

Chapter 4. Determining Which Procedure Applies

Summary

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

Essential Information in this Chapter	
<ul style="list-style-type: none">• Generally, the procurement of goods or nonprofessional services requires using the competitive sealed bidding or competitive negotiation procedure if the costs are expected to exceed \$100,000. If the costs are not expected to exceed \$100,000, one of the small purchase procedures applies.• If the expected costs of professional services are expected to exceed \$80,000, the procurement will require a competitive negotiation procedure. If the costs are not expected to exceed \$80,000, a small purchase procedure may apply.• If there is only a sole source, an emergency exists, or if the goods may be procured at public auction, the competitive sealed bidding or competitive negotiation procedure need not be followed even if the costs are expected to exceed \$100,000.• There are several types of goods and services that are exempt from the competitive sealed bidding or competitive negotiation procedure even if the costs are expected to exceed \$100,000. Legal services are the most notable goods or services in this exempt class.• When determining which procedure applies, begin by assuming that the competitive sealed bidding procedure applies, and then determine the expected cost of the goods or services, classify what is being procured, and determine whether an excuse or exemption applies.	
Key References to the Code of Virginia Applicable to this Chapter	
Section 2.2-4301: Definitions used in the Virginia Public Procurement Act Section 2.2-4343(B): Compliance with conditions on federal grants or contracts Section 2.2-4304: Cooperative procurement Section 2.2-4303(A): When competitive sealed bidding and competitive negotiation required, generally Section 2.2-4303(B): Competitive negotiation required for procurement of professional services Section 2.2-4303(D): When competitive negotiation available in lieu of competitive sealed bidding Section 2.2-4303(E): Procurement from a sole source Section 2.2-4303(F): Procurement in an emergency Section 2.2-4303(G): Small purchases Section 2.2-4303(I): Reverse auctioning Section 2.2-4305: Competitive bidding on state-aid projects Section 2.2-4344: Exceptions to the requirement for competitive procurement	

4-1 General

There are several possible procedures that may apply to a particular procurement. If the expected costs of the goods or nonprofessional services are expected to exceed \$100,000, most procurements require a competitive

procedure such as the competitive sealed bidding procedure or the competitive negotiation procedure. If the expected costs of professional services are expected to exceed \$80,000, the procurement will require a competitive negotiation procedure. The small purchase procedures set forth in Chapter 22 apply when the expected costs of the goods or nonprofessional services are expected to be \$100,000 or less, or when the costs of professional services are expected to be \$80,000 or less..

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

4-2 The Formal Competitive Procedures

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

4-2.1 Competitive Sealed Bidding for Goods or Nonprofessional Services

Competitive sealed bidding is a method of vendor selection that is used when the cost of the goods or nonprofessional services is expected to exceed \$100,000. This procedure has five elements: (1) the issuance of an invitation for bids; (2) public notice; (3) public opening of sealed bids; (4) evaluations of bids; and (5) award. This procedure is described in more detail in Part 2, beginning with Chapter 5.

4-2.2 Competitive Negotiation for Professional Services

Competitive negotiation for professional services is the method of vendor selection used only for the procurement of services within the scope of the practice of accounting, actuarial services, architecture, dentistry, land surveying, landscape architecture, law, medicine, optometry, pharmacy, or professional engineering where the cost of the services is expected to exceed \$80,000. This procedure has four elements: (1) the issuance of a request for proposals; (2) public notice; (3) negotiations; and (4) award. These elements are described in more detail in Part 3, beginning with Chapter 11.

4-2.3 Competitive Negotiation for Goods or Nonprofessional Services

Competitive negotiation for goods or nonprofessional services is the method of vendor selection that may be used in lieu of the competitive sealed bidding procedure for the procurement of goods or services, other than professional services, where the cost of the goods or services is expected to exceed \$100,000. This procedure has four elements: (1) the issuance of a request for proposals; (2) public notice; (3) negotiations; and (4) award. These elements are described in more detail in Part 3,

beginning with Chapter 11.

Table 4-1

Thresholds for Applicability of the Competitive Sealed Bidding And Competitive Negotiation Procedures	
Competitive Sealed Bidding	Competitive Negotiation
<p>Goods or nonprofessional services, including insurance, expected to exceed \$100,000</p> <p>Construction expected to exceed \$100,000</p>	<p>Professional services expected to exceed \$80,000</p> <p>Goods or nonprofessional services, including insurance, expected to exceed \$100,000</p> <p>The construction of highways and any draining, dredging, excavation, grading or similar work on real property</p>

4-3 Procurements Excused from Formal Competitive Procedures

There are three circumstances when compliance with the competitive sealed bidding or competitive negotiation procedure is excused, even though the cost of the goods or services are expected to exceed \$100,000.

4-3.1 Sole Source

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

4-3.2 Public Auction

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

4-3.3 Emergency

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

4-4 Goods and Services Exempt from Formal Competitive Procedures

The Virginia Public Procurement Act exempts several goods and services from the competitive sealed bidding and competitive negotiation procedures, even though the expected cost of the goods or services may exceed \$100,000. These exempt goods and services are:

