, confidential or sensitive citizen information; i.e., Department of Health, Department of Motor Vehicles, or Department of Social Services, may have special security or data protection needs as well. Procurement officials should seek, ask, research available internal sources, OAG and VITA to determine the requirements for such special terms and conditions.

It is important to perform a quality review of the solicitation to remove redundant, ambiguous and conflicting terms.

#### **24.5.1 Contents of an RFP**

A basic IT RFP consists of certain minimum sections. Refer to Appendix D, Contents of a Quality IT RFP, to view them.

#### **24.5.2 Preparing and writing RFP requirements**

The requirements document is the official statement of what is necessary for the project, solution, system or IT software and/or hardware. It is not a design document. It shall set forth what the project, system, solution, software and/or hardware should do, rather than how it should do it. RFPs shall include both a definition and a specification of requirements as well as functional and technical data relating to those requirements. Refer to [Chapter 8](#) and [Chapter 12](#) of this manual for detailed instruction on developing successful requirements, specifications and statements of work. For the purpose of this chapter, a Requirements Verification Checklist is provided in Appendix E, as a quick reference only.

#### **24.5.3 Commonwealth security and cloud requirements for IT solicitations and contracts**

Section [2.2-2009](#) of the *Code of Virginia* mandates that the Chief Information Officer (CIO) is responsible for the development of policies, standards, and guidelines for assessing security risks, determining the appropriate security measures and performing security audits of government electronic information. Such policies, standards, and guidelines shall apply to the Commonwealth's executive, legislative, and judicial branches and independent agencies.

Further, it requires that any contract for information technology entered into by the Commonwealth's executive, legislative, and judicial branches and independent agencies require compliance with applicable federal laws and regulations pertaining to information security and privacy. While agencies are required to comply with all security policies, standards and guidelines (PSGs), Security Standard SEC525-02 provides agency compliance requirements for non-CESC hosted cloud solutions. These PSGs are located at this URL: <https://www.vita.virginia.gov/it-governance/itrm-policies-standards/>

In addition to Security Standard SEC525-02, for any procurements for third-party (supplier- hosted) cloud services (i.e., Software as a Service), since agencies have \$0 delegated authority to procure these types of solutions, there is a distinct process for obtaining VITA approval to procure. Refer to the "Third Party Use Policy" in the link above. Your agency's Information Security Officer or AITR can assist you in understanding this process and in obtaining the required documentation to include in your solicitation or contract. There are specially required Cloud Services terms and conditions that must be included in your solicitation and contract, and a questionnaire that must be included in the solicitation for offerors to complete and submit with their proposals. In addition, if a procurement is a cloud-based procurement (i.e., off-premise hosting), following VITA's selection of the best proposal(s) representing best value to the commonwealth, Supplier's failure to successfully answer, negotiate and/or comply with any resulting security exceptions that may arise in order to approve Supplier's cloud application, may result in



removal from further consideration. Refer to Chapter 28 for more information. You may also contact: [enterpriseservices@vita.virginia.gov](mailto:enterpriseservices@vita.virginia.gov)

**24.5.4 Preparation instructions for presentations/demonstrations/site visits** VITA highly recommends that demonstrations, presentations, testing or pilot programs and/or site visits be used in the evaluation process. If they will be evaluated, below are guidelines or instructions which may be included in the RFP, but are not required:

- Description of the topics the supplier must address and the technical and management factors that must be covered in the demonstration and/or presentation.
- Statement covering the total amount of time that will be available to each supplier to give their demonstration and/or presentation.
- Description of limitations on agency and supplier interaction before, during and after the scheduled demonstration, presentation, testing and/or site visit.
- Statement that the presentation or demonstration will constitute clarifications only.
- Description and characteristics of the demonstration and/or presentation site.
- Rules governing the use of presentation media.
- Anticipated number of participants.
- Description of the format and content of presentation documentation and their delivery.
- Testing and/or pilot program requirements including time limits, materials, auditing, etc.
- Site visit requirements including location, costs, availability, etc.

**24.5.5 Preparing the evaluation criteria and evaluation process**

The PPT and/or ET creates the evaluation criteria used to review and evaluate proposal responses with the purpose of collecting the data needed to agree on a selection in a fair and competitive environment. The evaluation criteria used to assess proposals consists of the factors that reflect the areas of importance to an agency in its selection decision.

Through the evaluation factors, the ET is able to assess similarities, differences, strengths and weaknesses of competing proposals and, ultimately, use that assessment in making a sound source selection decision. A well-integrated evaluation scheme provides consistency, discipline, and rationality to the source selection process. Evaluation shall be based on the evaluation factors set forth in the RFP. Factors not specified in the RFP shall not be considered in determining supplier selection.

Written evaluation criteria that are measurable and objective shall be used as the standard for assessing proposals. Convert “feel good” objectives into observable, measurable criteria. Identifying the evaluation criteria prior to developing the RFP and tailoring the RFP around the evaluation criteria will ensure an expedited review of proposals. All PPT and/or ET members must agree with the weighting assigned in the evaluation matrix.

The evaluation criteria should be completed before the RFP is posted. In the event a numerical scoring system will be used in the evaluation of proposals, the point values assigned to each of the evaluation criteria shall be included in the RFP or posted at the location designated for public posting of procurement notices prior to the due date and time for receiving proposals. See Section [2.2- 4302.2\(A\)\(3\)](#) of the Code of Virginia.

Evaluation criteria should be tailored to each acquisition and include only factors which have a direct impact on source selection. The nature and types of evaluation criteria to be used for an acquisition are within the broad discretion of the procuring agency. In supporting the best-value concept, price or cost must be an evaluation factor in every

source selection.

Contracts can only be awarded at costs or prices that have been determined to be fair and reasonable. The evaluation of cost or price may include not only consideration of the cost or price to be paid to the supplier, but other costs that a project may incur as a result of awarding the contract (i.e., total project life-cycle cost). Examples of these costs include re-training costs, system or software conversion costs, power consumption, life cycle costs including out-year maintenance and support, and transportation costs. In these cases, the RFP should clearly identify these other costs that will be considered in the evaluation.

Non-cost factors address the evaluation areas associated with technical and business management aspects of the proposal. Examples of non-cost factors include technical and business management related areas, such as technical approach and understanding, capabilities and key personnel, transition plans, management plan, management risk, and resources. The level of quality needed or required in performance of the contract is an important consideration in structuring non-cost factors. Past performance, supplier business maturity and service quality should be included in the evaluation criteria but may be included as non-cost factors.

Another example of non-cost evaluation criteria is whether the proposer employs people with disabilities that will perform the specifications of the contract. [Per § 2.2-4302.2\(A\)\(3\)](#) of the *Code of Virginia*, a public body may include a proposer's employment of disabilities to perform the specifications of the contract as a factor in evaluating the proposal. See Chapter 7 for more information on how VITA is supports the Commonwealth's socioeconomic initiatives.

The business owner, working with the PPT and/or ET, must determine the evaluation criteria and address how the pricing model (if applicable) will be applied. The evaluation shall be based on best-value methodology, but broad discretion is allowed when selecting evaluation criteria as long as the criteria are relevant to the project. It is strongly recommended that most RFP procurements be solution-based (i.e., define the problem and allow suppliers to submit proposed solutions). Carefully consider the necessity of including mandatory (must-have) requirements which may limit the number of qualified suppliers who can respond to the RFP. Each criteria used shall be defined in the RFP with enough information for the supplier to understand how the successful supplier(s) will be determined. It is recommended that the ET establish rules for how to deal with a situation when the team cannot reach a consensus at any point in the evaluation process.

The agreed-upon evaluation criteria are confidential to the procuring agency, members of the executive steering committee (if one is used), and the procurement project team and/or the evaluation team at all times.

#### 24.5.6 Types of evaluation criteria

Evaluation criteria for IT procurements can usually be divided into these primary categories:

- Technical capability, including the supplier's understanding of the procurement requirements, the supplier's management plan, the quality of the proposed solution, the quality of the goods and services being proposed, the experience and qualifications of supplier's key personnel and vendor resources.
- Management capability, including the supplier's experience on similar projects; the supplier's past performance on similar projects; the supplier's available facilities and resources for the project; and the supplier's plan and business maturity level of processes for management and control of the project.
- Cost reasonableness and competitiveness, including the supplier's proposed price

(for fixed-price contracts); the realistic expected cost of performance, plus any other costs, such as that of ownership, including transportation costs, and life-cycle costs (installation, operation, maintenance, security and disposal).

- Supplier's status as a DSBSD-certified small business or micro business, including small businesses or micro businesses that are owned by minorities or women, and the Supplier Procurement and Subcontracting Plan, if the bidder is not a small business.
- Supplier's record of compliance with small business requirements

#### 24.5.7 Examples of IT evaluation criteria

The most common evaluation criteria used in IT procurements are assessment of the supplier's:

EVALUATION CRITERIA EXAMPLES	
Proposal quality including required submission and format, readability, neatness, and clarity. The proposal should be logical, reasonable and professional.	✓
Understanding and responsiveness to the RFP's requirements, terms and conditions.	✓
Technical approach and compliance with the RFP's technical requirements.	✓
Overall approach to performing the contract or meeting the requirements of the RFP, including warranty offerings.	✓
Proposed plan for performing needed services.	✓
Overall understanding of the project and the business need(s).	✓
Proposed methodology for performing the project.	✓
Proposed implementation/orientation/start-up procedures and efforts.	✓
Commitment and flexibility to the project's schedule requirements.	✓
Approach and plan for managing the project.	✓
Training, reports and documentation offered.	✓
Proposed maintenance plan and costs.	✓
Expansion and upgrade capabilities and costs.	✓
Problem resolution/escalation process.	✓
Willingness and approach to meet environmental objectives (if applicable).	✓
Non-acceptance of statutory and crucial contractual terms and conditions	✓

#### 24.5.8 Supplier evaluation criteria

The qualifications and experience of the supplier are crucial to the success of the project. The following evaluation criteria may assist agencies in determining which suppliers would be most beneficial to the project:

Past performance with similar projects and past performance of supplier's proposed personnel, consultants, or subcontractors who are specified to be assigned to the project.	✓
Experience with similar projects including a record of recent past performance of similar projects of similar scope.	✓
Performance on similar contracts with respect to such factors as control of costs, quality of the work, and the ability to meet schedules. Supplier reliability and past performance can be verified by contacting proposed references and other government and commercial customers.	✓
Availability to perform the project or provide the needed goods and services within the agency's time frame. Supplier should have the personnel, equipment, and facilities to perform the services currently available or demonstrated to be made available at the time of contract award. This criterion should include considering the current and projected workloads of the supplier that would affect its ability to perform the required work on schedule, and the availability of key personnel to be assigned to the project.	✓
Reputation for personal and professional integrity and competency.	✓
Financial strength and stability. Supplier's financial capability can be verified by obtaining a credit rating service report or obtaining certified financial	✓
Proposed quality control plan (QCP), if applicable.	✓
Record of compliance with public policy issues and statutory requirements.	✓
Status as a DSBSD-certified small business or prime supplier's planned use of small businesses	✓
Record of compliance with small business subcontracting plan requirements	✓
Record of satisfactory performance and contract compliance on previous contracts with VITA or the Commonwealth, if any.	✓
Interviewing supplier key personnel	✓
Short-listed supplier presentations	✓

If the acquisition is aimed at contracting with a service provider, below are some additionally recommended best practice evaluation criteria:

Supplier's process maturity and competence	✓
Supplier's vertical knowledge, approach to performing the contract or meeting the service level requirements	✓
Supplier's proposed geographic coverage. If supplier will subcontract for portions of the geographic coverage, validate the competence, knowledge and experience of the proposed subcontractors	✓
Supplier's project management abilities and proposed management plan	✓
Supplier's infrastructure capabilities and software product knowledge	✓
Supplier's organizational change management skills and implementation tools	✓

#### 24.5.9 Weighting the evaluation criteria

The SPOC and ET may use discretion in determining how to score proposals, provided that it is not arbitrary. If criteria are weighted, do this with caution to assure that they are properly weighted in accordance with the importance of each criterion.

Note: If using the VITA RFP template, the evaluation criteria are derived directly from section 5 (Functional and Technical Requirements) and section 6 (Supplier Profile) of the template, as well as the supplier's response to the proposed contractual terms and conditions.

Section [2.2-4302.2](#) of the *Code of Virginia* provides as follows:

"Issuance of a written Request for Proposal indicating in general terms that which is sought to be procured, specifying the factors that will be used in evaluating the proposal, indicating whether a numerical scoring system will be used in evaluation of the proposal, and containing or incorporating by reference the other applicable contractual terms and conditions, including any unique capabilities, specifications or qualifications that will be required. In the event that a numerical scoring system will be used in the evaluation of proposals, the point values assigned to each of the evaluation criteria shall be included in the Request for Proposal or posted at the location designated for public posting of procurement notices prior to the due date and time for receiving proposals. No Request for Proposal for construction authorized by this chapter shall condition a successful offeror's eligibility on having a specified experience modification factor."

#### 24.5.10 Methodologies for weighting criteria

If weighting criteria is used or a numerical score system is used, the point values assigned to each of the evaluation criteria shall be included in the RFP or publicly posted prior to the due date and time for receiving proposals. Agencies are free to design rating plans which best achieve their business needs and the requirements of a particular procurement. The key in using any rating system is consistent application by the evaluators. If additional guidance on weighting or numerical scoring systems is desired, please contact [SCMinfo@vita.virginia.gov](mailto:SCMinfo@vita.virginia.gov).

#### 24.5.11 Supplier's obligation to understand RFP content and specifications

When suppliers sign and submit a proposal, they are communicating that they have read and understood all of the content, requirements, terms and conditions and specifications of the RFP. Each proposal should include an intent to contract statement that is signed by an authorized representative of the supplier stating their understanding of this obligation.

Make sure these requirements are clearly stated in the proposal requirements section of the RFP.

#### 24.5.12 Completing the RFP package

A comprehensive RFP package, including all of the appendices will be assembled by the SPOC with the assistance of the other PPT members. The SMEs will provide the completed technical requirements sections of the RFP and participate in final review of the completed RFP. The business owner shall provide the completed business and functional requirements sections of the RFP and participate in final review of the completed RFP. The SPOC is accountable for a complete, comprehensive RFP package. When finalizing the RFP package prior to posting, the SPOC shall:

- Review the RFP sections submitted by SMEs and the business owner for accuracy, completeness and clarity, assuring the overall quality of RFP.

- Draft the remaining content of the RFP, including general and VITA's IT-specific terms and conditions.
- Select and include the appropriate and approved VITA IT contract template.

Non-VITA SPOCs shall use their agency's contract format until they receive training in VITA's contract template usage or request VITA's assistance in template training. It is required that agencies use the "VITA Minimum Contractual Requirements for "Major" Technology Projects" matrix for major projects requiring CIO approval and it is highly recommended for use in all delegated IT procurements. The matrix may be found on SCM's website at this location under the Forms section:

<https://www.vita.virginia.gov/supply-chain/scm-policies-forms/> that non-VITA SPOCs shall use to confirm inclusion of certain critical IT contractual terms and conditions.

(Note: Be sure to include a statement that any supplier redlines to the RFP and terms and conditions should exclude exceptions or recommended language revisions to any provisions regarding liability. This will be requested from supplier only at time of negotiations.) This requirement is due to the following language in § [2.2-4302.2](#):

"In the case of a proposal for information technology, as defined in § [2.2-2006](#), a public body shall not require an offeror to state in a proposal any exception to any liability provisions contained in the Request for Proposal. Negotiations shall then be conducted with each of the offerors so selected. The offeror shall state any exception to any liability provisions contained in the Request for Proposal in writing at the beginning of negotiations, and such exceptions shall be considered during negotiation."

- Route the complete final draft RFP package to appropriate internal, VITA or other reviewers/approvers.
- Lead the PPT in final review of RFP and all attachments.
- Finalize and complete the RFP package, including all attachments, which should be ready to be issued pending executive steering committee approval, if needed.
- Begin documenting issues for negotiation strategy planning.

#### **24.5.13 Indemnification and Liability Terms are limited in Major IT Projects**

If the RFP is for a major information technology project (see § [2.2-2006](#) for definition of "major information technology project"), § [2.2-2012.1](#) will apply. Section [2.2-2012.1](#) provides that terms and conditions relating to indemnification and liability of a supplier must be reasonable and shall not exceed in aggregate twice the value of the contract in any contract for a major information technology project.

"§ [2.2-2012.1](#). Major Information Technology Project Procurement: Terms and Conditions

A. For purposes of this section, "supplier" means an offeror with whom the Commonwealth has entered into a contract for a major information technology project.

B. Except as provided in subsection C, in any contract for a major information technology project, terms and conditions relating to the indemnification obligations and liability of a supplier shall be reasonable and shall not exceed in aggregate twice the value of the contract. There shall be no limitation on the liability of a supplier for (i) the intentional or willful misconduct, fraud, or recklessness of a supplier or any employee of a supplier or (ii) claims for bodily injury, including death, and damage to real property or tangible personal property resulting from the negligence of a supplier or any employee of a supplier.

C. If the CIO believes that a major information technology project presents an exceptional

risk to the Commonwealth, he shall conduct a risk assessment prior to the issuance of a Request for Proposal. Such risk assessment shall include consideration of the nature, processing, and use of sensitive or personally identifiable information. If the risk assessment concludes that the project presents an exceptional risk to the Commonwealth and the limitation of liability amount provided in subsection B is not reasonably adequate to protect the interest of the Commonwealth, the CIO may recommend and request approval by the Secretary of Administration to increase the limitation of liability amount.

The CIO shall make such recommendation in writing setting forth the reasons that the limitations in subsection B are not adequate to protect the Commonwealth's interests. The recommendation shall describe the risks presented to the Commonwealth and how those risks are not sufficiently mitigated by the expected terms and conditions associated with the Request for Proposal. The CIO shall recommend a reasonable maximum alternative limitation of liability amount that is a multiple of the contract value, with the same exceptions to the limitation as provided in subsection B.

The Secretary of Administration shall review and may approve any recommended maximum alternative limitation of liability amount to be included in any Request for Proposal issued for the project. The CIO shall annually publish a list of all approvals granted under this subsection pertaining to any Request for Proposal issued in the previous 12-month period.

D. Notwithstanding the provisions of this section, the Commonwealth may agree to a lower limitation for any contract subject to subsection B or C."

## **24.6 Issuing the RFP**

The SPOC will issue the approved final RFP. Once the finalized RFP is posted in [eVA](#), the requirements definition phase of the procurement is concluded, the evaluation phase begins leading into the negotiation phase. The SPOC shall continue to serve as single point of contact during all phases of the procurement.

Any member of the PPT and/or ET shall NOT disclose any evaluation criteria, requirements, or budget information to anyone not on the PPT and/or ET prior to the posting of the RFP. Team members should be prepared to tactfully decline should a supplier contact them for information and provide the supplier with the SPOC's phone number or e-mail address.

## **24.7 Posting and advertising the RFP**

Section [2.2-4302.2\(A\)\(1\) and \(2\)](#) of the *Code of Virginia* provides as follows:

"1. Issuance of a written Request for Proposal indicating in general terms that which is sought to be procured, specifying the factors that will be used in evaluating the proposal, indicating whether a numerical scoring system will be used in evaluation of the proposal, and containing or incorporating by reference the other applicable contractual terms and conditions, including any unique capabilities, specifications or qualifications that will be required. In the event that a numerical scoring system will be used in the evaluation of proposals, the point values assigned to each of the evaluation criteria shall be included in the Request for Proposal or posted at the location designated for public posting of procurement notices prior to the due date and time for receiving proposals. No Request for Proposal for construction authorized by this chapter shall condition a successful offeror's eligibility on having a specified experience modification factor;

2. Public notice of the Request for Proposal at least 10 days prior to the date set for receipt of proposals by posting on the Department of General Services' central



electronic procurement website or other appropriate websites. Public bodies may also publish in a newspaper of general circulation in the area in which the contract is to be performed so as to provide reasonable notice to the maximum number of offerors that can be reasonably anticipated to submit proposals in response to the particular request. Posting on the Department of General Services' central electronic procurement website shall be required of (i) any state public body and (ii) any local public body if such local public body elects not to publish notice of the Request for Proposal in a newspaper of general circulation in the area in which the contract is to be performed. Local public bodies are encouraged to utilize the Department of General Services' central electronic procurement website to provide the public with centralized visibility and access to the Commonwealth's procurement opportunities. In addition, proposals may be solicited directly from potential contractors. Any additional solicitations shall include certified businesses selected from a list made available by the Department of Small Business and Supplier Diversity;"

Refer to VITA SCM policy, IT Procurement Policy for Enhancing Opportunities for Small, Women-and Minority-owned Businesses, at this website location for soliciting small business participation and complying with this VITA policy: <https://www.vita.virginia.gov/supply-chain/scm-policies-forms/scm-policies/>

## 24.8 Events That May Occur During the Posting Period

### 24.8.1 Pre-proposal conference

When the PPT elects to conduct a pre-proposal conference or teleconference, it is held prior to the proposal due date. The conference is open to all suppliers. It is recommended that a pre-proposal conference not be designated as mandatory unless absolutely critical, as it may discourage suppliers from responding to the RFP. Conferences may be held in person at a selected site or be conducted via teleconference or other available meeting technologies that are accessible to all interested suppliers. The SPOC schedules and coordinates any pre-proposal conference. The pre-proposal conference invitation may limit the number of attendees per supplier. The PPT members agree to specific roles in responding to questions during the conference.

- **SPOC:** The SPOC may request that suppliers submit written questions at least three business days in advance of the pre-proposal conference. The SPOC shall contact the PPT members and obtain responses to all submitted questions for presentation at the pre-proposal conference. The SPOC shall make the necessary hosting arrangements and lead the pre-proposal conference.
- **SMEs & business owner:** The SMEs and business owner shall respond to questions submitted by the suppliers in writing through the SPOC in a timely matter during the posting period.
- **Suppliers:** Suppliers must notify the SPOC of their intent to attend, and submit questions in advance of attending the conference. When applicable, the deliverable is a completed pre-proposal conference, with all suppliers receiving documented answers to all submitted questions.
- **PPT:** The PPT should make every effort to create a level playing field for all suppliers by providing equal access to information. The PPT should take advantage of the pre-proposal conference to reinforce the importance of the SPOC during the entire procurement process.

### 24.8.2 Information requests during the posting period

All material information concerning the RFP or the procurement process shall be posted on



eVA. Non-material information will not be posted. These written responses usually include answers to material supplier inquiries, RFP amendments and clarifications, any additions or modifications to procurement process rules and any responses to inquiries concerning the RFP evaluation criteria. All communications with suppliers during the posting period should go through the SPOC. Only the SPOC should contact any supplier.

#### 24.8.3 Issuing amendments to an RFP before proposal due date

An RFP may be amended by the SPOC issuing a written addendum prior to the date and time set for receipt of proposals. Such addenda shall be posted on eVA and the agency website where the RFP is displayed. All addenda must be signed and returned by all suppliers to the SPOC with their proposals. If a deadline extension is granted to any supplier it must be granted to all of the suppliers. VITA does not accept late proposals.

### 24.9 Cancelling an RFP

#### 24.9.1 Cancellation of a Solicitation

An Invitation for Bids, a Request for Proposal, any other solicitation, or any and all bids or proposals, may be canceled or rejected. When canceling a written solicitation not created in eVA, all vendors who have been issued a solicitation must be notified, and the notice must be publicly posted. When canceling a Quick Quote solicitation in eVA, the purchasing office is not required to notify vendors of the cancellation. When canceling an eProcurement solicitation in eVA, the cancellation shall be made through eProcurement which will update the posting on VBO Buyer. All premium vendors registered for the commodity code used for the solicitation will be automatically notified. Other vendors may view the status of the solicitation in the VBO to see that the solicitation has been cancelled. If the solicitation was posted on the VBO, the solicitation must be cancelled by the issuing purchasing office using VBO Buyer in order to notify vendors of the cancelled solicitation. The reason for cancellation shall be documented and made a part of the contract file. A public body shall not cancel or reject an Invitation for Bid, a Request for Proposal, any other solicitation, bid or proposal solely to avoid awarding a contract to a particular responsive and responsible bidder or offeror (*Code of Virginia*, § [2.2-4319](#)). Personnel responsible for opening bids or proposals must be notified of the cancellation to prevent responses from being inadvertently opened. [...] If a program is canceled after receipt and opening of bids or proposals, original documents will remain a part of the procurement transaction file.

Bidders or Offerors should be notified in writing that the program has been canceled and that duplicate proposals, if provided, will be destroyed unless the Offeror requests their return (APSPM <https://dgs.virginia.gov/procurement/policy-consulting--review/policy/>).

#### 24.9.2 Cancellation before proposal due date

If an RFP has been issued and the due date has not arrived, the RFP may be canceled. The following procedure should be used in such instances:

- A cancellation notice must be posted promptly through eVA and where the RFP is displayed at the time of original release (i.e., newspaper(s) of general circulation and agency website), stating that the decision to cancel the RFP has been reached;
- Notice shall also be provided to all agency personnel responsible for receipt and opening of proposals to prevent responses from being unintentionally opened;
- Any proposals received should be returned unopened to the supplier;
- The reasons for cancellation and/or rejection of any proposal shall be made part of the agency procurement file.

A public body may cancel an RFP, or reject proposals at any time prior to making an award,

but may not cancel an RFP or reject a proposal to avoid awarding a contract to a particular supplier. See § [2.2-4319](#) of the *Code of Virginia*.

#### **24.9.3 Cancellation after proposal due date**

When the RFP due date is past and proposals have been received and opened, the proposals may be rejected and the procurement canceled at any time prior to award. The following procedure will be used in such instances:

- A cancellation notice must be posted promptly through [eVA](#) and wherever the RFP was advertised at the time of original release (including the newspaper of general circulation if applicable), stating that the decision to cancel the RFP has been reached.
- The opened proposals will remain as part of the procurement file.
- Any duplicate proposals may be destroyed unless the supplier requests that these proposals be returned at their expense.
- The reasons for cancellation or rejection shall be made part of the procurement file.

When a solicitation is cancelled, the procurement file including all received proposals remains confidential and will become part of the new solicitation procurement file. In the event that a new solicitation is not issued within a period of 12 months from the date of cancellation, the procurement file shall then become available and open for public inspection.

### **24.10 Receipt and Distribution of Proposals**

#### **24.10.1 Receipt of sealed proposals**

Public openings are not required and VITA recommends that they not be held. No questions regarding any proposal will be answered until after evaluation and negotiations are complete and an award decision has been made. The SPOC ensures all proposals are received on time and are complete. Proposals that are submitted late will not be considered. The SPOC reviews proposals for compliance with mandatory or must-have requirements or any mandatory terms and conditions. The SPOC maintains an evaluation sheet identifying each supplier's status with respect to the RFP's must-have or mandatory requirements (marked with an M).

#### **24.10.2 Distribution of proposals**

Once the SPOC has determined which proposals meet the completeness and compliance criteria described in the above paragraph, he/she will distribute copies of these proposals to the evaluation team, according to defined roles for each. The price data is not distributed at this stage.

### **24.11 Proposal Clarifications**

The SPOC may require certain suppliers clarify information contained in their proposals. The SPOC will issue any clarification questions in writing and these suppliers will be required to submit written clarification responses. A strict deadline for receipt of clarification responses should be included in the written communication to these suppliers. Suppliers must provide responses that sufficiently clarify their proposal's misunderstandings or confusion; however, the response should not reveal a previously unknown issue or problem. Supplier responses must be submitted to the SPOC, who will distribute them to the evaluation team. All clarification questions and responses become permanent records in the official procurement file.

All communications with suppliers during the RFP process should go through the SPOC. Only the SPOC should contact any supplier.

## 24.12 Mistakes in Proposals

A mistake in a proposal may be corrected or the proposal may be withdrawn depending on the stage in the procurement process when the mistake is discovered. Minor informalities or mistakes in proposals are generally allowed to be corrected before award. Below is a reference table for determining how a proposal mistake should be handled:

Occurrence of a proposal mistake	Available remedy
Before proposal due date	Supplier may correct mistakes discovered before due date by withdrawing or correcting and resubmitting the
After due date but before award	When review of the proposal (before award) indicates that a mistake was made, the supplier should be asked by the SPOC to confirm the proposal. If the supplier alleges that a mistake was made, the supplier may correct or withdraw the proposal. Correction of mistakes at this stage is only allowed if: <ul style="list-style-type: none"><li>• Mistake and the correct proposal information are clearly evident on the face of the proposal, in which event the proposal may not be withdrawn.</li><li>• Minor mistakes that are not clearly evident on the face of the proposal but the supplier submits proof of evidentiary value which clearly and convincingly demonstrates both the existence of the mistake and the correct offer and allowing the correction would not be contrary to fair and equal treatment of other suppliers.</li></ul>
During negotiations	Supplier may freely correct any non-material mistake by modifying or withdrawing the proposal.

## 24.13 Modifying or Adding RFP Requirements after Proposal Due Date

If the business owner determines that it needs to modify or add requirements after proposals are received, the existing RFP will need to be canceled and reissued with the modified or additional requirements, as well as modified evaluation criteria. The business owner will need to establish a new proposal submission date.

## 24.14 Evaluation and Scoring of Proposals

Evaluation criteria shall not be altered after the opening of proposals with the exception of minor changes and only if the alterations are justified and evidence is presented to ensure that such alterations would not materially benefit or disadvantage any supplier.

During the evaluation phase, suppliers may not initiate any communication with the SPOC, PPT and/or ET members. SPOCs may ONLY initiate discussions with suppliers in order to further assess their responsiveness.

Evaluators may request presentations or discussions with suppliers to clarify material in the proposals, to help determine those fully qualified and best suited. Proposals are then evaluated on the basis of the criteria set forth in the RFP, using the evaluation method previously specified in the RFP. Only proposals meeting the mandatory ("M") requirements will be evaluated. Price is considered, but is not the sole determining factor. Two or more suppliers determined to be fully qualified and best suited are then selected for negotiation. A proposal may be eliminated and not evaluated if the proposal is clearly not within the specifications or plans described and required by the RFP.

During the evaluation phase it may be determined that only one supplier is fully qualified, or that one supplier is clearly more highly qualified than the others under consideration. A

written determination shall be prepared and retained in the procurement file to document the meaningful and convincing facts supporting the decision for selecting only one supplier and negotiating with that supplier.

Under no circumstances shall a Supplier's ECOS/Security Assessment be evaluated. The Assessment must not be distributed to the entire Evaluation Team, but only to the SPOC, business owner, and ISO. Assessments are done for the selected finalist Supplier(s) and will receive a VITA approval or disapproval.

#### 24.14.1 Evaluation process – roles and responsibilities

Selection shall be made of two or more suppliers deemed to be fully qualified and best suited among those submitting proposals on the basis of the factors involved in the RFP, including price if so stated in the RFP.

	RFP process steps: evaluation through award	Responsible unit
1	RFP due date	SPOC
2	Opening of proposal submissions	SPOC
3	Administrative screen: vendor compliance with mandatory as well as basic submission requirements	SPOC
4	Business and technical evaluation	PPT and/or ET, SMEs as specialized input
5	Reference checks	SPOC, PPT and/or ET, SMEs as specialized input is
6	Interviews, demonstrations, presentations and/or site visits	SPOC, PPT and/or ET, SMEs as specialized input
7	Clarifications	SPOC
8	Reviewing proposals and preparing a negotiation strategy	SPOC, PPT and/or ET team members, SMEs as specialized input
9	Contract negotiations – SPOC hosts and leads	SPOC, PPT and/or ET team members, SMEs as specialized input
10	Evaluation summary and evaluation team signoff	SPOC, ET, SMEs as specialized input
11	Contract award	SPOC
12	Procurement summary	SPOC
13	Contract management	Sourcing agency contract administration and management.

#### 24.14.2 Scoring proposals

The evaluation and scoring of proposals for most IT procurement projects involves the following steps:

- ET member individual scoring
- consensus meeting(s)
- preparing the short list of suppliers
- demonstrations/testing/site
- visits/presentations by short list suppliers
- in-depth evaluation of short listed proposals
- identify top contenders
- conduct negotiations with top contenders
- perform total solution cost reasonableness analysis

#### 24.14.3 Evaluation team (ET) meetings

The SPOC will coordinate and facilitate all evaluation meetings in an ADA accessible location. ET members must participate in all evaluation segments, including any demonstrations, onsite visits, etc. The SPOC will document the review of the ET and the scoring for each proposal evaluated. A master-scoring sheet should be compiled by the SPOC with the consensus score for each proposal. The evaluation team shall reach consensus on which proposals meet the minimum functional and technical requirements, scoring them based on all pre-established evaluation criteria. The consensus is reached among the evaluators. Only team members may assign or vote on points. All team members are expected to be present and to take an official vote. If none of the proposals meet the minimum functional, technical, and schedule requirements, the ET will decide whether to end the evaluation process at this point.

If such a decision is made, refer to section 24.9.2, Cancellation after Proposal Due Date, and section 24.13, Modifying or Adding RFP Requirements after Proposal Due Date, for further guidance.

#### 24.14.4 Preparing the short list of suppliers

At this stage in the evaluation process, the evaluation team has completed enough of the evaluation to determine which suppliers will make the final short list. The evaluation team shall then identify and rank the short list of suppliers by scoring their proposals against the “wants” list of criteria. The SPOC shall document which suppliers made the final short list.

#### 24.14.5 Conduct in-depth evaluation

In complex procurements, the SPOC may schedule and conduct fact-finding discussions with each supplier on the short list to clarify their offers prior to developing the negotiation strategy. The SPOC is also responsible for coordinating and documenting the completion of the cost analyses and presentation, demonstration, site visit and/or testing results, if any, prior to developing the negotiation strategy. This documentation should include a complete understanding of the offers, to include all segments of the evaluation process. All documentation related to the evaluation must be maintained in the procurement file.

The key point to remember at this stage in the sourcing process is the value of coordinating the results of the evaluations, presentation/demonstration/testing/site visit results and total solution cost analyses in regard to the project's budget. All results must be kept confidential within the ET. It is in the Commonwealth's best interest that all side discussions and social outings with contending suppliers be avoided. All communications with suppliers during the evaluation process should go through the SPOC.

#### 24.14.6 Test/site visit/presentations

Upon request by the evaluation team, the SPOC may request suppliers on the short list to perform testing, supply a pilot project, allow site visits and make presentations or demonstrations to the ET as warranted in order to determine the best solutions from among the short list proposals. Determining whether presentations, demonstrations, testing, and/or site visits are warranted is based on the team's need to obtain additional information in order to arrive at a data driven decision.

The SME(s) will assist the ET in preparing the presentation/demonstration/site visit and/or testing requirements/scenarios. All short list suppliers should be afforded an equal opportunity for the presentations, demonstrations, site visits, test/pilots, etc. required by the ET at this evaluation stage. Before testing begins, the SME(s) might work with short list suppliers to identify a testing protocol that will deliver the desired results.

If necessary, the SPOC will update the evaluation documentation if the process has identified additional items critical to the success of the solution. The SPOC will also reach agreement with members of the evaluation team on the project/site visits and presentations and assess the evaluation results. If SMEs and non-team agency representatives or resources are involved in the testing or pilot, the SPOC will coordinate the testing plan and presentation schedule with these resources.

The SPOC may provide an evaluation/pilot form agreement or a script of what is expected in the pilot/presentation and what the team will validate to the short-list suppliers and lead the required negotiations to execute the defined testing protocol. The SPOC will assist the ET in documenting the evaluation criteria for the testing pilot or site visits and advise them regarding the need to keep test or site visit results confidential to protect the agency or Commonwealth's position in continued negotiations.

Selecting suppliers for a pilot does not imply that a final selection has been made. If the pilot suppliers fail to demonstrate the ability to meet the requirements during testing or site visits, the evaluation team needs to be well-positioned to pursue another pilot. The testing units, pilot and supplier labor are to be provided by supplier at no cost to the sourcing agency whenever possible.

After testing, site visits and/or presentations, the SPOC will document the review of the testing, site visits or presentations and the scoring for each supplier and prepare a written report, based upon scoring results of the proposed short-list supplier solutions that were shown to meet the requirements and can deliver a proven, qualified solution. It may be necessary to address whether testing, site visits and/or presentations raised new issues which need to be covered in the negotiation strategy.

If only one supplier is fully qualified the SPOC shall prepare a written determination of the facts supporting the decision to negotiate with that single supplier and retain it in the procurement file.

#### 24.14.7 Preliminary negotiations (if appropriate)

Preliminary negotiations are fact-finding discussions to fully understand each aspect of the supplier's proposal. The SPOC may, if appropriate, communicate with each of the finalists who has met the RFP's mandatory requirements to work through their comments to the proposed contract. The SPOC may come away with additional considerations—how much risk are we willing to accept? What is our strategy for risk associated with this sourcing initiative?

#### 24.14.8 Total solution cost analysis (after preliminary negotiations)

After negotiations are completed a total solution cost analysis can be used. The cost/value ratio determines which supplier is offering the best value solution. Remember, although value/cost ratio criteria may be an evaluation criterion, it is not applied until after negotiations are complete.

It is essential that the evaluation team understand the complete cost of a technology-based business solution. A total solution cost analysis will fit the project's business plan and identify the best solution to match its goals and budget; for example, adding capabilities in order to improve customer service or expand services.

The intention is to arrive at a final figure that will reflect the effective cost of purchase. For example, the lifetime cost of a PC can be more than five times its acquisition cost.

Evaluators should thoroughly consider the complete cost—not only obtaining the PC but operating, supporting and maintaining it during its lifetime including costs of hardware, software, training, maintenance, or other services. The total cost solution analysis is the big picture cost analysis of each supplier's proposal. This includes, but is not limited to, cost elements such as start-up, transition from current, rollout, training, help line support, operating, maintenance and repair, hardware upgrades related outsourcing or consulting and "exit" cost, or, cost to replace this system or solution at the end of its useful life. The analysis may also include lease versus purchase, the benefits, costs, and risks imposed by various contract terms and conditions identified during preliminary negotiations.

The SPOC is responsible for supplementing the evaluation team with the necessary internal resources to gather the data, including the total cost of the solution, required to make a data driven decision. This may include substantial involvement by the SME(s) as well as finance personnel. The SPOC is also responsible for determining the value/cost ratio of each proposal, and assess any inordinate risks or ancillary intangible costs associated with each solution, such as supplier's viability over the life of the solution, quality of the system documentation and its impact on operating costs, etc. (i.e., total cost to the agency or Commonwealth). SMEs and agency personnel should provide input into the total solution cost analysis where needed. The SPOC, working with agency resources and SMEs, will document a cost benefit analysis that clearly represents the total value/cost ratio of each short list solution. Without this data the team cannot determine the true value/cost ratio of the proposed solutions.

#### 24.14.9 Identify top contenders

To develop the initial recommendation, the SPOC will schedule a meeting of the evaluation team to review the results of the testing/pilot project, value/cost ratio and preliminary contract negotiations. A DSBSD-certified Small Business, including certified Small Businesses owned by women, minorities, or service-disabled veterans (SWaM) and micro businesses, might be able to win an award, even if not the highest ranked Offeror, so long as the price quoted is fair and reasonable and does not exceed five percent (5%) of the lowest responsive and responsible bidder. Where conflicts arise, the team will rely upon the consensus rules established at the beginning of the process.

Any open issues or issues in need of further clarification will be documented by the SPOC and included in the negotiation strategy. This documentation will be included in the official procurement file. Agency resource personnel and SMEs who are not members of the evaluation team may attend the scheduled meeting and provide input into the initial recommendation. The SPOC will ensure that all project requirements have been addressed.

Key evaluation questions:

- Are these suppliers aligned with VITA's business needs?
- Are they positioned for future growth and competition?
- Do our contracts preserve our leverage in a changing business environment?

#### **24.14.10 Update executive steering committee (if appropriate)**

Once the total value/cost rationale of each solution is determined, the evaluation team will make a recommendation to the executive steering committee (if appropriate). This recommendation is based on the team consensus achieved through reviewing the results of the testing, pilot or site visits, and total solution cost analysis and preliminary contract negotiations.

While the evaluation team will present the initial recommendation to the executive steering committee, SMEs may participate and assist if necessary. The executive steering committee cannot select or affect the recommendation since this must be a data-driven decision; however, they may, at this stage in the procurement process, agree to proceed, request more information or may end the project.

The SPOC is responsible for ensuring that the executive steering committee is fully and accurately informed of the recommended solution, and that they approve the recommendation prior to proceeding with final negotiations. If the executive steering committee requests more information, the SPOC is responsible for obtaining and conveying the requested information to them.

If approval is granted, the business owner ensures that funding documents are fully executed before proceeding with final negotiations. The executive steering committee (if appropriate) provides the appropriate management concurrence of the recommended supplier with confirmation of authorized funding. Short, concise updates to the executive steering committee throughout the RFP process may streamline approval of the initial recommendation.

Key negotiation question:

- Did the suppliers raise new issues that need to be covered in the negotiation plan?

### **24.15 Final negotiations**

In-depth discussion on final negotiations, covering basic and IT-specific negotiation guidance, as well as, links to a negotiation risk mitigation worksheet and negotiation strategy worksheet are found in [Chapter 26](#) of this manual.

### **24.16 Pre-award activities**

Prior to any award the following activities should be completed:

- SPOC confirms supplier's compliance with all statutory and Commonwealth award requirements; i.e., registered in [eVA](#), authorized to transact business in the Commonwealth via State Corporation Commission, not on Commonwealth or Federal debarred or prohibited lists, etc.
- Obtain applicable reviews and approvals of final negotiated contract from OAG, CIO, and/or federal sponsor.



**Appendix A**  
**Procurement Project/EvaluationTeam**  
**Confidentiality and Conflict of Interest Statement**

This form is available on VITA SCM's website at the following URL:

<https://www.vita.virginia.gov/media/vitavirginiagov/supply-chain/docs/Confidentiality-and-Conflict-of-Interest-Statement-20180701.docx>

**Appendix B**  
**Checklist of Issues to Resolve Before and During RFP Preparation**

Issues/questions to resolve	YES	NO
1. Has the agency accepted that we must use “best value” methodology in this acquisition?		
2. Has the agency included requirements and links in the RFP for VITA-required ITRM PSGs for Security, Data Standards, Enterprise Architecture and IT accessibility and Section 508 compliance? How will these requirements affect the specifications/requirements in the RFP? What is the emergency or back up plan for standby commodities or services?		
3. Has the agency determined any constraints on RFP flexibility as a result of full or partial federal funding?		
4. Has the agency considered Commonwealth strategic objectives and ensured there is no potential conflict?		
5. Has the agency considered all legacy systems and interface requirements that will be affected by this project and taken all associated risks into account? Are these systemic relationships clearly defined in the RFP?		
6. Would this be an appropriate procurement to designate as a set-aside for DSBSD-certified small businesses, including small businesses owned by women, minorities and service disabled veterans as well as micro businesses? Has the agency analyzed the impact of the RFP process on these small businesses to remove barriers and limitations? Can the RFP be structured to promote the inclusion of small businesses in the solution? Would a supplier be able to form a consortium of smaller suppliers to submit one proposal in response to an RFP? Does the RFP include a requirement to submit a Supplier Procurement and Subcontracting Plan?		
7. Has the agency determined if subcontractors may be used? How will they be identified? What are reporting requirements for subcontracting?		

Issues/questions to resolve	YES	NO
8. Avoid discouraging brand specifications. In PC RFPs, brand names cannot be used in specifications. Is the project equipment required to be a certain brand name or would an equivalent suffice? Will the RFP allow suppliers to propose multiple options to provide the solution to the same functional requirement? If so, RFP should state that each option will be fully considered by the evaluation team prior to the evaluation of the full proposals.		
9. Has the customer analyzed potential supplier management issues and contract management issues if contracts will be offered to multiple suppliers?		
10. Risk of loss – What are the insurance (i.e., errors and omissions, cyber security liability) and performance or surety bond requirements of the project? Bonds are not generally used for IT procurements.		
11. Has the agency established objective evaluation and weighting criteria and developed the evaluation scoring? The criteria must be available to bidders in the RFP or by amendment prior to proposal due date.		
12. If the RFP will contain a SOW process, has the SOW been defined? Has a SOW template been prepared?		
13. What type of contract will be utilized and what terms and conditions are negotiable or not negotiable? Are there special IT or federal terms and conditions that need to be included and are these negotiable? Are there special data protection/access/security/backup terms that need to be included to align with the requirements? If this is a Software as a Service (SaaS) procurement, have required approvals been given by CIO and does the RFP sufficiently address SaaS requirements and include SaaS terms and conditions?		
14. Has the agency planned how the project should be implemented, what deliverables and milestones the supplier will be expected to meet?		
15. What are the invoice and payment specifications? Are payments tied to delivery or milestones? Should payment holdbacks be included as an incentive to the supplier and a protection to the agency? Are there discounts/penalties to be applied if delivery or milestones are not met?		
16. What will the supplier need to supply for record keeping and reporting? What needs to be reported, how often and to whom?		

Issues/questions to resolve	YES	NO
17. Has the agency established clear and sufficient metrics and performance measures to include in the contract to measure project success and supplier's performance? Will the contract contain benchmarking of price?		
18. What changes to performance and/or contract specifications would require a formal contract amendment? Will any performance and/or payment time frames continue beyond the contract term and if so, how will they be managed?		
19. What are the agency's requirements for the contract and/or project manager(s)?		
20. Did we address and include these: <ul style="list-style-type: none"> <li>• Supplier Procurement and Subcontracting Plan requirement</li> <li>• What certifications, licenses or statutory requirements will supplier have to meet and/or provide?</li> </ul>		
21. Supplier must show proof of Workers Compensation insurance and other insurance.		
22. Have we conducted a quality review to remove redundancies, conflicting language/terms and ambiguous statements/requirements? <ul style="list-style-type: none"> <li>• Have we scheduled sufficient time in the RFP timeline to obtain all required reviews or approvals by VITA, OAG or other (i.e., federal reviews)?</li> </ul>		
23. Have we included all <i>Code of Virginia</i> requirements for determining if the procurement/project is designated as a High-Risk solicitation/contract in accordance with § <a href="#">2.2-4303.01</a> ?		

## **Appendix C**

### **The RFP Process Checklist**

Step	Process	✓
1	Meet with the customer to determine his/her needs. What does success look like? Who will be on ET? Preliminary discussion of the timeline.	
2	Conduct a market analysis to gain awareness of products/services/solutions that could meet the business or technology need. Perform a make vs. buy analysis. Estimate project investment costs including RFP investment cost.	
3	Analyze VITA statewide contracts to determine if the business or technology needs could be met through purchases from statewide contracts. Statewide contracts usually offer lower pricing than agency-specific contracts. If no statewide contracts available, continue with Step 3.	
4	An executive steering committee may be created in support of any project as determined by the business owner; however, for major IT projects and large enterprise procurements, an executive steering committee will be required. The executive steering committee is usually comprised of business owners and executives. The executive steering committee will serve in an advisory role and may assist in developing the business needs and requirements. The executive steering committee will not be involved in the evaluation process.	
5	Determine if project is appropriate for solution-based RFP. If determination is “yes,” RFP should include language which specifies “This is a best-value, solution-based RFP.”	
6	Create a procurement project/evaluation team summary documenting: members’ roles and responsibilities, be clear about the SPOC’s role as lead host, contact and coordinator, and obtain signed conflict of interest statements.	
7	Determine if procurement is appropriate to be set aside for DSBSD-certified small businesses and that barriers and limitations are removed to encourage their participation.	
8	Develop a clear and agreed-upon statement of the purpose of the RFP. This should align with any project planning charter/mission statement previously developed by the business owner in working with VITA ITIB project management (i.e., ProSight). Develop a high level outline of the RFP and have the procurement project/evaluation team review it.	
9	Develop schedule for RFP. Refer to appendix G.	
10	Develop solution requirements or necessary specifications in accordance with the guidelines of <a href="#">Chapter 8</a> , Describing the Need: Specifications and Requirements.	
11	Establish evaluation criteria including clear, concise definitions for each criterion provided to facilitate team understanding, using the guidelines set forth in this chapter. For all contracts in excess of \$100,000 a Supplier Procurement and Subcontracting Plan will be required. Establish weighting criteria.	
12	Develop an evaluation scoring plan that explains how proposals will be evaluated with the evaluation team.	
13	Identify major project milestones and deliverables for establishing supplier performance metrics and/or payments.	

Step	Process	
14	Identify any technical, functional, security, confidentiality, data protection, cost or schedule risks that need to be addressed and resolved as a result of developing the requirements, specifications and milestones in the RFP, or determine if suppliers should be required to identify any risks associated with their solutions, including costs. All procurement stakeholders should collaborate and communicate to mitigate RFP gaps (i.e., procurement, project manager/business owner, information security officer, functional/technical SMEs).	
15	Utilizing VITA's RFP template(s), VITA sourcing staff shall develop the RFP document in accordance with the guidelines set forth in this chapter. Other agencies should use their own templates and the VITA Minimum Contractual Requirements for "Major" Technology Projects" matrix found on SCM's website at this location under the Forms section: <a href="https://www.vita.virginia.gov/supply-chain/scm-policies-forms/">https://www.vita.virginia.gov/supply-chain/scm-policies-forms/</a> until they have received VITA training on VITA's RFP and contract templates. VITA SCM can provide additional SaaS or ASP terms and conditions. Counsel and review may be obtained from VITA SCM by contacting <a href="mailto:SCMinfo@vita.virginia.gov">SCMinfo@vita.virginia.gov</a> .	
16	Determine if pre-proposal conference will be held and whether supplier attendance will be optional or mandatory. Include information about pre-proposal conference in RFP. Pre-proposal conference can be held via teleconference.	
17	Finalize RFP with the procurement project/evaluation team. Review the RFP document to ensure that all necessary and specific requirements are included. Establish proposal submission due date.	
18	Obtain CIO approval if required (refer to manual <a href="#">Chapter 1</a> , VITA's Purpose and Scope.)	
19	Issue RFP. Post RFP for a minimum of 10 days in <a href="http://www.eva.virginia.gov/">http://www.eva.virginia.gov/</a> . Posting notice of the RFP in a newspaper of general circulation in the area where the contract will be performed is optional. Consider a longer response period for more complex procurements to ensure thoughtful, thorough responses.	
20	Answer questions from suppliers. Conduct optional pre-proposal conference or teleconference, prepared with adequate project team member participation to respond to suppliers' questions. Post material answers on <a href="http://www.eva.virginia.gov/">http://www.eva.virginia.gov/</a> .	
21	Amend RFP if needed. Post amendment on <a href="#">eVA</a> .	
22	Receive proposals.	
23	Evaluate proposals using the evaluation and weighting criteria provided in the RFP.	
24	Hold initial scoring and elimination session	
25	Conduct any supplier onsite demonstrations, presentations or clarification sessions.	
26	Select two or more suppliers deemed to be the most fully qualified and best suited based on evaluations.	
27	Conduct negotiations and finalize contract(s).	
28	Obtain any required reviews/approvals (CIO, OAG, other)	
29	Award contract(s).	
30	Prepare a complete procurement file.	
31	Post notice of contract award in <a href="#">eVA</a> .	
32	In the case of a Notice of Intent, procurement file remains open for inspection for 10 days after award.	
33	Facilitate <a href="#">eVA</a> catalogue.	

### **Appendix D Contents of a Quality IT RFP**

Section	Section content	Content description
1	Introduction	Provides a statement of the problem and must be detailed enough for suppliers to grasp the business issues driving the RFP and the technical issues that may have precipitated the problem.
2	Proposal instructions and administration	<p>Contains all administrative requirements and information with which a supplier must comply in order to submit an acceptable proposal. This section includes ground rules for the procurement, from submitting the RFP to awarding the contract and should contain the following types of information:</p> <ul style="list-style-type: none"><li>• if and when a pre-proposal conference will be held</li><li>• relevant dates for the procurement cycle</li><li>• requirements for preparing and submitting proposals (i.e., <i>Code of Virginia</i> requirements, as well as proposal protocol)</li><li>• how proposals will be evaluated</li><li>• RFP Single Point of Contact name and contact information</li><li>• when, where and to whom proposals are due</li><li>• other information that is required for a supplier to be fully responsive</li></ul> <p>If the instructions are incomplete or unclear, suppliers may overlook critical meetings or milestones. Some suppliers may view the lack of quality instructions as a sign of a weak project team or conflicted project which could influence major industry suppliers to not submit proposals. Failure of a supplier to comply with the RFP's administrative requirements may be cause for proposal rejection. This section should present clear rules for responding to the RFP and to make suppliers aware of the penalties for not following them.</p>
3	Proposal format	Provides details on how proposals are to be formatted and bound and the required media (i.e., hardcopy, CD, etc.). It is helpful to include a table to show if various proposal sections are to be submitted separately; i.e., technical from cost, redacted, etc.). This section should not duplicate or conflict with the proposal instructions in section 2.

4	Present situation	<p>Accurately describe the agency’s organizational background and the project’s current business and technical environments so suppliers can effectively and accurately propose solutions to adapt or modify that environment to satisfy the new requirements. Description of the current business environment should include all users and benefactors of the current business services and processes affected. Description of the current technical environment should be a clear definition including all current hardware and software being used, what could be used or should be used to address the project requirements, as well as current interfaces to other existing systems/platforms and/or applications. Workflow and application interfaces may be presented using visuals.</p>
5	Functional and technical requirements	<p>Provides functional and technical requirements and enough information to enable suppliers to understand the issues and prepare a complete and firm proposal. This overview should address both the current business application and the technical environment (hardware, software, communications). It is recommended that agencies not use “must” and “shall” technical requirements, but allow suppliers to suggest how they will solve the problem as part of a solution- based proposal. The technical and functional requirements section includes questions to which suppliers must respond, such as:</p> <ul style="list-style-type: none"> <li>• critical success factors</li> <li>• functional specifications for the current system</li> <li>• functional specifications for the projected system</li> <li>• performance specifications</li> <li>• service level expectations</li> <li>• hardware requirements (if mandatory)</li> <li>• software requirements</li> <li>• security and data protection requirements</li> <li>• communications requirements (if mandatory)</li> <li>• testing requirements</li> <li>• whether their solution complies (or can comply) with VITA Security, Data Standards and Enterprise Architecture and IT Accessibility/508 Compliance ITRMPSGs</li> </ul> <p>Project management requirements state the conditions for managing and implementing the project. This section should provide suppliers with information they need to develop a project plan, risk mitigation plan or other management plan, as required for the complexity and mission criticality of the project and that spans requirements definition, implementation, installation, testing, training, maintenance, and other phases of the project. The proposed project plan provides assurance that the supplier has the resources required to perform the contract successfully. The project management plan typically contains the following:</p> <ul style="list-style-type: none"> <li>• staffing requirements</li> </ul>



		<ul style="list-style-type: none"> <li>• site preparation responsibilities</li> <li>• delivery and installation schedule and plan</li> <li>• system acceptance test requirements</li> <li>• system maintenance requirements</li> <li>• system training requirements</li> <li>• documentation requirements</li> </ul> <p>Agencies should remember that it is possible a supplier can meet the technical requirements, but cannot meet the management requirements as evidenced in their poor or inadequate responses to this section. The management section will help differentiate between suppliers with mature or immature management capabilities.</p> <p>You may ask suppliers to identify all assumptions and any potential risks associated with the RFP and desired project objectives; and/or ask them to describe in detail a similar project and how they resolved problems or issues that occurred during their performance to their customer's satisfaction.</p>
6	Supplier profile	<p>Suppliers are asked to describe their business and professional qualifications and to provide references. They should be asked to present detail about their corporate and financial status and the customers who will serve as references for their professional performance and integrity. The following examples are what is typically required in this section:</p> <ul style="list-style-type: none"> <li>• Supplier's corporate history, organizational structure, locations and business-size status (i.e., DSBSD-certification status, if applicable).</li> <li>• Supplier's general background experience and capability for providing the type of solution or product being offered.</li> <li>• A description of the relationship between supplier and any proposed partner/subcontractor/manufacturer, if any, and how long this relationship has been in existence.</li> <li>• Evidence that supplier has the necessary technical, operational and management skills, staff and financial resources and viability to perform the contract.</li> <li>• A list of same/similar currently installed products, systems or solutions.</li> <li>• Names of customers with similar projects, configurations and/or applications who can provide references, including contact names and telephone numbers.</li> <li>• Supplier's qualifications, including resumes, company profile and business processes.</li> <li>• Supplier's usual method of providing services including a description of the work plan, methods to be used and a sample schedule of deliverables/timeline for project completion.</li> </ul>

7	SWaM Section	Suppliers are asked to provide a “Supplier Procurement and Subcontracting Plan” that states the overall commitment percentage that Supplier anticipates spending directly with subcontractors in performing the requirements of the contract. Additionally, Suppliers are asked to provide a list of all subcontractors it anticipates using in Supplier’s performance of the contract. The list of subcontractors should designate those subcontractors that are SWaM businesses, as well as those that are non-SWaM businesses. In the event that a Supplier does not anticipate using subcontractors in the performance of a contract, the Supplier are asked to state this fact in their response.
8	Pricing information	<p>Specifies how suppliers are to provide pricing information and provides a detailed format for them to follow in developing their price proposals. Instructions should be clear enough to ensure that price proposals can be compared on an equal basis. To facilitate this comparison, consider providing a sample spreadsheet that breaks the proposed system into components such as the following:</p> <ul style="list-style-type: none"> <li>• system software</li> <li>• application development software</li> <li>• installation</li> <li>• maintenance</li> <li>• training</li> <li>• documentation</li> <li>• project management</li> <li>• integration of unique hardware or software</li> <li>• license fees (ongoing)</li> </ul> <p>Include a pricing schedule/scenario as an example of how proposal prices must be submitted. If lump sum pricing is not advantageous, use a pricing scenario to obtain prices for unknown quantities or hours. Ask for a breakout of recurring versus non-recurring costs. The pricing schedule should be tied to deliverables and must coincide with the method of payment stipulated in the solicitation.</p> <p>When looking at pricing schedules, pay attention to pricing that involves one-time costs versus recurring costs. The initial price of a software package is a one-time cost; annual maintenance and software licensing fees are recurring costs which must be identified to develop a project’s total life-cycle cost. Pricing is not usually the sole determinant for award, but should be used to break a tie between two suppliers with equally good technical and management proposals.</p> <p>For complex projects you may also ask suppliers to submit a milestone pricing schedule to which holdback percentages can be applied to be paid after final acceptance on the final invoice. This</p>

		motivates suppliers and adds protection for the agency if final acceptance is delayed or problematic. It also allows easier contract severability at any milestone if the supplier is non- performing.
9	Agency standard agreement (i.e., contract template)	Contains a proposed contract template with nondisclosure agreements, confidentiality, data protection and security requirements, warranties, licensing agreement requirements and other statutory, legal and IT-specific terms and conditions, or any federal flow-down terms that may be required. Suppliers should be asked to redline the proposed contract template to highlight all exceptions they cannot agree to. Suppliers should not redline the liability clause at this time. They can raise issues or comments for the first time during negotiations later. Identify showstopper issues during the proposal evaluation period because it is possible to select a supplier who will not accept the agency's contract.
10	Supplier's section (optional)	Allows suppliers to include information they feel is relevant although not required or requested in the RFP. They can also discuss potential issues that are relevant to the RFP and to their proposal. For example, a supplier may have additional product features to demonstrate that are outside the scope of the RFP, present a unique solution that was not anticipated by the buyer, or may provide a solution to a problem evident in the RFP that other suppliers did not consider. Even if this particular supplier does not win, the explanation of the problem and the potential solution may still be worth considering.
	Appendices	Contain bulky but relevant information such as network diagrams, technical requirements studies, project plan outlines and other detailed information. Examples include the following: <ul style="list-style-type: none"> <li>• Spreadsheets with statistical information.</li> <li>• Communications network drawings and plans.</li> <li>• List of current equipment.</li> <li>• Standards used within the company.</li> <li>• Tentative project plan with dates.</li> <li>• Contract template</li> <li>• Small business subcontracting plan form</li> <li>• Supplier-completed State Corporation Commission form as registered to transact business in the Commonwealth.</li> </ul> <p>The information is then available to the supplier but does not distract from the narrative portion of the RFP. Note: Tell suppliers whether they must use this information when developing their proposals.</p>

## **Appendix E**

### **A 10-Step Process for Evaluating Proposals**

Step	Evaluation Procedure
1	An initial evaluation will be conducted by the SPOC to ensure “must haves” are met.
2	Suppliers not meeting “must haves” will be eliminated from further consideration.
3	The evaluation team (ET) will then review proposals based on the evaluation factors contained in the RFP.
4	A “short list” is determined after reviewing evaluation results.
5	Suppliers on the short list may be asked to deliver presentations or demonstrations.
6	Another evaluation meeting may be held, and two or more suppliers may be selected for negotiation.
7	Preliminary negotiations may be conducted with each selected supplier. Preliminary negotiations allow modification of proposals, including price and negotiable terms and conditions.
8	Perform a total solution cost analysis on top proposals.
9	After steps 7 and 8 are completed with each of the selected suppliers, the ET may select the supplier(s) which, in its opinion, has made the best proposal. The ET is not required to furnish a statement explaining why a particular proposal was not deemed to be the most advantageous. If an executive steering committee was used during the acquisition process, notify the committee of the selection and obtain their approval to proceed with final negotiations and contract award.
10	Complete final negotiations. Funding must be confirmed prior to award. Obtain required reviews/approvals of final contract with CIO, OAG, other. A contract may be awarded to the supplier(s), and notice of award shall be posted in the manner prescribed in the terms or conditions of the RFP.

**Appendix F**  
**VITA SCM RFP Timeline Template (Provided as an example)**

(Name of Project)

Deliverables	Owner	Start Date	Projected Completion Date	Status	Comment
Requirements Definition Phase					
Conduct Client Interview					
Draft statement of need/scope. Obtain agreement from business owner, and copies of any VITA project management, VITA governance, CIO and/or federal approval documents for the procurement file.					
Make small business set-aside determination and remove barriers and obstacles to encourage participation					
RFP approval letter and SCM justification for RFP, as applicable					
Contact Customer Account Manager					
Develop Procurement Timeline					
Assemble Evaluation Team					
Document Functional Requirements					
Document Technical Requirements					
Add or use template to include all general, statutory, special, IT specific (i.e., Cloud, escrow, warranties, IT specific insurance, IT Accessibility, etc.) terms and conditions					
Develop Evaluation Criteria - Scoring Weights					
Complete Request For Proposal (RFP) Draft					
Obtain Required Reviews/Approvals (CIO, ECOS, OAG, other)					
Complete RFP Final Package					
Negotiation Phase					
Contact SCM SWAM Outreach person					
Release RFP to Supply Base					
Advertise in <a href="#">eVA</a>					
Conduct Pre-Proposal Conference					
Submit Addendums as Appropriate					

Receive and Distribute Proposals					
Facilitate Evaluation of Proposals					
Determine Short List of Suppliers					
Conduct Short List In-Depth Evaluation					
Negotiate with Top Suppliers					
Complete Contract Negotiations					
Confirm Supplier Compliance with all Statutory award requirements					
Execution Phase					
Conduct Legal, CIO, ECOS OAG Contract Reviews and obtain any required approvals and place copies in procurement file					
Sign and Award Contract					
Post Notice of Contract Award					
Conduct Contract Orientation Meeting					

### Chapter highlights

- **Purpose:** This chapter provides discussion of how to create an effective and well-prepared information technology (IT) contract document.
- **Key points:**
  - The formation of an effective contract starts while drafting the solicitation.
  - All IT contracts should promote excellence in supplier performance.
  - Due to the nature of technology procurement, and the many risks associated with these public investments, there are many specific contractual provisions that must be included in a technology contract which agencies do not normally use for non-technology purchases.
  - The lead procurement professional assigned to a technology contract is accountable for ensuring the inclusion of relevant federal and *Code of Virginia* contract provisions and any VITA-required IT specific contractual terms.

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## 25.0 Introduction

Every acquisition of information technology (IT) goods and services needs an appropriate contract. Every acquisition requires written technical, legal, administrative and financial agreements between the parties. Contract formation requires mutual consent to agreeable terms by both parties, generally manifested by an offer and acceptance. This chapter provides Virginia Public Procurement Act and VITA requirements and includes guidelines to cover the components of a successful IT contract.

The formation of an effective starts with the drafting of the solicitation. All terms and conditions that the agency intends to include in the contract should be incorporated into a proposed contract that is included in the solicitation. If the agency attempts to insert substantive contract provisions after proposals are received or during negotiations, suppliers may need to revise pricing or other proposal elements. Agencies should always provide the desired resulting contract in the solicitation package.



## 25.1 Statutory provisions relating to contract formation

There are certain types of contracts or potential suppliers which are prohibited by the *Code of Virginia* (refer to § [2.2-4321.1](#)). Those contracts and/or suppliers are as follows:

- No state agency shall contract for goods or service with a supplier or any affiliate of the supplier if the supplier fails or refuses to collect and remit sales tax or fails or refuses to remit any tax due. This will not apply if the supplier has entered into a payment agreement with the Department of Taxation to pay the tax and is not delinquent under the terms of the agreement or has appealed the assessment of the tax and the appeal is pending. Agencies may contract with these suppliers in the event of an emergency or if supplier is the sole source of needed goods and services. The Department of General Services shall post public notice of all prohibited sources on its public internet procurement website and on other appropriate websites.
- A public contract may include provisions for modification of the contract during performance, but no fixed price contract may be increased by more than 25% of the amount of the contract or \$50,000, whichever is greater.
- Any public body may extend the term of an existing contract for services to allow completion of any work undertaken but not completed during the original term.
- Contract pricing arrangements: Public contracts may be awarded on a fixed price or cost reimbursement basis. Except in the case of emergency affecting the public health, safety or welfare, no public contract shall be awarded on the basis of cost plus a percentage of cost.

Additionally, an agency may not award a contract to a supplier, including its affiliates and all subcontractors if they are excluded on the federal government's System for Award Management (SAM) at <https://www.vita.virginia.gov/supply-chain/scm-policies-forms/#sam>; or, who is not registered in eVA at time of award.

Section [2.2-5514](#) of the *Code of Virginia* prohibits agencies from using, whether directly or through work with or on behalf of another public body, any hardware, software, or services that have been prohibited by the U.S. Department of Homeland Security for use on federal systems.

## 25.2 The Offer

An offer is an expression of willingness to contract with the intention that the offer shall become binding on the party making the offer (the supplier) as soon as it is accepted by the party receiving the offer (the agency). An offer gives the agency the ability to form a contract by an appropriate acceptance.

An offer is not valid until received by the agency. If the offer has a stated time within which the acceptance must be made, any attempted acceptance after the expiration of that time will not be successful. Instead, the agency will be considered to have made a counter-offer that the original supplier can accept or reject. Generally, the time for accepting an offer begins to run from the time it is received by the agency. If there was a delay in delivery of the offer and the agency is aware of the delay, the usual inference is that the time runs from the date on which the agency would have received the offer under reasonable circumstances. If no specific time is stated within which the agency must accept, it is assumed that the supplier intended to keep the offer open for a reasonable

period of time, to be determined based on the nature of the proposed contract, prior dealings, trade usage and other circumstances of which the agency knows or should know.

Most Commonwealth solicitations require that an offer (bid or proposal) be valid for 90 to 120 days after the bid or proposal due date. This timeframe should accommodate the expected time for the agency to conduct evaluations, prepare the contractual document, as well as any pre-award phases including steering committee, Office of Attorney General (OAG) review, VITA Enterprise Cloud Oversight Services (ECOS), VITA high risk contract review and/or CIO or Secretary of Administration in unique situations and approval and receipt of any pending budget.

#### **25.2.1 Revocation of an offer**

An offer is generally revocable by the supplier at any time prior to acceptance. An offer may be revoked by any words that communicate to the agency that the supplier no longer intends to be bound by the offer. An offer is also revoked by any action by the supplier that is inconsistent with the intent to be bound once the agency learns of such inconsistent action. A revocation is effective upon receipt by the agency.

#### **25.2.2 Termination of an offer**

An agency cannot accept an offer under these circumstances:

- The death or insanity of the supplier, even without notice to the agency of such occurrence.
- The agency's rejection of the offer, which cannot be reinstated by the agency's subsequent attempted acceptance.
- The agency's counter-offer, which implies a rejection of the original offer.
- Revocation of the offer by the supplier.
- Expiration of the offer.

#### **25.2.3 Rejection of an offer**

A rejection of an offer is effective upon receipt by the supplier.

### **25.3 Acceptance of an offer**

A contract is formed when acceptance of the offer is sent.

#### **25.3.1 Acceptance by silence**

Silence may not constitute an acceptance except where, based on prior dealings between the parties, it is reasonable that the agency should notify the supplier if it does not intend to accept. Also, where the supplier has given the agency reason to understand that agency's acceptance may be manifested by silence or inaction, and the agency remains silent, that is tantamount to acceptance of supplier's offer.

#### **25.3.2 Notice of acceptance**

The supplier is entitled to notice of the acceptance. Thus, even if the agency effectively accepts an offer and a contract is formed, failure by the agency to notify the supplier of the acceptance within a reasonable time may preclude the supplier from enforcing the contract.

#### **25.3.3 Notice of acceptance by performance**

When an offer invites acceptance by performance, the supplier is not required to provide notice to accept the offer, unless the supplier so specifies. Agencies should not

communicate or agree to acceptance by performance, but should always have a written contract document or purchase order which memorializes the terms of the transaction. In transactions for the sale of goods, where commencement of performance may be used to communicate acceptance, if the supplier is not notified of acceptance within a reasonable time, it may treat the offer as having lapsed prior to acceptance. However, if an agency has reason to know that the supplier does not have means of learning that performance has begun, the supplier's contractual duty will be discharged unless:

- The agency exercises reasonable diligence to notify the supplier of acceptance;
- The supplier learns of the performance within a reasonable time; or
- The offer indicates that notification of the acceptance is not necessary.

#### 25.3.4 Notice of acceptance by return promise

Where the agency accepts by promise, the agency must exercise reasonable diligence to notify the supplier of the acceptance or ensure that the supplier receives the acceptance. All public body transactions are required to be memorialized by a written contract or purchase order.

#### 25.3.5 When acceptance becomes effective

An acceptance becomes effective when:

- Absent the offer specifying when the acceptance is effective, acceptance is effective when sent, if sent by reasonable means.
- If an acceptance is sent by means that are not appropriate or reasonable under the circumstances or if it is improperly dispatched, the acceptance will be effective upon receipt.
- In the case of option contracts, an acceptance is not effective until received by the supplier.

#### 25.3.6 Terms of acceptance

An acceptance is sufficient even if it contains additional or different terms from those offered that result from mutually accepted and agreed negotiations by both parties.

#### 25.3.7 Acceptance of terms on packaging and in shrinkwrap and clickwrap

Standard terms presented on or within product packaging present special problems with respect to contract formation. When a shrinkwrap package containing a software program contains a printed warning stating that unwrapping the package constitutes consent to the terms of the license therein, those licenses terms may or may not be binding depending on the jurisdiction interpreting such licenses. Under the Uniform Computer Information Transactions Act UCITA, which has been partially enacted in Virginia, such software license terms are binding on the licensee. Where software is downloaded from the internet, with the licensee being required to click on the "I agree" button indicating agreement to the licensor's terms, such conduct is deemed to be a binding acceptance of the licensor's offer.

## 25.4 Forming an IT contract

#### 25.4.1 The contract document

An IT contract can be a simple purchase order (PO) and include only [eVA](http://www.eva.state.va.us/eva-order-terms/eva-order-terms.htm) PO terms located at: <http://www.eva.state.va.us/eva-order-terms/eva-order-terms.htm>, be based

on an invitation for bid (IFB) that has a nominal set of terms and conditions which are non-negotiable, or can be a negotiated agreement based on a complex request for proposal (RFP) process.

VITA has a master library of standard definitions, standard contract clauses and specific terms and conditions that are appropriate for these different IT procurement types—

- Services
- COTS Software and Maintenance
- Hardware and Maintenance
- Solution
- Cloud Services
- Telecommunications
- License Agreement Addendum for EULA

These terms can be selected for the appropriate procurement type(s) by SCM sourcing consultants through VITA's contract management system during solicitation/contract development.

For other agencies, "major" IT procurements require the use of the requirements found in the VITA Minimum Contractual Requirements for "Major" Technology Projects and Delegated Procurements, while agencies delegated by VITA with authority to conduct an IT procurement are encouraged to use them. These may be found in Appendix A, by following the link to the appropriate VITA SCM webpage: <https://www.vita.virginia.gov/media/vitavirginiagov/supply-chain/docs/Min-Requirements-Agency-Delegated-RFPs-Contracts-2019-07-01.xlsx>.

For Software as a Service (SaaS) or cloud-based contracts, a mandatory set of cloud terms must be included in the contract. These may be obtained by contacting: [SCMinfo@vita.virginia.gov](mailto:SCMinfo@vita.virginia.gov).

#### 25.4.2 General guidelines for a successful IT contract

The key to success in forming any IT contract is setting and meeting the agency's business needs and project's expectations. This can be accomplished by the designation of a joint steering committee to manage the contract's success; identifying individuals for both parties who will have responsibility for the project; continual dialog and open discussion of problems; keeping the contract up-to-date with an effective change-control process; and requiring the supplier to provide early and frequent progress reports in order to minimize the potential for surprises. According to IT contract experts, most IT contract troubles result from one of the following scenarios:

- Supplier makes unrealistic commitments (e.g., performance guarantees, unachievable schedules, fixed price contracts without the required analysis) or supplier underestimates labor time, costs, risks.
- There is no firm contractual baseline (e.g., unclear requirements, terms and conditions and statements of work) in the contract.
- The supplier does not manage the agency relationship (i.e., the working relationship must be continually enhanced and problems must not be hidden).
- The contract does not contain a procedure and process for managing change (i.e., no formal change management process).

The following industry best-practice considerations should be used when forming an IT contract:

- A successful IT contract will include all technical and administrative expectations and commitments from both parties. The contract should include procedures for quality reviews, testing, measurement of progress, performance capture and reporting, defect management, change request processing, upgrades and problem escalation. The agency should consider its needs with respect to supplier reliability, performance, functionality, compatibility, lifespan, security compliance, support and cost.
- In order to reduce the likelihood of failure, the contract should be as specific as possible. Contract failure can be avoided by making sure both sides agree upon a common, written set of definitions, specifications, and time tables with regard to the services or systems being procured. As questions and issues arise, both sides can refer to and, if necessary, revise the document.
- The supplier looks to define its contractual obligations while the agency seeks to solve business issues. To deal with this difference in perspectives, the contract should include conflict and change provisions. For instance, the contract agreement might call for monthly meetings to review performance, problems and successes. This encourages supplier management and helps the parties deal with issues before they become major problems.
- The agency should monitor all IT contracts carefully, especially contracts for IT services. In most IT contracts, there is a service or support element involved, and suppliers should be held to their performance/response time contractual guarantees and promised service levels beyond the initial implementation period. If the supplier is not providing adequate service or not meeting agreed upon service levels, if the product is not operating as promised, or if the agency usage is not as high as anticipated, the agency may receive a partial refund or request a credit or higher discount.
- There is an advantage in agreeing to a detailed service level agreement (SLA) that confirms what exactly supplier responsibilities are under the contract. A good SLA will reflect common sense project discussions and seek a balance of interests and incentives.
- Pricing should adapt to certain contract changes, for example, changes in services, optional services and revised or unmet SLA. Another adaptive price modality would include subscription-based services as in Software as a Service procurements where pay-as-you-go pricing (or scalable pricing) should be included in the pricing so that agencies only pay for the actual number of users of the service. If contract prices are fixed over a period then price increases, and sometimes decreases, may need consideration. Agencies should seek to limit increases to the rate of inflation and can even include a cap; i.e., +/-3% of the CPI.
- Both parties should contractually agree to specific expectations, promises, and contingencies. For example, system specifications should include not just the required functionality, but should also spell out any performance requirements or constraints, compatibility requirements, anticipated lifespan, and acceptable levels of defects.
- Both parties should clearly and unambiguously define key terms, conditions, and activities such as the meaning of "beta testing" or the standards for determining whether the agency has accepted the system. In the IT world, accepting a system

can occur at many different times, such as when it has passed a series of agreed- upon tests (“acceptance testing”) and has been in operation for a certain period of time with no serious defects. If all parties are not willing to define acceptance, that’s a strong warning sign that a dispute may emerge. However, the exercise of creating an SLA may flush out potential problem areas well in advance of any signing, payment, or delivery.

- All time references should be specific dates. Avoid the use of “reasonable time” or “promptly” and be specific in each party’s requirements under the contract. i.e. “within three days after (some point in time; i.e., contract award date).”
- If formulas are used within the agreement, make sure that theywork.
- Do not use vague references such as “prepared to our satisfaction,” “in a timely manner,” would reasonably be expected to.” It is difficult to determine when a supplier “has performed in a timely manner.”
- Avoid using words like “materiality” and “solely” unless definitions areincluded.
- Carefully select use of the words “shall” (mandatory) and “may”(permissive).
- If the contract is defined as “high risk” pursuant to 2.2-4303.01 of the *Code of Virginia*, the contract must contain distinct and measurable performance metrics and clear enforcement provisions, including penalties and incentives, to be used in the event that contract performance metrics or other provisions are not met.

Finally, VITA recommends that all contract documents go up and down the chain of command in both parties’ organizations as needed to make sure all relevant personnel understand what is promised and what is expected and that the final contract includes all. Additionally, VITA’s Project Management and Oversight Division provides standard Commonwealth project-related templates and tools, including a Technology Management Glossary, for IT-based terminology to drive consistency throughout the Commonwealth. (Visit: <https://www.vita.virginia.gov/it-governance/project-management/>).

## **25.5 Code of Virginia contractual requirements**

The *Code of Virginia* requires that certain language and requirements be included in every public body contract. In addition, there is other contract language that is required to be included in public body contracts through either policy or by an Executive Order of the Governor. Current statutory provisions dictated by the *Code of Virginia* are updated annually on July 1<sup>st</sup> or as legislation or policy may otherwise require. Current versions may be located at the following VITA SCM website location: <https://www.vita.virginia.gov/supply-chain/mandatory-contract-terms/>, at “Core Contractual Terms.”

## **25.6 Federal contractual requirements**

There are certain federally mandated clauses which are to be included in all agency IT contracts if there is a possibility that federal funds may be used to procure any product or service from the contract. The assigned agency procurement professional should ensure that all federal flow-down terms are included in any procurement using federal funds. The clauses are as follows:

### **25.6.1 Civil Rights Clause**

“The bidder, with his signature on this proposal, HEREBY AGREES THAT he will comply with the title VI of the Civil Rights Act of 1964 (P.L. 88-352) and all requirements imposed by or pursuant to that title, to the end that, in accordance with title VI of that Act and the Regulation, no person in the United States shall, on the ground of race, color, national origin or sex, be excluded from participation in, be denied the benefits of, or be otherwise

subjected to discrimination under any program or activity for which the bidder receives Federal financial assistance and HEREBY GIVES ASSURANCE THAT he will immediately take any measures necessary to effectuate this agreement."

In addition, to the extent allowed by law, this public body does not discriminate against faith-based organizations in accordance with the *Code of Virginia*, § [2.2-4343.1](#) or against a bidder or offeror because of race, religion, color, sex, national origin, age, disability, sexual orientation, gender identity or expression, political affiliation, or status as a service disabled veteran or any other basis prohibited by state law relating to discrimination in employment.

#### 25.6.2 Anti-Kickback Clause

Read section 52.203-7 of Subpart 52.2 of the *Federal Acquisition Regulation*. This certification is also required to be in the solicitation for which the contract award is made: "The offeror, by signing its offer, hereby certifies to the best of its knowledge and belief that no Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress on its behalf in connection with the awarding of this contract."

#### 25.6.3 Clean Air Act

"Supplier hereby agrees to adhere to the provisions which require compliance with all applicable standards, orders or requirements issued under the Clean Air Act."

#### 25.6.4 Energy Policy and Conservation Act compliance

Read Subpart 23.2 of the *Federal Acquisition Regulation*.

#### 25.6.5 Anti-Lobbying Act

For more information read the [Lobbying Disclosure Act of 1995](#). Appendix C provides the Lobbying Certificate that VITA requires suppliers to sign prior to contract award. This signed form is then retained in the procurement file. The following provision must be included in VITA-issued contracts:

"Supplier's signed certification of compliance with 31

U.S.C. § 1352 (entitled "Limitation on use of appropriated funds to influence certain Federal Contracting and financial transactions") or by the regulations issued from time to time thereunder is incorporated as Exhibit XX to this Contract."

#### 25.6.6 Debarment Act compliance

Read Subpart 52.209-6 of the *Federal Acquisition Regulation*. VITA recommends:

- The following language be included in the "Termination for Breach or Default" provision of the contract: "If Supplier is found by a court of competent jurisdiction to be in violation of or to have violated 31 USC 1352 or if Supplier becomes a party excluded from Federal Procurement and Nonprocurement Programs, VITA may immediately terminate this Contract, in whole or in part, for breach, and VITA shall provide written notice to Supplier of such termination. Supplier shall provide prompt written notice to VITA if Supplier is charged with violation of 31 USC 1352 or if federal debarment proceedings are instituted against Supplier.
- This language be included in the "Ordering" provision of the contract: "Notwithstanding the foregoing, Supplier shall not accept any order from an Authorized User if such order is to be funded, in whole or in part, by federal funds and if, at the time the order is placed, Supplier is not eligible to be the recipient of



federal funds as may be noted on any of the Lists of Parties Excluded from Federal Procurement and Nonprocurement Programs.

#### 25.6.7 Federal Employment Eligibility Verification (E-Verify) Program

Legislative action in 2001 resulted in adoption of compliance with the federal "Illegal Immigration Reform and Immigrant Responsibility Act of 1996 amendment, operated by the U.S. Department of Homeland Security. Section [2.2-4308.2](#) of the *Code of Virginia* provides:

"(Effective December 1, 2013) Registration and use of federal employment eligibility verification program required; debarment.

A. For purposes of this section, "E-Verify program" means the electronic verification of work authorization program of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (P.L. 104-208), Division C, Title IV, § 403(a), as amended, operated by the U.S. Department of Homeland Security, or a successor work authorization program designated by the U.S. Department of Homeland Security or other federal agency authorized to verify the work authorization status of newly hired employees under the Immigration Reform and Control Act of 1986 (P.L. 99-603).

B. Any employer with more than an average of 50 employees for the previous 12 months entering into a contract in excess of \$50,000 with any agency of the Commonwealth to perform work or provide services pursuant to such contract shall register and participate in the E-Verify program to verify information and work authorization of its newly hired employees performing work pursuant to such public contract.

C. Any such employer who fails to comply with the provisions of subsection B shall be debarred from contracting with any agency of the Commonwealth for a period up to one year. Such debarment shall cease upon the employer's registration and participation in the E-Verify program."

All IT contracts and contract modifications for services, staff augmentation contractor services or statement of work resources issued on or after 12/1/2013 must include the following language: "If Supplier has an average of 50 or more employees for the previous 12 months of the date of this contract, supplier affirms that it registers and participates in the E-Verify program."

#### 25.6.8 Mandatory Internal Revenue Service Publication 1075 (required for federal tax information (FTI) data only)

For agency contracts that will or may include the entry, handling, processing, storage, movement, sharing of or access to FTI by a supplier or any subcontractor of supplier in any manner, IRS Publication 1075 shall apply to that Contract. The Tax Information Security Guidelines for Federal, State and Local Agencies – Exhibit 7, Safeguarding Contract Language, as appropriate, and the requirements specified in Exhibit 7 in accordance with IRC 6103(n) are included by reference and are located at this URL: [https://www.vita.virginia.gov/media/vitaviriniagov/supply-chain/pdf/Mandatory\\_IRS\\_Pub\\_1075\\_for\\_FTI\\_data-1.pdf](https://www.vita.virginia.gov/media/vitaviriniagov/supply-chain/pdf/Mandatory_IRS_Pub_1075_for_FTI_data-1.pdf). Suppliers must acknowledge that they will comply with all applicable requirements of these terms and IRS Publication 1075 in its entirety. Non-compliance with the terms and IRS Publication 1075 may be determined, solely by the agency, as a material breach of the contract. FTI consists of federal tax returns and return information (and information derived from it) that is in the



agency's possession or control which is covered by the confidentiality protections of the Internal Revenue Code (IRC) and subject to the IRC 6103(p)(4) safeguarding requirements including IRS oversight. FTI is categorized as Sensitive but Unclassified information and may contain personally identifiable information (PII).

**25.6.9 Compliance with applicable federal information security and privacy laws** Section [2.2-2009](#) of the *Code of Virginia* requires that any contract for information technology entered into by the Commonwealth's executive, legislative, and judicial branches and independent agencies require compliance with applicable federal laws and regulations pertaining to information security and privacy.

**25.6.10 Procurements funded with federal funds**

When an agency conducts a procurement that is wholly or partially funded with federal funds, it is necessary to understand the federal funding source's contractual requirements and expectations for the agency and/or for flow down to the supplier. Below is a table that offers high-level questions that you may need to consider when forming your solicitation and contract.

1.	Are there unique requirements from the federal funding source that need to be in the solicitation or contract?
2.	Are there any restrictions on use or spend of this federal funding? If so, does your solicitation or contract clearly specify these?
3.	Does the funding source require theirs or another entity's review/approval of the solicitation or contract that could affect your procurement schedule?
4.	Do you need to align dates of any spend requirements or deadlines that could affect schedules for any deliverables, a project plan and/or milestone payments?
5.	Are there any contractual terms and conditions that must be included in your solicitation or contract? Are there any that must be flowed down to your supplier?
6.	Are there any special technical specifications, regulations or rules the feds may require that you include in the solicitation or RFP?
7.	Is there any special expenditure reporting of the funds? If yes, does this affect reporting requirements that the supplier must submit to your agency?
8.	Are there unique audit requirements (cost or price records) that the supplier would need to comply with? Are there any special records retention requirements to include in the solicitation or contract?

9.	Are there any unique accounting standards for suppliers to follow (which may affect pricing review/approvals)?
10.	Are there any required federal forms that supplier would need to complete?
11.	Are there any federal agreements (i.e, Business Associate Agreement, Non-Disclosure Agreement or other) that supplier must sign and comply with?
12.	Are there any special data rights, security or work product requirements that need to be included in the solicitation or contract?
13.	Are there any restrictions or requirements on the supplier's use of subcontractors?
14.	Are there any interdependencies on other state or federal entities that should be considered in the solicitation's or contract's schedules or deliverables?

## 25.7 VITA contractual requirements

VITA requires that all statutory requirements be included in any IT contract whether issued by VITA or when delegated to an agency for issuance (refer to [Chapter 1](#) of this manual for more information). VITA's website, <https://www.vita.virginia.gov/supply-chain/mandatory-contract-terms/>, provides required VITA terms and required eVA terms. These are updated annually to incorporate statutory changes. IT contracts should include the active link to these rather than full text as suppliers must comply with then-current versions, as updated, during contract performance.

### 25.7.1 Requirements for SCM strategic sourcing professionals

VITA-required contract provisions are included in VITA's contract management system. If questions arise about which provisions are best-suited for a particular procurement, please contact the [Manager, Strategic Sourcing](#) or [SCMinfo@vita.virginia.gov](mailto:SCMinfo@vita.virginia.gov). The following table offers general guidelines on which provisions to use for different types of IT procurements:

Description of procurement	Use this contract template	Comments
All	All non-telco contract definitions and contract clauses are included in the individual contract templates below.	You may delete any definitions and clauses that clearly do not apply to your procurement; you may add project specific definitions and clauses with approval

Description of procurement	Use this contract template	Comments
Software as a Service (SaaS), Platform as a Service (PaaS), Infrastructure as a Service (IaaS)  (Note to SCM Sourcing: check with Director, Enterprise Services, for PaaS and IaaS procurements for applicability of all terms or	Cloud Services	Use a Cloud Services contract when you desire to procure a SaaS or PaaS solution. Both a whole Cloud Services template and an exhibit of Cloud Services clauses that may be added to the Solution template are available for your use,
Hardware or equipment and maintenance/support	Hardware and maintenance	Include the warranty worksheet, which allows a supplier to identify its standard warranty and
Licensing of COTS software and purchase of maintenance/support for the software, including	Software off the shelf	
IT services, not to include any software development	Services	
Maintenance/support services for COTS or custom- developed software, including upgrades but no new	Software maintenance	
Custom software, any software development services, systems development/design, software-based systems, projects involving software and where work product will result	Solution	The Solution template provides clauses covering the whole Solution, which may be made up of solution design and approach, other related services and all components including
Telecommunications	Telco	This template includes a majority of the definitions and clauses found in all the other templates, but has many unique telco-related
Value-added reseller (VAR) products	License Agreement Addendum	This is not a contract template. It should be included as a solicitation attachment. It is VITA's

Description of procurement	Use this contract template	Comments
		language ONLY when the supplier is a reseller of the software, or when the software is an integral part of the supplier's product, and the supplier does not have the right to license the software itself (e.g., when a software licensor requires the VAR supplier to pass through the licensor's terms and conditions). The solicitation must state that VITA requires the software licensor to execute this addendum to address terms and conditions in their license agreement which VITA, as a government entity, by law or by policy, cannot agree to. It is the supplier's responsibility to

#### 25.7.2 Requirements for major and delegated agency procurements

Agencies desiring CIO approval to issue an IT contract (or solicitation) must include the minimum elements shown in the spreadsheet entitled, "VITA Minimum Contractual Requirements for "Major" Technology Projects and Delegated Procurements" found in Appendix A, by following the link to the appropriate VITA SCM webpage.

This manual results from the directive provided in § [2.2-2012](#). A "The CIO shall develop policies, standards, and guidelines for the procurement of information technology of every description" therefore, the provisions of the Virginia Department of General Services, Division of Purchases and Supply' *Vendor's Manual* does not apply to IT contracts. When VITA has delegated authority to an agency for technology procurement, any language that conflicts with this manual should be removed from the agency's contract document(s).

Agencies conducting a "high-risk" procurement, as defined in § [2.2-4303.01](#) of the *Code of Virginia*, must submit both the solicitation and the resulting to contract to VITA and the agency's Office of Attorney General (OAG) representative for review of the terms and conditions. Reviews will be conducted within 30 business days and will include an evaluation of the extent to which the contract complies with applicable state law, as well as an evaluation of the appropriateness of the contract's terms and conditions. The review will also ensure the inclusion of distinct and measureable performance metrics, as well as penalties and incentives, to be used in the event that the contract's performance metrics are not met.

Agencies are required to contact VITA's Supply Chain Management division (SCM) at: [scminfo@vita.virginia.gov](mailto:scminfo@vita.virginia.gov) during the contract planning stage prior to awarding a high risk contract. SCM will assist the agency in preparing and evaluating the contract and identifying and preparing the required performance metrics and enforcement provisions.

VITA recommends that all solicitations and contracts submitted to VITA or the CIO for review and approval, or that are delegated to agency without need for VITA or CIO approval include the following qualities to improve the turnaround time for the agency:

- Be free of typographical, spelling and formatting errors.
- Be free of duplications and conflicting language/terms.
- Include all mandatory provisions required by the *Code of Virginia* and any Federal flow-down requirements.
- Include all document exhibits that comprise the whole contract.
- Be already reviewed by the agency's OAG representative, if necessary.
- Be submitted electronically in Microsoft Word format to the agency's then-current designated PMD representative.
- All solicitations and contracts that are submitted to VITA for review must include an agency-completed version of the matrix in Appendix A, as a document separate from the contract to facilitate VITA review.

Additionally, all final contracts requiring CIO approval must have undergone review by the agency's OAG representative prior to submission to VITA. Agencies may obtain assistance in developing a technology contract by emailing a request to: [SCMinfo@vita.virginia.gov](mailto:SCMinfo@vita.virginia.gov).

#### 25.7.3 Requirements for promoting supplier performance

Section [2.2-2012\(E\)](#) of the *Code of Virginia* states: "If VITA, or any executive branch agency authorized by VITA, elects to procure personal computers and related peripheral equipment pursuant to any type of blanket purchasing arrangement under which public bodies, as defined in § [2.2-4301](#), may purchase such goods from any vendor following competitive procurement but without the conduct of an individual procurement by or for the using agency or institution, it shall establish performance-based specifications for the selection of equipment."

All IT contracts should promote excellence in supplier performance. Measuring a supplier's performance as part of the contract, combined with the agency's management of the supplier's performance will provide greater value for the Commonwealth and taxpayers.

In order to emphasize excellence in supplier contract performance, VITA recommends that all IT contracts include the following:

- Agency and project performance expectations and objectives.
- Procedures for systematically gathering and using ongoing performance data on supplier's performance during the term of the contract.
- An issue resolution and/or escalation process with defined timeframes.
- Built-in incentives/remedies attached to supplier performance.
- Distinct and measurable performance metrics
- Clear enforcement provisions, including penalties and incentives, to be used in the event that contract performance metrics or other contractual provisions are not met.

During contract negotiations, work with the supplier on establishing partnering programs and measurable goals for reducing administrative burdens on both parties while ensuring

supplier performance and value. Include negotiated goals into the contract. Always make agency satisfaction with the supplier's performance an on-going measurement during the term of the contract.

The type of performance data needed will be determined by the type of procurement. For instance, a contract for maintenance support will require a service level agreement with monthly reporting on supplier's service performance in order to tie remedies to payment via a percentage discount. A solution and implementation driven procurement should include sequential milestones or deliverable submissions and gear remedies to on-time delivery and/or acceptance criteria. For a contract with a Value Added Reseller (VAR) or for an off the shelf IT commodity procurement, availability and delivery may be performance drivers. Please refer to [Chapter 21](#) of this manual, Performance-Based Contracting and Service Level Agreements, for a more in-depth discussion and valuable guidance.

If the agency's procurement is a "high-risk contract" as defined in § [2.2-4303.01](#), then the solicitation and resulting contract must include distinct and measureable supplier performance metrics and clear enforcement provisions, including clearly outlines penalties and incentives, to be sued in the event that contract performance measures are not met. The following language should be customized for your project and be included in the solicitation and contract documents for high-risk contracts:

"(Your agency name) has developed a set of supplier key performance indicators ("KPI") relating to Supplier's performance under this Contract and which are attached hereto and incorporated by reference as Exhibit XX. Supplier agrees to be bound by and perform its obligations under this Contract pursuant to the KPI. The remedies for Supplier's failure to meet the KPI are set forth in Exhibit XX.

Supplier and (Your agency name) agree to meet within 30 calendar days of the Effective Date of this Contract to set forth the methodology and designated personnel of each Party to provide, collect, monitor, and report the KPI performance data and mutually agreed-to incentives and remedies. Supplier agrees to provide to (Your agency name) a report of its performance against the KPIs no less than once every six (6) months throughout the Term of this Contract. Supplier's report must include a comparison of its KPI performance against the agreed-to targets and, in the event of any shortfall by Supplier, proposed remediation measures. Supplier will report its KPI performance for the Contract in aggregate and for each order or SOW over \$1,000,000. Any instances of Supplier non-compliance will be recorded in Supplier's Contract file and shared with Contract stakeholders. Supplier further agrees that any degradation or failure of Supplier's performance obligations may result in failure to renew the Contract, termination for convenience of the Contract or termination for breach of the Contract. VITA will have all rights and remedies available at law."

The objective of the KPI is to provide a reference to determine whether the procurement was successful by having discrete, quantifiable and measurable performance measures for suppliers. The metrics below are examples and should be customized to the agency's specific procurement type and goals:

"EXHIBIT XX  
Key Performance Indicators

(For goods/product-type procurements)

- All orders delivered on time as specified in the order or SOW.
- 100% match in the quantity, quality, and condition between products/goods listed on the order or SOW and the products/goods delivered to VITA/Authorized User.
- No more than XX percent (XX%) of the goods delivered in a calendar year are deemed defective or do not pass Acceptance Testing.

(For services-type procurements)

- Supplier achieves overall satisfaction level of XX percent (XX%) from all Authorized Users each month of the Term.
- Supplier maintains service uptime of at least XX percent (XX%) of the time each month.
- Supplier responds to all instances of unplanned downtime of services within one (1) hour.
- Supplier meets all milestone Deliverables for all Authorized Users each month of the Term.
- For Supplier-hosted Licensed Services, Supplier meets all Reporting Requirements of the Term."

Agencies should consider the following questions and integrate them into the contract from what was included in the solicitation and negotiated, if applicable, with the supplier:

- What does the project need (product specifications, service turnaround, etc.) to satisfy the end user(s)? "What would the successful project looklike?"
- How quickly must the supplier correct each failure? What are the agency's remedies if supplier does not correct the failure within the specified time?
- What measurement and enforcement tools and processes will be implemented to ensure that performance can be measured and enforced?
- What financial or other incentives or remedies are needed by the agency?
- Does the agency have the ability to get out of the contract without penalty if the supplier is not meeting its service level obligations?
- How important is it to the agency for the supplier to provide "transition services" while an agency is trying to procure a new supplier?

#### 25.7.4 VITA security and cloud contractual requirements

Section [2.2-2009](#) of the *Code of Virginia* mandates that the Chief Information Officer (CIO) is responsible for the development of policies, standards, and guidelines for assessing security risks, determining the appropriate security measures and performing security audits of government electronic information. Such policies, standards, and guidelines shall apply to the Commonwealth's executive, legislative, and judicial branches and independent agencies.

While agencies are required to comply with all security policies, standards and guidelines (PSGs), Security Standard SEC525-02 provides agency compliance requirements for non- CESC hosted cloud solutions. These PSGs are located at this

URL: <https://www.vita.virginia.gov/it-governance/itrm-policies-standards/>

In addition to Security Standard SEC525-02, for any procurements for third-party (supplier- hosted) cloud services (i.e., Software as a Service), since agencies have \$0



delegated authority to procure these types of solutions, there is a distinct process for obtaining VITA approval to procure. At the link above, refer to the Third Party Use Policy. Your agency's Information Security Officer or AITR can assist you in understanding this process and in obtaining the required documentation to include in your solicitation or contract. There are specially required Cloud Services terms and conditions that must be included in your solicitation and contract, and a questionnaire that must be included in the solicitation for bidders to complete and submit with their proposals. You may also contact: [enterpriseservices@vita.virginia.gov](mailto:enterpriseservices@vita.virginia.gov)

## **25.8 VITA recommendations for a successful IT contract**

Below are discussions and guidance on typical IT contract elements. While some of these are common elements in all contract documents, this discussion is focused on a technology perspective.

### **25.8.1 IT special insurance coverages**

In IT contracts Errors and Omissions (E/O) Insurance should always be required for Suppliers, except for simple computer-off-the-shelf (COTS) software products. This insurance covers a Supplier's performance errors and intentional or accidental omissions in their performance obligated by the contract's technical/functional requirements. The coverage amount is based on the complexity of your procurement. For instance, if a Supplier is developing a custom solution for the agency, or if the procurement is providing a critical business continuity service to citizens, or if the Supplier is providing a cloud service (i.e., Software as a Service), then a higher amount of coverage should be required. Typical language to include in a contract is: "Supplier shall carry Errors and Omissions insurance coverage in the amount of \$2,000,000 per occurrence."

For cloud service procurements, it is recommended to require Supplier to also provide coverage for Cyber Security Liability Insurance to assist in data loss or security breach, which can result in losses valued in excess of millions of dollars. This is a relatively new type of insurance that some Suppliers will not have. Often they will say it is included in their E/O insurance. If that is the case, you should require a higher coverage in the E/O requirement and ask them to confirm how their insurance provider will cover incidents of data loss and security breach. Get the facts in writing and include applicable language in your contract. The typical language to include in your contract requirement for this is: Supplier shall carry Cyber Security Liability insurance coverage in the amount of \$5,000,000 per occurrence. Once again, the coverage amount can be decreased or increased based on your risk factor and project complexity and data/security sensitivity.

### **25.8.2 IT Scalability**

Scalability (the ability to expand an application or use of hardware) is often a significant issue in complex IT transactions. Agencies should watch for data interoperability issues. If scalability may be a possible issue in an agency IT contract, the agency should be sure to obtain a warranty regarding scalability of applications and data interoperability. Scalability in software as a service contracts serves a "pay as you go" fee structure so you don't pay for more than you need.

### **25.8.3 Material breach provision in IT contracts**

Most contracts allow a party to terminate the contract for the other party's "material breach." It is often difficult to determine whether a particular set of facts amounts to "material breach." Agencies should identify key scenarios which would constitute "material breach" and include those in the IT contract. If repeated small breaches could also constitute a "material breach", the IT contract should include that language.



Commonwealth agency contracts usually provide that the supplier should not have a right to terminate for breach for any reason, particularly for a mission critical application or solution. If the supplier has the right to terminate the contract, the impact to the agency, project or Commonwealth as a whole, could be paramount, because our common goal is uninterrupted business on behalf of the citizens. If there is a material breach, outside of payment disputes, the agency and the supplier should work to cure the breach and, if necessary, escalate the issue. Your OAG can offer additional guidance for your particular agency and project.

#### **25.8.4 Source code escrow**

If there is a potential need to obtain source code for an application if the supplier is unable to support it (bankruptcy, cessation of support of the product, etc.), the contract should provide for a source code escrow. Source code escrow provisions should identify the escrow agent, when must supplier make escrow deposits (initial and on-going), the triggers under which the escrow agent will release the source code to the agency (insolvency, failure to support, sunset of the application, breach by supplier, etc.) and any and all payment terms. Source code escrow must contain all documentation and runtime files necessary for compilation. Testing of the deposited source code (including later release versions) is strongly recommended. The supplier will have its own agent and escrow agreement form.

Agencies should carefully review any such agreement before incorporating it into the contract or signing it. Ideally, an escrow agreement should be negotiated prior to contract execution so the agency can uphold its best interests on behalf of the Commonwealth.

Visit SCM's website at this URL: <https://www.vita.virginia.gov/supply-chain/scm-policies-forms/> and select "Guidance on Source Code Escrow" from the Tools menu for additional information and language related to escrow.

#### **25.8.5 Key IT supplier personnel**

The IT contract should identify the supplier's key personnel and also include under what circumstances supplier would be able to replace such key personnel. In addition, if the agency would like background and security checks on supplier's personnel, as well as the right to interview or demand replacement of such personnel, those provisions should be specifically included in the agreement. This provision is of special value in a large and/or complex IT project.

#### **25.8.6 Alternative dispute resolution (ADR) provision in IT contracts**

If the agency and the supplier have agreed to submit all contractual disputes to ADR, the agreement should specify what rules apply, how the mediator(s) will be chosen, as well as where the mediation will take place. Also, escalation procedures should be included in the event the first mediation is not successful, timeframes for escalation and the parties to be involved. If the agency does not have its own ADR process and VITA has delegated authority for the procurement, VITA's ADR process may be used by the parties if so stated in the IT contract.

#### **25.8.7 Force majeure in IT contracts**

A force majeure ("a greater force") event excuses a party's failure to perform when failure results from some circumstance beyond a party's reasonable control (be careful of "labor and supply shortages" being included in the definition of force majeure in the agreement, since these often are based on business circumstances over which the supplier actually does have some control). The force majeure language defines when each party's obligation to perform is deemed to be "suspended." Agencies should include a clause that

gives them the right to terminate the contract if force majeure continues for a certain period of time—typically 30 days, though a shorter period would be appropriate for a mission-critical system.

#### **25.8.8 Disaster recovery provision in IT contracts**

IT contracts where the supplier has network or operational responsibilities or processes or stores Commonwealth data should include a disaster recovery plan (back-ups, hot-site, cold site) and detail supplier's responsibility to provide full or partial restoration, to participate in disaster simulation exercises and the frequency of such responsibilities, to securely hold copies of all data for quick and easy access. The contract should also provide a timeframe for returning the agency to normal service levels following the disaster. Hosting and software as a service contracts must insist that all disaster recovery facilities are in the continental U.S.

#### **25.8.9 Termination of IT services**

Agencies should strive to obtain a contractual commitment from the supplier that the supplier will not suspend services except in the most limited circumstances. Agencies should try to negotiate an exception to the typical limitation of liability clause in the IT contract to include damages caused by a supplier's suspension or cancellation of services. For example, those damages might include the cost of finding a replacement service. Any revenue commitment in the agreement should also be reduced by an amount equal to or greater than the revenue generated for the supplier from the cancelled service if the supplier will continue to provide other services under the contract.

It is important to include "transition assistance" language within the IT contract. For instance, if the contract is not renewed or terminated or if work on a project is terminated for any reason, the supplier is responsible to provide reasonable transition assistance to allow for the expired or terminated portion of the services to continue without interruption or adverse effect and to facilitate the orderly transfer of such services to the agency. Here is language from VITA's contract templates, customized for agency use:

"Prior to or upon expiration or termination of this Contract and at the request of Agency, Supplier shall provide all assistance as Agency may reasonably require to transition Name of Project/Contracted Services to any other supplier with whom Agency contracts for provision of a Project services. This obligation may extend beyond expiration or termination of the Contract for a period not to exceed six (6) months. In the event of a termination for breach and/or default of Supplier, Supplier shall provide such assistance at no charge or fee to Agency; otherwise, Supplier shall provide such assistance at the hourly rate or a charge applicable under the Agreement or as otherwise agreed upon by Supplier and Agency."

#### **25.8.10 Maintenance needs in IT contracts**

The contract should clearly state the manner of maintenance/support to be provided and identify who to contact for service and/or repair. The contract should also include severity levels, an agreed upon acceptable response time for the supplier, the level of maintenance/support to be provided, as well as the billing structure for such services. The contract should also include a notification/escalation process for the resolution of errors, deficiencies or defects, including the method of notification to the supplier, acceptable response time and the agency's recourse if the supplier's action does not correct the problem or is not acceptable to the agency.

#### **25.8.11 IT documentation and training needs**

The IT contract should describe responsibilities of both parties regarding the provision of user manuals, technical support manuals, application documentation, training materials and other training needs. The IT contract should include the due dates of all such materials, format and level of detail of the materials to be provided under the contract. All training needs should be specifically described in contract including the nature and extent of training to be provided by the supplier as well as the location, timeframe and cost of training.

#### **25.8.12 IT hold harmless clauses**

This language addresses the issue of who pays when there is a claim for damages arising out of the work performed or a product provided under an IT contract. A hold harmless clause is an indemnity clause and is to be included in all IT contracts. Under an indemnity clause, the supplier agrees to indemnify, defend and hold harmless the agency, its officials and employees from and against any and all claims, proceedings, judgments, losses, damages, injuries, penalties and liabilities of, by or with third parties. Additional information about indemnification is provided in subsection 25.8.20.

#### **25.8.13 Liquidation costs and completion failure remedies in IT contracts**

If the supplier's failure to deliver on time will adversely affect an agency's capacity to perform its business function, a liquidated damages clause should be included in the contract. This clause will establish the method for computing the reimbursement to an agency for costs incurred due to the failed delivery of the IT product or service. This may be linked to service level requirements or acceptance testing failure. Liquidated damages must be based on a realistic estimate of the expense incurred by the Commonwealth.

#### **25.8.14 Assignment of IT contracts**

Agencies will want broad rights to assign the contract (or license) in their IT contracts. This allows them to transfer technology resources to other agencies or even to outside contractors who are providing them with services. Suppliers often want to prohibit such assignments to encourage sales or to prevent technology from falling into the hands of competitors. IT contracts should allow agencies to assign agreements to other agencies and to those contractors providing them with services, provided that the contractor may only use the technology to provide services to the agency, not to its other customers. It is best to have this right without requiring the advance agreement of the supplier. Most assignments should provide that the Commonwealth or agency has the right to assign the contract or license upon giving notice to the supplier. Although it can create extra work for managing suppliers, it is not uncommon to have a contract provision requiring a customer to notify a supplier of an assignment, even if the supplier's consent is not required.

#### **25.8.15 IT performance bonds**

Although performance bonds (a surety bond issued by an insurance company to guarantee satisfactory completion of a project by a supplier) are usually used in construction or transportation contracts, the *Code of Virginia* (§ [2.2-4339](#)) provides that a public body may require a performance bond for contracts for goods or services if provided in the IFB or RFP. For example, a supplier may cause a performance bond to be issued in favor of the agency for whom the supplier is developing and implementing a major IT solution. If the supplier fails to develop and implement the solution according to the contract's requirements and specifications, most often due to the bankruptcy of the supplier, the agency is guaranteed compensation for any monetary loss up to the amount of the performance bond.

Performance bonds are contracts guaranteeing that specific obligations will be fulfilled by the supplier. The obligation may involve meeting a contractual commitment, paying a debt or performing certain duties. Under the terms of a bond, one party becomes answerable to a third party for the acts or non-performance of a second party.

Performance bonds are required in a number of business transactions as a means of reducing or transferring business risk. Agencies may require a performance bond for the purpose of reducing public responsibility for the acts of others, and the courts require bonds to secure the various responsibilities of litigants, including the ability to pay damages.

A typical performance/surety bond identifies each of three parties to the contract and spells out their relationship and obligations. The parties are:

- **Principal** or the party who has initially agreed to fulfill the obligation which is the subject of the bond. (Also known as the obligor/contractor/supplier.)
- **Obligee** or the person/organization/agency protected by the bond. This term is used most frequently in surety bonds.
- **Guarantor** or **Surety** or the insurance company issuing the bond.

The performance bond binds the Principal to comply with the terms and conditions of a contract. If the Principal is unable to successfully perform the contract, the surety assumes the Principal's responsibilities and ensures that the project is completed.

Performance bonds must be in an amount at least equal to 100% of the accepted bid or proposal and should be filed 10 days prior to issuance of the notice of award unless a written determination is made that it is in the best interests of the agency to grant an extension. A certified check or cash escrow may be accepted in lieu of a performance bond. If approved by the Attorney General, a supplier may furnish a personal bond, property bond, or bank letter of credit in the face amount required for the performance bond.

Approval shall be granted only if the alternative form of security offered affords protection equivalent to a corporate surety bond. If a performance bond requirement is not stated in the solicitation and the agency later determines that a bond is needed prior to contract award, the supplier to whom the award will be made shall provide a performance bond, and the agency will pay the cost of the bond.

In IT contracts, a performance bond may be in addition to the E/O insurance requirement, but never in place of it, as E/O insurance is a professional liability insurance that covers just what the term implies, but not remuneration for a supplier bankruptcy situation.

#### 25.8.16 The IT statement of work

A strong statement of work (SOW) should define precisely, clearly and completely all the obligations of the parties with respect to the IT effort to be performed. The SOW details what the supplier agrees to do, what the agency agrees to do, the instructions to the supplier and the technical, functional and performance and reporting requirements and specifications of the contract. All SOWs must be in writing and agreed to before any work begins. The SOW should be an exhibit to the contract. The SOW should be sufficiently detailed so that a person who is unfamiliar with the contract will be able to clearly see everything that is included and what is not. Please refer to manual [Chapter 21](#), Performance-based Contracting, SOWs and SLAs and [Chapter 12](#), SOWs for IT Procurements for more in-depth discussion and details on creating effective and complete SOWs. Chapter 12 also includes a link to a SOW template and Change Order template. A

strong SOW should include the following elements, as applicable to the procurement:

- A detailed statement of the purpose, objective or goals to be undertaken by the supplier.
- Limitations of the services being provided.
- An identification of all significant material to be developed by supplier and delivered to the agency.
- Project reporting requirements (i.e., project status, sales status, monthly/quarterly, service level/performance). SWaM and IFA sales reporting do not need to be included in the SOW if they are elsewhere in the contract document.
- List of all deliverables with due dates and submission requirements.
- Estimated time schedule and/or milestones for the provision of products/services by the supplier.
- If not a performance-based contract, include the methodology for how the products/services will be provided.
- Travel and meeting attendance requirements.
- Testing requirements.
- Completion/acceptance criteria for the work to be performed.
- Maintenance that will be provided.
- Support that will be provided.
- Service level requirements.
- Name/Identification of supplier personnel to be assigned, if specific personnel are key to the engagement. (Some may also require job classification or skill level of the personnel to be made available by the supplier.)
- Supplier work hours required to accomplish the purpose and goals.
- Invoice procedures, if not in the contract document.
- Supplier's total cost if not included in the contract's pricing schedule (perhaps in a new purchase order situation). Scope of work must have breakdown of costs, including billing rates. Divide the supplier services into billable tasks or billable units such as price list of equipment or supplies or a list of hourly rates for services.
- Safety, data privacy and return, confidentiality, audit and liability requirements, if not in the contract.
- List of required specifications and any supplier professional certifications or licenses.
- Place of performance (agency onsite, supplier location, other)
- Special work hours, if any.
- The agency's responsibilities, such as facilities, equipment for supplier performance and information, data, documentation to facilitate the supplier's performance.
- Any special security requirements; i.e., transmittal of data, government facility access, etc.

A Statement of Work Template and a Statement of Work Change Order Template are available at [www.vita.virginia.gov/supply-chain/scm-policies-forms/](http://www.vita.virginia.gov/supply-chain/scm-policies-forms/).

#### **25.8.17 IT confidentiality agreements**

Parties to IT contracts frequently enter into confidentiality agreements before the contract is signed. Any consultant or supplier who has access to sensitive agency data must agree to treat that data as confidential, whether it is personally identifiable employee or agency data, agency lists, marketing plans, nonpublic financial information or trade secrets. In

many cases, an agency may need to disclose some of this information to an IT supplier before the contract is signed. Confidentiality protection requires more than a well written agreement. When an agency needs to protect certain information, employees need to be educated not to make unnecessary disclosures. Where the confidentiality agreement calls for marking or otherwise identifying information as confidential, employees must be sure to so identify the information. It is important to keep complete and accurate records of who has access to the information and how it is transmitted and used. Below is a comprehensive contractual definition of "confidential information." "As used herein, the term "Confidential Information" of agency means all information that supplier may receive from the agency, its employees, agents or representatives, prior to or on or after the date hereof, which is not generally available to the public, including but not limited to agency lists, proposed or planned products or services, marketing plans, financial and accounting records, cost and profit figures, forecasts and projections and credit information."

- **Identifying confidential information:** If the agency desires that the confidentiality agreement be more restrictive, it can require that each item that is disclosed be specifically identified as being "confidential" in order to be within the scope of the agreement. Here is one example of such a clause:

"If the Confidential Information is embodied in tangible material (including without limitation, software, hardware, drawings, graphs, charts, disks, tapes, prototypes and samples), it shall be labeled as "Confidential" or bear a similar legend. If the Confidential Information is disclosed orally or visually, it shall be identified as such at the time of disclosure, and be confirmed in a writing within XX days of such disclosure, referencing the place and date of oral or visual disclosure and the names of the employees of the receiving party to whom such oral or visual disclosure was made, and including therein a brief description of the Confidential Information disclosed." It may make sense for an agency to include as confidential information "all oral and written information that an objective observer would consider confidential taking into account the surrounding circumstances."

In other words, did the recipient have reason to believe the information he or she saw (rather than information actively supplied to him or her) might be confidential?

- **Extent of the nondisclosure obligation:** The core of any confidentiality agreement is the clause that obligates the receiving party to treat the received information as confidential. This clause can be drafted in any number of ways.

Here's an example of an expansive confidentiality provision:

"Except as set forth herein or as otherwise agreed by the parties in writing, each Recipient shall at all times, both during and after the Disclosure Period: (i) not disclose any Confidential Information of the other party or its affiliate to any person other than the Recipient's employees or representatives who need to know such information; (ii) use the same care and discretion to avoid disclosure as the Recipient uses with respect to its own confidential information; (iii) not use any

Confidential Information in the Recipient's business, nor develop, market, license or sell any product, process or service based on any Confidential Information; and (iv) not modify, reverse engineer or create derivative works based on any computer code owned by the other party or its affiliate."

The clause includes both a nondisclosure and nonuse obligation. It specifies a level of care that the recipient uses with respect to its own confidential information, and it restricts the recipient from reverse engineering the disclosing company's software or creating derivative works. A variation might include an absolute obligation not to disclose, rather than an obligation to exercise a defined level of care to avoid disclosure. Depending on the importance of the information being protected, an agency may consider including a detailed security requirements addendum. Another way of limiting the use of the information would be to say that the recipient may "use the information only for the purpose for which it was disclosed, or otherwise solely for the benefit of the Discloser."

The clause also restricts the range of parties to whom the recipient may disclose to the recipient's employees or representatives who need to know such information. Some agreements add that any such employees or representatives must be under a similar obligation of confidentiality. At a minimum, the recipient should be obligated to inform such recipients of their obligation to retain the information in confidence. Here is sample contract language that will fulfill that purpose: "Each Recipient will ensure that its employees, agents and representatives also comply with the Recipient's obligations of confidentiality and non-use under this Agreement."

- **Exceptions to confidentiality:** Certain information is typically exempted from the coverage of a confidentiality agreement. For instance, here is a typical "exception" clause: "The obligations of confidentiality and non-use described above will not apply to information that (i) was already rightfully known to the Recipient on a non-confidential basis before the Effective Date; (ii) was independently developed by the Recipient; or is publicly available when received, or thereafter becomes publicly available through no fault of the Recipient or its employees, agents or representatives." Other exceptions to confidentiality coverage might include information obtained from a third party without obligation of confidentiality, or information disclosed by the discloser without obligation of confidentiality.

A supplier might also want a confidentiality exception for "residual information." The supplier's programmers will inevitably learn skills through the work they perform for the agency, and it would be impossible to prevent them from using these skills. The supplier will not want to be liable for breach of contract as a result of the supplier's use of such residual information. Here is some suggested contract language to address this situation: "The Recipient may disclose, publish, disseminate, and use the ideas, concepts, know-how and techniques, related to the Recipient's business activities, which are contained in the Discloser's information and retained in the memories of Recipient's employees who have had access to the information pursuant to this Agreement ("Residual Information"). Nothing contained in this Section gives Recipient the right to disclose, publish or disseminate, except as set forth elsewhere in this Agreement:



- 1) the source of Residual Information;
- 2) any financial, statistical or personnel data of the Discloser; or
- 3) the business plans of Discloser."

Such a clause allows the employees of the supplier to work with other agencies. It is also not a bad idea as a general rule from the agency's point of view, because the agency potentially receives the benefit of residual information that the supplier received from other agencies.

- **Disclosures required by law:** A party that is bound by a confidentiality agreement may find itself subject to a court order or a subpoena to disclose information that such party is contractually obligated not to disclose. Many confidentiality agreements specifically deal with this situation by requiring notice to the discloser and an opportunity to object or seek a protective order. Here is a sample clause to address this issue: "In the event that Recipient becomes legally compelled to disclose any Confidential Information, Recipient shall: (i) promptly notify the Discloser that such information is required to be disclosed, (ii) use Recipient's best efforts to obtain legally binding assurance that all those who receive disclosure of such information are bound by an obligation of confidentiality, and (iii) disclose only that portion of the Confidential Information that Recipient's legal counsel advises is legally required to be disclosed."

Agency procurements are subject to the Freedom of Information Act, with exceptions in the VPPA. The requirements of the Virginia Freedom of Information Act are more fully discussed in [Chapter 10](#) of this manual.

- **Duration of confidentiality obligation:** Many recipients of confidential information from suppliers seek to limit the length of their obligation not to disclose such information. One way to do this is to limit the term of the confidentiality obligation. Some agreements, for example, require the recipient of confidential information to regard the information as confidential for a period of one, two or three years. On the other hand, it may be very important to the discloser to preserve the confidentiality of the disclosed information indefinitely. This is an issue that the parties should consider based on the specific facts and needs of the parties. VITA normally includes confidentiality obligations in its Survival provision.
- **Return of confidential materials:** The discloser of confidential information will want to include a clause requiring the recipient to return the confidential information to the discloser upon request. Here is an example of such a provision: "Upon the request of Discloser, Recipient will promptly return to Discloser all Confidential Information and all copies thereof in Recipient's possession or under Recipient's control, and Recipient will destroy all copies thereof on Recipient's computers, disks and other digital storage devices."
- When the confidentiality clause is part of a larger agreement, the agreement should provide that the confidential information will be returned to the discloser upon the expiration or termination of the agreement. The agreement should always provide that it will be governed by the laws of the Commonwealth of Virginia. In addition to the clauses described above, a confidentiality agreement might contain provisions to the effect that:



- the discloser may obtain both injunctive relief and monetary damages in the event that the recipient fails to comply, and that the recipient will pay for the discloser's attorneys' fees;
- a recipient in breach must indemnify if a third party sues the discloser due to the breach;
- monetary liability for breach is limited to a specified dollar amount;
- the disclosed information remains the property of the disclosing party;
- the recipient shall immediately notify the discloser upon discovering any loss or unauthorized disclosure by any of the recipient's personnel of any confidential information;
- each party shall comply with all applicable laws, rules and regulations, including those relating to technology export or transfer;
- the discloser is disclosing the information "as is" or with implied or express warranties;
- the discloser is granting no license;
- the recipient is not restricted from providing competitive products or services to others;
- the recipient may not reverse engineer, decompile or disassemble any disclosed software;
- the recipient will not export any disclosed software in violation of any export laws;
- the parties will mediate and then arbitrate any dispute (with a carve-out for injunctions).

#### 25.8.18 IT warranties

The IT contract should require the supplier to warrant that, as applicable to the procurement, all equipment, software, systems installed and services meet the contractual requirements. Suppliers generally prefer to disclaim all implied warranties of merchantability and fitness for purpose in favor of specific repair or replace warranties that give little or no recourse to agencies. In order to protect the agency, the contract should either reinstate the implied warranties or avoid the supplier's implied warranty disclaimers by devising a format that exchanges supplier disclaimers for specific express warranties. For instance, include language such as "Should such product not perform as warranted, the supplier will be responsible for fixing and repairing the product and if the supplier fails to do so, the agency has the right to receive a credit or equitable relief from the supplier, etc." All express and implied warranties should be clearly stated in the contract.

The contract should include a stated warranty period that begins after acceptance of the product and prior to the commencement of paid-for maintenance/support. During the warranty period the supplier is required to fix problems and provide some level of support at no additional cost to the agency. Warranty periods vary in length. They are frequently twelve months, although they may be as short as three months. Each VITA contract template includes warranty language adapted for the particular procurement type. After the warranty period expires, agencies commonly receive ongoing service through a maintenance agreement. Here is a sample warranty clause:

"For a period of \_\_\_\_\_ months from Agency's acceptance of the completed Software/Service/Solution (the "Warranty Period"), Supplier represents and warrants that such Software/Service/Solution will conform to all agreed-upon requirements. If, during that period, Agency notifies Supplier that the Software/Service/Solution does not conform to agreed-upon requirements, then Supplier promptly shall correct such nonconformities

at no charge to Agency. If Supplier fails to correct any problem, programming error or bug reported during the Warranty Period within thirty days after receipt of notice, Agency may contract for such work to be done by any third party and Supplier shall reimburse Agency for the reasonable cost of such work."

Most agencies will want far more extensive warranties than merely a warranty that the product will conform to all agreed-upon requirements, and they will want warranties that last beyond the "warranty period". This is true especially in contracts in which the supplier prominently states that it makes no warranties other than those expressly set forth in the agreement. An agency that purchases a product or licenses software should also obtain a warranty from the supplier or licensor that the technology will not infringe on the rights of any third party. In addition to warranties that the product and all fixes and enhancements will conform to agreed-upon requirements and will not infringe the rights of any third party, an agency might require *express warranties* from the supplier that ensure:

- The product and all enhancements and new versions will contain no known defects.
- Supplier has the right to enter into the agreement and to perform its obligations under the agreement.
- The agreement is its legal, valid and binding obligation.
- Neither supplier nor its employees have been or are the subject, directly or indirectly, of any governmental order, investigation or action of any kind, including without limitation any order or action to revoke or deny any export privileges, and supplier will notify agency immediately in the event supplier or any of its employees become subject to any such order, investigation or action.
- Supplier's software, services or products shall not infringe on any third party's intellectual property rights, including, but not limited to patent, trademark, copyright or trade secret.
- Supplier is under no obligation or restriction, nor will it assume any such obligation or restriction, which would in any way interfere or be inconsistent with, or present a conflict of interest concerning, the services which are the subject of the agreement.
- Supplier's performance will not breach or conflict with any prior obligation of supplier to any other party, including any obligation to keep confidential any information acquired by supplier before the date of the agreement.
- Unless approved in advance by agency, no information supplier discloses to agency in providing the services that are the subject matter of the agreement will be confidential to supplier or any third party.
- The supplier, if a licensor, has the right to grant a license to the software free and clear of any liens and encumbrances.
- The supplier is not currently the subject of any litigation or pending claim that would materially affect the supplier's ability to perform.
- The fees and hourly rates set forth in Exhibit/Schedule are the best rates supplier offers to any of its customers.
- The software and all enhancements and new versions will contain no known computer virus or other "contaminants," including any codes or instructions that may be used to access, modify, delete, damage or disable agency's computer system, which shall include, but not be limited to, security or expiration codes.
- Licensor expressly waives and disclaims any right or remedy it may have at law or in equity to unilaterally de-install, disable or repossess the Software should Licensee fail to perform any of its obligations under this Agreement.
- In no event shall Licensor have the right to purposefully or accidentally electronically repossess the Software using "self-help" devices. For purposes of

this Agreement, “repossess” shall include, but not be limited to, electronic lock-outs or boobytraps.

When the supplier incorporates third party software into the software it is licensing or selling, the agency may want to include that the supplier must obtain comparable warranties from such third parties and shall assign such warranties to the agency. The supplier should also commit to cooperate with the agency in the enforcement of any such warranties. What about the term or survival of these warranties? While the warranty regarding the conformity of the software to the agreed-upon requirements may have a fixed term, for example, of twelve months, the agency may want the warranty against infringement to last indefinitely.

IT contracts may define levels of product errors and deal with each level in a different manner. For example, the contract might define a “fatal error” as one that results in the inability of a system to perform a vital business function of the agency (as further defined in the agreement). The contract might provide, for example, that if the agency discovers a fatal error within six months, then the supplier will handle the error in the same manner as it would handle infringement. In other words, the supplier would modify or replace the product, offer some workaround, or terminate the license and pay the agency the depreciated book value of the software. The agreement might provide that the licensor or supplier will use its best efforts to fix any error other than a fatal error.

#### **25.8.19 IT indemnification contractual language**

An agency that licenses or acquires technology from an IT supplier should include a provision in its IT contract for the supplier to indemnify the agency for claims from third parties arising out of the failure of any warranties or the supplier’s breach of the agreement. The Commonwealth cannot indemnify. Here is a sample indemnity clause:

##### **“A. Indemnification Generally**

Supplier shall defend, indemnify, and hold harmless the Commonwealth and agencies, and their officers, directors, agents, and employees (collectively “Commonwealth Indemnified Parties”) from and against any and all third-party losses, damages, claims, demands, proceedings, suits and actions, including any related liabilities, obligations, losses, damages, assessments, fines, penalties (whether criminal or civil), judgments, settlements, expenses (including attorneys’ and accountants’ fees and disbursements), and costs (each a “Claim” and, collectively, “Claims”) to the extent the Claims in any way relate to, arise out of, or result from:

- i. any negligent act, negligent omission, or intentional or willful conduct of Supplier or any Supplier Personnel;
- ii. a breach of any representation, warranty, covenant, or obligation of Supplier contained in this Contract;
- iii. any defect in the Supplier-provided products or services; or
- iv. any actual or alleged infringement or misappropriation of any third party’s intellectual property rights by any of the Supplier-provided products or services.

##### **B. Defense of Claims**

Supplier will be solely responsible for all costs and expenses associated with the defense of all third-party Claims against Commonwealth Indemnified

Parties. Selection and approval of counsel, and approval of any settlement, shall be accomplished in accordance with all applicable laws, rules, and regulations.”

#### **C. Duty to Replace or Reimburse**

In the event of a Claim pursuant to any actual or alleged infringement or misappropriation of any third party’s intellectual property rights by any of the Supplier-provided products or services, or Supplier’s performance, Supplier shall, at its expense and option, either (a) procure the right to continue use of such infringing products or services, or any components thereof; or (b) replace or modify the infringing products or services, or any components thereof, with non-infringing products or services satisfactory to VITA.

In the event that an Authorized User cannot use the affected Deliverable, Product, Licensed Services, or Services, including any Components, then Supplier shall reimburse such Authorized User for the reasonable costs incurred by such Authorized User in obtaining an alternative product or service.

#### **D. Supplier Dispute of Obligation to Indemnify**

If a Claim is commenced against any Commonwealth Indemnified Parties by a third party alleging an infringement of the third party’s intellectual property rights and Supplier is of the opinion that the allegations in the third-party Claim, in whole or in part, are not covered by the indemnification provision in this Contract, then In the event that Supplier disputes any of its obligations to defend or indemnify any Commonwealth Indemnified Party, then Supplier shall immediately notify VITA and the affected Authorized User(s) in writing and shall, nonetheless, take all reasonable steps to protect the rights, remedies, and interests of the Commonwealth Indemnified Parties in the defense of the Claim, including to secure a continuance to permit VITA and the affected Authorized User(s) to appear and defend their interests in cooperation with Supplier as is appropriate, including any jurisdictional defenses VITA or the affected Authorized User(s) may have.”

A provision placing liability on the supplier will not help the agency if the supplier does not have adequate resources to pay. Accordingly, the agency may want the supplier to carry insurance covering the indemnified risks. Agencies may want to require that suppliers provide proof of general liability insurance and professional liability coverage, naming the agency as additional insured. The contract should state the required limit of the policies (usually at least \$1 million for each occurrence) and require the supplier to produce certificates of insurance to show that the required policies are in effect. As an added protection, the agency may require that it be added as an additional named insured to the Supplier’s insurance policy.

#### **25.8.20 Liability limitations in IT contracts – General**

In the private sector, most IT contracts contain language which limits the liability of the supplier to some multiple of the value of all payments made under the contract. As agencies rely heavily on their IT suppliers to assist in providing essential government services to citizens, limiting a supplier’s liability may not be as appropriate. When preparing the IT contract, the agency should evaluate the true risk involved should the supplier fail to perform or deliver. Agencies should take care to limit risk in its IT procurements through good contract scoping, specifications, good statements of work and

supplier and contract management.

- **Liability for direct and indirect damages:** Hold suppliers responsible for *direct* damages arising out of an IT contract. Do not hold suppliers responsible for third party claims arising out of *indirect* damages, with certain exceptions, including infringement of a third party's intellectual property or willful misconduct by the Supplier. Unless responsibility is specifically allocated to the supplier in the contract, the agency should not hold supplier responsible for indirect damages, including special or consequential damages. Example: Supplier should not be liable for lost data, unless the contract specifically provides for supplier responsibility for lost data in the contract.
- **Amount of liability limitations:** Supplier liability should be limited according to the IT contract risk. Liability limitations in excess of 2X the total amount of the contract could be warranted for high-risk contracts, such as contracts for agency IT systems that involve public safety. If a contract contains a liability limitation that is a multiple of the total amount of the contract, then the agency and the supplier should specifically address in the contract how the "amount of the contract" is calculated. This is especially important where the contract has an extension clause or unique funding mechanism. Even if a limitation of the supplier's liability is included, the contract should exclude unlimited liability for infringement of a third party's copyrights or patents from that cap. A limitation of the supplier's liability also should not cap the amount of supplier's liability for property damage, death, or bodily injury suffered either by the agency and its employees, or that might be brought as a claim by a third party. An agency may negotiate no limit for breach of security, confidentiality, infringement or data privacy provisions of the contract.

#### 25.8.21 Liability contractual language for major IT projects

Pursuant to § [2.2-2012.1](#) of the *Code of Virginia*, in all contracts for a "major information technology project" (as that term is defined in § [2.2-2006](#)), the terms and conditions relating to a supplier's indemnification obligations and liability must be reasonable and cannot exceed twice the aggregate value of the contract. Section [2.2-2012.1](#) further provides that in instances of "(i) the intentional or willful misconduct, fraud, or recklessness of a supplier or any employee of a supplier or (ii) claims for bodily injury, including death, and damage to real property or tangible personal property resulting from the negligence of a supplier or any employee of a supplier" a supplier's liability is unlimited.

An exception to the liability limitations exists in contracts that pose an "exceptional risk" to the Commonwealth. In these instances, the CIO is required to conduct a risk assessment prior to the issuance of a Request for Proposal. The risk assessment must include consideration of the nature, processing, and use of sensitive or personally identifiable information. If the risk assessment concludes that the project presents an exceptional risk to the Commonwealth and the limitation of liability amount provided for in the paragraph above is not reasonably adequate to protect the interest of the Commonwealth, the CIO may recommend and request approval by the Secretary of Administration to increase the limitation of liability amount. The Secretary of Administration must approve any recommended maximum alternative limitation of liability amount before it may be included in any Request for Proposal issued for the project.

#### 25.8.22 IT pricing

While the obligations of the IT supplier to the agency may be complex, the primary obligation of the agency is simple. The agency pays the supplier for its IT services or products. System development contracts are traditionally for large complex projects and commonly call for progress payments. An agency can manage the risk of these projects by paying in increments based on project milestones, or holding back a portion of the fee until the software/system is deemed by the agency to be acceptable. In order to work within these constraints, IT suppliers are increasingly breaking projects into smaller chunks, covering shorter periods of time. Agencies may want to evaluate whether it would be more beneficial to pay a greater amount for the supplier's services in implementing the software, rather than for the software license itself.

Software license agreements may call for one-time payments or recurring payments, depending on whether the software license is viewed as a subscription or "paid-up." Applications service/hosting and software-as-a-service are normally subscription based. Fees depend on use and may be charged monthly or annually. Maintenance fees are recurring regardless of whether the underlying license is paid-up one time or is an ongoing subscription, and may include additional hourly charges. The maintenance price should be based on the actual price paid for the software after all discounts and negotiations, rather than the list price, which usually will be significantly higher. IT agreements commonly list the amount of fees and the manner of payment in a schedule (exhibit) to the contract. The contract might state that the amounts set forth in the schedule will be effective for the base term after the contract is signed. If the agency agrees to any increases, they should be capped at a low fixed percentage or at a percentage based on published inflation indices, such as the Consumer Price Index. Here is language from VITA's "Solution" contract template:

"As consideration for the Solution and any additional products and Services provided hereunder, an Authorized User shall pay Supplier the fee(s) set forth on Exhibit B, which lists any and all fees and charges. The fees and any associated discounts shall be applicable throughout the term of this Contract; provided, however, that in the event the fees or discounts apply for any period less than the entire term, Supplier agrees that it shall not increase the fees more than once during any twelve (12) month period, commencing at the end of year one (1). No such increase shall exceed the lesser of three percent (3%) or the annual increase in the Consumer Price Index for All Urban Consumers (CPI-U), U.S. City Average, All Items, Not Seasonally Adjusted, as published by the Bureau of Labor Statistics of the Department of Labor (<http://www.bls.gov/cpi/home.htm>), for the effective date of the increase compared with the same index one (1) year prior. Any such change in price shall be submitted in writing in accordance with the above and shall not become effective for sixty (60) days thereafter. Supplier agrees to offer price reductions to ensure compliance with the Competitive Pricing Section."

The agency should require adequate notice of any price increase so that the agency can replace the supplier if it finds the price to be too high. The agency may also want to include a general clause along the following lines: "For all services that Supplier performs for Agency, Supplier will charge only such amounts as are reasonable and customary. Supplier will not charge Agency more for any such service than Supplier's standard charges for similar services for other customers."

The first sentence above calls for fair prices. The agency will want to obtain quotes from

other suppliers to be sure that the prices being requested by the supplier are fair. The second sentence is a most-favored-nation pricing clause and favors the agency. Normally, only agencies that are in the best bargaining position will be able to obtain such a clause. In order to enforce this clause, an agency would want the right to inspect the supplier's books and records.

An easier clause to negotiate might be one that gives an agency the benefit of any better offer the supplier might make to any other public body in the Commonwealth. Here is a clause along these lines: "Supplier agrees that if any offer is made to or agreement entered into by Supplier with any other Commonwealth public body for substantially similar programs in substantially similar volume at a price less than the price to Agency reflected in this Agreement, then the price reflected in this Agreement shall be reduced to such price offered to such public body."

**Appendix A**  
**VITA Minimum Contractual Requirements for “Major” Technology Projects and**  
**Delegated Procurements**

This form is available on VITA SCM’s website at the following URL:

<https://www.vita.virginia.gov/media/vitavirginiagov/supply-chain/docs/Min-Requirements-Agency-Delegated-RFPs-Contracts.docx>



## **Appendix B**

### **Where to Find Special Terms and Conditions for IT Contracts**

The current version of the Reference Table of Special Terms and Conditions for IT Contracts may be found at VITA's SCM website, under the Tools section:

<https://www.vita.virginia.gov/supply-chain/scm-policies-forms/>.

Additional Special Terms and Conditions for Information Technology Goods and Services are located at: <https://www.vita.virginia.gov/media/vitavirginiagov/supply-chain/docs/Special-Ts-and-Cs-for-IT-Goods-and-Services.docx>.

NOTE: There are additional mandatory terms for cloud procurements; i.e., Software as a Service (SaaS) RFPs/contracts. Please contact [enterpriseservices@vita.virginia.gov](mailto:enterpriseservices@vita.virginia.gov) or to [SCMinfo@vita.virginia.gov](mailto:SCMinfo@vita.virginia.gov) to obtain a copy, which must be added as an exhibit to your RFP/contract.

## **Appendix C**

### **Certification Regarding Lobbying**

The current version of this form may be downloaded from this VITA SCM website, under the Forms section: <https://www.vita.virginia.gov/supply-chain/scm-policies-forms/>

### Chapter highlights

- **Purpose:** This chapter presents methods and strategies for negotiating an IT contract, risks to avoid and proven methods for reaching agreement that will support a successful relationship and mutual project success.
- **Key points:**
  - An effective negotiator is thoroughly prepared and knows the technical and business requirements as well as the strengths and weaknesses of his/her position versus the other negotiating party.
  - Successful negotiation begins with preparation at the outset of the procurement, even before the development of the solicitation.
  - Key areas of preparation include understanding the business needs, understanding the market and contacting customer references.
  - Negotiating a contract for software licenses presents some unique negotiating considerations.
  - There are usually more costs involved in a technology acquisition than the initial sale price. The costs of support and ancillary technology far outweigh any sticker savings that may seem appealing on the original item purchase.

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### 26.0 Introduction

[§2.2-4302.2\(A\)\(3\)](#) of the *Code of Virginia* states in part:

3. For goods, nonprofessional services, and insurance, 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. In the case of a proposal for information technology, as defined in [§ 2.2-2006](#), a public body shall not require an offeror to state in a proposal

any exception to any liability provisions contained in the Request for Proposal. Negotiations shall then be conducted with each of the offerors so selected. The offeror shall state any exception to any liability provisions contained in the Request for Proposal in writing at the beginning of negotiations, and such exceptions shall be considered during negotiation. Price shall be considered, but need not be the sole or primary determining factor. After negotiations have been conducted with each offeror so selected, the public body shall select the offeror which, in its opinion, has made the best proposal and provides the best value, and shall award the contract to that offeror. When the terms and conditions of multiple awards are so provided in the Request for Proposal, awards may be made to more than one offeror. Should the public body 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;

Procurement by negotiation is a process of arriving at a common understanding through bargaining on the elements of a contract, such as delivery, specifications, price, risk mitigation and allocation and terms and conditions. The interrelation of these factors, together with intellectual property ownership rights, existing legacy systems, Commonwealth strategic and/or enterprise objectives, Commonwealth architecture and security requirements, data protection and user access to proprietary software make negotiating a technology contract more complex than non-technology contracts.

An effective negotiator is thoroughly prepared and knows the technical and business requirements, as well as the strengths and weaknesses of his/her position versus the other negotiating party. Only through awareness of relative bargaining strength will a negotiator know where to be firm and/or where permissive concessions in price or terms may be made.

In addition to the insight of the technology experts and subject matter experts (SMEs), negotiation teams benefit from the input of legal, purchasing and/or the business units that will be using the technology. Negotiation experts say that the most common cause of a breakdown in negotiations or in a contract is the failure of one or both sides to define their end of the deal clearly. A well-rounded negotiation team helps to ensure a successful contract by developing a clear and complete negotiation strategy.

Successful negotiation begins with preparation at the outset of the procurement, even before the development of the solicitation. A well-prepared solicitation will outline any negotiation rules or procedures that the agency expects suppliers to follow. This strategy strengthens the Commonwealth's negotiation position.

## 26.1 Contract negotiation steps

### 26.1.1 Preparation

Key areas of preparation include understanding the business needs, understanding the market and contacting customer references. These steps may have been performed earlier in the procurement phase, but revisiting them at this stage will help in developing a clear and complete negotiation strategy.

- **Understand the business needs.** Consider who will be using the solution and why they need it. Determine if the need is critical or desired and how soon it is needed. Discuss contingency plans for what to do if the desired solution cannot be obtained within the timeframe needed. Determine how many users will need the solution, how they will use it and what type of usage is anticipated. Test or witness demonstrations of

the proposed solution(s). What a supplier states in their proposal and what the proposed solution actually delivers may be very different.

- **Understand the marketplace.** The suppliers' proposals may be a great source of current market data that directly relates to the IT project. Research the market and determine what others are paying for the same IT goods or services. Look at different pricing models and determine which model would provide the best value for the product or service being procured. Generally, the solution you want has been implemented before. This means that comparable pricing information should be available in the marketplace or from other users. Conduct a market survey, if one has not been done already. There are various sources of information (Gartner, Forrester, internet sources, etc.) to help you better understand the marketplace.
- **Contact customer references.** Those provided by the supplier will likely provide positive reviews. Checking with other references can prove insightful. Determine where the supplier has done similar work for other customers and call those customers.

#### 26.1.2 Conduct a risk analysis

Identify potential project risks based on the selected proposal(s) and the RFP requirements. This will help to ensure that you have covered all areas to take to the negotiation table. You will include them in the final negotiation strategy. The second tab of Appendix A, Risk Mitigation Worksheet, provides a valuable tool for ensuring a comprehensive look at possible project risk areas to negotiate around. Such areas include but are not limited to the following:

- Commonwealth and/or VITA technology strategies, standards and dependencies affecting a successful project might include:
  - Network, internal architecture, major application and/or server upgrades
  - Interface issues
  - Lacking requirements in the statement of work (SOW)/functionality/business processes
  - Phased development/growth/enhancement
  - Schedule (interdependencies on other applications/systems/hardware/software components/subcontractors/partners/data availability, etc.)
- Price (requirements analysis/customization/data conversion/scope creep)
- Spending risks/out year budgets
- Changes
- Supplier accountability/viability
- Supplier customer service experience from references
- Supplier product/service/performance limitations
- Licensing restrictions/issues
- Supplier assumptions/exceptions to technical/functional/business requirements
- Supplier assumptions/exceptions to terms and conditions
- Supplier assumptions/exceptions to other areas
- Unclear proposal statements

#### 26.1.3 Develop the negotiation strategy

Bring the completed risk analysis into the negotiation strategy. Document the final negotiation strategy using the Appendix A spreadsheet, Tab 1, Negotiation Strategy Worksheet. Documentation should include requirements in business, legal, technical/functional and price. Establish positions on each issue: best, likely and least acceptable. Below is a list of negotiation strategy areas to review:

- Determine final scope/functionality from RFP and selected proposal(s) and/or any “now vs. later” or phased elements.
- Resolve any internal or VITA-required platform/architecture standards or legacy dependency issues.
- Confirm maximum budget.
- Identify those elements of the RFP and selected proposal(s) on which you can afford some degree of negotiation flexibility and those on which you cannot.
- Define non-negotiable, primary “key,” (proposed vs. target), secondary (proposed vs. target) and “walk-away” negotiation factors. Determine how granular you want to go. These factors should include but are not limited to:
  - Price
  - Scope
  - Schedule
  - Milestones/deliverables
  - Performance measurement/service level agreements/remedies or incentives
  - Software license
  - Source code/escrow
  - Business/functional
  - Technical
  - Functional/performance testing
  - Final acceptance criteria
  - Warranty period
  - Warranty
  - Training/documentation
  - Maintenance and support
  - Transition services
  - Change process/administration
  - Project management
  - Key personnel, if any
  - Reporting requirements
  - Security/information technology resource management (VITA ITRM) policy requirements
  - Invoicing/payment
  - Payment withhold schedule, if any
  - Terms and conditions

#### **26.1.4 Assign negotiation team and roles**

Typical roles include the following. The single point of contact (SPOC) will communicate with supplier(s) and make all agreements; the scribe (which may also be the SPOC) will document all agreements; the business lead will represent the project’s business needs; the technical lead will represent the project’s technical needs; and the legal expert will validate legality of the agreements. Conduct an internal trial run of negotiations to test the negotiation strategy and practice the assigned negotiation roles.

## **26.2 Conducting negotiations**

Once the preparation, risk analysis, negotiation strategy and assignment of roles are complete, it is time to enter into negotiations with the supplier(s). It is recommended that the agency negotiate with more than one supplier deemed to be fully qualified and best suited among those submitting proposals. It may be helpful to inform the supplier(s) that negotiations are being conducted with others, but never name the competition. While every negotiation is unique, there are some common practices that should be followed.

- **Prepare an agenda for the meeting.** Items might include an introduction, supplier presentation, issues identification, common ground, negotiation topics, problem solving, and wrap up. Send the agenda to all participants prior to the meeting.
- **Negotiate with the right people.** Verify that the supplier representatives you are meeting with have the authority to make decisions and commit their company to agreements.
- **Avoid quick and hurried negotiations.** Informing the supplier about internal deadlines or restrictions may not be to the agency's best interest, unless possible impacts and concessions have been evaluated and included in the negotiation strategy.
- **Confirm all of the requirements, expectations and supplier promises in writing.** These are based on the solicitation and the supplier's proposal. Include these as part of your final contract.
- **Use the agency's approved contract form.** Customize the agency's contract template as needed with final negotiations. Do not allow the supplier to provide the contract form or any drafting assistance.
- **Use consistent terminology.** Make sure all parties use the same terminology to avoid conflicts and misunderstandings.
- **Lock down the scope of the work to be performed.** Be sure to include services, related costs and all performance levels to be met by the supplier. Most IT suppliers are willing to negotiate performance-based standards. All customer requirements as well as how the supplier plans to meet those requirements should be fully negotiated and included in the contract.
- **Strive for a "win-win" negotiation outcome.** Be flexible in negotiations and willing to yield on points that are not critical. The purchasing agency's negotiation strategy should identify critical and non-critical negotiation points and the value that should be attached to each. Obtain concessions in the right places. Talk with the supplier's references and learn what the supplier's sticking points were during their negotiations. If a supplier is known to be inflexible about its service pricing, for instance, get concessions in other areas, such as license fees. Strategically plan your trade-offs.
- **Protect your agency's and the Commonwealth's interests.** Conduct a thorough review of the contract, including legal review. If possible, have a peer and an attorney provide input prior to and during your negotiations to reduce the possibility of re-work after negotiations have been completed.
- **Do not be undersold.** To set a realistic pricing target for negotiation, conduct a market survey or contact other customers of the supplier who had/have similar projects to obtain their pricing agreement.
- **Use payments as leverage.** Negotiate supplier payments based on certain performance milestones and written formal acceptance by the agency. Payments tied to milestones provide an incentive to the supplier to ensure that the project meets the schedule, the price and the solution, service or product acceptance requirements. Final acceptance payment should not be released until after the agency completes testing,

confirming that the system meets all performance requirements, and is able to use it in a production mode.

- **Identify key personnel in the contract.** If the solution being provided includes key supplier personnel (project manager, technician, etc.) that are critical to the project's success, make sure they are clearly identified in the contract. Make sure that the contract includes language requiring that the agency must approve any changes to supplier personnel.
- **Consider the project's future needs.** Agency needs may change over time. License fees for future additional seats should be included in whatever volume discount is negotiated as part of the initial contract. The time to negotiate these issues and any other foreseeable points is before the contract is signed.
- **Protect the Commonwealth's investment.** Protecting the IT investment should cover the project's lifespan, (i.e., total cost of ownership) and should be given due negotiation consideration. The agency should negotiate supplier support from post-warranty maintenance and support to source code availability and access in the event of certain unforeseen events, as well as post-contract transition services. Depending on the hardware and/or software components that compose an IT project, the life span of those individual components may range anywhere from two to 20 years. It is advisable to:
  - Negotiate terms and prices of post-warranty maintenance and support.
  - Negotiate terms for placing the software source code into an approved escrow account;
  - Negotiate the right to recruit the supplier's technical staff to support the product or provide transition services in the event the supplier ceases doing business, goes bankrupt, is acquired by another company or the contract is terminated early for any reason.
- **Beware of "evergreen" clauses.** Evergreen clauses are automatic renewal clauses that extend the contract. Some suppliers will want to include clauses that automatically extend the term of a service agreement if the supplier does not receive notice of contract termination by a certain date. While some suppliers defend this policy as a customer convenience to prevent gaps in service, it could also mean that an agency could be obligated to pay for service that is no longer needed. Refer to [§2.2-4309](#) of the *Code of Virginia* for statutory guidance on contract modifications.

Defining the scope of the deal is often more difficult than either the agency or supplier expect. In the case of hardware, this includes not only the product specifications, but also the cost of training, the terms of service and/or warranties and the cost of any professional services required to integrate the equipment into an existing environment. For software, the agreement should define the license cost and the costs of support, training, patches/ upgrades and professional services associated with implementation, integration or customization.

## 26.3 Special negotiation issues

### 26.3.1 Software licensing negotiations

Negotiating a contract for software licenses presents some unique and critical considerations. The form of license grant, ongoing fees and supplier requirements for monitoring software usage are a few examples. It is very important to read [Chapter 27](#) of this manual, Software Licensing and Maintenance Contracts, for important information on



understanding and negotiating intellectual property, software types and licenses, warranty and maintenance support, risks, etc. Generally, key negotiation points for software licensing include:

- Rights to use/access, and use/access restrictions
- Licensee's intent to release to third parties
- Definition of the parties entering into the licensing arrangement
- Accurate definition of software to be licensed
- Operating systems and versions supported
- Source code availability (escrow)
- Right to modify
- Limitation of liability
- Warranty period
- Right to copy and distribute (manuals, backups, training, replacement, testing)
- Acceptance criteria definitions

Whether the purchasing agency will be granted a software license directly from the supplier or from a value-added reseller (VAR) on behalf of a software publisher, VITA recommends beginning with this type of license grant requirement language in the RFP: "a fully paid, perpetual, worldwide, nonexclusive, transferable, irrevocable object code license to use, copy, modify, transmit and distribute the Software and Documentation including any subsequent revisions, in accordance with the terms and conditions set forth herein and subject only to the limitations and/or restrictions explicitly set forth in this Contract."

Suppliers prefer to limit and restrict usage and access rights as much as they can; however, careful consideration should be given to negotiating acceptable license rights, both for usage and access. Limitations on license usage may negatively impact the agency's ability to fulfill its future goals and/or the Commonwealth's strategic and/or architectural requirements.

The agency may consider supplier-provided contract language only when the supplier is a reseller of the software and the software publisher requires an end user license agreement (EULA). In such case, the supplier should be advised that a License Agreement Addendum (LAA) is required to address terms and conditions of the EULA with which the agency or the Commonwealth, by law or by policy, cannot agree. Supplier shall have sole responsibility for ensuring that any such Software Publisher executes the LAA. License Agreement Addendum templates (one version for VITA use, another version for other agency use) are located under the Forms section of this VITA SCM website: <https://www.vita.virginia.gov/supply-chain/scm-policies-forms/>.

If the purchasing agency is an executive branch agency, board, commission or other quasi- political entity of the Commonwealth of Virginia or other body referenced in Title 2.2 of the *Code of Virginia*, the license shall be held by the Commonwealth. If your organization is a locality, municipality, school, school system, college, university, local board, local commission, or local quasi-political entity, the license shall be held by that public body. If the purchasing body is a private institution of higher education who is allowed to purchase from VITA's statewide contracts, the license shall be held by that institution.

The type of software license(s) required for your project should have been identified in the solicitation, based on the project's current and future business needs. The solicitation should have requested various pricing scenarios to accommodate additional license purchases should they be needed in the future. These final prices will be a negotiation item. The

agency will negotiate pricing for one or more of the following license types: designated CPU concurrent use, project specific, site, and/or enterprise-wide. Refer to [Chapter 27](#) of this manual, Software Licensing and Maintenance Contracts, for a definition of these license types.

Since software license terms may charge per the number of users/seats/etc., a supplier may want to ensure through scheduled audits that they are being paid the correct licensing fees. If the supplier requires this in the contract, be sure the contract specifies the details of how that audit will occur. The inclusion of an audit term and condition should be considered a strong concession to the supplier; look for something in exchange. Here are some key points to include in the contract regarding audits:

- Define how often they can take place (once per year is common), and for how long after expiration of the contract.
- State that all audit costs will be paid by the supplier.
- State that all audit results will be provided to both parties.
- State that audits may only occur during business hours (clearly define these, as it pertains to you), and require prior written notification several days in advance.
- Define where the audit will take place.
- Define what information will be available during the audit, and clearly specify particular areas not covered (such as personal data).
- Define any agency or Commonwealth limitations and restrictions, and security or privacy standards.

### 26.3.2 Technology pricing negotiations

There are usually more costs involved in a technology acquisition than the initial sale price. The costs of support and ancillary technology far outweigh any sticker savings that may seem appealing on the original item purchase. Many suppliers are willing to reduce their initial sales prices to generate more revenue during the course of the contract.

- **Hardware.** When negotiating an IT contract, remember that pricing for hardware, software, and services follow very different models. Hardware often is priced like a commodity unless the product is new or unique. Usually, supplier margins on hardware are small (one to 15 percent).
- **Software.** The margin for software is often large. Software is priced based on value to the customer and to recover the initial investment to develop the software, not the incremental cost to the supplier for each license, so license prices often can be negotiated down substantially. Maintenance and support are an ongoing cost of software ownership that can cumulatively exceed the cost of the license itself in a few years. Be sure to define what is to be provided for the cost of maintenance and support. If the supplier is requested to provide support with projected resolution time and specified availability windows (could be 24/7 or just during business hours), these are requests that may increase the agency's costs. Annual fees are usually set as a percentage of the license fee. These should be based on the final, negotiated license fee, not the Supplier's list price. Setting the maintenance and support fee at 15 to 20 percent is a good target; however, validate current market prices before establishing a target. The software supplier also may want to be able to increase the fees over the term of the contract. Any increases should be capped at an absolute percentage (3-5 percent is typical) or based on a standard inflation index. Often, agencies can negotiate a freeze on any increases for the first few years of the contract. Often, suppliers who are/will be strategic partners will negotiate more favorably for a long-term relationship.

- **Services.** Services are usually based on labor rates and are marked up based on the demand for those skills (15-50 percent).
- **Licensed Services.** Application hosting services or software-as-a-service suppliers usually offer an annual subscription rate based on the number of application users. Always try to negotiate a pay as you go rate, so that you are only charged per number of actual users, if your user base is subject to fluctuation. Obtaining concurrent user licenses will also reduce these fees depending on your user base access needs.
- **Telecommunications.** Because of common carrier regulations, it may be difficult to get major concessions when acquiring traditional telecommunications services. Often, concessions are won by agreeing to revenue commitments annually or over the term of the contract. It may be unavoidable to commit to a revenue commitment over the term of the contract to achieve rate savings, but revenue commitments should be entered into with caution. Have a firm understanding of your telecommunications spend. You need to know how much is actually spent before you can responsibly commit. If the supplier proposes a commitment based on an agency's current spending, ask for documentation of the basis for that proposal, including how much of your current spend is represented by the commitment. Aim for commitments no greater than 75 percent of the agency's historical spend to ensure flexibility and competitive leverage in the future. If a purchasing agency is using supplier data to evaluate a commitment, include contract language whereby the supplier acknowledges that the agency is relying on their data and agrees to reduce the commitment if their data is later found to be inaccurate. Provide for business downturns. If demand for services is reduced through cutbacks in agency operations, the contract should allow for such an adjustment.

### 26.3.3 Data processing negotiations

Negotiations regarding the protection and privacy of Commonwealth data should result in the highest standards for that protection and privacy, as well as security. Some suppliers providing software as a service or application hosting services may not assume responsibility or liability for the loss, compromise, corruption, unauthorized access, or other vulnerabilities with pushing data into their application. Supplier terms may also state they can share your data with their third-party providers, partners, or subcontractors. It is critical that you negotiate terms that align to the level of data protection and security that your project needs, especially when processing confidential information, personal information, personal health information, or citizen information. Your negotiations must not result in non-compliance with required Commonwealth Security, Enterprise Architecture and Data policies and standards that cannot be formally waived or any federal requirements, such as HIPAA or other statutory privacy acts. It is also critical that your negotiations result in your ability to retrieve your metadata within two to four hours of your request and that you have all your metadata returned at the termination or expiration of the contract within a quick, but reasonable time. Equally important is to negotiate that supplier facilities and backup/disaster recovery facilities, and those of any supplier third-party providers, partners or subcontractors, are located within the continental U.S.; that your data will be backed up daily; and, that supplier notifies you immediately of any compromise to the security or privacy of your data. Another important factor is the positive negotiation result for service or performance levels for the uptime you require for business continuity.

## 26.4 Post-negotiation activities

All agreements that have been negotiated must be finalized in writing and placed in the contract for signature. All other agreements (verbal, e-mails, etc.) will not be enforceable.

Negotiations are complete when you have signed contract offer(s) from the supplier(s). Ensure that those signing the contract have the proper authority to do so. This may have been provided in the supplier's proposal; however, validation binding signature authority may be requested from the supplier. Proceed to [Chapter 29](#) of this manual, Award and Post- Award of IT Contracts, which discusses verifying any federal or *Code of Virginia* compliance requirements that must be validated with supplier prior to award.

#### **26.4.1 Conduct an internal "lessons learned" meeting**

After contract award, it is recommended that an internal meeting with the agency's negotiation team be held to identify what went well, areas for improvement and any other insights that could help make the next negotiation even more effective. Holding the meeting soon after negotiations are completed allows the team to review issues while they are still fresh.

#### **26.4.2 Negotiation file requirements**

Ensure that negotiation team members submit any negotiation records to the agency's procurement lead or single-point of contact (SPOC) when the negotiations are finished and the procurement is completed. It is recommended that the negotiation risk assessment and negotiation strategy documents, if used, be included in the main procurement file.

### **26.5 Basic negotiation guidance**

Below is a list of best negotiation practices:

- Know that anything in the contract can be discussed. Just because something is in print does not make it non-negotiable. Be well prepared and know the agency's position on each item of negotiation.
- The agency's procurement lead; i.e., single-point-of contact, should host and lead the negotiation sessions.
- Identify each point to be negotiated, using a written agenda.
- Establish parameters of discussion for each point.
- Identify important issues first and consider appropriate points in time for their negotiation.
- Try to settle one point before moving to the next.
- Discuss budget limitations, policy and restrictions related to the program or the procurement.
- Be prepared to discuss alternatives.
- Negotiate on an even basis. If the supplier has legal or technical support, bring the agency's qualified counterparts or vice versa.
- Avoid arguments, interruptions and quick deals.
- Be ethical, fair and firm.
- Attempt WIN-WIN results so that both parties realize a satisfactory contract at the conclusion of negotiations and share balanced risks and responsibilities.
- Never underestimate the ability or knowledge of the other party as they have probably done their homework too.
- Avoid narrowing the field to one supplier.
- Never neglect the other side's problems or issues.
- Do not let price bulldoze other interests or issues. A cheap price will not compensate an agency for a system or product that does not meet all of its requirements.
- Search for common ground without spending an irrational amount of time.
- Always have a fallback position.
- Never disclose contents of other proposals to suppliers.
- Do not negotiate areas beyond the scope of the solicitation; i.e., scope creep.

- It's fairer to trade by making a concession and obtaining a concession.
- Try not to accept the first "no." Express concern, make a counter-offer and/or invite alternatives for discussion.
- Be persistent when it comes to pricing and agency budgetary restrictions.
- Be patient, reasonable, fair and respectful.
- Never compromise your business needs or compliance requirements.

## **Appendix A** **Negotiation Strategy Worksheet/Risk Mitigation Worksheet**

A current version of this worksheet may be located under the Tools section of this VITA SCM website:  
<https://www.vita.virginia.gov/supply-chain/scm-policies-forms/>

### Chapter highlights

- **Purpose:** This chapter provides policies and guidelines for the purchase of licensed software and maintenance, including commercial off the shelf(COTS), and related support services. It also presents a comprehensive discussion on intellectual property.
- **Key points:**
  - The well-prepared solicitation will set the stage for negotiating a successful software and/or maintenance contract. Addressing IP ownership issues during the solicitation phase helps ensure an even playing field for the Commonwealth and potential suppliers.
  - Whatever the agency's business objective in buying the software, it's to the agency's advantage to build flexibility into the software licensing and/or maintenance contract to insure that the licenses can adapt to changes in a fast moving technical environment.
  - Except for small, one-time, or non-critical software purchases, VITA recommends that a supplier's license agreement not be used, but that the final negotiated license terms are included in the agency's contract.
  - For value-added reseller (VAR) software products, VITA requires the use of an end user license agreement addendum with certain non-negotiable terms.

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## 27.0 Introduction

Typically, in a software license agreement, the licensor (the one licensing the software technology to the customer), also known as the “supplier,” will grant certain rights to a licensee (the agency or customer). The supplier will retain ownership to each copy of software delivered, but the agency will have a license to use it. The agency’s rights to use, transfer, modify, access and/or distribute the software are defined in the license grants.

Some guidance, but not all guidance in this chapter, may be applicable to cloud/Software as a Service (SaaS). Refer to Chapter 28 for more information regarding cloud/SaaS procurements. If you have any questions, please contact [scminfo@vita.virginia.gov](mailto:scminfo@vita.virginia.gov).

The supplier generally has an interest in restricting the rights granted. The supplier is also interested in protecting the secrecy of the software and its associated trade secrets. The agency, on the other hand, generally wants the grant from the supplier to provide broad rights and few restrictions. The specific types of rights and restrictions negotiated, depends on many factors including:

- Type of a software to be licensed
- Intended use of the software
- Bargaining power of the supplier and agency
- Fee the agency is willing to pay for the license

Many rights can be negotiated into or out of a license agreement if the agency is willing to pay the fee. Many of these negotiated rights, such as bundled training or consulting, can often lead to positive bottom-line results for the Commonwealth.



## 27.1 Understanding the agency's business problem

For successful drafting and negotiation of software licensing and maintenance contracts, the customer must determine:

- Why do we need this software?
- What is the business problem the software is intended to solve?

It is important to understand the agency's business problem that the software being purchased is intended to solve. For example, is the agency planning remote locations? Will existing licenses be adequate for any expansion? The more information the software buyer gathers, the more effectively the contract can be customized to protect the agency's and the Commonwealth's interests.

Read the license terms very carefully. Ensure that the contract provides for the following:

- What happens if the agency's needs or customer base should change/grow/shrink?
- What happens if the supplier changes/grows/shrinks/disappears?
- What if the technology changes?
- What if the project is delayed/changed/scrapped?
- What happens to agency's continuity of business if the supplier has the ability to automatically terminate the license?
- What if the license agreement does not allow for access to the software by agency's agents for conducting the business of the Commonwealth?
- What interruption of services or business happens to the agency if supplier requires random license audits? Who conducts the audits? Who pays for the audits? What are supplier's remedies if audit finds agency out of compliance?

Whatever the agency's business objective in buying the software, it is advantageous to build flexibility into the software licensing and/or maintenance contract to insure that the licenses can adapt to changes in a fast moving technical environment.

## 27.2 Software license user base

Always consider geographic usage when drafting and negotiating a software contract. For example, if an agency is aware that it will use the software licenses in many locations throughout the Commonwealth, the agency should be careful that the software contract does not tie user licenses to the agency's primary location. Some software contracts tie user licenses to an agency's physical location and do not allow licenses to "travel." If a software contract contains location-specific restrictive contract language, new licenses would be required for remote locations. Agencies should always use planning, foresight and negotiation, to minimize additional fees that may be charged for traveling licenses or license expansion. Additionally, software access by VITA infrastructure providers may be required at some point, so it is important to include access rights for them or "other Commonwealth agencies and partners" to reduce restrictive language and requirements for contract modifications later.

## 27.3 Software licensing costs

Licensing of software presents a unique negotiating opportunity. First, the license price accounts for the software buyer's major initial cost. Secondly, the agency should determine the appropriate type and term of the license to help contain ongoing costs. Agencies should

not purchase more licenses than they need or additional software functionality or add-ons that can drive up the price.

A major expense in purchasing software licenses is the cost of ongoing software support and maintenance. Try to concentrate on negotiating up the scope of what is included in license support rather than negotiating down the price first. Fees for support and maintenance are generally charged as a percentage of the license cost, payable up front for the first year and as an ongoing cost throughout the life of the software license. The agency can negotiate the percentage increase of maintenance costs and write cost-increase caps into the software contract to head off arbitrary inflation of annual fees. Remember that the percentage fee charged for support and maintenance is always negotiable.

The agency should be careful to identify all the costs linked to software licenses and associated products, services and deliverables. These might include:

- Initial costs
- Hardware
- Software
- Communications
- Installation
- Maintenance/ongoing support costs
- Interfaces
- Application implementation support costs
- Technical support costs
- Training
- Documentation costs
- Integration costs now and when you implement new releases of the software. Will the software be linked to other systems to or from this system such as PDM, CAD, ERP, APS systems? If so how? It is essential when defining integration parameters that the interface is both specified and stable.
- The Commonwealth's entitlement to new releases/bug fixes.
- The cost of tailoring. Include a clause that specifically precludes other costs now and in the future. Tailoring language to look for and reject will:
  - Say the agency can have new releases but these will be supplied as fixes to the old release or that for a cost the software supplier would integrate the fixes for the agency;
  - Impose a time limit for free upgrades even when the agency subscribes to maintenance. Be sure that the agency's entitlement for free upgrades is not time bound but lasts for the duration of the software agreement.

## 27.4 Developing an appropriate license agreement

For major, complex or enterprise projects, refer to [Chapter 24](#), Requests for Proposals and Competitive Negotiations, for a more in-depth discussion on preparing the solicitation for software acquisitions. A well-prepared solicitation will set the stage for negotiating a successful software and/or maintenance contract. VITA recommends that a supplier's license agreement not be used, but that the final negotiated license terms be included in the agency's contract. In some cases, especially for small software purchases and value-added reseller (VAR) software products, this may not be possible; however, the same scrutiny described below must be considered. For VAR software products, VITA requires the use of a License Agreement Addendum with certain non-negotiable terms. Two versions of this

addendum, one version for VITA SCM and another version for other agency use, are available at the following VITA SCM web page, under the Forms section: <https://www.vita.virginia.gov/supply-chain/scm-policies-forms/>

## **27.5 Contractual provisions for software license agreements**

The following subsections discuss key provisions that should be carefully reviewed by the agency prior to agreeing to any software license agreement terms. Each subsection contains a description of the provision, as well as suggested language that should be incorporated into the contract. Readers will find a helpful table in appendix A, IP/IT Contract Checklist, which describes software usage rights and other recommended IT contract provisions. Refer to [Chapter 25](#) of this manual, IT Contract Formation, for further discussion. An important tool, "VITA Minimum Contractual Requirement for "Major" Technology Projects and Delegated Procurements," must be used by agencies for obtaining VITA approval on major technology projects and is recommended for use in delegated IT procurements may be found at the following VITA SCM web page, under the Forms section: <https://www.vita.virginia.gov/supply-chain/scm-policies-forms/>. Contact VITA's Supply Chain Management Division with any questions at: [scminfo@vita.virginia.gov](mailto:scminfo@vita.virginia.gov).

### **27.5.1 Assignment of software license and maintenance contracts**

Assignment clauses deal with the rights of each party should the software supplier sell to, merge with, or decide to transfer the agreement to another supplier. The language will typically read that the supplier has all of the rights to assign the agreement, while the agency has none. Each party to the agreement should have equal rights to assign or not assign the agreement. It is recommended that purchasing agencies ensure that they have the right to assign the agreement to any other Commonwealth entity or private entity upon providing notice of the assignment to the supplier. The suggested contract wording would allow the supplier to assign the agreement, but only with the written consent of the purchasing agency. Suggested contract wording: "This agreement may not be assigned or otherwise transferred by either party, in whole or in part, without prior written consent by the other party." Should a supplier absolutely reject this language, the agency may be successful in getting supplier to accept the following alternate language, which would follow the supplier's language: "Notwithstanding the foregoing, **Name of Agency** may transfer its license (i) to another Commonwealth agency due to legislative action or if such transfer is in the best interests of the Commonwealth or (ii) to the Commonwealth's infrastructure partner, if this Contract is so transferred under direction of the Commonwealth's Secretary of Administration or Chief Information Officer."

### **27.5.2 Payment of software licenses**

This term outlines the payment requirements of the agency. A software supplier will often require either full payment in advance or a significant percentage in advance with the balance due upon shipment or receipt of product. Obviously, making a full or major payment in advance limits the agency's leverage to not pay or withhold payment should there be a problem with the product.

It is suggested that agencies make payment arrangements based on the successful completion of specific events or milestones. For example, a percentage of payments can be made based upon delivery, installation, preliminary testing, and final testing. The actual percentages will vary by project. Suggested contract wording: "Payment shall be made in the **listed** increments based on successful completion and agency acceptance of the following events: **(assign the actual percentages as appropriate to delivery, installation,**

preliminary testing and final testing). Written acceptance of the deliverable and invoice approval must be given by the agency before payment will be issued.”

Supplier hosting of Commonwealth applications (Application Service Provider) and supplier- provided Software as a Service models normally bill monthly or annual subscription fees which include maintenance and update costs. Agency should try to obtain in-arrears payments rather than advance payments. It is also recommended to negotiate scalable usage fees so that payment is only for what is used.

### **27.5.3 Maintenance/support/upgrades**

If the supplier knows that the agency intends to be largely self-sufficient, which is a recommended best practice, the supplier will usually be more accommodating on maintenance costs. This contract term deals with ongoing maintenance, support fees and future product upgrades after the product is installed. Often, these terms are used interchangeably. Agencies should be wary of maintenance agreements that do not have a cap on increases in annual maintenance or subscription fees, meaning the supplier is free to charge any price in subsequent years. It is recommended that agencies insist on an inflation clause with a “cap” (a ceiling of the retail price index or CPI) in the contract that states the maximum maintenance fee increase that the supplier may charge the agency per year.) Software suppliers may attempt to begin maintenance fees upon delivery of the product.

Typically, the purchase of a software package includes a warranty, which should include maintenance coverage during the warranty period. Be sure that the support start date coincides with the expiration date of the warranty.

The software supplier may look to provide product upgrades to the purchasing agency at an additional cost. The need for upgrades may vary by product. The agency should decide how upgrades will be provided and at what cost. A best practice recommendation is that maintenance support be treated as a separate contract. The purchase of software can be a one-time transaction while maintenance/support is considered an ongoing item with a defined start and end date. Separating the two contracts allows the agency the option to continue using the software even if it later decides to discontinue maintenance/support.

A software maintenance agreement should include remedies or equitable adjustments to maintenance fees for the agency by the supplier if the product does not perform as promised. Often, an agency will judge the supplier’s performance to a problem based on response time, or the amount of time it takes the supplier to respond to the customer’s call for help and to remedy the error. The maintenance agreement can be structured to charge the supplier for services that do not meet the pre-determined parameters concerning system up-time and downtime or other service level commitments.

The agreed-to terms of any software maintenance agreement should match the agency’s business requirements and complexity of the project. Below is an example of suggested language to include in the agreement. The final terms, however, should not conflict with any of the solicitation’s requirements (if applicable), or the agency’s needs or budget, unless the agency has so negotiated with the supplier.

“Supplier shall provide a separate agreement for any maintenance service provided. This maintenance agreement shall begin upon expiration of the warranty period. Supplier shall provide services for the entire period of the maintenance agreement. Supplier shall adhere to the following response criteria regarding maintenance requests. (This is to be determined

by the agency on a case-by-case basis. The response time criteria shall include categories of severity, chain-of-command reporting, and measurement of response times over extended periods, maintaining and providing access to electronic information, and e-mail communications.) Supplier shall provide a service tracking and reporting mechanism, which shall be available to the customer at all times either via e-mail or on the web. Agency, at its sole discretion, may order from Supplier support services ("Maintenance Services"), including new software releases, updates and upgrades, for a period of one (1) year ("Maintenance Period") and for an annual fee of ten percent (10%) of the Software license fee paid by any Authorized User for then-current installed base. Supplier shall notify Agency sixty (60) days prior to the expiration of the Maintenance Period, and Agency, at its sole discretion, may renew Maintenance Services for an additional one (1) year period. The annual fee for Maintenance Services shall not exceed the fee charged for the preceding year's Maintenance Services by more than three percent (3%), or the annual change in CPIW, as defined in the Fees and Charges section, in effect at the time, whichever is less. Agency can decline to implement enhancements, upgrades or a new release if those programs interfere with the agency's intended usage or operating environment." (Declining enhancements, upgrades or new releases, however, can present other risks, so agency is urged to be mindful and discuss thoroughly before making that decision or including such a statement.)

#### 27.5.4 Illicit code

Illicit code may be programming language or additional programs included in the software which allow the software supplier to take action such as automatically disabling the software or providing the supplier with remote access to the software and to agency data and/or systems. Review license agreement terms to ensure terminology is not included that will restrict access by the agency or allow the supplier inappropriate access to the agency's systems. Suggested contract wording:

"Supplier warrants that the licensed software contains no illicit code. Illicit code includes, but is not limited to anything not required to perform the functions that the customer contracts for. Supplier further warrants that the software does not contain any keys that could include any locks, time-outs or similar devices that restrict the customer's access. If any illicit code is found, supplier will be considered automatically in default."

"Supplier warrants that the licensed software does not contain any illicit code that would allow the supplier unauthorized access to the customer's systems or software."

#### 27.5.5 Source code escrow

A source code escrow account is designed to protect a customer in the event the supplier does not or cannot support the software; e.g., supplier is acquired by another company or declares bankruptcy. Typically, a third party specializing in maintaining code and selected by the supplier acts as the escrow agent. The escrow agent will leave the terms of release of the source code to be negotiated between the supplier and agency. The release conditions (i.e., when the source code escrow would be released to the agency by the agent) could include:

- failure to perform any obligation under the agreement;
- the discontinuance of support, upgrades, or enhancements;
- events that endanger the financial stability or indicate instability of the supplier.

The escrow agreement also requires the software supplier to keep the escrowed software updated. The agency should have the opportunity to verify that all current versions of the software and all modifications and enhancements have been delivered to the escrow agent.

Source code escrows provide significant protection for the agency. Agencies can expect software suppliers to challenge the inclusion of this term. Agencies should insist upon clearly defined conditions in the escrow agreement as well as the ability to deliver effective instructions to the escrow agent. In the event of a bankruptcy filing by the supplier, the Bankruptcy Code allows the enforcement of an escrow agreement that is incidental to a license of intellectual property.

It is advisable to require that the escrowed code is verified to ensure the deposited material is complete, correct, and that it works. While your technical team may require other verification activities, here are some basic steps that could be included in an escrow agreement to perform an escrow verification:

- Have the files catalogued and confirm they are readable
- Ensure that all documentation needed to compile and run the code and any associated run-time is included in escrow
- Identify any tools that may be required to maintain the deposit
- Have the product compiled and build the executable code
- Test the functionality of the compiled deposit
- Confirm the usability of the files built when installed

There is a fee associated with an escrow account and additional fees may apply to any escrow verification. If the agency does not want to pay this fee, be sure that the solicitation states clearly that the cost of any escrow account will be paid by the supplier. Suppliers typically will take the position that the escrow fees are an extra cost. Having the agency pay the escrow fee has the potential advantage of expediting release of the software, since a bankrupt supplier may fail to maintain escrow payments.

The approved contract templates used by VITA Supply Chain Management include very complete and comprehensive language. Other agencies, if not using VITA's language, may also consider the following contract language:

"Customer reserves the right to request a third party specializing in maintaining code acts as an escrow agent. This agent will be authorized to release source code information in the event the supplier is unable or unwilling to support the software. The terms of release will be included in Exhibit X (Exhibit X is the document that contains the individualized terms of release that are important to the agency.)

#### **27.5.6 Bankruptcy of supplier**

All licensing agreements should be drafted in anticipation of the risk of the supplier/licensor's insolvency or bankruptcy, particularly for mission-critical software. Specific provisions of the United States Bankruptcy Code are designed to protect the rights of intellectual property licensees in the event of a licensor's bankruptcy.

Section 365(n) of the Bankruptcy Code gives a debtor (here, the licensor) the right to exercise its business judgment to determine which of its contracts it will "assume" (or continue to perform), and which it will "reject" (or breach with the bankruptcy rules),

provided that the contracts are deemed “executory.” A contract is commonly considered “executory” if the obligations of both the debtor and the non-debtor party to the contract “are so far unperformed that the failure of either to complete the performance would constitute a material breach excusing the performance of the other.” A nonexclusive license typically imposes sufficient out-going obligations on each party to be deemed to fit within this definition of “executoriness.” Section 365(n) allows the licensee to retain most of its contract rights before and even after the debtor has rejected the license. Section 365(n) allows the licensee to elect, by notice to the debtor, whether it wishes to have the debtor continue to perform its obligations or to deliver possession of the intellectual property to the licensee. In addition, Section 365(n) prohibits the debtor from interfering with the licensee’s rights as provided in the contract. Upon rejection of the license by the debtor, the licensee may elect either to (i) treat the license as terminated and file a claim for rejection damages against the debtor’s estate or (ii) retain its right to use the intellectual property in exchange for payment of all royalties due over the duration of the license and a waiver of all rights of setoff it may have against the debtor. Section 365(n) also protects the licensee’s rights under an “agreement supplementary to” the license, such as a third-party technology escrow agreement.

To protect the Commonwealth under Section 365(n) of the Bankruptcy Code, the contract should provide the following:

- Licenses granted under the supplier’s license are deemed to be “intellectual property” as defined under Section 101(35A) of the Bankruptcy Code, and that the licensee shall retain and may fully exercise its rights under Section 365(n) in the event of the bankruptcy of licensor.
- The Commonwealth (licensee) should have a present right to use and repair the intellectual property and to make derivative works as of the effective date of the license, even if the Commonwealth is not presently in possession of the source code.
- The agreement should include sufficient ongoing duties on the part of licensor and licensee that the license will be deemed “executory” in the event of a bankruptcy filing. Examples of obligations which are executory include a duty for the licensor to notify the licensee of patent infringement suits and to defend the licensee against infringement claims; as well as indemnities and warranties.
- If feasible, create separate agreements for: (i) trademarks and trade names, which do not fall within the Bankruptcy code definition of “intellectual property”; and (ii) affirmative obligations imposed upon the licensor, such as maintenance and support services, to which Section 365(n) does not authorize the licensee to retain rights. If maintenance and support services are included in the agreement, separately itemize that portion of the fees payable by the licensee that correspond to these obligations and stipulate that such fees will be reduced or eliminated if the licensor ceases to perform the services.
- Include a statement that failure by the licensee to assert its rights to benefits provided by Section 365(n) will not be deemed a termination of the agreement in the event that it is rejected by the licensor.
- Create a separate technology escrow agreement (cross-referenced to the license agreement) by which the licensor must provide source code for all intellectual

property, including upgrades and modifications, to a third-party escrow agent. In addition to audit provisions and requirements concerning storage and maintenance of the software, the escrow agreement should recite that it is an “agreement supplementary to” the license as provided in Section 365(n) of the Bankruptcy Code, and specify trigger conditions for automatic release of the source code to the licensee, such as the cessation of business operations or failure of supplier to support the licensed property.

#### **27.5.7 Supplier audit rights**

Most software suppliers will want to include a provision allowing the conduct of a compliance audit. While the contract may specify the supplier’s right to audit, the agency should negotiate more control over the process. The agency’s information security officer should include any agency or Commonwealth security, confidentiality and access restrictions or parameters for any such audit. COV ITRM policies, standards and guidelines (PSGs) for compliance with security audit requirements and restrictions are available at this location: <https://www.vita.virginia.gov/it-governance/itrm-policies-standards/>. Recommended general contractual language may include and be customized for agency and aligned with any security audit restrictions and any negotiations with supplier:

“Supplier shall provide forty-five (45) days’ written notice to (name of your agency) prior to scheduling any software license audit. The notice shall specify name(s) of individual(s) who will conduct the audit, the duration of the audit and how the audit will be conducted.

Further, the Supplier and its representatives, agents and subcontractors shall comply with any access, security and confidentiality requirements and restrictions of (name of your agency). No penalty shall be levied against (name of your agency) or the Commonwealth for unlicensed software found during the course of the audit. If (name of your agency) is determined to be using unlicensed software, the maximum liability to (name of your agency) shall be the cost of licensing the subject software. All costs associated with the audit shall be borne by the Supplier.”

#### **27.5.8 Documentation and training**

The supplier should be required to provide documentation to the agency that provides instructions on how to install, use and modify the software. The supplier should also be responsible for training the end-users in the use of the software. While negotiable, the following language is suggested as a beginning position:

- “Supplier shall provide to agency documentation, such as a user’s manual, that will provide information necessary to utilize the software. This manual shall include at minimum, a product overview and step-by-step procedures, which include any on-line help desk functions. The supplier shall agree to deliver sufficient copies and allow agency the freedom to use those copies as needed. The supplier warrants that the documentation is sufficient to allow appropriately skilled people to use, modify, and enhance the software. The supplier further agrees to provide documentation to agency for any third-party software that is embedded in the supplier’s software or that supplier’s software is dependent upon.”
- “The supplier must provide hands-on training at the agency’s site and at the supplier’s expense. Training materials should include features designed to train users for certain identified functionalities.”



- “The supplier shall notify the agency of, and allow the agency to participate in user groups, bulletin boards, and other on-line services.”

#### 27.5.9 Right to customizations or enhancements

The Commonwealth should have the right to own or have a perpetual license to any software customizations it performs or enhancements that it creates or pays to have created. All applications software developed and installed by the supplier for the Commonwealth should become the exclusive property of the Commonwealth unless the contract specifically states otherwise. If the Commonwealth has a license for any such customizations or enhancements, then it also should have the right to modify those customizations or enhancements at its own discretion. Usually, contracts for COTS software make it difficult for a customer to obtain ownership to enhancements or modifications because these contracts are highly standardized. Contracts for consulting services (state ownership with a license to the contractor) may be negotiated to provide for state ownership of customizations and/or enhancements.

**27.5.10 Software license agreement recommended language and expectations** Refer to “Guide to Commonwealth Expectations for Software License Agreements,” located under the Tools section at this URL: <https://www.vita.virginia.gov/supply-chain/scm-policies-forms/>. This tool provides valuable information regarding recommended language or expectations for software license contractual provisions. The guide can also be found in Appendix A of this chapter.

#### 27.5.11 Software terms and usage information

General IT terms and conditions can be found at the following link:

<https://www.vita.virginia.gov/media/vitavirginiagov/supply-chain/docs/Special-Ts-and-Cs-for-IT-Goods-and-Services.docx>.

This table provides general software licensing terms and descriptions:

Software term	Usage/need to know
Acceptance of COTS	Governed by terms and conditions of license agreement.
Custom software	Acceptance upon written notice of acceptance or 60 (could vary) days after installation or implementation date, whichever better favors the project's complexity. Any notice of rejection will explain how product fails to substantially conform to the functional and performance specifications of the contract. If contractor unable to remedy deficiency within 60 (could vary) days of notice of rejection, the Commonwealth shall have the option of accepting substitute software, terminating for default the portion of the contract that relates to such custom software or terminating the contract in its entirety for default.
Future releases	If improved versions of any software product are developed by supplier and are made available to other licensees, they will be made available to the Commonwealth or agency at the Commonwealth's option at a price no greater than the Contract price.
License grant	Non-exclusive, perpetual, transferable license, state may use in the conduct of its own business and any division thereof.

Software term	Usage/need to know
License for government purposes	<p>Allows the Commonwealth (including local governments) to use the intellectual property (IP) as long as it is for a “government purpose.” Term should be clearly defined in the RFP and contract. A supplier may have an incentive to permit sharing a government purpose license where there is a possibility of future modifications or support and maintenance. Government purpose licenses should address:</p> <ul style="list-style-type: none"> <li>• Redistribution rights – Who to?</li> <li>• Modification rights – Can the Commonwealth or agencies modify IP or create derivative works without the supplier’s permission?</li> <li>• Length of a license – Does agency need a fixed number of years or non-expiring?</li> <li>• IP indemnification/copyright infringement – Include rights and obligations of both parties in the event of IP infringement/ copyright infringement issues. The Commonwealth should have the right to own or have a perpetual license to any customizations it pays for, performs or enhancements it may create to supplier’s software. If the Commonwealth has a license for any such customizations or enhancements, then the Commonwealth also should have the right to modify these at its own discretion.</li> </ul>
Maintenance	<p>Correction of residual errors will be considered maintenance – will be performed by contractor at no additional charge for duration of contract. If error caused by State’s negligence, modification – Contractor can charge on time and material basis – rates in accordance with SOW.</p>
Procurement of COTS/ancillary services	<p>Standardized licensing agreements, contractor retains COTS software enhancements or derivative works. Contractors should maintain ownership over deliverables related to the maintenance, installation and configuration of COTS software.</p>
Software term	Usage/need to know
Procurement of standardized IT services	<p>(Hosting, Disaster Recovery Services) Be sure that Commonwealth or agency receives appropriate use rights through the licensing of IP embedded in the service.</p>
Procurement of consulting services with customized deliverables	<p>Unless the Commonwealth or agency has a compelling need to exclude contractors from using the deliverables, a license back to the contractor may facilitate competition and resolve negotiation of terms.</p>
Procurement of system integration services	<p>May involve COTS software, custom deliverables with newly created IP with pre-existing contractor IP. (May want to use combination of categories of ownership approach.)</p>

Software term	Usage/need to know
Right to modify/copy	May be copied to perform benchmark tests, archival or emergency restart purposes, to replace a worn copy provided that no more than the number of copies specified in the SOW are in existence at any one time w/o prior written consent of contractor. State may modify for its own use and merge into other program material provided does not conflict with third party license agreement.
Sole source escrow issue with COTS software	<p>Large suppliers less likely than smaller suppliers to provide the Commonwealth with a source code escrow.</p> <ul style="list-style-type: none"> <li>Clearly state need for source code escrow in RFP including whether the Commonwealth or the purchasing agency will bear the administrative costs of an escrow agreements or for collecting the source code.</li> <li>If determine need source code escrow – allow proposers to suggest parameters for escrow.</li> <li>If source code is not supplied ensure that ownership of the source code is held in "escrow" on the customer's behalf if the supplier for some reason is unable to provide maintenance in the future. (In which case, other support arrangements could be made.) There are a number of independent "escrow agents" available.</li> </ul>

## 27.6 Intellectual property (IP) and ownership

The ownership of IP created or used under a state IT contract is an important issue for the Commonwealth, its agencies and suppliers. Suppliers invest significant sums of money in the development of IP and then seek to market their IP to multiple government and commercial entities in order to generate revenue. Purchasing agencies also invest a substantial sum of money in the development of IP by contractors. State and local governments may seek the ownership of IP when they have paid for the creation of changes to an existing system or other work products. In instances where a state or locality takes ownership of IP, the state may then permit other government entities to use the IP, thereby saving those government entities time and money in creating similar IT systems.

IP means the legal rights which result from intellectual activity in the industrial, scientific, literary and artistic fields. There are two main reasons for the protection of IP: One is to give statutory expression to the moral and economic rights of inventors in their creations and the rights of the public concerning those creations. The second is to promote creativity and the dissemination and application of such creativity while encouraging fair trading which would contribute to economic and social development.

IP refers to creations of the mind: inventions, literary and artistic works, and symbols, names, images, and designs used in commerce. Intellectual property is divided into two categories: *industrial property*, which includes inventions (patents), trademarks, industrial designs, and geographic indications of source; and *copyright*, which includes literary and artistic works such as novels, poems and plays, films, musical works, artistic works such as drawings, paintings, photographs and sculptures, and architectural designs. Rights related to copyright include those of performing artists in their performances, producers of phonograms in their recordings, and those of broadcasters in their radio and television programs. IP rights can be licensed or assigned. IP should be treated as an asset that can

be bought, sold, licensed, or even given away at no cost. IP laws enable owners, inventors, and creators to protect their property from unauthorized uses.

### **27.6.1 Copyright**

Copyright is a legal term describing the economic rights given to creators of literary and artistic works, including the right to reproduce the work, to make copies, and to perform or display the work publicly. Copyrights offer essentially the only protection for music, films, novels, poems, architecture, and other works of cultural value. As artists and creators have developed new forms of expression, categories of copyrights have expanded to include them. Computer programs and sound recordings are eligible for copyright protection.

Copyrights endure much longer than some other forms of IP. The Berne Convention mandates that the period of copyright protection cover the life of the author plus 50 years. Under the Berne Convention, literary, artistic, and other qualifying works are protected by copyright as soon as they exist. The United States permits copyright to be conditioned upon a work having been created in fixed form. In the United States, for example, the Constitution gives Congress the power to enact laws establishing a system of copyright, and this system is administered by the Library of Congress' Copyright Office. The U.S. Copyright Office serves as a place where claims to copyright are registered and where documents relating to copyright may be recorded when the requirements of the U.S. copyright law are met.

For software code written to a medium, the copyright must be registered before a party can sue for its infringement.

Only the creator or those deriving their rights through the creator—a publisher, for instance—can rightfully claim copyright. Regardless of who holds the copyright, however, rights are limited. In the United States, copyright law allows the reproduction of portions of works for purposes of scholarship, criticism, news reporting, or teaching. Similar "fair use" provisions also exist in other countries. Copyright protects arrangements of facts, but it does not cover newly collected facts. Moreover, copyright does not protect new ideas and processes; they may be protected, if at all, by patents.

### **27.6.2 Patents**

A patent serves as a contract between society and an individual inventor. Under the terms of this contract, the inventor is given the exclusive right to prevent others from making, using, and selling a patented invention for a fixed period of time—usually for up to 20 years—in return for the inventor's disclosing the details of the invention to the public.

Many products and technologies would not exist without patent protection, especially those that require substantial investments. However, once these products are available in the marketplace, they can be easily duplicated by competitors. When patents are not available, technology is closely held. Patent owners can exclude others from making, using or selling their invention or creation.

Patents are not easily obtained. Patent rights are granted not for vague ideas but for carefully tailored claims. To avoid protecting technology already available, or within easy reach of ordinary individuals, those claims are examined by experts. Patent claims may vary as much in value as the technologies they protect.

There are three types of patents: 1) utility patents; 2) design patents; and 3) plant patents. Utility patents may be granted to any new and useful process or useful improvement thereof. A design patent protects the ornamental design of an article or creation. A plant patent is granted for the invention or discovery of a district and new variety of plant.

### **27.6.3 Trade secrets**

Any information that may be used in the operation of a business and that is sufficiently valuable to afford an actual or potential economic advantage is considered a trade secret. Pursuant to § 59.1-336 of the *Code of Virginia*, “trade secrets” include formulas, patterns, compilations, programs, devices, methods, techniques or processes that derive independent economic value from not being generally known, and not being readily ascertainable through proper means by other persons who can obtain economic value from its disclosure or use. Trade secrets are subject of reasonable efforts to maintain their secrecy. Examples of trade secrets can be formulas for products, such as the formula for Coca-Cola; compilations of information that provide a business with a competitive advantage, such as a database listing customers; or advertising strategies and distribution processes. Unlike patents, trade secrets are protected for an unlimited period of time, and without any procedural formalities.

End user license agreements (EULAs) traditionally contain prohibitions against the reverse engineering of software to protect the trade secrets contained in the code.

In addition, §§ [2.2-4342](#) and [2.2-4343](#) of the Virginia Public Procurement Act provides that a bidder, offeror, or contractor shall not improperly designate as trade secrets or proprietary information (i) an entire bid, proposal, or prequalification application; (ii) any portion of a bid, proposal, or prequalification application that does not contain trade secrets or proprietary information; or (iii) line item prices or total bid, proposal, or prequalification application prices.

### **27.6.4 Trademarks**

Trademarks are commercial source indicators, distinctive signs, words, phrases or symbols (including packaging) that identify certain goods or services produced or provided by a specific person or enterprise. Trademarks are especially important when consumers and producers are far away from one another. The brands for Barbie dolls, Lego building blocks, and Hot Wheels are all trademarks. Trademarks assist consumers with choosing (or avoiding) certain goods and services. Throughout most of the world, trademarks must be registered to be enforceable, and registrations must be renewed.

## **27.7 Intellectual property license types**

An IP “license” means the right to use the IP (and perhaps to copy, modify, and do certain other things to it as well). That right can be limited or unlimited, exclusive or nonexclusive, perpetual or for a finite duration, etc. “Assignment” means a transfer of the ownership of the IP—that is, a transfer of all IP rights.

The basic rule is that a supplier that creates IP owns it unless and until it assigns the IP to someone else. Possessing a copy of the IP is not the same thing as owning the IP itself. When a supplier licenses or provides a deliverable to the Commonwealth that does not mean that the Commonwealth owns the IP embodied in that deliverable.

### 27.7.1 Unlimited

The Commonwealth and its executive branch agencies as defined by § [2.2-2006](#) usually obtain “unlimited rights” in acquired software/technical data. Under certain circumstances the Commonwealth or an agency may be willing to accept “government-purpose rights.” Under other circumstances, the Commonwealth may be willing to accept “limited rights” in technical data or “restricted rights” in software. “Unlimited rights” mean the rights to use, modify, reproduce, release, perform, display, or disclose software/technical data in whole or in part in any manner and for any purpose whatsoever and to authorize others to do so. Such “unlimited rights” are so broad that they are tantamount to ownership rights.

A supplier’s grant of unlimited rights in a deliverable precludes the supplier from making any further sales of that particular deliverable to anyone. Moreover, the Commonwealth may freely disclose the deliverable to supplier’s competitors. An unlimited license grant also limits the contractor’s ability to commercialize the deliverable.

### 27.7.2 Government purpose

“Government purpose” license grant means that the software may be used for any activity in which the government is a party, including cooperative agreements with international organizations or sales or transfers by government to foreign governments or international organizations. Such purposes include competitive procurement. Such “government purpose license grants” do not include the rights to use, modify, reproduce, release, perform, display, or disclose software/technical data for commercial purposes or to authorize others to do so.

### 27.7.3 Limited or restricted

Limited rights and restricted rights apply only to noncommercial software/technical data, not to commercial off-the-shelf (“COTS”) items. Such rights are similar to the rights that a supplier would acquire if it obtained software from a developer pursuant to a negotiated, two- party software license. Typical restrictions on software include limitations on the number of authorized “seats” (i.e., simultaneous users), on making more than minimum number of copies required for archiving, backup, etc., and on modifying software except as required for maintenance purposes.

## 27.8 IP ownership and rights for Commonwealth agencies, as pursuant to § 2.2-2006 of the *Code of Virginia*

The Commonwealth generally obtains unlimited rights in software/technical data which is developed solely at Commonwealth expense. The Commonwealth may obtain government purpose rights (usually for up to five years, when they then become unlimited) in software/technical data developed partly at government expense. The Commonwealth obtains limited/restricted rights in noncommercial software/technical data developed solely at private expense.

“Government or Commonwealth/agency expense” is defined as that IP developed exclusively at Commonwealth expense or that software development was not accomplished exclusively or partially at private expense or IP that was developed with mixed funding: (1) partially with costs charged to indirect cost pools and/or costs not allocated to a Commonwealth contract, and (2) partially with costs charged directly to a Commonwealth contract.

Agencies should strongly consider utilizing licensing arrangements with suppliers in which the supplier retains ownership of its IP and grants the agency (or Commonwealth) a license to use the IP. This licensing approach will lower the overall contract cost by allowing the supplier to retain their IP ownership and the right to market it to others. In addition, a licensing approach will increase the pool of suppliers willing to submit proposals thus increasing competition. Through a licensing approach, agencies will also avoid potential liability in the event of an IP infringement suit by a third party against the owner of the IP and will avoid the administrative and resource burdens associated with future IP support and maintenance issues.

If an IT system or project is federally funded, then the agency should determine if any federal laws or regulations mandate the type of IP arrangement. A federal law or regulation may mandate that an agency acquire a broad license to all IP produced at the government's expense.

#### **27.8.1 Determining the appropriate type of IP ownership for the Commonwealth**

The agency should specify in the solicitation the type of IP ownership arrangement that it is seeking and whether the IP terms and conditions are negotiable. This approach may reduce the likelihood of protests as well as the expense and time spent by the agency and supplier negotiating IP rights. The IP ownership arrangement should be selected after carefully considering the options available to the Commonwealth and determining which ownership option best suits the agency's business needs or the IT project.

Addressing IP ownership issues during the solicitation phase helps ensure an even playing field for the Commonwealth and potential suppliers.

In instances where an agency, as defined by § [2.2-2006](#), is contemplating procuring software products, services and related deliverables for which IP ownership may be needed, the agency should consider whether the benefits of total ownership will outweigh the costs. Agencies should consider: (1) the cost of IP ownership, (2) the cost of alternative IP ownership arrangements, such as a licensing arrangement with the supplier, and whether a sufficiently broad license right can be procured, (3) the number of potential users of the IP, and (4) the potential risks associated with IP ownership, including possible IP copyright and patent infringement suits and future support and maintenance. If an agency insists upon total IP ownership with no license back to the supplier, suppliers may be discouraged from submitting a proposal at all and this could increase the total amount of a contract.

The norm for most IP ownership is that the supplier retains ownership of the IP and the customer takes a perpetual, non-exclusive license. Some different licensing/ownership configurations are discussed below:

- **Agency/Commonwealth owns IP with a license to the supplier**—Commonwealth or the agency owns the IP that is the subject of the IT contract. The agency grants the supplier a license to use the IP developed under the contract with other customers, to create derivative works and to authorize others to use the IP. License granted to supplier allows supplier rights tantamount to ownership and mitigates supplier's concern over surrendering IP ownership.
- **Supplier owns IP with a license to the Commonwealth (or agency)**—Supplier retains ownership of IP but provides the Commonwealth (or agency) with a license to

use the IP. This arrangement tends to be favored by suppliers, since it makes it easier for them to use the IP in projects for other clients. The supplier can grant the agency a license tantamount to ownership in terms of the breadth of the rights. The benefit to the agency or Commonwealth of this arrangement is that the agency does not have to assume the burdens of IP ownership, including the potential for copyright infringement lawsuits.

- **Commonwealth or agency owns IP with no license to supplier**—Commonwealth or agency owns the IP that is the subject of the IT contract, and the supplier does not retain a license to the software to use the IP for other customers or purposes. Suppliers reject this type of arrangement as they want to retain their IP and any future revenue. Suppliers will charge higher prices to offset the value of IP ownership. Only a few suppliers would be willing to agree to this type of ownership arrangement, thus reducing competition and increasing pricing.
- **State-contractor joint ownership**—Commonwealth and supplier claim joint ownership over IP. Joint ownership may create an opportunity for both the Commonwealth and the supplier to benefit from the revenue generated by the redistribution of the IP to other states or entities. Both parties should assess all potential issues of IP indemnification and copyright infringement and determine how they may be appropriately handled in the context of joint ownership.

#### 27.8.2 Determining the appropriate IP rights for the Commonwealth

In determining IP rights, agencies should examine the particular requirements of the acquisition to help determine the appropriate rights the Commonwealth will need:

- **Procurement of commercial software and ancillary services**— Commercial off-the- shelf software (COTS) is virtually always subject to standardized licensing agreements. In certain instances, the terms of the license may be negotiated, particularly regarding financial terms; however, suppliers should not be expected to divest themselves of ownership of COTS software enhancements or derivative works of such software. Also, suppliers will want to maintain ownership over deliverables related to the maintenance, installation and configuration of COTS software.
- **Procurement of standardized IT services (such as hosting or disaster recovery services)**— These offerings typically do not pose difficult IP issues, and the Commonwealth can receive appropriate use rights through the licensing of IP embedded in the service.
- **Procurement of consulting services involving customized deliverables**— In this instance, the Commonwealth may legitimately require ownership of certain deliverables. However, the Commonwealth can still retain the IP rights in work product deliverables while allowing a license back to the contractor. This approach usually provides for increased competition and greater negotiation success.
- **Procurement of systems integration services**— A systems integration contract may involve COTS software and ancillary services, custom deliverables and deliverables that combine newly created IP with pre-existing supplier IP. In this situation, it is advisable for purchasing agencies to utilize IP ownership clauses in the contract in which particular



types of IP can be designated as licensed back to the Commonwealth, owned by the Commonwealth (with or without a license back to the supplier) or jointly owned.

## **27.9 Defining IP ownership and license rights in the contract**

A license can be tantamount to ownership, since it can bestow upon the Commonwealth all of the benefits of ownership without actually transferring title to the state. Agencies, as defined by § [2.2-2006](#) must carefully detail their license rights within the contract to ensure they have the rights to deploy the technology acquired under the contract. The subsections below provide an overview of the types of license rights.

### **27.9.1 License for government purposes**

This type of license permits the Commonwealth to use the IP as long as it is for a government purpose. The term “government purpose” should be clearly defined in the RFP and contract. Suppliers may be incentivized to permit sharing via a “government purpose” license where there is a possibility of future modifications or support and maintenance.

### **27.9.2 Redistribution rights**

The Commonwealth should clearly define whether it will have the right to redistribute IP to other entities, such as other agencies or local governments.

### **27.9.3 Modification rights**

The contract should specifically address whether the Commonwealth can modify IP or create derivative works without the supplier’s permission.

### **27.9.4 Length of license**

The contract should clearly define the length of a license in terms of whether it will last for a specific number of years or whether it is perpetual.

### **27.9.5 IP indemnification/copyright infringement**

The contract should include language regarding the rights and obligations of both parties in the event that IP indemnification or copyright infringement issues arise. For IP owned by a supplier under the terms of the contract, the payment of royalties to the Commonwealth by the supplier upon redistribution or use of IP is typically rejected by suppliers due to legal, financial and administrative concerns.

## **27.10 Software access, ownership and license issues that may arise**

The Commonwealth may request that a supplier place its source code in an escrow that would be accessible by the state if certain events occur, such as a contractor’s bankruptcy. Escrow is usually not suitable for packaged, off-the-shelf software. In the current IT market, large contractors are less likely to provide customers with a source code escrow, while smaller contractors may be more likely to put their source code in escrow. If an agency determines that it needs the protection of a source code escrow, this requirement should be clearly stated in the RFP, including which party will bear the administrative costs of an escrow agreement or for collecting the source code.

There are risks if the supplier keeps the source code and delivers only the object code to the Commonwealth. The Commonwealth may need the source code at some point to avoid relying on the supplier for support and maintenance should the platform not perform or in the event the supplier goes out of business. In addition, auditors may need to access the source code to perform required audits. One solution is that the Commonwealth can create a source code escrow account whereby a trustee has control over a copy of the supplier’s source code. If the supplier goes out of business or bankrupt, the trustee may distribute the software to all of the supplier’s existing customers.

## **Appendix A**

### **Guide to Commonwealth Expectations for Software License Agreements**

VITA has created a guide for reference when drafting a Software License Agreement. Recommended language and expectations for Software License Agreements can be located using the link below:

[https://www.vita.virginia.gov/media/vitavirginiagov/supply-chain/docs/Guide\\_to\\_commonwealth\\_expectations\\_for\\_software\\_license\\_agreements\\_eff-09262017.docx](https://www.vita.virginia.gov/media/vitavirginiagov/supply-chain/docs/Guide_to_commonwealth_expectations_for_software_license_agreements_eff-09262017.docx)

## **Appendix B**

### **IP/IT Contract Checklist**

	Agreement should contain	What it means	
1	Software functionality <ul style="list-style-type: none"> <li>written representations</li> <li>documentation</li> </ul>	All solicitation requirements and supplier representations, certifications, verifications must be included in agreement.	√
2	Service level agreements <ul style="list-style-type: none"> <li>response time</li> <li>capacity</li> <li>interface compatibility</li> </ul>	Include service level agreements where supplier agrees to specific levels of service.	√
3	System configuration <ul style="list-style-type: none"> <li>Compatibility</li> <li>Capacity</li> </ul>	If performance is not met by supplier, (current, not future state) should be specifically included in agreement.	√
4	New software <ul style="list-style-type: none"> <li>Upgrade path</li> <li>Will it work?</li> </ul>	If system is or requires new software development, detail supplier's responsibility to ensure it performs as promised with current platform.	√
5	Anti-virus protection <ul style="list-style-type: none"> <li>Upon delivery</li> <li>In use</li> </ul>	The agreement should include how the antivirus component will work and when it will be fully operational.	√
6	Anti-vaporware protection <ul style="list-style-type: none"> <li>Does the product exist?</li> <li>If not, when?</li> </ul>	Same as above.	√
7	Intellectual property ownership <ul style="list-style-type: none"> <li>Upon delivery</li> <li>In use</li> <li>In bankruptcy</li> </ul>	IP ownership and usage/access rights should be clearly defined in the contract. Supplier may own all rights when system delivered, but who owns customizations and who owns in the event of supplier's bankruptcy?	√
8	Regulatory compliance <ul style="list-style-type: none"> <li>Federal</li> <li>State</li> </ul>	If system is required to follow certain federal or state regulations or requirements, include them in agreement. If supplier warrants full compliance, that should be included as service level with requisite discounts or penalties resulting from compliance failure.	√
9	Change of date warranty <ul style="list-style-type: none"> <li>New year</li> <li>Other significant dates</li> </ul>	If data or system is date reliant, these requirements and supplier's agreement that system will meet them should be included.	√

	Agreement should contain	What it means	
10	Limitation of liability <ul style="list-style-type: none"> <li>• Penalties</li> <li>• Caps</li> </ul>	Make sure supplier agrees to liability if: 1) system fails; 2) system has to be replaced; 3) system failure affects other systems or transactions, etc. For all major IT projects, supplier liability should not exceed twice the value of the contract.	✓
11	Supplier indemnifications <ul style="list-style-type: none"> <li>• Negligence</li> <li>• Willful acts</li> </ul>	All suppliers providing services to the Commonwealth should be required to indemnify the Commonwealth for the negligence or willful acts of its employees, agents, etc.	✓
12	Scope of use <ul style="list-style-type: none"> <li>• Number of sites</li> <li>• Number of users</li> <li>• Customers</li> <li>• Third parties</li> </ul>	Scope of license use should be very specific and included in agreement. Commonwealth, if possible, should have perpetual, non-revocable, transferable and unlimited license.	✓
13	Conversion <ul style="list-style-type: none"> <li>• Initial phase</li> <li>• Planning and documentation requirements</li> <li>• Exit strategy</li> </ul>	Include supplier's plan for system conversion, if any. If contract is terminated or upon system failure, describe supplier's exit plan.	✓
14	Modifications <ul style="list-style-type: none"> <li>• Upon agency's request</li> <li>• Upon regulator's request</li> <li>• Upon supplier's request</li> </ul>	Define who can request modifications. Describe modification process and change control management process for complex projects. All modifications must be in writing and signed by both parties.	✓
15	Acceptance testing <ul style="list-style-type: none"> <li>• Standards</li> <li>• Payment</li> </ul>	Detail acceptance criteria (functional and technical) and how system must perform to meet acceptance. List milestone events; i.e., delivery, installation, acceptance testing, etc., that trigger milestone payments. Define what constitutes final acceptance and final payment.	✓
16	Access to data <ul style="list-style-type: none"> <li>• Customer owns data</li> <li>• Backing up data</li> </ul>	Specify Commonwealth's rights to data if hosted, continued ownership in data, backup and storage requirements.	✓
17	Security <ul style="list-style-type: none"> <li>• Customer services</li> <li>• Related networks</li> </ul>	Detail supplier's responsibility for security compliance, access and reporting security issues. Suppliers are responsible for compliance with Commonwealth security policies, standards and guidelines. Security compliance may be a service level in the agreement.	✓
18	Costs and fees <ul style="list-style-type: none"> <li>• Most favored nation</li> <li>• Caps on increases</li> </ul>	All prices should be agreed to up front and included in agreement. Include caps on price increases. Require supplier to provide same prices to Commonwealth as to any other customer.	✓
19	Confidentiality <ul style="list-style-type: none"> <li>• Post-termination</li> <li>• Confidentiality agreements</li> </ul>	Specify supplier's responsibility to maintain confidentiality of Commonwealth systems, data, information, etc. Do all of supplier's employees sign confidentiality agreements? What if supplier breaches confidentiality?	✓

	Agreement should contain	What it means	
20	Employees <ul style="list-style-type: none"> <li>Hiring and exit procedures</li> <li>Account managers</li> </ul>	Can Commonwealth hire supplier's employees? What is procedure for removal or non-performance of supplier's employee?	√
21	Priority <ul style="list-style-type: none"> <li>SLAs</li> <li>Timelines</li> </ul>	Agreement should establish which service levels have priority. Supplier's priority should be to maintain service levels with minimum disruptions to business continuity and compliance with security procedures. Include performance criteria, reporting and incentives/remedies/penalties.	√
22	Rights to software <ul style="list-style-type: none"> <li>Escrow</li> <li>Modifications</li> </ul>	Who owns software? Who owns licenses? What rights do licenses confer? Who owns customizations and modifications? These should be agreed upon and included in agreement.	√
23	Assignment <ul style="list-style-type: none"> <li>To affiliates</li> <li>To merged entities</li> </ul>	Assignment should require mutual written consent and notice. Include who licenses or software can be assigned to.	√
24	Disaster recovery <ul style="list-style-type: none"> <li>Procedures</li> <li>Scope</li> <li>Periodic testing</li> <li>State of readiness</li> <li>Replacements and upgrades</li> </ul>	The agreement should detail supplier's responsibilities for disaster recovery. Procedures should be in writing and supplier should be required to test disaster recovery procedures on a specified schedule.	√
25	Maintenance agreements <ul style="list-style-type: none"> <li>Updates, modifications and new versions</li> <li>Separate contracts</li> </ul>	Will supplier maintain software after warranty period? For how long? What does maintenance include? Will maintenance agreement be a separate contract?	√
26	Bankruptcy <ul style="list-style-type: none"> <li>Create present rights</li> <li>Escrow agreements</li> </ul>	Detail each party's ownership and license rights in the event of supplier's bankruptcy.	√
27	Termination <ul style="list-style-type: none"> <li>At customer's option</li> <li>Upon bankruptcy</li> <li>Breach/default</li> <li>Non-appropriation of funds</li> <li>Transition of services</li> </ul>	Agreement must provide for agency's ability to terminate the contract. The Commonwealth does not allow suppliers to terminate agreements as this will interfere with our ability to provide public services. A transition plan and supplier's transition support should be included.	√

## **Appendix C**

### **Best Practice Tips for Software Agreements**

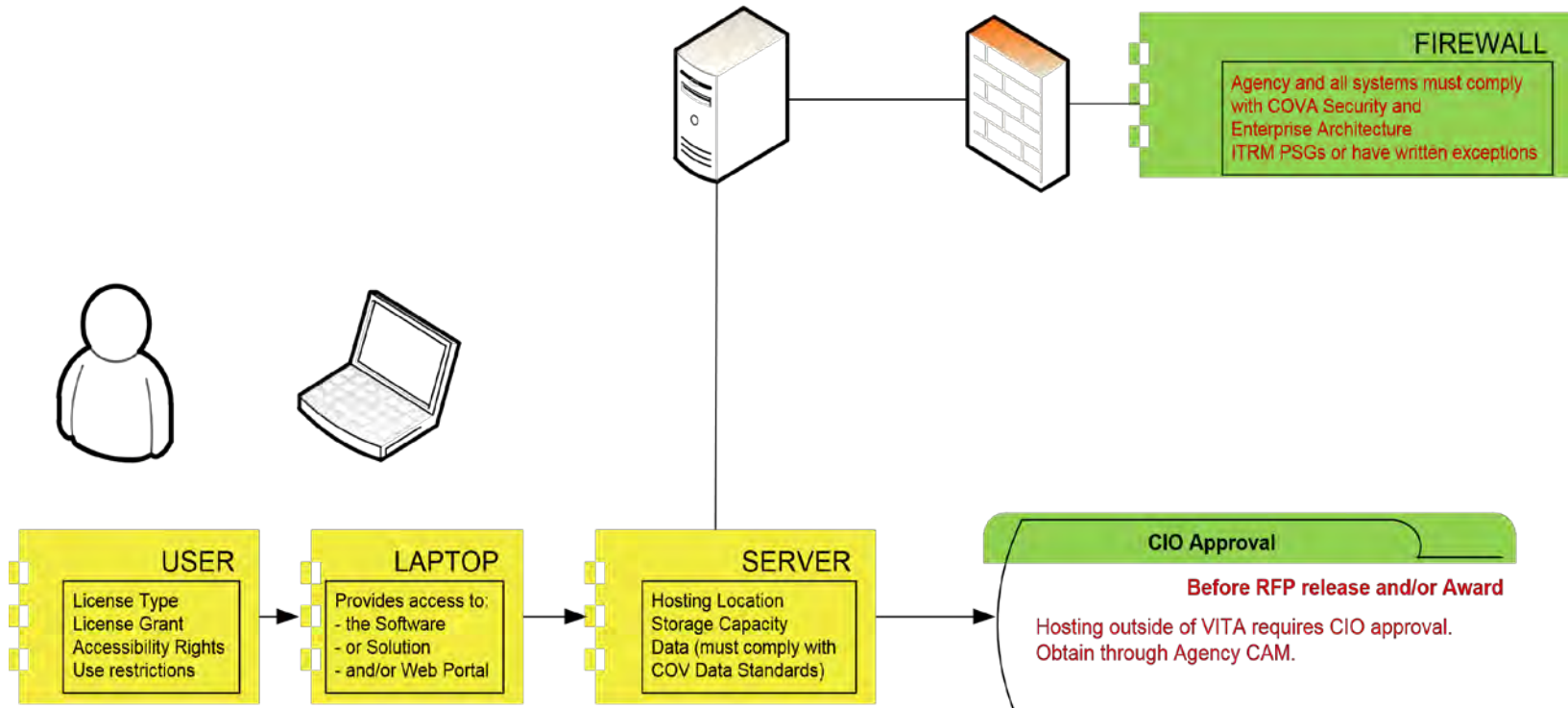
The list below includes best practices for software procurement that may achieve increased benefits:

- Define what is to be accomplished with the software, the current and desired platform/environment and all functional and technical performance expectations in the solicitation and contract. Because these must be comprehensive and complete, impacted end users should be part of any project planning and pre-purchase committee discussions.
- A supplier may insist that the agency accept its standard software license terms, however, diligent negotiations should be pursued. The Commonwealth and VITA may have mandatory terms and, to accept the supplier's standard terms may put the Commonwealth at risk. Software contract negotiation assistance may be obtained by contacting: [SCMinfo@vita.virginia.gov](mailto:SCMinfo@vita.virginia.gov).
- Attempt to spread payments out based on events or milestones. Just like working with a home contractor, paying for everything at once can reduce the agency's leverage if there is a problem later. Carefully map all payments to clearly defined, pre-negotiated milestones, service levels and/or acceptance criteria; include exact deliverable dates.
- Ensure contract termination policies and requirements are clear and in writing.
- Spell everything out. Although it may be more work, put deliverable requirements— specifics of what a product will do at what time—in the contract. Include consequences if the software does not perform as expected. A service-level agreement might say that for every hour a server is down past 24 hours, the supplier credits the agency \$1,000.
- Do not automatically accept the first price the supplier offers. The agency should strive for better pricing without destroying the customer-supplier relationship. If that relationship isn't positive, an agency might secure a good price for the first contract term, commit to a product, and then see a significant price increase in following years or in support and maintenance services. Be persistent in efforts to lower prices. If the supplier cannot or will not lower prices, ask who in their chain of command has the authority to negotiate and work with that person. Remind suppliers that if the Commonwealth or your agency adopts a new technology, other state or local government customers may follow.
- An agency may leverage its buying power by being part of a larger group of buyers and purchasing off a VITA statewide contract. This increases the supplier's potential customers and can result in lower prices.
- Negotiate multi-year contracts for a percentage discount. Agencies should expect to receive a 5% to 15% discount off the final discounted price. Be careful to not mix a multi-year discount in with a volume discount. The multiyear discount and the volume discount should be negotiated separately and subtracted from the original price.

- Be clear about the rights to your data. Suppliers should be bound by a confidentiality agreement. At contract termination, a supplier is required to give all Commonwealth or agency data back in a usable format.
- Ensure that the software license being procured is perpetual and never runs out, including at the end of the software contract, when maintenance fees expire or if the company is acquired or goes bankrupt.

## Appendix D

### IT Procurement Overview



### **THE TERMS AND CONDITIONS MUST EMBRACE, HUG, AND WRAP AROUND THE PROCUREMENT AND THE REQUIREMENTS**

Through the terms and conditions, you need to protect:

- The Commonwealth and your Agency
- Commonwealth assets (users, citizens, the software or solution, data, work product, business continuity, hardware product)
- COTS software and IT services are simple to address; a complex solution is full of interdependent components; cloud solutions (SaaS, ASP, IaaS, PaaS) can create risk



### Chapter highlights

**Purpose:** This chapter provides information about the commonwealth's security and cloud compliance requirements for all agencies when procuring information technology (IT). VITA has statutory authority for the security of state government electronic information from unauthorized uses, intrusions or other security threats by developing and implementing policies, standards and guidelines, and providing governance processes and audits to ensure agency compliance.

**Key points:**

- Adherence to all information security policies, standards and guidelines is required of all state agencies and suppliers providing IT products or services to your agency.
- Also, any procurement of information technology made by the Commonwealth's executive, legislative, and judicial branches and independent agencies shall be made in accordance with federal laws and regulations pertaining to information security and privacy.
- In addition to VITA Security Standard SEC525 for any procurements for third-party (supplier-hosted) cloud services (i.e., Software as a Service), since agencies have \$0 delegated authority to procure these types of solutions, there is a distinct process for obtaining VITA approval to procure.
- There are specially required Cloud Services terms and conditions that must be included in any solicitation or contract for cloud services and a questionnaire that must be included in the solicitation for bidders to complete and submit with their proposals.

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### 28.0 Introduction

The Virginia Information Technologies Agency (VITA), under the authority of [§ 2.2-2009](#) of the *Code of Virginia*, is directed to: "... provide for the security of state government

electronic information from unauthorized uses, intrusions or other security threats, the CIO shall direct the development of policies, standards, and guidelines for assessing security risks, determining the appropriate security measures and performing security audits of government electronic information. Such policies, standards, and guidelines shall apply to the Commonwealth's executive, legislative, and judicial branches and independent agencies."

VITA's statutorily-obligated security responsibilities include (but are not limited to):

- [§ 2.2-2009](#) of the *Code of Virginia* requires the Chief Information Officer of the Virginia Information Technologies Agency to develop policies, standards, and guidelines to ensure that any procurement of information technology made by the Commonwealth's executive, legislative, and judicial branches and independent agencies is *made in accordance with federal laws and regulations pertaining to information security and privacy*.
- In accordance with [§ 2.2-2009](#) of the *Code of Virginia*, VITA shall operate an information technology security service center to support the information technology security needs of agencies electing to participate in the information technology security service center. Support for participating agencies shall include, but is not limited to, vulnerability scans, information technology security audits, and Information Security Officer Services. Participating agencies shall cooperate with the Virginia Information Technologies Agency by transferring such records and functions as may be required.
- Established funding for both Technology Security Oversight Services and Cloud Based Services Oversight (refer to [Title 2.2, Chapter 20.1](#) of the *Code of Virginia*).
- In accordance with [Title 2.2, Chapter 20.1](#), "VITA shall prioritize efforts to modernize current information technology services and to make available to agencies, where appropriate, commercially-offered information technology services including but not limited to cloud computing, mobile, and artificial intelligence."
- [§ 2.2-2009\(C\)](#) states "[i]n addition to coordinating security audits as provided in subdivision B 1, the CIO shall conduct an annual comprehensive review of cybersecurity policies of every executive branch agency, with a particular focus on any breaches in information technology that occurred in the reviewable year and any steps taken by agencies to strengthen cybersecurity measures. Upon completion of the annual review, the CIO shall issue a report of his findings to the Chairmen of the House Committee on Appropriations and the Senate Committee on Finance. Such report shall not contain technical information deemed by the CIO to be security sensitive or information that would expose security vulnerabilities."

The CIO has given VITA's Commonwealth Security and Risk Management (CSRM) Division the responsibility for developing security-related policies, standards and guidelines, implementing them and providing governance processes and audits to ensure agency compliance. VITA's Project Management Division (PMD) and Supply Chain Management Division (SCM) and other VITA divisions participate in various oversight and governance capacities to assist CSRM in fulfilling VITA's statutory security obligations.

## **28.1 VITA Information security policies, standards and guidelines (Security PSGs) required in all IT solicitations and contracts**

### **28.1.1 Application of VITA Security PSGs to all IT solicitations and contracts**

All Security PSGs are available at this URL: <https://www.vita.virginia.gov/it->

[governance/itrm-policies-standards/](#). Adherence to the Security PSGs is required of all state agencies and suppliers providing IT products or services to your agency. Agency information security officers (ISOs) or agency information technology resources (AITRs) are familiar with them.

When developing an IT solicitation or contract, the agency procurement lead must ensure the above link is included in the Technical/Functional Requirements section of the document. Use the Minimum Requirements Matrix which you can download from this SCM webpage. It is located at the first bullet under the Forms section: <https://www.vita.virginia.gov/supply-chain/scm-policies-forms/>.

This matrix includes usable mandatory language that points to the Security PSGs link above, as well as mandatory language and links to other VITA PSGs that cover Enterprise Architecture requirements, Data Standards requirements IT Accessibility and 508 Compliance and high risk contract requirements. Your procurement's project manager, ISO or AITR will know if any formal exceptions will be needed and will obtain any such exception from VITA, should the supplier proposal not be able to comply with any of these requirements.

In addition, if a procurement is a cloud-based procurement (i.e., off-premise hosting), Supplier's failure to successfully answer, negotiate and/or comply with any resulting security exceptions that may arise in order to approve Supplier's cloud application, may result in removal from further consideration.

### **28.1.2 Enterprise Cloud Oversight Services (ECOS) Security Assessments**

For the ECOS Assessments, normally the Supplier will agree to any exceptions as specified by ECOS Director in his ECOS Assessment Approval. Any such exceptions would be added to the Contract. This is a standard sub-process within ECOS Security Assessment approval process. The Sourcing Consultant or procurement lead may be involved in negotiations surrounding the exceptions. Please take special note to understand the two points below:

Point 1: Because the Commonwealth has public facing contracts, the Sourcing Consultant or procurement lead may be asked to assist in obtaining Supplier's response as to whether or not the exceptions are confidential or proprietary (i.e., disclosure of these exceptions would or would not compromise the Supplier's security processes or protocols, thereby providing hackers any opportunity to hack Supplier's application or systems, or if public disclosure would or would not provide competing suppliers with too much information). If they say 'yes' then the public facing contract has to be redacted to serve your agency's responsibility to not disclose or make the information publicly available. If another agency person other than the procurement lead; i.e., business owner, project manager, ISO receives the approval from the ECOS Director, it is important that they collaborate with the assigned Sourcing Consultant or procurement lead and the Sourcing Consultant or procurement lead should follow up as a due diligence action.

Point 2: Sometimes the Supplier will ask the agency to sign a non-disclosure agreement (NDA). The ECOS Director signs an ECOS NDA, if requested by Supplier, on behalf of VITA personnel having access to the Assessment details or the Assessment responses and any resulting approval exception(s) as part of the ECOS process.

The actual ECOS Assessments are never to be included in the contract, and extreme care should be taken not to share the ECOS Assessment with non-stakeholders. Normally, the results of the ECOS Assessment and its approval and exceptions are not shared with the

Evaluation Team, as these are not evaluated per se. If a Sourcing Consultant or procurement lead needs to share, it would be wise to reiterate the confidentiality and proprietary nature of the ECOS Assessment responses and any resulting exceptions to stakeholders (in this case, meaning individuals with a need-to-know), or have stakeholders individually sign a NDA, if they have not already signed one as an Evaluation Team member.

Suppliers would not be in breach of contract compliance if they agree to comply with the exceptions and these exceptions are included in the contract, with any public facing version being redacted according to the Supplier's identification to the agency of any proprietary content. You may contact [SCMinfo@vita.virginia.gov](mailto:SCMinfo@vita.virginia.gov) for any contractual guidance.

### **28.1.3 Application of ECOS policy and procedures to all Cloud Services solicitations and contracts**

While agencies are required to comply with all Security PSGs as described in section 28.1.1, Security Standard SEC525 provides agency compliance requirements for non-CESC hosted cloud solutions.

In addition to Security Standard SEC525, for any procurements for third-party (supplier- hosted) cloud services (i.e., Software as a Service), agencies must use this process obtaining VITA approval to procure. Refer to the Third Party Use Policy at this link: <https://www.vita.virginia.gov/media/vitavirginiagov/it-governance/psgs/pdf/ThirdPartyUsePolicy.pdf>.

Your agency's ISO or AITR can assist you in understanding this process and in obtaining the required documentation to include in your solicitation or contract. There are specially required Cloud Services terms and conditions that must be included in your solicitation and contract, and a questionnaire that must be included in the solicitation for bidders to complete and submit with their proposals. You may also contact: [enterpriseservices@vita.virginia.gov](mailto:enterpriseservices@vita.virginia.gov)

More guidelines for application of ECOS is available here:  
Enterprise Cloud Oversight Services (ECOS): <https://www.vita.virginia.gov/services/catalog-services/enterprise-cloud-oversight-service/>

Commonwealth Security and Cloud Requirements for Solicitations and Contracts:  
<https://www.vita.virginia.gov/supply-chain/scm-policies-forms/>

ECOS Procedure Checklist for Cloud Solution Solicitations and Contracts:  
<https://www.vita.virginia.gov/supply-chain/scm-policies-forms/>

### **28.1.4 Executive Order Number 19 (2018)**

Executive Order Number 19 (2018), Cloud Service Utilization and Readiness, directs VITA to develop governance documents in support of the Order's cloud approach that addresses requirements for evaluating new and existing IT for cloud readiness. This process, which shall apply to Executive Branch agencies as defined in [§ 2.2-2006](#) of the *Code of Virginia*, will include details regarding the following areas:

#### **Development of New IT Applications and Solutions**

- As of the effective date of this Executive Order, all new IT solutions proposed for development must either be cloud-enabled or have a documented exemption approved by the Commonwealth Chief Information Officer (CIO).

- Agencies shall minimize in-house development of custom IT solutions and applications and leverage cloud solutions if recommended by VITA's cloud governance process.

#### **Existing Systems/Applications Cloud Enablement**

- Agencies shall evaluate the continued use of dedicated hardware supporting premise-based IT solutions.
- Agencies shall develop formal processes to enable application development and business services to evaluate cloud service options when deploying, updating, or investing in existing IT solutions.

All agency cloud solutions shall adhere to VITA security and infrastructure policies, standards, and guidelines that will be located in the ITRM Policies, Standards & Guidelines. All agency cloud solutions shall be obtained through VITA's services as outlined by the agency unless otherwise approved by the CIO.

#### **Agency Reporting**

- VITA shall collect information from each agency indicating the percentage of physical and virtually deployed IT system components as well as cloud-ready workloads.
- By December 1, 2018, and annually thereafter, each agency shall identify each system's cloud-readiness status (cloud-ready or not cloud-ready) and report this information to VITA, unless granted a temporary or permanent exemption by the CIO.
- By January 15, 2019, agencies shall provide to VITA information regarding resource requirements necessary to make systems cloud-ready within their IT strategic plans, unless granted an exemption by the CIO. This information shall be evaluated by VITA for cloud-readiness as part of the IT strategic planning process.
- By June 1, 2019, VITA shall report to the Secretary of Administration on the status of identifying cloud-ready systems within the Commonwealth.
- Beginning September 1, 2019, VITA shall report annually to the Secretary of Administration on the progress of migrating systems identified as appropriate for cloud solutions.

#### **28.1.5 Prohibition on the use of certain products and services**

Pursuant to [§ 2.2-5514](#) of the *Code of Virginia*, Commonwealth public bodies are prohibited from using, whether directly or through work with or on behalf of another public body, any hardware, software, or services that have been prohibited by the U.S. Department of Homeland Security for use on federal systems.

### Chapter highlights

- **Purpose:** This chapter sets forth required and valuable award and post- award information technology (IT) procurement policies and guidelines.
- **Key points:**
  - Upon completion of negotiations, if applicable, and before awarding any IT contract, the assigned procurement lead must validate the supplier is in compliance with certain critical contractual or statutory requisites.
  - Unless exempted through legislation, before awarding any IT contract valued at \$250,000 or greater, or a contract for a major project, agencies must obtain required VITA reviews and approvals. Additionally, the Procurement Governance Review (PGR) process must be followed for any technology investment valued at \$250,000 or greater.
  - It is recommended that within 30 days of contract award, a contract kick-off meeting be conducted.

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## 29.0 Introduction

There are certain activities a procurement lead should perform during the award and post- award phases of a procurement's life cycle. These activities will ensure vital statutory compliance requisites are met and add value to the successful transition from negotiations to day one of contract performance.

## 29.1 Before Award

Upon completion of negotiations, if applicable, and before awarding any information technology (IT) contract, the assigned procurement lead must validate the supplier is in compliance with the following critical or statutory requisites:

- Properly registered with eVA: <http://www.eva.virginia.gov/>.
- In Commonwealth compliance: no sales tax delinquency with the Commonwealth ([lrms.Support@Tax.Virginia.Gov](mailto:lrms.Support@Tax.Virginia.Gov)) and not included on the Commonwealth's Debarment List: ([https://logi.eprocgipdc.com/External/rdPage.aspx?rdReport=Public.Reports.Report90\\_20\\_Data](https://logi.eprocgipdc.com/External/rdPage.aspx?rdReport=Public.Reports.Report90_20_Data)).
- In Federal compliance: not listed on the Federal government's Excluded Parties List (<https://www.vita.virginia.gov/supply-chain/sam/>), if federal funds are used to fund any portion of the project or acquisition.
- In Commonwealth compliance: is registered with the [State Corporation Commission](#) (SCC) and authorized to transact business in the Commonwealth (<http://www.scc.virginia.gov/clk/bussrch.aspx>).
- Is not prohibited for use on federal systems by the Department of Homeland Security in accordance with § [2.2-5514](#) of the *Code of Virginia*.

Unless exempted through legislation, before awarding any IT contract valued at \$250,000 or greater, or a contract for a major project, agencies must obtain required VITA reviews and approvals. Additionally, the Procurement Governance Review (PGR) process must be followed for any technology investment valued at \$250,000 or greater.

The procurement file must also include "High-Risk" identification and mitigation planning and reporting, as well as approvals by the Office of Attorney General (OAG) and VITA, in accordance with § [2.2-4303.01](#). If the procurement is a Cloud procurement, the procurement file must include the required ECOS Security Assessment approval, and any VITA Security contractual requirements or security exceptions. The ECOS Security Assessment and security exceptions may be considered supplier proprietary and not available for public disclosure, therefore a redacted version of the contract may also be required for such purposes. Prior to posting notice of award, the procurement file and contract must be prepared to be available for review by other suppliers.

Evaluation team members are requested to complete and submit the evaluation team survey in Appendix A at the close of each procurement where an evaluation was conducted. The procurement's lead or single-point-of-contact should provide team members with the survey form and submission details. VITA SCM is collecting and sharing lessons learned.

Commonwealth IT procurement professionals and project managers may contact [scminfo@vita.virginia.gov](mailto:scminfo@vita.virginia.gov) if interested in obtaining and/or sharing evaluation team lessons learned.

### 29.1.1 Contractual requirements for major IT projects

A "major information technology project", as defined by § [2.2-2006](#) of the *Code of Virginia*, is any Commonwealth IT project that (a) has a total estimated cost of more than \$1 million, or (b) has been designated a major IT project by the Secretary pursuant to § [2.2-225](#). Refer to §§ [2.2-2006](#), [2.2-2007\(9\)](#), [2.2-2016.1](#) and [2.2-2020](#) of the *Code of Virginia* and [Chapter 1](#) of this manual, VITA's Purpose and Scope, for detail regarding these requirements.

Contract terms and conditions for major information technology projects must include limitations on the liability of a supplier. According to § [2.2-2012.1](#) of the *Code of Virginia*, supplier liability for major IT project contracts may not exceed twice the aggregate value of the contract. Refer to [Chapter 25](#) of this manual for more information on supplier liability limitations.

### 29.1.2 "High risk contracts" require review by OAG and VITA

Prior to awarding a "high risk contract," as defined by § [2.2-4303.01](#) of the *Code of Virginia*, the solicitation (prior to posting) and the contract (prior to award) must be



reviewed by both VITA and the OAG. Reviews will be conducted within 30 business days and will include an evaluation of the extent to which the contract complies with applicable state law, as well as an evaluation of the appropriateness of the contract's terms and conditions. The review will also ensure the inclusion of distinct and measureable performance metrics, as well as penalties and incentives, to be used in the event that the contract's performance metrics are not met.

Agencies are required to contact VITA's Supply Chain Management division (SCM) at: [scminfo@vita.virginia.gov](mailto:scminfo@vita.virginia.gov) during the solicitation and contract planning stage prior to awarding a high risk contract. SCM will assist the agency in preparing and evaluating the contract and identifying and preparing the required performance metrics and enforcement provisions.

## **29.2 Types of Awards**

Although a single-contract award is the most common procurement vehicle other variations may be appropriate depending on the agency's needs and the solicitation documents.

### **29.2.1 Split awards**

Award of a definite quantity requirement may be split among suppliers. Each portion shall be for a definite quantity and the sum of the portions shall be the total definite quantity required. A split award may be used only when awards to more than one supplier for different amounts of the same item are necessary to obtain the total quantity or the required delivery. Documentation of reasons for split award shall be made part of the procurement file.

### **29.2.2 Partial and multiple awards**

Partial, progressive or multiple awards may be made where it is advantageous to VITA, the procuring agency or the Commonwealth. When the terms and conditions of multiple awards are provided in the invitation for bid or request for proposal, awards may be made to more than one supplier. Unless otherwise specified in the solicitation, agencies may award multi-line item procurements, in whole or in part, or on an individual line item basis. In determining whether to make separate line item awards on a multi-line item solicitation, consideration should be given to the administrative and management costs to the agency.

## **29.3 Award Documents**

Award documents will vary according to the method of solicitation and agency protocol. Required IT terms and conditions for use in major projects and/or delegated procurements are located in [Chapter 25](#) of this manual, IT Contract Formation. At a minimum, the award document shall include or incorporate by reference the specifications, descriptions or scope of work, general conditions, special and IT conditions and all other requirements contained in the solicitation, together with all written negotiations, modifications and proposal submitted by the supplier.

## **29.4 Contract Execution and Award**

For agency-specific and VITA-delegated IT contracts, the procuring agency is responsible for finalizing their contract and announcing their award. VITA is responsible for finalizing contracts and announcing awards for statewide and non-VITA-delegated IT and telecommunications contracts. Once a contract is ready for award, the following activities should be coordinated by the procurement lead/sourcing specialist:

- Finalize the contract.
- Post the award(s) through publication in eVA and, if elected (refer to § [2.2-4303](#)),a



newspaper of general circulation. See section 29.5 below for additional guidance on award notices.

- Send two executable originals of the final contract to the supplier for signature. The supplier must always sign the final contract before it is signed by the agency.
- Once the supplier has signed and returned the two originals, review the contract documents to ensure the supplier has not made any changes that need to be addressed, present the contract originals to the appropriate VITA or agency executive for signature, depending on the dollar level or authority. Any award document can only be signed and issued by an authorized official of the agency. Return a fully executed original to the supplier.
- Issue letters or e-mails to all non-awarded suppliers to thank them for participating and encourage future interest. It is important to formally acknowledge the efforts of the non-selected suppliers.

## **29.5 Notice of Award and Notice of Intent to Award**

Upon the completion of evaluation, and if the agency determines to make an award, the agency procurement lead will post either a notice of award or a notice of intent to award. If a notice of intent to award is used, the notice will be publicly posted ten (10) days prior to the actual award date of the contract. All award notices will be, at a minimum, publicly posted on eVA. Notice of award is the recommended document to be used as a unilateral award notice posted for public announcement. The notice of intent to award form is a format used to officially notify the public through public posting of the procuring agency's intent to issue an award, but is not required. This notice may be used whenever considerable supplier interest was expressed about the potential award and/or an agency determines it is in the best interest of the procurement process. The notice should not be posted until after completion of the evaluation and negotiation phases, and, if CIO approval is required, until after official written approval is received by the procuring agency. The notice shall be date stamped and publicly posted for the ten-day period allowed for protest (*Code of Virginia*, § [2.2-4360](#)). Upon expiration of the ten-day period, the appropriate award document may be issued. Notices of intent to award are not routinely used by VITA but can be used at an agency's discretion. Upon the award of a contract as a result of this RFP, VITA will promptly post a notice of award at <http://www.eva.virginia.gov>. No award decision will be provided verbally. Any final contract, including pricing, awarded as a result of this RFP shall be made available for public inspection.

## **29.6 Post-Award Activities**

### **29.6.1 Documentation and filing**

Upon completion of the posting period, the procurement file is filed according to the respective agency's contract administration activities. For VITA contracts, VITA procurement staff must provide contract documentation and information, as well as VITA SCM website data and eVA catalog data, as applicable, in accordance with then-current internal SCM procedures. Appendix B includes a procurement file checklist that should be completed and included in the procurement file. Other agencies may use this form as a best practice; however, at a minimum, the procurement file should include:

- Signed contract documents
- Copy of the notice of award as posted in eVA for 10 days

### **29.6.2 Contract kickoff meeting**

A contract kickoff or orientation meeting is an interaction between the agency and the supplier held shortly after the award of a contract. It is recommended that within 30 days of

contract award, a contract kickoff meeting be conducted. Attendees should include the procuring agency's procurement lead, contract manager/administrator, business owner/project manager, technical leads and agency SWaM representative (and for VITA, the IFA Coordinator, as applicable); supplier's project or account manager, contract manager, and key technical personnel; and, any other significant stakeholders who have a part in the successful performance of the contract. The purpose of this meeting will be to review all contractual obligations for both parties, all administrative and reporting requirements, and to discuss any other relationship, responsibility, communication and performance criteria set forth in the contract. Not every contract requires a full-scale formal kickoff meeting, but following award, each contract should be accompanied by a discussion to ensure the parties agree on the performance expectations, requirements and the administrative procedures applicable under the terms of the contract. The agency's procurement lead should make a decision as to whether a kickoff meeting is necessary or if a telephone conference will be sufficient. VITA's sourcing and/or procurement staff will conduct these for VITA contracts in accordance with then-current internal procedures. For less complex, low-dollar value contracts, a telephone call to the supplier to review major points of the contract may be adequate. The following factors may be used to determine the need for a formal meeting or telephone review:

- Type of contract
- Contract value and complexity
- Length of contract, period of performance and/or the delivery
- Requirements
- Procurement history of the supplies or services required
- Expertise/track record of the supplier
- Urgency of delivery schedule
- Agency's prior experience with the supplier
- Any special or unusual payment requirements
- Criticality or complexity of the contract

The kickoff meeting should not be used to change the terms of the contract, but should accomplish the following:

✓	Review of the contractual terms and conditions
✓	Review and coordination of any required insurance and insurance certificates
✓	Identification of roles and responsibilities to include the parties' contract managers/administrators, project managers, key technical leads, etc.
✓	Reinforcement of the contract's performance expectations, measurements and any remedies
✓	Review of any incentive arrangement(s)
✓	Reinforcement of any partnering arrangement(s).
✓	Discussion of the project schedule and milestones.
✓	Revisit and/or clarify the contract's functional and technical requirements including any security, confidentiality, IT accessibility and/or Section 508 compliance.
✓	Reporting requirements, as applicable, including SWaM, sales, status, service level, etc.
✓	Applicable contract administration procedures, including delivery, inspection and acceptance of deliverables, modifications, contract monitoring and progress measurement

✓	Review of eVA ordering procedures, if applicable
✓	Review invoicing and payment requirements and procedures
✓	Restate delivery, inspection and acceptance criteria
✓	Explanation of the limits of authority for the personnel of both parties
✓	Procedures for escalation

After the kickoff meeting, the procurement lead should prepare a memorandum for the file detailing the items covered. It should include areas requiring resolution, a list of participants, and, in particular, those individuals assigned responsibilities for further action and the due dates for those actions. Copies of the memorandum should be distributed to all participants.

## **Appendix A**

### **Evaluation Team Survey**

Supply Chain Management is constantly looking for ways to refine our processes and deliver the best experience and results. Please assist us by taking a few moments to complete an Evaluation Team Survey, which may be downloaded from VITA SCM website, under the Forms section at the following URL:  
<https://www.vita.virginia.gov/supply-chain/scm-policies-forms/policies-forms/>.

## **Appendix B**

### **Procurement File Checklist**

<b>Agency:</b>	<b>RFP#:</b>
<b>PGR #:</b> (if applicable)	<b>IFB #:</b>

<b>Item</b>	<b>Date</b>	<b>Initials</b>
PGR document (if applicable)		
Approval from CIO (as required)		
Justification to issue (RFP)		
Final draft of solicitation and contract template(s)		
Evaluation Criteria/weights		
Public notice of solicitation (State agencies must post in eVA and, if desired, a newspaper of general circulation. Localities are encouraged to post in eVA and must do so if they elect not to publish in a newspaper of general circulation in their area).		
List of SWAM suppliers solicited		
Amendments (if posted)		
Supplier Q & A (if posted)		
Pre-bid or Pre-proposal attendees		
Recording from Pre-bid (proposal) conference (if avail)		
List of suppliers submitting responses to solicitation		
Instructions to Evaluation Team (including non- disclosure agreement)		
Consensus evaluation form(s)		
Evaluation Team Report		
Check for Federal debarment. Print EPLS ( <a href="https://www.vita.virginia.gov/supply-chain/sam/">https://www.vita.virginia.gov/supply-chain/sam/</a> ).		
Check Virginia tax status: ( <a href="mailto:lrms.Support@Tax.Virginia.Gov">lrms.Support@Tax.Virginia.Gov</a> )		
Check for Virginia debarment: <a href="https://logi.eprocipdc.com/External/rdPage.aspx?rdReport=Public.Reports.Report9020_Data">https://logi.eprocipdc.com/External/rdPage.aspx?rdReport=Public.Reports.Report9020_Data</a>		
Validate SCC identification no. for supplier authorization to transact business in the Commonwealth ( <a href="http://www.scc.virginia.gov/clk/bussrch.aspx">http://www.scc.virginia.gov/clk/bussrch.aspx</a> )		
Validate Supplier's products or services are not included on the U.S. Homeland Security prohibition list. (Check with VITA Security if needed.)		
Validate supplier eVA registration		
If this is a Cloud procurement, validate that the required ECOS Security Assessment has been approved or requires contractual requirements or security exceptions.		
Notice of Award		
Final Contract (will go to contract file)		

### Chapter Highlights

**Purpose:** This chapter defines “high risk” solicitations and contracts, the requirements for a “high risk” solicitation or contract, and the necessary review process for all “high risk” IT solicitations and contracts.

**Key points:**

- All “high risk” IT solicitations and contracts, as defined in [§ 2.2-4303.01\(A\)](#), must be reviewed by both VITA and the Office of the Attorney General (OAG) prior to release of a high risk solicitation and prior to award of a high risk contract.
- VITA Contract Risk Management will conduct high risk IT solicitation and contract reviews according to [§ 2.2-4303.01\(B\)](#).
- All high risk solicitations and contracts must include clear and distinct performance measures and enforcement provisions, including remedies in the case of Supplier non-performance
- eVA will serve as the system of record for reporting data related to performance of high risk contracts

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## 30.0 Introduction

In 2014 the Joint Legislative Audit and Review Commission (JLARC) directed its staff to review the development and management of state contracts. Interest in this topic was prompted by problems that arose from several high profile contracts. JLARC evaluated whether the state's procurement policies ensure that contracts provide good value to the state while also mitigating the risks to agencies and the public. JLARC found that a majority of public contracts deviated from agency expectations across multiple categories, including cost, schedule, and specifications. The study also found that most public contracts for goods and services did not contain incentives to perform the specifications of the contract, or remedies in the case of continued nonperformance.

As a result of the JLARC study, on July 1, 2019, the General Assembly amended the Virginia Public Procurement Act to define "high risk" solicitations and contracts, and the required review and approval processes for all solicitations and contracts that meet the definition of "high risk."

This chapter defines and explains high risk contracting, the *Code* mandated review process for high risk solicitations and contracts, and how agencies can ensure their "high risk" solicitation or contract fulfills the requirements set forth in the VPPA.

## 30.1 High Risk Contracts, Defined

[§ 2.2-4303.01](#) of the Code of Virginia defines a "high risk" solicitation or contract as any public contract with a state public body for the procurement of goods and services which:

- o Costs over \$10 million dollars over the course of the initial term, OR,
- o Costs over \$5 million dollars over the initial term and meets at least one of the following criteria;
  - The goods, services, insurance, or construction that is the subject of the contract is being procured by two or more state public bodies;
  - The anticipated term of the initial contract, excluding renewals, is greater than five years; or,
  - The state public body procuring the goods, services, insurance, or construction has not procured similar goods, services, insurance, or construction within the last five years

According to the statute, all "high risk" solicitations and contracts must be evaluated to ensure that they comply with applicable state law and policy and contain the following:

- o Appropriate terms and conditions,
- o Distinct and measurable performance metrics, including clear enforcement provisions,
- o Remedies in the case that performance measures are not met

VITA, along with the Office of the Attorney General (OAG), is required to review all "high risk" solicitations and contracts to ensure that the requirements outlined in [§ 2.2-4303.01\(B\)](#) are met prior to the release of a "high risk" solicitation, or the award of a "high risk" contract.

### 30.1.1 IT Contracts that meet the definition of "High Risk" Awarded Prior to July 1, 2019

Any existing IT contract that: (i) meets the definition of a high risk contracts and, (ii) has 2 or more remaining renewal provisions shall be reviewed in accordance with the provisions of [§ 2.2-4303.0\(B\)](#) prior to any renewal.

### 30.1.2 Determining "Cost" VS. "Spend"

[§ 2.2-4303.01\(A\)](#) specifies that the dollar threshold for determining whether a solicitation or

contract meets the definition of “high risk” is based on the projected total cost of the procurement. A solicitation or contract is considered “high risk” if it has an *anticipated cost* of over \$10 million dollars, or over \$5 million dollars and meets one of the criteria outlined in [§ 2.2-4303.01\(A\)](#).

Pre-solicitation market research and input from industry subject matter experts can help estimate possible “cost.” This should be the total cost of ownership. Total cost should be calculated to include the total value of the acquisition. This includes the purchase price, installation, maintenance for all of the expected years of the contract, and so on. High risk review requirements will be triggered if the “cost” exceeds the high risk dollar threshold. IT solicitations and contracts that meet the definition of “high risk” will need to be reviewed by VITA and the OAG.

### 30.1.3 Major IT Projects - definition of “High Risk” and approval by CIO

[§ 2.2-2006](#) of the *Code of Virginia* defines a “major IT project” as any Commonwealth information technology project that has a total estimated cost of more than \$1 million or that has been designated a major information technology project by the CIO.

High risk solicitations and contracts are also considered major IT projects, and therefore, must be approved by the CIO prior to the issuance of the high risk solicitation or award of the high risk contract. In order for VITA SCM to recommend approval to CIO, an agency seeking to conduct a high risk procurement must fully meet all requirements laid out in [§ 2.2-4303.01](#).

## 30.2 What should be Included in High Risk Solicitations and Contracts?

### 30.2.1 What a High Risk IT Solicitation Must Contain

An IT high risk solicitation must contain the following in order to be approved for release:

- Distinct and measurable performance metrics, as well as clear enforcement provisions that are incorporated as part of the contractual obligations upon award
- Include performance measures and enforcement provisions in the high risk solicitation which provide a service provision baseline from which to negotiate with Suppliers to the benefit of your agency
- An Attached IT contract template, provided by VITA, contains the appropriate terms and conditions that comply with applicable state law and policy

### 30.2.2 What a High Risk IT Contract Must Contain

A high risk contract must contain the following in order to be approved for award:

- Appropriate contractual terms that comply with applicable Virginia law and policy
  - Terms cannot be duplicative or conflicting within the body of the contract
  - When using VITA’s IT contract templates, it is important to remove all references to VITA and all other general language reserved for VITA’s statewide contracts
  - Distinct and measurable performance metrics and clear enforcement provisions, including remedies or incentives to be used in the event that contract performance metrics or other provisions are not met.

It is important that your agency send the most current, redlined version of the high risk contract in order for VITA and the OAG to determine the appropriateness and legality of the Supplier’s and Agency’s redlines to the original document(s).

## 30.3 Compliance with High Risk Requirements

### 30.3.1 Performance Measures

Performance measures are quantifiable metrics of expected service provision, and are the backbone of a successful contract.



Strong performance measures are:

- o Clear – The standards by which the Supplier are contractually bound are explicit and leave no room for ambiguity;
- o Distinct - Capture inputs/outputs, outcomes, quality, and timeliness in relation to identified performance measures
- o Calculable – Metrics are quantifiable, and are tied to a methodology which can accurately measure performance against the contract;

Performance measures should be tailored to provide accurate and reliable data on the Supplier's performance against agreed upon service provisions. The metrics chosen should be able to correctly identify how well, and to what extent, the Supplier regularly meets the expected levels of service outlined in the original agreement.

Performance measures should be tailored to render the maximum value of the contract. When crafting performance measures, some important questions to ask are:

- o *Which aspects of service delivery are **most** important to procurement success?*
- o *What aspects of performance will indicate that the project is effectively fulfilling its intended purpose?*
- o *What aspects of performance indicate the intended value-add of the project for the Commonwealth?*  
*and,*
- o *What things are measurable that would indicate contract failure?*

Common examples of performance measure areas are: webpage uptime, incident response time/mean time to repair (MTTP), customer service/satisfaction, and prompt delivery of all hardware/software necessary to begin services.

### 30.3.2 Enforcement Provisions and Remedies

Each performance measure should be tied to a corresponding enforcement provision. Enforcement provisions incentivize the Supplier to consistently meet the performance measures set out in the contract.

Strong enforcement provisions:

- o Appropriately incentivize the Supplier to hit performance measure targets regularly using monetary or contractual provisions;
- o Reduce the risk of service level or project failure by holding the Supplier materially accountable for failure to meet performance measures;
- o Include remedies in the case of non-performance

Contractual remedies provide a tangible way to ensure the Supplier is informed and addressed appropriately for missing key performance measures. This can be in the form of monetary penalties, or exercising contractual options such as termination or seeking neglected services from another Supplier.

When crafting enforcement provisions, some of the most important questions to ask are:

- o *How are you making sure the expected deliverables are being met?*
- o *How are you holding the Supplier accountable for poor or nonperformance of the contract requirements?*
- o *In what ways is the Supplier properly incentivized to consistently meet performance targets?*

Common examples of enforcement provisions include liquidated damages, credits applied to monthly invoices, termination for breach of contract, and milestone payment withholds, to be paid after the last milestone in completed, reflected on the final invoice.

## 30.4 Additional Resources

Below are other procurement tools to manage risk and comply with high risk requirements.

### 30.4.1 Service Level Agreements

Service level agreements, or SLAs, define the level of service expected by a customer from a Supplier, laying out the metrics by which that service is measured, and the remedies, if any, should the agreed-on service levels not be achieved.

SLAs provide a modular, easy-to-use methodology for measuring and evaluating performance under the contract. A strong SLA serves as a vehicle for routine monitoring and reporting on outlined performance measures, and provides performance data which can be leveraged to collect remedies or enact enforcement provisions should the Supplier fail to meet the SLAs.

More information on how to create SLAs can be found at the following link: [Service Level Agreement \(SLA\) Tool](#).

See [Chapter 21](#) for more information on SLAs and performance based contracting.

### 30.4.2 Market Research

Preliminary market research will help determine the viability of existing solutions to meet your agency's IT business needs, and establishes a baseline for what to expect of Suppliers' proposed solutions.

Conducting market research also provides your agency with an estimate of the total projected cost of the procurement, allowing your agency to more easily determine whether or not the procurement is considered high risk.

In-depth market research can also forecast potential risks that could occur during the lifecycle of a particular procurement. Understanding the ways industry leaders provide service for the particular solution your agency is procuring helps better understand what your agency should expect of a selected Supplier and the level of service they should be able to provide.

The different phases of market research include:

- Surveillance – involves a high level scan of the industry environment (routine review of journal articles, webinars, etc.)
- Investigation – using the data gathered during market surveillance to identify potential solutions and monitor industry leaders
- Identification – applies knowledge obtained during market surveillance and investigation to scope the procurement to meet your agency's specific IT business needs. Agencies may release a Request for Information (RFI) in order to determine the types of products that are available which will satisfy its requirements. See [Chapter 18](#) for more information on Requests for Information (RFIs)

Market research can also provide your agency with a baseline for establishing performance measures and enforcement provisions. By carefully evaluating what performance targets and remedies have been applied to procurements of a similar size and scope, your agency can leverage the knowledge from the industry during contract negotiations, and hold the Supplier to appropriate standards of performance.

### 30.4.3 Milestone and Corrective Action Planning

For large scale IT procurements, a granular milestone plan, including scheduled deliverables, may help ensure timely delivery of all services the Supplier is contractually obligated to provide. If each milestone is tied to formal acceptance and payment, this incentivizes the Supplier to complete milestones on a timely basis and at the expected level of service. VITA Contract Risk Management recommends that each milestone payment include at least a 20% payment withhold, to be paid once all milestones have been completed and accepted by your agency, reflected on the final invoice to the Supplier.

One method of holding the Supplier materially accountable to performing its contractual obligations is to

require that the Supplier submit a Corrective Action Plan (CAP) for any missed deliverables, milestones, or contractual obligations. Requiring the Supplier to submit, in writing, a detailed plan to correct the deficiencies that caused a variance in performance from what is specified in the contract, will incentivize the Supplier to ensure that all deliverables and/or milestones are met according to initial expectations.

#### **30.4.4 Use of VITA's IT Procurement Tools**

VITA has a number of tools available for agencies to use when conducting an IT procurement to ensure that the procurement remains in compliance with high risk requirements, applicable Virginia law, and VITA's policies, standards, and guidelines.

Our minimum requirements matrix has been revised to include requirements for high risk IT procurement. The matrix contains the contractual language and requirements for IT procurement VITA will be looking for when conducting a high risk review of a particular solicitation or contract. The revised matrix can be found here: [Minimum Contractual Requirements Matrix for Major IT Projects, High Risk Procurement, and Delegated Procurements](#).

In order to accurately judge the appropriateness and legality of the high risk solicitation or contract's terms and conditions, it is important for your agency to use VITA SCM's most current solicitation and contract templates. VITA SCM's RFP, contract and evaluation templates are all designed to result in the strongest IT contract possible. When you are preparing to conduct a high risk procurement, contact [scminfo@vita.virginia.gov](mailto:scminfo@vita.virginia.gov) and you will be provided with the appropriate solicitation or contract templates, as well as any necessary training on how to properly modify VITA SCM's templates.

### **30.5 How to Begin the High Risk IT Procurement Review Process**

#### **30.5.1 Additional VITA Review Processes**

High risk IT solicitations and contracts also fall under the purview of other groups within VITA, and are still subject to additional VITA oversight per the Code. It is up to your agency to ensure that the high risk solicitation or contract has met all additional VITA governance and oversight requirements.

#### **30.5.2 High Risk IT Procurement in Relation to your Agency's Strategic Plan**

Before your agency begins a high risk IT solicitation, it is important to confirm with your AITR that the procurement has been included in your agency's strategic plan. If the procurement was not initially included in your agency's strategic plan, you must ensure that it is retroactively included via a Procurement Business Alignment (PBA). VITA's High Risk Contract Group will not review a high risk solicitation if the procurement is not included in your agency's strategic plan.

Contact your AITR for more information on your agency's strategic plan, or to begin the PBA process.

#### **30.5.3 Submitting a Procurement Governance Request**

For any IT procurement \$250,000 and above, your agency must submit a Procurement Governance Request (PGR). High risk IT solicitations and contracts require a PGR and approval from VITA's Project Management Division (PMD). It will be up to your agency to ensure that all reviews and corresponding documents are submitted to PMD so that VITA can recommend approval for release of the solicitation or award of the contract to the CIO.

### 30.5.4 Enterprise Cloud and Oversight Services (ECOS)

If your high risk IT procurement will be leveraging Cloud services as part the solution, your agency must follow all required Enterprise Cloud and Oversight Service (ECOS) processes. High risk solicitations for Cloud services must include an ECOS Assessment form, which Cloud solution providers must complete and submit as part of their proposal.

Additionally, all high risk solicitations for Cloud computing services must include an Exhibit of Additional Cloud Services Contractual Terms and Conditions. These are to be negotiated after proposals have been evaluated, and select Suppliers have been invited to contract negotiations. An SCM Cloud Sourcing Specialist and Enterprise Services expert, if necessary, must be present during contract negotiations. For additional guidance, refer to the ECOS Procedure Checklist, located at the following link: [ECOS Procedure Checklist for Cloud Solicitations and Contracts](#).

Once your agency has determined which Supplier(s) will move forward to contract negotiations, your agency must submit a request for an ECOS Assessment of the remaining Supplier(s). This assessment must be complete prior to the conclusion of contract negotiations.

A high risk IT contract for Cloud services cannot be awarded until the Supplier has passed the ECOS Assessment, prior to VITA CSRM written approval of any Security Exceptions, or prior to final negotiations to the Exhibit of Cloud Services Additional Contractual Terms and Conditions.

Contact [scminfo@vita.virginia.gov](mailto:scminfo@vita.virginia.gov) for the most current version of the Exhibit of Additional Cloud Terms and Conditions.

## 30.6 Review by VITA Contract Risk Management

After all additional IT procurement requirements have been met, your agency will need to begin the high risk review process with VITA Contract Risk Management. The information below will help your agency navigate the high risk review process.

### 30.6.1 Submitting the High Risk Solicitation or Contract

If the total "cost" of the procurement will exceed \$5 or \$10 million dollars, and meet the definition of "high risk" outlined in [§ 2.2-4303.01\(A\)](#), PMD will forward the high risk IT solicitation or contract to VITA Contract Risk Management so that the high risk review can begin.

All high risk IT solicitations must be reviewed by VITA Contract Risk Management and the OAG prior to the solicitation being publicly posted, and all high risk contracts must be reviewed prior to award. High Risk IT Contracts should be negotiated with top Supplier(s) before submission to SCM for review. All redlines submitted by the Supplier and approved by all parties should be included in the submitted documentation to aid Contract Risk Management in reviewing the contract's inclusion of appropriate terms and conditions and compliance with applicable state law and policy.

Both the OAG and VITA Contract Risk Management have, according to the statute, thirty (30) business days to review a high risk solicitation or contract. In order to maximize the review period, your agency should submit the high risk solicitation or contract to both VITA and the OAG at the same time.

Agencies must submit a completed Minimum Requirements Matrix to VITA Contract Risk Management along with their high risk solicitation or contract. The Matrix can be found at the following website: [Minimum Contractual Requirements Matrix for Major IT Projects, High Risk Procurements, and Delegated Procurements](#).

### 30.6.2 VITA Contract Risk Management Review Process

VITA Contract Risk Management will review the submitted high risk IT solicitation or contract. Remember, the CIO has to approve all procurements for release if they exceed \$1 million. It's the same for contracts. Contract Risk Management is one of the groups that recommends approval to the CIO.

In order to assist agencies with this process, VITA has established the Contract Risk Management team, a group dedicated to reviewing high risk IT solicitations and contracts and consulting agencies before, during, and after the review process has been completed.

High risk contract analysts are trained to identify whether or not the terms and conditions of high risk IT solicitations and contracts are appropriate, comply with Virginia state law and policy, and that the high risk solicitations or contracts include strong performance metrics and enforcement provisions.

In order to determine if a high risk solicitation or contract complies with the requirements set out in [§ 2.2-4303.01\(B\)](#), and can be recommended to the CIO for approval, VITA Contract Risk Management will review the submitted document(s) and provide feedback via redlines. All redlines indicating non-compliance with [§ 2.2-4303.01\(B\)](#) and other applicable Virginia law and policy will mandate revisions on behalf of your agency.

Agencies must re-submit all high risk solicitations and contracts that were returned with redlines so that they can be re-reviewed by VITA Contract Risk Management.

VITA Contract Risk Management also has a trained High Risk Contracting Consultant who is a designated resource for agencies to contact for training on how to use VITA's IT contracting tools. The High Risk Contracting Consultant also serves in an advisory role after the high risk solicitation or contract review has been completed, walking your agency through the comments from VITA Contract Risk Management.

## 30.7 What to Expect from a VITA High Risk Review

### 30.7.1 High Risk Review Timeline

According to the statute, both VITA and the OAG have thirty (30) business days to review the high risk solicitation or contract. So, for example, if Agency X submits their high risk solicitation or contract to VITA and the OAG on September 1, the review will be completed no later than October 12.

VITA Contract Risk Management aims to review and return a submitted high risk solicitation or contract to the submitting agency well within the 30 day business day limit. However, the statute intentionally allows for 30 business days for review of high risk solicitations or contracts in order for VITA Contract Risk Management and the OAG to fulfill their responsibilities, outlined in [§ 2.2-4303.01\(B\)](#).

### 30.7.2 VITA Contract Risk Management's Post-Review Response

After VITA Contract Risk Management's review of your agency's high risk solicitation or contract has been completed, you should expect to receive one of the following responses:

- **Approval for release/award:** if all of the Code requirements are met, VITA Contract Risk Management will inform your agency that it is recommended that the high risk solicitation or contract is approved for release or award by the CIO, pending all other required approvals.
- **Resubmitted to the agency for corrections:** if VITA Contract Risk Management cannot recommend the high risk solicitation or contract to the CIO due to conflicts with the Code requirements, the High Risk Contracting Consultant will reach out to your agency to discuss how the solicitation or contract can become compliant with [§ 2.2-4303.01\(B\)](#).

VITA Contract Risk Management does not recommend approval for release or award until full compliance

with [§ 2.2-4303.01\(B\)](#) has been achieved. If there are outstanding comments from VITA Contract Risk Management that preclude SCM recommending the release/award of the high risk solicitation/contract to the CIO, your agency must resubmit the solicitation or contract to VITA Contract Risk Management with the comments addressed.

### **30.7.3 Post-Review Consultation for High Risk IT Procurements**

If your agency's high risk solicitation or contract contains outstanding comments from VITA Contract Risk Management, your agency will need to resubmit the document(s) with the comments addressed in order for approval for release or award to be recommended. VITA Contract Risk Management seeks to amend the current high risk solicitation or contract, as opposed to rejecting the high risk solicitation or contract outright.

The High Risk Contracting Consultant will serve as the liaison between your agency and VITA Contract Risk Management. The Consultant will contact your agency, walk through the outstanding comments, and explain how the solicitation or contract can be amended to satisfactorily meet the requirements in [§ 2.2-4303.01\(B\)](#).

The post-review consultation process gives agencies the opportunity to revise the high risk solicitation or contract per the guidance of the high risk reviewers and the High Risk Consultant and resubmit their high risk solicitation or contract. Keep in mind, once the revised high risk solicitation or contract is submitted, VITA Contract Risk Management may take up to an additional thirty (30) business days to review the resubmitted document(s).

It is important to remain conscious of the length of time each high risk review may take when creating your procurement timeline., VITA Contract Risk Management always recommends that that suppliers agree to a proposal validity period of at least 180 days to account for both the VITA Contract Risk Management and OAG 30 business day high risk solicitation and contract review periods (and an ECOS review if the solution is a Cloud solution), in addition to the other necessary review processes.

### **30.7.4 OAG High Risk Review Process**

While the OAG will also make suggestions in the form of redlines, they do not formally approve a high risk solicitation or contract for release or award. If changes are required, they will advise you to do so, then you must make the changes and resubmit the document for review to the OAG and to VITA Contract Risk Management. Once the high risk solicitation or contract has been re-submitted, both VITA Contract Risk Management and the OAG will have an additional 30 day review period to ensure that necessary changes have been made.

When the OAG is satisfied with their review, they will re-send the submitted high risk review request form stating that the proposed solicitation or contract has met the statutory requirements. When you receive the form indicating that the OAG review has been completed, it is important that you inform VITA Contract Risk Management by emailing the group directly at [scminfo@vita.virginia.gov](mailto:scminfo@vita.virginia.gov) so that VITA Contract Risk Management ensures that all review requirements have been met.

See Appendix A for the OAG High Risk Submission form.

**Appendix A**  
**Office of the Attorney General**  
**(OAG) High Risk Contract Review**  
**Request Form**

This form is available on the OAG's website at the following URL:

<https://www.oag.state.va.us/files/HighRiskContract-Review-Request-Secured.pdf>

## **Appendix B**

### **VITA's Mandatory Terms and Conditions**

VITA's Core IT Contract Terms and Conditions can be found at the following link:

<https://www.vita.virginia.gov/media/vitavirginiagov/supply-chain/pdf/StatutorilyMandatedTsandCs.pdf>



### Chapter highlights

- **Purpose:** This chapter sets forth VITA's policies on protest procedures related to the procurement of information technology (IT) goods and services.
- Key points:
  - VITA recommends that all IT requests for proposals and contracts undergo several layers and perspectives of review to yield a holistic review and to mitigate the risk of protest.
  - It is VITA's policy that once a supplier invokes alternative dispute resolution (ADR) to address a protest denial, ADR procedures must be exhausted prior to instituting legal action concerning the same procurement transaction unless the purchasing agency agrees to waive ADR.

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### 32.0 Introduction

VITA works diligently to prepare solicitations and contract documents and establish procurement processes in a manner that minimizes the likelihood of protests. VITA recommends that all IT solicitation and contract documents undergo several layers and perspectives of review to yield a holistic review and to mitigate the risk of protest. For VITA issued solicitations and contracts, reviewers include, at a minimum, the procurement project

team, SCM Contracts and Governance and SCM management. Depending on the complexity and size of the project, subject matter experts/consultants and the Office of the Attorney General (OAG) may be requested to participate. While every effort is made to mitigate the risk of protest, there is never any guarantee.

The most obvious areas subject to protest include: how the solicitation document is written (no holes, misguidance, preferential or swayed requirements or conflicting language), proposal evaluation/scoring/weighting content and process integrity, efficient and punctual public postings and supplier notifications, reliability of the procurement project/evaluation team (including conflict of interest and confidentiality), fair and equal communication with and treatment of suppliers prior to award, not adhering to processes or obligations stated in the solicitation document, determination of supplier disqualification/ineligibility/non-responsibility, denial of withdrawal of a supplier's proposal, relationship with the incumbent supplier, if any, and the award decision itself.

## 32.1 Overview of VITA's protest policy

VITA's protest policy follows [§ 2.2-4364](#) of the *Code of Virginia* which states: "A bidder, offeror or contractor need not utilize administrative [including ADR] procedures meeting the standards of [§ 2.2-4365](#), if available, but if those procedures are invoked by the bidder, offeror or contractor, the procedures shall be exhausted prior to instituting legal action. . ." It is VITA's policy that once a supplier invokes alternative dispute resolution (ADR) to address a protest denial, ADR procedures must be exhausted prior to instituting legal action concerning the same procurement transaction unless the purchasing agency agrees to waive ADR. ADR shall be used for:

- Appeals from a determination that the supplier is ineligible to participate in public contracts, e.g., debarment
- Appeals from a denial of a request to withdraw a bid
- Appeals from a determination of non-responsibility
- Appeals from denial of a protest of a contract award

The following language is included in all VITA solicitation templates: "VITA's ADR process serves as its Administrative Appeals Procedure meeting the requirements of [§ 2.2-4365](#) of the *Code of Virginia*. More information regarding the ADR process can be found on the VITA website: <https://www.vita.virginia.gov/supply-chain/sell-to-vita/alternative-dispute-resolution-procedure/>. By responding to this RFP, Supplier agrees to submit any appeal of a protest denial to VITA's alternative dispute resolution (ADR) process."

This language must be included in all VITA SCM solicitations. VITA encourages other Commonwealth agencies which have delegated IT procurement authority in accordance with the requirements set forth in [Chapter 1](#) of this manual to include this language in their solicitations. VITA's delegated IT procurements are not subject to protest processes established by the Department of General Services' Vendor's Manual or Agency Procurement and Surplus Property Manual (APSPM). Any reference to these publications in VITA delegated IT procurements should be removed from the solicitation documents. If such delegated agency does not have an established ADR process, contact: [SCMinfo@vita.virginia.gov](mailto:SCMinfo@vita.virginia.gov) for assistance. VITA's ADR process may be utilized by these agencies.

If a protest decision is appealed and the administrative appeals procedure is requested pursuant to [§ 2.2-4365](#) of the *Code of Virginia*, the purchasing agency will require that the protesting party submit its appeal to an alternative dispute resolution (ADR) process established by VITA. In the event that the dispute is not resolved successfully through ADR procedures, the protesting party may then pursue remedies under the administrative appeals procedure or institute legal action as proscribed in [§ 2.2-4364](#) of the *Code of Virginia*.

### **32.2 Supplier ineligibility/disqualification determinations**

Any supplier refused permission to, or disqualified from participating in public contracts shall be notified in writing. If the purchasing agency makes a written determination that a supplier is disqualified or ineligible to participate in solicitation or public contracting, the agency shall do the following:

- Notify the supplier in writing of the results of the evaluation for determination of disqualification or ineligibility,
- Disclose the factual basis for the determination, and
- Allow the supplier an opportunity to inspect any documents which relate to the determination. The supplier should be notified that it must request to inspect any documents within ten business days after receipt of the notice of ineligibility or disqualification.

Within ten business days after receipt of the notice of disqualification/ineligibility from the purchasing agency, the potential supplier may submit written rebuttal information challenging the determination. The purchasing agency shall issue a written response concerning its determination of disqualification/ineligibility based on all information known to the agency including any rebuttal information, within five business days of the date the agency received the rebuttal information.

If the agency's review of known information or rebuttal information indicates that the supplier should be allowed permission to participate in the solicitation or public contract, the disqualification action should be cancelled. If the agency's review indicates that the supplier should be determined ineligible to participate in the solicitation or disqualified from participation in the contract, the agency shall notify the supplier accordingly. The notice shall state the reasons for the disqualification/ineligibility determination/action. This decision shall be final unless the supplier appeals within ten days of receipt of the agency's written notice by requesting alternative dispute resolution (see <https://www.vita.virginia.gov/supply-chain/sell-to-vita/alternative-dispute-resolution-procedure/> or by instituting legal action as provided in [§ 2.2-4364](#) of the *Code of Virginia*.) If, upon appeal, it is determined that the disqualification/ineligibility determination was arbitrary or capricious, or not in accordance with the Constitution of Virginia, statute or regulations, the sole relief shall be the supplier's restoration of eligibility. Refer to [§ 2.2- 4357](#) of the *Code of Virginia*.

Any supplier, actual or prospective, who is refused permission or disqualified from participation in a solicitation or who is determined to not be a responsible supplier for a particular contract, may bring an action in the appropriate circuit court challenging that decision. The purchasing agency's decision will only be reversed by the court if the supplier establishes that the agency's decision was arbitrary or capricious.

### 32.3 Denial of supplier's withdrawal of bid/proposal

If a potential supplier requests permission to withdraw a bid and the purchasing agency denies permission to withdraw the bid, the agency must notify the supplier in writing stating the reasons for its decision. The decision denying withdrawal of a bid is final unless the supplier appeals the decision within ten (10) business days after receipt of the decision by invoking alternative dispute resolution (refer to: <https://www.vita.virginia.gov/supply-chain/sell-to-vita/alternative-dispute-resolution-procedure/>) or by instituting legal action as provided in the [§ 2.2-4364](#) of the *Code of Virginia*.

If, upon appeal, it is determined through ADR or legal action that the agency's denial of supplier's request to withdraw a bid/proposal was arbitrary or capricious, or not in accordance with the Constitution of Virginia, statute or regulations, the sole relief shall be withdrawal of bid. ([§ 2.2-4358](#) of the *Code of Virginia*)

A supplier who is denied withdrawal of a bid/proposal under [§ 2.2-4358](#) of the *Code of Virginia* may bring an action in the appropriate circuit court challenging that decision, which shall be reversed only if the supplier establishes that the decision of the purchasing agency was not an honest exercise of discretion, but was arbitrary or capricious or not in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms or conditions of the solicitation.

### 32.4 Determination of supplier non-responsibility

A supplier found to be nonresponsible for a particular procurement by a purchasing agency in accordance with [§ 2.2-4359](#) of the *Code of Virginia* will be notified in writing of the results of the finding and the purchasing agency shall disclose the factual support for the determination. If requested by the supplier within five (5) business days after receipt of the notice, the supplier has an opportunity to inspect any agency documents which relate to the determination. Within ten business days after receipt of the notice, the supplier may submit rebuttal information challenging the evaluation. Within five business days of receipt of the rebuttal information, the purchasing agency shall issue its written determination of responsibility based on all information, with return receipt requested, stating the basis for the determination. A determination of nonresponsibility will be final unless the supplier, within ten days after receipt of the notice, initiates an ADR using VITA's ADR procedures (<https://www.vita.virginia.gov/supply-chain/sell-to-vita/alternative-dispute-resolution-procedure/>) or appeals to the appropriate circuit court ([§ 2.2-4364](#) of the *Code of Virginia*).

If the award has not been made, the supplier's sole relief shall be a finding that the supplier is a responsible bidder for the contract in question. If an action is brought in the appropriate circuit court challenging the determination of nonresponsibility and the Court finds that the supplier is a responsible bidder, the court may direct the public body to award the contract to such supplier in accordance with the requirements of [§ 2.2-4364](#) of the *Code of Virginia* and the terms and conditions of the solicitation. Documentation reflecting the sole source determination of non-responsibility and any protest and decision with respect to such protest along with any written notification to supplier shall be included in the procurement file.

### 32.5 Protest of award

Any supplier who desires to protest a contract award shall submit a written protest to the purchasing agency no later than ten days after public posting of the award. The purchasing agency shall publicly post the contract award in <https://eva.virginia.gov/> as well as in any

other public venue as outlined in the solicitation. Any potential supplier who desires to protest a contract award negotiated on a sole source or emergency basis shall submit a written protest to the purchasing agency no later than ten days after posting of the contract award. The written protest must be received by the purchasing agency no later than 5:00 p.m. on the tenth day. If the tenth day falls on a weekend or an official holiday, the ten-day period expires at 5:00 p.m. on the next regular workday. No protest shall lie for a claim that the selected supplier is not a responsible bidder or offeror. A supplier shall not challenge the validity of the terms or conditions of the solicitation.

If the protest of any supplier depends in whole or in part upon information contained in public records (refer to Virginia Freedom of Information Act for guidance) pertaining to the procurement transaction which are subject to inspection under the [§ 2.2-4342](#) of the *Code of Virginia* 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 [§ 2.2-4342](#) of the *Code of Virginia*.

If the protest of any supplier requests information from another supplier's proposal, ensure that no records or information are disclosed from such supplier's proposal that are marked "Confidential" or "Proprietary," are included in such supplier's redacted proposal or are responses in the supplier's ECOS/Security Assessment, including any security exceptions, if applicable.

The written protest shall include the basis for the protest and the relief sought. The purchasing agency shall issue a decision in writing within ten days stating the reasons for the action taken. This decision shall be final unless the supplier appeals within ten days of receipt of the written decision by the purchasing agency by invoking VITA's ADR procedure (<https://www.vita.virginia.gov/supply-chain/sell-to-vita/alternative-dispute-resolution-procedure/>) or by instituting legal action as provided in [§ 2.2-4364](#) of the *Code of Virginia*.

If, prior to contract award, the purchasing agency determines that the decision to award is arbitrary or capricious, then the sole relief shall be a finding to that effect. The agency shall cancel the proposed award or revise it to comply with the law. If the contract award has been posted, but contract performance has not begun and the purchasing agency determines that the award was arbitrary and capricious, then the performance of the contract may be enjoined. Where the award has been made and performance has begun, the agency may declare the contract void upon a finding that such declaration is in the best interest of the public. Where a contract is declared void, the performing supplier shall be compensated for the cost of performance up to the time of such declaration. In no event shall the performing supplier be entitled to lost profits. ([§ 2.2-4360](#) of the *Code of Virginia*.) The table below provides a snapshot of the actions required by affected participants.

	Protesting supplier	Purchasing agency	ADR	Legal action
1	Files written protest with agency within 10 days of posting of contract award			

	Protesting supplier	Purchasing agency	ADR	Legal action
2		Receives protest. Submits written response to protester within 10 days of receipt of protest. Written response should approve or deny protest. If agency decides award was arbitrary or capricious, award may be cancelled or revised if performance has not begun. If performance has begun, performance may be enjoined. Agency may declare contract void if in public's best interest and resolicit.		
3	Supplier may appeal decision within 10 days of receipt by invoking ADR (administrative appeals procedure) or instituting legal action.			
4		If supplier invokes ADR, agency should follow VITA's ADR procedures ( <a href="#">VITA: Alternative Dispute Resolution Procedure</a> )		
5			Agency and protesting supplier meet with facilitator to review solicitation and contract award. Result of ADR may be cancellation of award, award of contract to protesting supplier, contract cancellation.	
6				If ADR is not successful, supplier has

	Protesting supplier	Purchasing agency	ADR	Legal action
				statutory right to file legal action against agency within six months of receipt of protest denial.

## 32.6 Roles and responsibilities of the parties during a protest

The following subsections describe the responsibilities of the primary protest participant roles:

### 32.6.1 Responsibilities of the purchasing agency

The purchasing agency must:

- Acknowledge receipt of the protest.
- Distribute all correspondence related to the protest to all parties.
- Immediately review the facts of the solicitation process:
  - Interview all participants in the solicitation and award process.
  - Thoroughly review all documentation in the procurement file.
  - Analyze the concerns raised in the protest and determine if valid issues have been raised.
  - Determine if contract award was made in compliance with terms and conditions of the solicitation as well as the *Code of Virginia*.
  - Determine if the solicitation process itself was handled properly, accurately and in a professional manner, which reflected fairness, objectivity and equal access to participants.
  - Determine if award decisions and actions were properly documented in the procurement file.
- Determine if the agency is likely to prevail if litigation is filed by the protesting supplier. Evaluate the risk and potential liabilities and determine the most likely outcomes.
- Provide the protesting supplier with a written response which states whether the agency has determined if the protest is valid or invalid within ten days of receipt of the protest. The purchasing agency's decision shall be final unless the supplier appeals within ten days of receipt of the agency's decision by invoking ADR (see <https://www.vita.virginia.gov/supply-chain/sell-to-vita/alternative-dispute-resolution-procedure/>) or by instituting legal action as provided in [§ 2.2-4364](#) of the *Code of Virginia*.
- Take immediate steps to correct the situation if there is a determination that the purchasing agency is in error or that the terms and conditions of the solicitation were not followed.
- Maintain an official protest file which includes copies of all documents relating to the protest.
- Coordinate with all parties to schedule any protest conferences or meetings, including distributing official notification of such meetings.

- Administer research and respond timely to any FOIA requests received in conjunction with the protest.
- Conduct a lessons-learned or debrief evaluation of the solicitation process and award decision. After lessons learned are documented and placed in the agency's protest file, the agency should work to make any changes to its current procedures or processes that may preclude similar protests in the future.

### **32.6.2 Responsibilities of the customer (if the customer is not the purchasing agency)**

The customer must:

- Work with the purchasing agency to research and organize project and procurement information that may be required for the protest evaluation and response or any associated FOIA requests.
- Be ultimately responsible for all business decisions associated with the protest and with the underlying procurement.
- Assist the purchasing agency to promptly respond to any and all requests for information and documentation relating to the project, procurement and protest.
- Comply with the purchasing agency's policies, procedures and schedules.

### **32.6.3 Responsibilities of the protesting supplier**

The protesting supplier must submit written protest within ten days of posting of contract award. The written protest must:

- Include name of protesting supplier and name of the individual responsible for the submission of the protest.
- Contain facts and arguments on which the supplier's protest is based.
- Contain information about the solicitation and the procurement method used.
- Be specific and contain a complete statement of the purchasing agency's action which is protested and state all grounds for the protest.
- State a description of the relief sought or corrective action that the supplier is requesting.
- Be signed by a person authorized to bind the supplier to a contractual relationship.

## **32.7 Effect of protest 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. Refer to [§ 2.2-4361](#) of the *Code of Virginia*.

## **32.8 Stay of an award during protest**

An award need not be delayed for the period allowed a supplier to protest, but in the event of a timely protest or the filing of a timely legal action, no further action to award that contract will be taken unless there is a written determination that proceeding without delay is necessary to protect the public interest or unless that bid/proposal would expire. Refer to [§ 2.2-4362](#) of the *Code of Virginia*. When such a written determination is made, copies shall be sent to all parties to a protest or appeal. The written determination shall be maintained in the purchasing agency's procurement file.



## 32.9 Review of protest by purchasing agency

The purchasing agency has ten days to review the supplier's protest and to decide if the protest is valid. After reviewing the protest, the purchasing agency has several options on how the protest will be handled:

- If the purchasing agency decides that the contract award was not an honest exercise of discretion, but rather was arbitrary or capricious or not in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms or conditions of the solicitation, the agency shall:
  - If the contract has not been awarded for whatever reason, the supplier's sole relief shall be a finding to that effect. The purchasing agency will either cancel the proposed award or revise the award to comply with the *Code of Virginia* and the terms and conditions of the solicitation.
  - If the contract has been awarded, but performance on the contract has not begun, the performance of the contract may be enjoined by the purchasing agency or VITA.
  - Where the contract has been awarded and performance of the contract has begun, the purchasing agency may terminate the contract/declare the contract void upon a finding that this action is in the best interests of the public. The performing supplier will be compensated for the cost of performance, with the exception of lost profits, up to the contract void date. Refer to [§ 2.2-4360\(B\)](#) of the *Code of Virginia*.
- If the purchasing agency determines after holding a hearing following reasonable notice to all suppliers, that there is probable cause that an award was based on fraud or corruption or an act in violation of "Ethics in Public Contracting," ([§ 2.2-4367](#) et seq. of the *Code of Virginia*) the award of the contract to a particular supplier may be enjoined or set aside.

## 32.10 Utilizing ADR for a protest appeal

In the event a supplier invokes ADR to appeal a denial of a protest by a purchasing agency, the agency and the supplier will agree to submit the protest to an informal mediation process led by an objective facilitator. For more information, refer to VITA's ADR Procedures (<https://www.vita.virginia.gov/supply-chain/sell-to-vita/alternative-dispute-resolution-procedure/>).

## 32.11 Legal action for protest appeal

Any supplier on a contract negotiated on a sole source or emergency basis as provided in [§ 2.2-4303](#) of the *Code of Virginia*, whose protest of an award or decision to award under [§ 2.2-4360](#) of the *Code of Virginia*, is denied, may bring an action in the appropriate circuit court challenging the award of a contract. The purchasing agency's decision shall be reversed only if the supplier establishes that the proposed award or the award is not an honest exercise of discretion, but rather is arbitrary or capricious or not in accordance with the Constitution of Virginia, statutes, regulations or the terms and conditions of the solicitation. If injunctive relief is granted, the court, upon the purchasing agency's request, shall require the posting of reasonable security.

## 32.12 Frivolous protests

As part of its effort to make technology procurements smarter, faster and better, VITA discourages frivolous protests and encourages free and objective fair dealing with its

suppliers. Toward that end, VITA works with customer agencies to establish and maintain procedures for identifying frivolous protests. VITA will determine in its opinion, if a protest is frivolous. A frivolous protest is one that VITA determines has no valid basis for complaint, such as a protest directed at the procurement outcome or successful supplier instead of the procurement process itself. After VITA identifies a protest as frivolous and notifies the protesting supplier that its protest has been deemed frivolous, the supplier is allowed to withdraw any frivolous protest within five days of such notification by VITA.

Any supplier who has filed more than two (2) frivolous protests during any preceding twenty four (24) - month period (which were not later withdrawn by the supplier after being identified as frivolous by VITA) may be required to post a bond as a condition precedent to filing another protest. The bond shall be payable to VITA in an amount equal to the value of the contract sought to be procured. The bond shall be for an indeterminate period to cover the duration of the protest and conditioned to provide VITA indemnification for the direct and consequential costs, damages and expenses arising out of the protest filing, including but not limited to, VITA's costs for processing the protest, delaying the contract award and litigation (including attorney's fees).

## **32.13 Appeals and disputes**

### **32.13.1 Contractual disputes**

Contractual claims, whether for money or other relief, shall be submitted in writing to the purchasing agency 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 the occurrence or beginning of the work upon which the claim is based. Pendency of claims shall not delay payment of amounts agreed due in the final payment. Written claims must be submitted to the purchasing agency.

Each purchasing agency shall include contractual claim procedures in all contracts. All contractual claim procedures should establish a time limit for the purchasing agency's final written decision on the supplier's contractual claim. A supplier may not invoke ADR or institute legal action as provided in [§ 2.2-4364](#) of the *Code of Virginia* prior to receipt of the purchasing agency's decision on the claim. If the purchasing agency fails to provide the supplier with a decision within the time limit set in the contract, the supplier may invoke ADR or institute legal action without first receiving the agency's decision. The agency's decision shall be final unless the supplier appeals within six (6) months of the date of the final decision by the agency by invoking ADR or instituting legal action. Once ADR is exhausted, a supplier may bring an action involving a contract dispute with a purchasing agency in the appropriate circuit court.

VITA's approved contract templates include the following language, which may be borrowed by other agencies, concerning contractual claim procedures under the General Provisions section, Dispute Resolution clause:

"In accordance with [§ 2.2-4363](#) of the *Code of Virginia*, contractual claims, whether for money or other relief, shall be submitted in writing to the public body from whom the relief is sought no later than sixty (60) days after final payment; however, written notice of the Supplier's intention to file such claim must be given to such public body at the time of the occurrence or beginning of the work upon which the claim is based. Pendency of claims shall not delay payment of amounts agreed due in the final payment. The relevant public body

shall render a final decision in writing within thirty (30) days after its receipt of the Supplier's written claim.

The Supplier may not invoke any available administrative procedure under [§ 2.2-4365](#) of the *Code of Virginia* nor institute legal action prior to receipt of the decision of the relevant public body on the claim, unless that public body fails to render its decision within thirty (30) days. The decision of the relevant public body shall be final and conclusive unless the Supplier, within six (6) months of the date of the final decision on the claim, invokes appropriate action under [§ 2.2-4364](#), *Code of Virginia* or the administrative procedure authorized by [§ 2.2-4365](#), *Code of Virginia*.

Upon request from the public body from whom the relief is sought, Supplier agrees to submit any and all contractual disputes arising from this Contract to such public body's alternative dispute resolution (ADR) procedures, if any. Supplier may invoke such public body's ADR procedures, if any, at any time and concurrently with any other statutory remedies prescribed by the *Code of Virginia*.

In the event of any breach by a public body, Supplier's remedies shall be limited to claims for damages and Prompt Payment Act interest and, if available and warranted, equitable relief, all such claims to be processed pursuant to this Section. In no event shall Supplier's remedies include the right to terminate any license or support services hereunder."

### **32.13.2 Using ADR for contractual disputes**

Regarding the use of ADR for contractual disputes, [§ 2.2-4366](#) of the *Code of Virginia* states: "Public bodies may enter into agreements to submit disputes arising from contracts entered into pursuant to this chapter to arbitration and utilize mediation and other alternative dispute resolution procedures. However, such procedures entered into by the Commonwealth, or any department, institution, division, commission, board or bureau thereof, shall be nonbinding and subject to [§ 2.2-514](#), as applicable."

ADR is designed to encourage the supplier and the purchasing agency to resolve contractual disputes through the informal ADR process. A supplier requesting ADR shall provide written notice to the purchasing agency which specifies the contract dispute and requesting that ADR be commenced. Using an impartial mediator, the agency and the supplier will provide each other with all documents and information which are incidental to the contract claim.

The mediator will assist representatives from the agency and the supplier to resolve the dispute amicably.

No obligation to negotiate or continue negotiating shall be inferred from the parties' agreement to use ADR, and each party shall remain free to discontinue ADR at any time. No agreement shall be deemed to arise from any communication during the ADR process, unless the agreement is reduced to writing and signed by duly-authorized representatives of both parties.

### **32.14 Ways to minimize the likelihood of protests**

Assurances by purchasing agencies to minimize the likelihood of protests include, but are not limited to:

- Develop specifications and solicitation requirements in an objective manner.

- Ensure solicitations do not include conflicting language, provisions, requirements or specifications and that there are no confusing directions.
- Have multiple procurement team and agency subject matter experts review the solicitation for gaps, conflicting language, objectivity and process realism.
- Make sure all procurement project/evaluation team members read and sign conflict of interest and confidentiality statements.
- Confirm all procurement project/evaluation team members are aware that they must not communicate with potential suppliers, but direct all supplier-initiated communication to the procurement's single-point-of contact.
- Follow the procurement processes and obligations stated in the solicitation.
- Ensure that the solicitation fully defines responsibilities of both parties. If a supplier is able to fully identify their costs associated with a given project, they will generally be more willing to provide the agency with a better proposal or bid. If suppliers are uncertain as to future costs, they will add a cushion to their price to account for that uncertainty.
- Actively communicate with suppliers during the solicitation process on specification issues. Utilize a pre-bid conference for developing awareness of both supplier concerns and specification deficiencies. Make sure all supplier questions are submitted in writing and/or at a pre-bid conference. Respond to all supplier questions and communication in writing. Telephonic responses should not be included, as there is no objective record of the communication.
- Be aware that the main objective of most suppliers is to participate in a fair and open process. Ensure that your actions and words communicate this to suppliers.
- Strive to resolve all concerns before contract award. Inform suppliers that they must raise all relevant concerns regarding specifications or bid/proposal requirements before the date and time specified in the IFB document, or in the case of an RFP, before negotiations are complete. Advise suppliers that if they fail to do so, subsequent protests based upon those issues will not be allowed.
- Thoroughly review all issues raised by suppliers with customers and procurement team members. Attempt to accommodate those concerns where feasible. If changes in the solicitation are necessary as a result of that review, publish an amendment for all potential suppliers.
- If the agency cannot accommodate the concerns of a supplier, inform that supplier as early as feasible in the solicitation process and do so in a positive and proactive manner.
- Be timely in response to potential suppliers. Provide suppliers with sufficient time to put together a bid/proposal that will meet the agency's IT business needs.
- Provide all suppliers with the same information. Treat them with courtesy and respect and encourage them to submit their best possible bid/proposal.
- Document all conversations or interactions with suppliers during the solicitation process. This documentation will prove invaluable if a supplier protests a contract award based on a misunderstanding during the solicitation.
- For assistance, contact: [SCMinfo@vita.virginia.gov](mailto:SCMinfo@vita.virginia.gov) .

### Chapter highlights

- **Purpose:** This chapter provides discussion of post-award contract administration of IT procurements.
- **Key points:**
  - The process of contract administration begins with the solicitation documentation and continues through from the time of contract award until the work has been completed and accepted, any disputes or adjustments have been resolved, final payment has been made and the contract is formally closed out.
  - The contract administrator must understand all activities expected of him/her, based on the agency's protocol and in relation to the complexity and requirements of the specific IT contract.
  - The contract administrator should read and become familiar with the contractual documents in order to establish a schedule of activities for ensuring compliance by both parties to the contract—the supplier and the agency.
  - A successful contract is equally dependent on post-award administration as it is on a well-written statement of work or rigid performance standards.
  - Should any claims and disputes arise for either party during contract performance, accessibility to the contract administration file documents may be of paramount importance. Therefore, it is critical that all documentation regarding contract actions, supplier performance and agency performance are maintained and accessible.

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## 34.0 Introduction

Information technology (IT) contract administration principles share many best practices with other procurement categories. However, due to the nature and increasing complexity of IT contracts, the Commonwealth's growing strategic and daily dependence on IT and the escalating importance of supplier and project performance, post-award administration requires the application of specialized IT best practices. The Commonwealth's rising dependence on technology necessitates the use of well-thought-out procurement and business processes during the procurement planning, sourcing, management and administration of IT acquisitions.

The process of contract administration begins with the solicitation documentation and continues through from the time of contract award until the work has been completed and accepted, any disputes or adjustments have been resolved, final payment has been made and the contract is formally closed out.

This chapter focuses on the post-award administration of IT contracts, which often have complex interdependencies or serious risk considerations for supporting the operational backbone of public safety and citizen services offered by the Commonwealth.

## 34.1 General contract administration

Contract administration encompasses the oversight of the relationship and obligations between the agency and the contractor as they relate to contract performance. The contract administration activity begins with the signing of a contract or purchase order. Its purpose is to insure that the parties' performance is in accordance with the terms and conditions of the contractual agreement. Usually, a single contract administrator is assigned and identified in each contract.

The contract administrator must understand all functions expected in this role, based on the agency's protocol and in relation to the complexity and requirements of the specific IT contract. The contract administrator should become thoroughly familiar with the contract's requirements and be debriefed by the procurement lead (buyer/sourcing specialist/contract manager) as the contract is handed off for post-award administration. Additionally, the contract administrator should attend, and often host, any contract kick-off or orientation

meeting with the contract's supplier(s) and project stakeholders and continue in close contact with the project's business owner/project manager for the duration of the contract.

The contract administrator must ensure that the contract file or electronic storage location for the contract's administration documents is accurate and complete. Documentation in the contract file should include, but not be limited to:

- the signed contract and exhibits,
- current supplier validations, representations and certifications (i.e., [eVA](#) registration, SWaM certification, SCC authorization to transact business in the Commonwealth, contractually required security program audits/certifications or licenses, if any, etc.,
- all contract modifications and actions,
- final SWaM plan compliance reports, as required by current legislation or executive order, if any
- contractually required insurance documents
- supplier and agency communication regarding any contractual problems or issues
- deliverable transmittals and acceptance documents
- government- and supplier-furnished data, information, equipment transmittals,
- supplier performance or service level reports, evaluations and results

Should any claims and disputes arise for either party during contract performance, accessibility to these documents may be of paramount importance. Therefore, it is critical that all documentation regarding contract actions, supplier performance and agency performance are maintained and accessible.

#### 34.1.1 Core contract administration functions

General contract administration has four core functions—monitoring contract compliance, modification processing and administration, conducting contract closeout, and conducting contract retirement. The sub-functions under each core function are taken to varying levels of granularity according to the agency's procedures and the requirements of the contract being administered:

- Monitor contract compliance
  - Attend/host contract kick-off meeting
  - Monitor supplier certifications and reporting
    - Insurance/bonding certificates
    - Statutory certificates (Dept. of Taxation, Federal debarment, lobbying)
    - Professional certificates
    - [eVA](#) registration validation
    - Small (SWaM) business certificates
    - SWaM reporting and compliance
    - Project status reporting
    - Performance reporting
    - Sales/usage reporting
    - Sales/IFA reporting (VITA statewide contracts only)
  - Monitor/coordinate subcontractor approvals
  - Monitor deliverables and acceptance
    - Shipping and transportation
    - Project milestone deliverables
    - Soft- and hard-copy deliverables
    - Service and product deliverables
    - Written acceptance approvals
  - Monitor supplier performance

- Service level
- Schedule
- Budget
- Key personnel
- Project/business process management
- Monitor supplier warranties
- Coordinate/monitor transmittal of or access to government data/property
  - Coordinate facility security access and badging
  - Coordinate confidentiality/non-disclosure agreements
- Monitor invoicing and payment
  - Processing
  - Budget and project approvals
- Monitor agency obligations
  - Budget availability
  - Resource availability
  - Maintenance renewals
  - License tracking and/or audits
  - Confidentiality or Non-Disclosure commitments
  - Roles and responsibilities
  - Supplier-dependent approvals
  - Supplier-dependent information or data
  - Deliverable reviews/acceptance deadlines
  - Acceptance testing deadlines
  - Meetings and training
  - Requisite technical environment set-up, installation, upgrade and/or maintenance
- Site access
- Process disputes, claims and resolution
  - Intake, fact-finding, follow-up, closure
- Process requests under FOIA
- Modification processing and administration
  - Contractual terms
  - Term or termination
  - Assignments/novation
  - Pricing
  - Scope
  - Administrative changes
- Conduct contract closeout
  - Final supplier reports
  - Final deliverables
  - Final acceptance
  - Final property report
  - Final patent/royalty report
  - Final escrow report
  - Final payment
- Conduct contract retirement
  - Update agency/Commonwealth contract, portfolio management or financial systems
  - File closed
  - File archived for retention

The monitoring and processing of each of the above functions is normally completed by a contract administrator. Contract administrative data may be required for input both electronically and in the contract file, depending on the agency's business processes and procedures. Also, depending on the complexity and size of the project/contract, the



assigned project manager, contract manager and contract administrator will work together to assure the contractual requirements are completed. For multi-million dollar or enterprise- sized contracts several contract administrators may be assigned to individual areas of responsibility.

#### **34.1.2 Additional IT contract administration functions**

Again, depending on the complexity, size and requirements of the IT contract, contract administration may include additional functions or amplified granularity of the functions normally assigned to this role. Some of them may be handled by the project manager. Depending on the type of IT contract being administered; i.e., Solution, Services, Software, Hardware with Maintenance, or Application Service Provider, some or all of these IT contract administration activities may be required:

- Coordinating any escrow agreement renewals and fee payments.
- Coordinating any warranty or performance escalations.
- Coordinating any software license or maintenance agreements/renewals.
- Informing users of software license access/use rights and limitations.
- Interaction with any infrastructure services providers
- Coordinating the return of government-furnished data and information.
- Coordinating the receipt and storage of software configuration documentation.
- Monitoring new software releases.
- Sixty (60) days prior to the expiration of the warranty period, ensure that supplier has notified the agency of such expiration in writing.
- Coordinating any required training sessions.
- Coordinating that Agency, within thirty (30) days of the end of each calendar quarter, provides to supplier a report of the net number of additional copies of the software deployed during the quarter. (From the "Reproduction Rights" clause in the contract, if included.)
- Coordinating any required solution demonstrations.
- Coordinating any testing or IV&V activities.
- Coordinating any Steering Committee meetings or updates.

### **34.2 Monitor contract compliance**

#### **34.2.1 Attend/host contract kick-off meeting**

It is in the best interest of all contractual parties to attend a contract kick-off meeting where all project stakeholders are present. The agenda should include a page-by-page review of the contractual agreement, including the main contract document and all exhibits, to discuss all contractual obligations, performance expectations, escalation processes and initial project planning (e.g., schedule, reporting, deliverables, etc.). This is a time to confirm points of contact for the technical and administrative functions of both parties. Most often the contract administrator will coordinate this meeting, which should occur no later than 30 days after contract award. It is vital that the contract administrator be present, even if the meeting is hosted by the contract manager.

The contract administrator must study and become familiar with the contractual documents before the meeting in order to establish a schedule of activities for ensuring compliance by both parties to the contract—the supplier and the agency. Some agencies may have a minimal set of functions for the contract administrator to perform; however, contract compliance requirements may exceed those minimal functions. A successful contract is equally dependent on post-award administration as it is on a well-written statement of work or rigid performance standards. There may be special invoicing and payment clauses,

certain insurance/bond requirements, federal grant requirements, extraordinary confidentiality or security issues or specific meeting and reporting requirements.

The activities of contract administration may be split between the project manager and the contract administrator or even with a contract manager. Regardless of how an agency delegates responsibilities of the contract administration function; there should be a written assignment of contract administration expectations and a named individual(s) for each function. The activities of each assignee will complete the “whole” contract administration file, so a check and balance should be required and the consolidation of administrative file data planned for at contract closeout. In other words, the left hand needs to know what the right hand is doing, how and from whom to obtain vital contract administration information and a quality check should occur to ensure there are no holes, missing activities or lost data. The delegation assignment of contract administration must be available to all contract stakeholders.

#### **34.2.2 Monitor supplier certifications and reporting**

The contract administrator needs to ensure that the contract file includes all certifications, registrations and/or licenses required by the agency, solicitation and contract award. The procurement lead may have obtained these prior to award; however, the contract administrator must validate the file. These may include small (SWaM) business certification, [eVA](#) registration validation, current authorization by the State Corporation Commission to transact business in the Commonwealth, Anti-Lobbying certification, insurance certificates, bond guarantees, federal or state debarment compliance, e-Verify compliance, Virginia Tax compliance or payment schedule verification to mention a few. Throughout the contract's duration, validations and/or renewals of these should be conducted by the contract administrator no less than annually.

The contract may call for the supplier's monthly submission of administrative reporting including, but not limited to: SWaM participation, project status, performance status, sales or usage status, and for VITA statewide contracts only, sales and IFA reporting. The timely reporting by supplier must be monitored by the contract administrator to ensure the supplier is contractually compliant. Copies of all such reports should be made available either in the contract file or electronically. Failure by supplier to comply with its contractually obligated Supplier Procurement and Subcontracting Plan may prohibit or delay any renewals of the contract. For agencies, the plan may be called the Small Business (SWaM) Subcontracting Plan. For VITA, the plan will be called the Supplier Procurement and Subcontracting Plan.

Here are two “musts” when monitoring the supplier's performance in this administrative area:

- Supplier must comply with contractually required certifications, licensing and reporting must be verified prior to the execution of any contract modification increasing the contract's value or scope or any benefit or incentive to the supplier.
- Careful records of any non-compliance must be maintained in the contract file and shared with contract stakeholders, who may be measuring or collecting the supplier's total project performance independently.

The following information may assist the contract administrator's supplier validation process for the above concerns:

- Validate supplier state debarment status on eVA website at: [eVA Inactive Vendor List](#)

- Validate supplier federal debarment status on federal website if federal funds support the contract at: <https://www.vita.virginia.gov/supply-chain/sam/>
- Validate supplier state tax compliance status (e.g., no interception being conducted currently) by calling 804-367-8380 or by email to: <mailto:lrms.Support@tax.virginia.gov>
- Validate supplier SWaM reporting compliance according to the agency's individual protocol and process (VITA only) Validate supplier sales/IFA reporting compliance
- Validate supplier has a current authorization to transact business in the Commonwealth through obtaining a copy of supplier's current registration form and SCC identification number

### 34.2.3 Monitor/coordinate subcontract approvals

If the contract requires agency approval of all subcontractors, the contract administrator will ensure the contract file includes copies of such approvals and, in fact, may need to coordinate the processing of any supplier requests for approval. The contract administrator may be required to conduct reference research on the performance, corporate, financial and other viability strengths of proposed subcontractors prior to agency approval for the subcontractor. It is important to verify (or obtain supplier's written confirmation) that the proposed subcontractors are not included on the Commonwealth's or the federal government's (if federal funding supports the contract) debarment or excluded parties lists. An annual validation of subcontractor eligibility status should be conducted.

### 34.2.4 Monitor deliverables and acceptance

Depending on the complexity and value of the project, the agency's business owner/project manager may handle this activity, may request assistance only from the contract administrator or may request the contract administrator totally handle this activity. If the contract, statement of work or project milestone plan does not include a clear listing of all deliverables, their due dates and submission requirements, the contract administrator should develop a master list with dates and create a calendar to monitor the supplier's performance of timely deliverables.

The contract may provide that the agency has a certain number of days to accept the deliverables or they will be deemed accepted, which could be to the detriment of the project or agency. Therefore, it is vital that the contract administrator monitor the agency's performance as well as the supplier's.

If the contract requires a transmittal letter to accompany each deliverable or requires the agency to provide written acceptance to the supplier for each deliverable, these documents should be copied to the contract file, whether for e-storage or hardcopy storage. The agency's recipient(s) and delivery location(s) for each deliverable—whether it be product (hardware or software), electronic, paper or service—should be specified in the contract, but if not, the contract administrator will certainly want to ensure that the deliverables are submitted on time and received/accepted in accordance with the contract's requirements as this is a criterion of successful contract performance by both parties.

If the contract requires any specific or special shipping and transportation handling, accountability or liability, this will also need to be monitored for adherence. The function for coordinating this may be assigned to the contract administrator as well. If not, the contract administrator will still need to monitor.

If the contract requires the supplier to provide training sessions or to present a "solution" demonstration as part of their performance commitment, the contract administrator may be responsible for coordinating the location, resources, security access, date and agenda for this. Special media resources may be required by the supplier.

The contract administrator will be required to monitor new software releases if the contract includes a requirement similar to this: "Provide to all (Agency or Authorized Users) no later than the first day of general release, copies of the Software and Documentation revised to reflect any enhancements, including all new releases, upgrades, and access modes, to the Software made by Supplier, including, without limitation, modifications to the Software which can increase the speed, efficiency or base of operation of the Software or add additional capabilities to or otherwise improve the functionality of the Software." This particular deliverable may not be directly specified in the contract's statement of work or list of deliverables, but may be in the actual contract body. This requirement entitled, "New Releases," is in the body of VITA's relevant contract templates; i.e. Software and Solution.

If a deliverable is late, unacceptable or there is some other dispute, the contract administrator may be responsible for coordinating the required communication and resolution. If not, the contract administrator will still need to be aware of all agency-supplier activities, communications and status surrounding such deliverable in the event this situation would affect any other area of the contractual relationship and status. The contract administrator should obtain copies of the relevant paper trail, as the contract file must include complete supporting data regarding such a situation.

#### **34.2.5 Monitor supplier performance**

The contract administrator should carefully review the contract for all supplier performance requirements; some of which are clearly defined and others which may be indirectly included. It is recommended that the contract administrator develop a performance checklist and calendar to ensure all performance requirements are exposed for scheduled monitoring.

The contract may specify a clearly defined service level agreement (SLA) or acceptance criteria for deliverables describing expectations for the supplier's technical performance. The contract may also necessitate that indirect supplier performance requirements be monitored—the submission of recurring technical, status and/or administrative reports (see subsection 34.2.2); compliance and licensing certifications (see subsection 34.2.2); key personnel, and business or project management obligations.

- **Technical performance**—Needless to say, there are many variations on technical performance objectives and requirements that could be in a contract. The contract administrator must know exactly what these are and what performance data capture, measurement and reporting requirements exist in order to monitor the supplier's or product's performance and determine how the performance results may impact other areas of the contract's administration, including supplier payments. Close teamwork between the contract administrator and other contract stakeholders will ensure that all required performance results are captured, reported and used in monitoring a supplier's or product's technical performance. Here are examples of how a supplier's or product's technical performance can be captured and monitored.
  - Service level agreements will often require that the supplier provide monthly performance reports that indicate how well they met the performance requirements in order that related monthly invoices reflect any non-performance penalties/incentives (usually tied to a percentage of service level attainment or non-conformance). Such performance parameters may be linked, for example, to "uptime" and "downtime" of a system or web-hosted application or to "response time" and "remedy time" for the procured service.

- Acceptance criteria may require, for instance, that 100 simultaneous users of a system will not degrade system performance or impact the required maximum time it takes for a user to complete a certain electronic “transaction” or “function.” If the system’s built-in self-monitoring design captures degradation or error capture then reports can be generated by the agency’s system administrator and reported to contract stakeholders.
- **Schedule and budget**—Schedule and budget are two risk-critical performance areas common to non-IT as well as IT contracts. Schedule and budget performance have the potential to severely impact the agency’s funding sources—Commonwealth and/or federal grant—and dependent planned or existing technology projects, as well as the supplier’s financial condition.

Here’s a hypothetical example: A contract for developing and implementing a replacement for a critical incident tracking system that links into multiple statewide databases and a federal database was awarded by a Commonwealth agency on January 1, 2008. The application software of the current 10-year old system will no longer be supportable or operational after June 30, 2009. The contract includes a major project milestone deliverable for a 60-day acceptance testing to be complete February 1, 2009. The total contract fixed price is \$3 million dollars—half from General Funds and half from a federal matching grant. Thirty days into the acceptance testing a major error occurs that the supplier cannot fix without redesigning a critical interface. By this point in time in the project, due to payments triggered by the completion of interim milestones, \$2.5 million of the project budget has been paid to the supplier. With only 6 months and only \$500,000.00 in funds remaining before the old system goes away—“Houston, we have a problem.”

You can see how budget and schedule performance have the potential to impact both immediate and extended stakeholders. We’ll never know how this project turned out and who suffered the biggest impact, but more than likely it ended up in litigation.

Monitoring schedule and budget performance areas may be assigned to the contract administrator, the business owner/project manager or the contract manager, depending on the size and complexity of the procurement and the level of project management required. If the contract required CIO approval, then VITA’s [Project Management Division](#) has ProSight and other tools that the contract’s project manager will probably use in performing contract administration functions on these two performance areas. However, the contract administrator will need to be knowledgeable of communications, problems and resolutions surrounding these performance areas and be involved in any related fact-finding, communications, modifications, disputes or claims.

- **Key personnel**—Often an IT contract will include a key personnel term similar to this: “The statement of work may designate certain of supplier’s personnel as key personnel or project managers. Supplier’s obligations with respect to key personnel and project managers shall be described in the applicable statement of work. Failure of supplier to perform in accordance with such obligations may be deemed a default of this contract or of the applicable statement of work.” Additionally, a contract may require written approval by the agency if supplier desires to replace key personnel or named individuals. It is important that the contract coordinator work closely with the business owner/project manager to monitor and enforce whatever terms are in the contract.
- **Project/business process management**— The contract administrator should search the contract and exhibits for any performance obligations related to project/business process management. These may include relevant deliverables; i.e., project plans,

quality assurance plans/reporting, project status reports, cutover plans or specific project management and operational processes that supplier is committed to follow and/or substantiate either by providing a defined deliverable or simply by operation of business (i.e., using standards IEEE 1220 and ISO 1006 for monitoring project planning, etc.).

The supplier's contractual performance must be measured by all performance elements and criteria established in the contract. While the reporting, collection, monitoring and evaluation of supplier performance data may be a collective effort by other contract stakeholders, the contract administration function should act as a repository for all performance data and act as overseer to ensure that contractual performance requirements are monitored and reported.

If a supplier's performance is unsatisfactory, the contract administrator and other contractual stakeholders should document, with supporting evidence, their complaint of unsatisfactory or non-conforming performance. For all VITA-issued or VITA-delegated IT contracts, contact [scminfo@vita.virginia.gov](mailto:scminfo@vita.virginia.gov). For all non-VITA issued or agency non-delegated IT contracts, contact DPS Contract Compliance.

#### 34.2.6 Monitor supplier warranties

Supplier warranties may include both a limited warranty and general warranties. Since the **limited warranty** for a product (hardware or software), services or solution usually spans a given time period (30, 60, 90 days or even up to one year), the contract administrator will simply need to know when the warranty period ends and the maintenance or support period begins. This date should be included on any project schedule or contract administration schedule as a tickler. The contract pricing schedule may have included advance payment for the first year of maintenance or support, or the contract may indicate that the supplier needs to notify the agency within a set number of days prior to the end of the warranty period so the agency has sufficient time to issue a purchase order (PO). VITA contract templates include this statement: "Sixty (60) days prior to the expiration of the warranty period, ensure that supplier has notified the agency of such expiration in writing."

Either way, contract administration must ensure there is no lapse between limited warranty coverage and any required maintenance or support coverage and should coordinate necessary actions, as required, with the business owner/project manager. In rare cases (e.g., one-time purchase of a single hardware or COTS item), follow-on maintenance or support may not be required. For most other IT procurements, the agency or Commonwealth may be at risk not to have follow-on maintenance or support coverage and have included a requirement in the contract.

Contract administration should review the contract to determine what **general warranties** may need monitoring; for instance, "Supplier will notify agency if the Solution contains any Open Source code and identify the specific Open Source License that applies to any embedded code dependent on Open Source code, provided by supplier under this Contract." Depending on the criticality of the project, the contract administrator may request annual written acknowledgement from the supplier to verify that, "No notifications to any general warranties in Contract Number \_\_\_\_\_ have been required from (date) to (date). Supplier continues to be aware of the contractual general warranty requirements and will notify (name of agency) accordingly."

There may be occasions where the contract administrator will be required to facilitate and coordinate warranty escalation proceedings on behalf of the contract's business owner/project manager. The supplier's escalation process should be described in the



contract. The administrator should completely and accurately document and track the paper and communication flow for the contract file.

#### **34.2.7 Coordinate/monitor transmittal of and access to government property/data**

If the contract requires transfer of government property, information or data to the supplier for contract performance, the contract administration function must monitor all transmittals in accordance with the agency's property or asset/inventory management processes and procedures. For software and solution IT contracts, coordinating the receipt, distribution and storage of software configuration documentation may occur.

Written and signed transmittal documents must be maintained in the contract file. Additionally, if suppliers require access to the agency's facilities or equipment, the contract administrator will facilitate such access through the agency's security department. Should the transfer of government property, information or data or access to government facilities or equipment require the supplier's personnel to sign confidentiality or non-disclosure agreements, the contract administrator will facilitate this and maintain copies in the contract file.

This same coordination and monitoring would apply to any supplier-provided data, information, material or equipment provided to the agency on a temporary basis rather than as a contract deliverable.

#### **34.2.8 Monitor invoicing and payment**

The contract administration function may be required to process supplier invoices through approval cycles with the business owner/project manager before sending to the agency's payment office. However, the contract administrator should first confirm that invoices:

- Include all detail and information specified in the contract,
- Include pricing in accordance with the contract's pricing schedule,
- Ensure no taxes are charged the agency and provide any exemption documentation to supplier
- Reflect any performance penalty/incentive adjustments,
- Include travel expenses that are authorized and in accordance with then-current Per Diem Amounts as published by the Virginia Department of Accounts,
- Include any required signatory or certifications required in the contract,
- Include any required supplemental reporting (i.e., monthly usage, monthly service level performance statistics)
- Are accurate, complete and corrected by supplier before submitting for approval and payment.

The contract administrator may also be required to monitor that payments are made to the supplier in accordance with statutory regulations [§ 2.2-4350](#) or [§ 2.2-4352](#) of the *Code of Virginia*, as applicable, and to assist in resolving any supplier claims regarding payments.

Any claims arising out of a contractual dispute must be processed in accordance with [§ 2.2- 4363](#) of the *Code of Virginia*. Refer to subsection 34.4.7 below for special discussion of final payments to supplier.

#### **34.2.9 Monitor agency obligations**

The contract administrator should carefully review the contract and create a list and schedule that includes all agency obligations under the contract. Successful IT contracts are not only dependent on the supplier's performance, but also on the agency's performance in fulfilling their contractual commitments and enabling, or not preventing, the supplier to

perform. The agency's non-performance or interrupted performance could put the contract/project at risk for delayed schedule and increased costs or invite risk to the Commonwealth for a contract dispute. IT contracts may require any of the following and more:

- Informing agency and other Commonwealth users of software license access/use rights and limitations and obtaining signed user acknowledgement for the contract file.
- Informing Commonwealth users and third-party representatives of all confidentiality restrictions and obtaining signed confidentiality or non-disclosure statements for the contract file.
- Ensuring that the agency fulfills any contractual obligation that includes the following or a similar requirement: "Within thirty (30) days of the end of each calendar quarter, the Agency must provide to Supplier a report of the net number of additional copies of the Software deployed during the quarter." (From the "Reproduction Rights" clause in the contract, if included.)
- Enabling or facilitating the conduct of any testing, IV&V activities, supplier demonstrations, and/or training sessions within a certain timeframe, with a specific technology environment or resources already prepared for use.
- Providing certain data, information, equipment or facilities to the supplier within a certain timeframe for enabling any software or solution requirements definition, design, interface, testing or implementation efforts by the supplier.
- Defining a timeframe for the review and acceptance of any deliverable and testing.
- Preparing and providing specific reports, technical data, specifications, standards, software configuration/architecture, legacy/interface code or data to be converted (including the condition of such data).
- Arranging the attendance of any IV&V, Steering Committee or other invitee for any critical project reviews or other contract-related meetings per the contract's schedule.
- Interaction with VITA Service Management and Delivery, VITA Project Management Division or VITA Security experts for any infrastructure preparation or integration efforts required for supplier's performance.
- Providing to supplier any notification of non-conformance or error discovered related to supplier's performance (product, service, solution) within a given timeframe.
- Providing any contractually required technical or administrative notification obligation within a given timeframe.
- Facilitating any statutory, Steering Committee, CIO or other VITA policy required approvals, waivers or exceptions
- Ensuring that project, technical and other agency stakeholders do not directly or indirectly alter, increase or decrease (i.e., scope creep) the supplier's performance obligations as required by the contract without formal contract modification.
- Processing, approving and paying supplier invoices within statutory timeframes.

#### 34.2.10 Process disputes, claims and resolution

The contract administrator may be responsible for processing or participating in fact-finding and resolution for any disputes and claims arising during performance of the contract. Any claims arising out of a contractual dispute must be processed in accordance with [§ 2.2-4363](#) of the *Code of Virginia* and the contractual requirements. The significance of a well-maintained and complete contract administration file or e-storage location for accessing the supporting documentation is of critical importance.

An alternative disputes resolution (ADR) provision may be in the contract, regardless of if the agency has an established ADR process or not. If it does not and the contract was delegated to the agency by VITA, then the agency may use VITA's ADR process. Contact [scminfo@vita.virginia.gov](mailto:scminfo@vita.virginia.gov) for more information.



A supplier may be considered in default if it fails to perform in accordance with the terms of the purchase order or contract. These factors should be considered prior to taking any default action.

- The specific reasons for the failure.
- The period of time needed to obtain the goods or services from other sources compared to the time that delivery or performance could be accomplished by the delinquent supplier.

If a supplier fails to perform, the agency should notify the supplier and try to reach a satisfactory solution. If the matter is still not resolved a "Notice to Cure" may follow. The notice must be given in writing advising the supplier that non-delivery or non-performance is a breach of contract and, if the deficiency or non-conformance is not cured within a certain number of days (as specified in the contract's language), the agency will terminate the contract for default and hold the supplier liable for any excess costs. Upon the expiration of the cure time period, if a satisfactory resolution has not been reached, the agency sends the supplier a Termination for Default Letter and takes repurchase action by awarding to the next lowest bidder or re-soliciting. If the repurchase results in increased costs to the agency, the agency invoices the original supplier for the excess costs, giving a specified period of time for repayment to be completed. Until the excess costs repayment has been received, the supplier may be removed from the agency's supplier list. If repayment has not been made by the end of the specified period of time, collection action may be taken under the agency's approved debt collection policy. In addition, concurrent action to debar the defaulted supplier can be initiated. Suppliers 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 supplier's source to deliver is generally not considered to be an unavoidable cause.

Agency contract administrators may obtain assistance from their OAG representative in accordance with their agency's protocol and processes. For VITA-issued or VITA-delegated agency contracts, agency administrators may also obtain VITA's guidance by contacting: [scminfo@vita.virginia.gov](mailto:scminfo@vita.virginia.gov).

#### **34.2.11 Process requests under FOIA**

The contract administrator may be required to coordinate any requests for information pertaining to the contract under the Virginia Freedom of Information Act (FOIA). While the contract administrator should process response to any request in accordance with the agency's protocol and processes, the Commonwealth does provide information at this link: Virginia Freedom of Information Advisory Council. VITA SCM contract administrators and sourcing specialists should follow SCM's current procedures. Additional guidance also may be found in [Chapter 10](#), "General IT Procurement Policies".

### **34.3 Modification processing and administration**

Supplier compliance with contractually required certifications, licensing and reporting must be verified prior to the execution of any contract modification increasing the contract's value or scope or any benefit or incentive to the supplier. The following information may assist the contract administrator's supplier validation process:

- Validate supplier state debarment status on eVA website at: [eVA Inactive Vendors List](#)
- Validate supplier federal debarment status on federal website if federal funds support the contract at: <https://www.vita.virginia.gov/supply-chain/sam/>

- Validate supplier state tax compliance status (e.g., no interception being conducted currently) by calling 804-367-8380 or by email to: <mailto:lrms.Support@tax.virginia.gov>
- Validate that supplier is complying with its contractually obligated Supplier Procurement and Subcontracting Plan and reporting requirements because failure to do so may prohibit or delay any renewals or modifications of the contract.
- Validate supplier sales/IFA reporting compliance (VITA only) by email to: [ifacoordinator@vita.virginia.gov](mailto:ifacoordinator@vita.virginia.gov)
- Validate supplier has a current authorization to transact business in the Commonwealth through obtaining a copy of supplier's current registration form and SCC identification number

Additionally, contract administrators must adhere to statutory requirements regarding contract modifications found in the *Code of Virginia*, in [§ 2.2-4309](#).

The contract administrator is required to be familiar with the contract's modification or amendment language and to ensure that the proposed modification can be done and is approved by all required stakeholders—primarily the supplier and the agency's business owner/project manager. The contract administrator will be responsible for ensuring that all modifications are processed in accordance with the contract and any statutory or federal (if the contract is federally funded) requirements/limitations. The following requisites apply to IT contract modifications:

- All necessary approvals for any modification are validated in the contract file.
- If funding is required for a modification, all funding is received and the funding change does not conflict with [§ 2.2-4309](#) of the *Code of Virginia*.
- The modification does not create a conflict with any other provision of the contract.
- Validation of the supplier's debarment status, state tax compliance and SWaMor sales/IFA reporting (if applicable) compliance is recorded in the file.
- The modification does not conflict with related statutory regulations in the *Code of Virginia* and Virginia Public Procurement Act.
- The supplier is required to sign the modification document before the agency does.
- The format for the contract modification document is in accordance with the agency's protocol.
- Notification to relevant stakeholders and updates to electronic records and contractor financial databases is in accordance with the agency's processes and procedures.
- Copies of all fully executed versions are in the contract file
- For VITA SCM, provide all contract modifications as required per SCM processes. Hard copies should be placed in the contract file. For statewide contracts that require web updates follow established processes.

### 34.3.1 Contractual terms

The contract administrator is responsible for understanding and being able to inform stakeholders on the entire contract being administered—all contractual components, exhibits and terms. VITA's statewide contract templates include the following language under the "Entire Contract" provision, customized for each contract type (solution, services, software, hardware with maintenance and application service provider). This excerpt is taken from the statewide "solution" template: "The following Exhibits, including all subparts thereof, are attached to this Contract and are made a part of this Contract for all purposes:

<a href="#">Exhibit A</a>	Solution Requirements
<a href="#">Exhibit B</a>	Solution Options List; Fees, Service Charges, and Payment Schedule <a href="#">Exhibit C</a>
	Escrow Agreement
<a href="#">Exhibit D</a>	Statement of Work (SOW) Template

<u>Exhibit E</u>	Change Order Template
<u>Exhibit F</u>	End User Licensing Agreement (for reference only) <u>Exhibit</u>
<u>G</u>	Certification Regarding Lobbying
<u>Exhibit H</u>	Small business subcontracting plan (give agency's protocol name)

This Contract, its Exhibits, and any prior non-disclosure agreement constitute the entire agreement between VITA and Supplier and supersede any and all previous representations, understandings, discussions or agreements between VITA and Supplier as to the subject matter hereof. Any and all terms and conditions contained in, incorporated into, or referenced by the Supplier's Proposal shall be deemed invalid. The provisions of the Virginia Department of General Services, Division of Purchases and Supply Vendor's Manual shall not apply to this Contract or any order issued hereunder. This Contract may only be amended by an instrument in writing signed by VITA and Supplier. In the event of a conflict, the following order of precedence shall apply: this Contract document, Exhibit A, any individual SOW, Exhibit B.

An **Authorized** User and Supplier may enter into an ordering agreement pursuant to this Contract. To the extent that such ordering agreement, or any order or SOW issued hereunder, include any terms and conditions inconsistent with the terms and conditions of this Contract, such terms and conditions shall be of no force and effect."

Additionally, the core contractual provisions included by reference in VITA contracts and VITA-delegated contracts issued by agencies and found at this link: [VITA's Core Contractual Terms](#) are updated annually on July 1 to reflect any legislative changes. The link, as used in the contract documents, will automatically update when the designated hyperlink is opened, even for contracts already in place. Because these are statutory, no contract modifications are necessary as they change. The supplier must follow current Virginia statutory requirements just like agencies do and no further negotiations are required for them to be effective. The same applies to the required [eVA](#) provisions at VITA's link: [Required eVA Terms and Conditions](#). References to these in the VITA contract templates state: "The then- current terms and conditions in documents posted to the aforereferenced URLs are subject to change pursuant to action by the legislature of the Commonwealth of Virginia, change in VITA policy, or the adoption of revised [eVA](#) business requirements. If a change is made to the terms and conditions, a new effective date will be noted in the document title. Supplier is advised to check the URLs periodically."

#### 34.3.2 Term or termination

The contract administrator will process all modifications due to term extension, option exercise or renewal of the contract and/or related agreements; i.e. software license, escrow agreement.

The contract administrator will want to ensure that any modification to extend the term of the contract, or to exercise a term or renewal option, should be completed no later than 30 days before the current expiration date. This is also critical for any escrow agreement, software license or maintenance renewals. Any lapse may create risks for the agency and Commonwealth. The same timely action should be taken if the contract includes a "Transition of Services" provision where the supplier agrees to provide assistance to the agency should the contract effort be transitioned to another supplier or to the agency due to self-sufficiency.

The contract administrator will process any termination documentation—for breach, default, non-appropriation of funds or if the agency terminates for convenience. When termination occurs for any reason except the end of the contract term, notices must be given to the

supplier in accordance with the contractual requirements. If termination for default occurs as a result of the cure and remedy provisions of the contract, be sure that the allotted time for the notice, the cure period and the re-acceptance period by the agency have occurred and that all relevant supporting documentation is in the contract file. All termination actions shall be done in accordance with the contractual requirements (including alternative disputes resolution and disputes resolution provisions) and the agency's processes and procedures. Refer to subsection 34.2.10, above, for more information on termination for breach or default.

Upon any termination, neither the Commonwealth, nor the agency, nor any authorized user shall have any future liability except for deliverables accepted by the agency or the authorized user or services rendered by supplier and accepted by the agency or authorized user prior to the termination date. The contract administrator will then begin the contract closeout process. Additionally, VITA statewide contracts should be removed from the VITA web site and any supplier catalogues, associated with the contract, removed from eVA by notifying [scminfo@vita.virginia.gov](mailto:scminfo@vita.virginia.gov) for assistance.

#### 34.3.3 Assignment/novations

The contract administrator will process all supplier assignment and novation requests or notices according to the contract's requirements. Most contracts will state that the supplier may not assign a contract without the prior written approval of the agency. The licensing rights of the contract will dictate how the agency can or cannot assign its rights to another party; however, the contract hopefully was negotiated to allow license assignment and/or access to other Commonwealth agencies, including VITA, to not prohibit infrastructure and/or enterprise architecture redesign, supportability and improvements that may occur during the life of the contract.

If a supplier is bought out by or merges with another corporation, the contract administrator should perform a financial viability analysis and obtain a Dun & Bradstreet report on the new corporation before agreeing to anything. The new business entity could introduce new risks to the contract/project if they are not financially or professionally responsible. Also it will be necessary to confirm and update any new contact information.

#### 34.3.4 Pricing

Before processing a pricing amendment, the contract administrator must review the contract's pricing language. The modification may entail a simple unit/line item addition, deletion or adjustment that has no impact on the contract's total value or milestone pricing. If the modification requires an increase in the contract's value, the contract administrator must ensure that budget is available with the business owner/project manager and that such budget is funded, not just approved for funding. Any modification to the contract's total value must follow the requirements of [§ 2.2-4309](#) of the *Code of Virginia*, provided in full text in subsection 34.3, above.

Additionally, pricing changes must comply with any parameters specified in the contract, for example: "No such increase shall exceed the lesser of three percent (3%) or the annual increase in the Consumer Price Index for All Urban Consumers (CPI-U), U.S. City Average, All Items, Not Seasonally Adjusted, as published by the Bureau of Labor Statistics of the Department of Labor (<http://www.bls.gov/cpi/home.htm>), for the effective date of the increase compared with the same index one (1) year prior. Any such change in price shall be submitted in writing in accordance with the above and shall not become effective for sixty (60) days thereafter. Supplier agrees to offer price reductions to ensure compliance with the Competitive Pricing Section."

### 34.3.5 Scope

The contract administrator will also process contract scope modifications presented by the business owner/project manager. Careful consideration of scope changes must be promoted to remove potential risks to the agency and the Commonwealth, especially in the areas of budget, schedule, interdependencies that may impact existing or planned legacy systems and/or infrastructures, or in exceeding or reducing the intent and objective of the original procurement.

A scope modification may range from adding another training session to adding another interface or increasing the number of software licenses. Each of these examples would also increase the contract price, so that a modification to the pricing schedule would also be required. An additional training session or adding more software licenses would not likely affect any critical milestones or the project's schedule; however, a new interface certainly could, so any milestone deliverable and payment dates would need adjustment. Also, access to VITA infrastructure, certain data or Commonwealth facilities could be impacted; planned testing schedule and many other areas may have to be modified due to a single scope change. Supplier price proposals that result from the scope change should be incorporated into the modification document.

Here is another example of how a scope change could impact other contract terms: If a performance or acceptance criteria or service level agreement element were to be modified, it would likely require negotiations between the parties. The supplier or agency may want to adjust any performance incentives or penalties based on the change.

The contract administrator should seek assistance from the business owner/project manager to help identify all areas of the contract that would require modification due to a scope change and incorporate them all in the same modification. Not to do so could introduce conflicts and/or areas of potential dispute. VITA is also available to offer assistance to agencies in this area by emailing: [scminfo@vita.virginia.gov](mailto:scminfo@vita.virginia.gov).

### 34.3.6 Administrative changes

Administrative modifications that the contract administrator may process include, but are not limited to, changes in:

- contact information or address
- invoicing or payment terms
- administrative compliance updates (certifications, licensing, etc.)
- reporting requirements or frequency (for administrative reports such as SWaM or sales/IFA, but not technical reports tied to the scope or statement of work)
- insurance or bond requirements
- legislative changes that affect the contract

## 34.4 Conduct contract closeout

Ideally, a closeout letter should be prepared by the contract administrator to accompany closeout reports/certificates tailored to the contract's requirements, for approval signature by the contract's business owner/project manager, the supplier and/or applicable agency- internal governance stakeholders. These stakeholders may include the SWaM coordinator, the inventory/asset manager, the financial manager, and for VITA statewide contracts, the IFA coordinator. Each stakeholder must acknowledge that they have received all final contract items due as they relate to their area—final SWaM report, the return of government or supplier data/equipment/software, final invoice/payment and final sales/IFA report and payment.

#### **34.4.1 Final supplier reports**

The contract administrator must validate in writing that all interim and final SWaM, and for statewide contracts that all interim and final sales/IFA reports and payments, have been received by the agency's designated SWaM and IFA coordinators. The contract administrator should review the contract to determine if any other administrative reports were required by the supplier and if so, obtain validation for these as well.

#### **34.4.2 Final supplier deliverables**

The contract administrator must validate in writing that all interim and final deliverables have been submitted by the supplier.

#### **34.4.3 Final acceptance**

The contract administrator should obtain a written and signed acceptance from the contract's Business Owner/Project Manager to confirm that all contract deliverables, technical reports, products and services have been received, are satisfactory and are formally accepted on behalf of the Commonwealth. A copy of the Business Owner/Project Manager's formal acceptance document is adequate. In the case of VITA statewide contracts, this may not be practical; however, written authorization to this effect from the VITA Strategic Sourcing Manager should be included in the closeout documentation.

#### **34.4.4 Final property report**

A final property report, when applicable, should be created to reflect the movement, transfer, return and receipt of any government-to-supplier (or vice versa) data, equipment, software, information, materials etc., where such items must be returned to the rightful owner or otherwise disposed of per the contract's requirements. Copies of signed transmittals for these actions should be placed in the contract file and attached to the final property report. This report should be coordinated with the Asset/Inventory Management Office at VITA or the agency, as applicable.

#### **34.4.5 Final patent/royalty report**

A final patent/royalty report, when applicable, is processed if there was a royalty or patent agreement between the agency and the supplier related to any product developed under the contract. While this is usually not applicable to Commonwealth IT contracts, it may be a flow-down requirement for a federally subsidized contract or when a federal grant is involved.

#### **34.4.6 Final escrow report**

A final escrow report, when applicable, is prepared if there was an escrow agreement between the agency and the supplier related to any source code under the contract. A copy of any agreement should be obtained and placed in the contract file. A copy of any ongoing or renewable agreement may also be provided to the agency's legal department for follow-on action and retention.

#### **34.4.7 Final payment**

For all agencies, final payment on the contract should be the last step in the closeout process. This may not be feasible for VITA statewide contracts where agencies purchase via individual purchase orders through [eVA](#) and when a purchase order term extends beyond the contract's end date. However, the VITA contract administrator should confirm with the supplier that there are no delinquent payments due by any agency. If there are, the VITA contract administrator should pursue closure on behalf of the supplier.



The contract administrator should review the contract (or purchase order) for any reduction, retainage, cost-share or fee-share obligations and confirm there are no outstanding performance incentives or penalties to ensure that any related adjustments or offsets are included in the final invoice, by mutual agreement of the supplier.

Final payment must not be made to the supplier if the supplier is delinquent in submitting any contractually required deliverable or report, or until all applicable closeout reports have been signed by the appropriate stakeholders. Additionally, the contract administrator may want to confirm with subcontractors that they have been paid by the supplier (prime contractor) for all work performed and billed to-date prior to the release of final payment.

Should there be any pending contract disputes at the time of contract closeout, in accordance with [§ 2.2-4363](#) of the *Code of Virginia*, any related contractual claims, whether for money or other relief, shall be submitted by the supplier in writing to the Commonwealth (agency) no later than 60 days after final payment has been made to the supplier; however, written notice of the supplier's intention to file such claim must be given to the agency at the time of the occurrence or beginning of the work upon which the claim is based. The contract administrator will facilitate bringing this to closure.

It is critical that this phase be expedited to ensure compliance with statutory payment requirements provided in the *Code of Virginia*, Sections [§ 2.2-4347](#) through [§ 2.2-4354](#).

An acknowledgement must be signed by the supplier to validate that final payment has been invoiced and received. If not, the supplier must attach a final invoice to the acknowledgement. The contract administrator will send the acknowledgement and invoice through the appropriate approval process, then to the appropriate agency paying office for payment and will monitor until the final payment is acknowledged by the paying office and confirmed by supplier's signed receipt.

### **34.5 Conduct contract retirement**

While the contract administrator should follow its agency's protocol and process for retiring a contract, there are three rudimentary steps to complete as provided in the following subsections.

#### **34.5.1 Update agency/Commonwealth contract, portfolio management and financial systems**

The contract administrator will follow its agency's protocol and process for updating any financial or contract systems to move the contract to a closed or inactive status. In some systems, removing the contract completely from an active contract list is required. The contract administrator must ensure all electronic data touch points are updated to reflect a terminated contract status in accordance with their agency's requirements, including any Department of Accounts and [Federal Grant Management](#) closeout or reporting requirements, as applicable.

In addition, VITA contract administrators will remove or coordinate with designated process owners (i.e., IFA Coordinator), the need for status change or removal of a terminated statewide contract from the VITA website database, from the posted [eVA](#) catalog and from other locations (i.e., IFA supplier database) in accordance with VITA's contract retirement processes and procedures.

For all agencies, the contract administrator should work with the contract's Business Owner/Project Manager or Contract Manager to ensure that terminated contract status

updates are processed in the agency's and in any required Commonwealth Portfolio Management systems.

#### 34.5.2 File closed

After the first two steps of contract retirement are completed, the contract administrator should verify that the contract file is complete and ready for archiving according to its agency's retention processes and the Virginia Public Records Act. No further procurement activity may occur against the contract once it is closed. Generally, the provisions of the contract regarding software license, rights to work product, warranty, escrow, confidentiality, and liability and indemnification, and the general provisions shall survive the expiration or termination of the contract. At the time the contract administrator notifies the contract's stakeholders of the closeout status, or when obtaining the signed closeout reports from them, notification of that contract's specific survival provisions would be prudent to include.

#### 34.5.3 File archived for retention

The Virginia Public Records Act requires agencies to cooperate with the Library of Virginia's records retention and disposition directives and requirements for public records. Section [§42.1-85 B](#) of the *Code of Virginia* states:

"B. Any agency with public records shall cooperate with The Library of Virginia in conducting surveys. Each agency shall establish and maintain an active, continuing program for the economical and efficient management of the records of such agency. The agency shall be responsible for ensuring that its public records are preserved, maintained, and accessible throughout their lifecycle, including converting and migrating electronic records as often as necessary so that information is not lost due to hardware, software, or media obsolescence or deterioration. Any public official who converts or migrates an electronic record shall ensure that it is an accurate copy of the original record. The converted or migrated record shall have the force of the original."

The contract administrator must ensure that all paper and electronic records associated with the contract and contract administration are maintained in accordance with the *Virginia Public Records Management Manual*.

### 34.6 Contents of contract administration file

At a minimum, each contract administration file should include the following items, as applicable to the specific IT contract:

- Executed contract
- Supplier contractually required certifications, licenses and authorizations, including Small (SWaM) Business designation, proof of authorization to transact business in the Commonwealth and Lobbying Certificate
- Supplier insurance certificates/bond guarantees
- Stakeholder contact detail
- Record of actions used to administer the contract
- Description of contract administrator duties
- Amendments/modifications
- Verification of required reporting (i.e., transmittal documents)
- Copies of any statutory and VITA required approvals, waivers and exceptions related to the procurement and/or contract
- Copies of agency acceptance approvals
- Copies of transmittals for government- or supplier-furnished data, information, material and equipment



- Copies of confidentiality agreements and/or software license user agreements
- Claims related to the contract
- Release of claims document
- Disputes and resolution documentation (including cure notices and termination letters)
- FOIA requests and responses
- Final supplier written statement certifying that it has fully complied with the contract's Supplier Procurement and Subcontracting Plan, and if it has not fully complied, a written explanation of any variances between such Plan and the actual participation.
- Contract closeout documents