- Legal services: Legal services, provided that the pertinent provisions of *Virginia Code* § 2.2-500 et seq. (pertaining to the legal services of the Attorney General) remain applicable.
- Litigation related services: Expert witnesses and other services associated with litigation or regulatory proceedings.
- Insurance purchased through an association: If insurance is purchased through an association of which the County is a member, if the association was formed and is maintained for the purpose of promoting the interest and welfare of, and developing close relationships with, similar public bodies. The association must obtain the insurance using competitive principles. The purchasing agent must make a determination in advance after reasonable notice to the public and state in writing that competitive sealed bidding and competitive negotiation are not fiscally advantageous to the public. The writing shall document the basis for this determination.
- Goods produced or services performed by the disabled: Goods produced or services performed by the disabled, if produced or performed by persons, or in schools or workshops under the supervision of the Virginia Department for the Visually Handicapped or by nonprofit sheltered workshops or other nonprofit organizations which offer transitional or supported employment services serving the handicapped.
- Goods or services for recipients of certain public welfare programs: Goods or services for an individual recipient of a public assistance program defined in *Virginia Code* § 63.2-100, a person receiving services from a community services board as defined in *Virginia Code* § 37.2-100, for services under the Children's Services Act (*Virginia Code* § 2.2-5200 et seq.), or the Virginia Juvenile Community Crime Control Act (*Virginia Code* § 16.1-309.2 et seq.) may be procured without using a competitive procedure. However, the bulk procurement of goods or services for use by the described recipients must be competitively procured.
- Extension of an existing contract: The purchasing agent may extend the term of an existing contract for services to allow completion of any work undertaken but not completed during the original term of the contract.

Legislation may also exempt some goods and services from the Act (e.g., *Virginia Code* §2.2-4343(A)(12) (school boards that make purchases through educational technology foundation exempt from certain provisions of Procurement Act); *Virginia Code* § 2.2-4346(A) (certain election materials), *Virginia Code* § 2.2-4343(A)(4) (vehicles purchased by the local department of

social services for TANF recipients)).

4-5 Determining Which Procedure Applies

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

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

The first step is to identify the expected cost of the goods or services to be procured. If the cost of the goods or services is expected to exceed \$100,000, then a formal competitive procedure applies unless the procurement is otherwise excused or exempted. If the expected cost of the goods or services is \$100,000 or less, then one of the small purchase procedures apply.

- Cost estimated by the using department: The using department shall determine the expected cost of the goods or services to be procured and document the determination in writing.
- Review of cost estimate by the purchasing agent: The purchasing agent may review the determination of expected cost made by the using department and may independently determine the expected cost of the goods or services.

4-5.2 Classify What is Being Procured

The second step requires that the purchasing agent classify what goods or services are sought to be procured, and identify whether professional services are sought.

- Goods: Goods are generally procured by the competitive sealed bidding procedure. However, when other factors, such as delivery time, service availability, or other factors unrelated to price are required to meet County needs, goods may be procured by the competitive negotiation procedure for goods or nonprofessional services.
- Nonprofessional services: Nonprofessional services are generally procured by the competitive sealed bidding procedure. However, other than most construction services, nonprofessional services may be procured by the competitive negotiation procedure for goods or nonprofessional services.

Table 4-2

Factors to Consider in Determining Whether the Competitive Sealed Bidding Procedure is not Practicable or Fiscally Advantageous

Whether the contract needs to be other than a fixed-price type

Whether oral or written discussions may need to be conducted with vendors concerning technical and price aspects of their proposals

Whether vendors may need to be afforded the opportunity to revise their proposals, including price

Whether the market will respond better to a solicitation permitting not only a range of alternative proposals, but evaluation and discussion of them before making the award

Whether the award may need to be based upon a comparative evaluation of differing price, quality, and contractual factors in order to determine the most advantageous offering to the County

Whether the primary consideration in determining the award may not be price

- Professional services: Services to be performed by an independent contractor within the scope of the practice of accounting, actuarial services, architecture, dentistry, land surveying, landscape architecture, law, medicine, optometry, pharmacy, or professional engineering, must be procured by the competitive negotiation procedure for professional services, unless otherwise exempted by law.

- Construction: Construction is procured by the competitive sealed bidding procedure, except for non-transportation-related construction in which the estimated value does not exceed \$100,000. However, the construction of highways and any draining, dredging, excavation, grading or similar work upon real property may be procured by the competitive negotiation procedure if the purchasing agent determines in advance and in writing that the competitive sealed bidding procedure is either not practicable or not fiscally advantageous to the public by considering the factors in Table 4-2 above. The writing shall document the basis for the determination.

Table 4-3

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

- Insurance: Insurance shall be procured by the competitive sealed bidding procedure. However, insurance may be procured by the competitive negotiation procedure if the purchasing agent determines in advance and in writing that the competitive sealed bidding procedure is either not practicable or not fiscally advantageous to the public. Procurement of insurance through an association to which the County is a member is exempted from competitive sealed bidding and competitive negotiation procedures. See 4-4, infra, and *Virginia Code* § 2.2-4345(A)(13).

4-5.3 Determine Whether an Excuse Applies

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

- Goods: Goods may be procured without complying with the

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

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

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

4-5.4 Determine Whether an Exemption Applies

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

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

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

Table 4-4

Circumstances When the Competitive Sealed Bid and Competitive Negotiation Procedures may be Excused	
Circumstances	Procedural Requirements
Insurance	Determine in writing in advance that competitive sealed bidding and competitive negotiation processes not practicable or fiscally advantageous; procure through broker or agent selected through competitive negotiation process; or purchase through an association of which the County is a member.
Sole source	Determine in writing that only one source practicably available; post public notice or publish notice in newspaper.
Emergency	Determine in writing the basis for the emergency and the selection of the contractor; post public notice or publish notice in newspaper.
Single-term contract less than or equal to \$100,000	Establish written small purchase procedures which so provide (See Chapter 22).
Goods, products or commodities purchased at public auction	Determine in writing in advance that the purchase is in the best interests of the public.

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

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

4-6.1 Cooperative Procurements

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

4-6.2 Procurements Funded by Federal Grants or Contracts

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

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

4-6.3 State-Aid Projects

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

4.7 Reverse Auctioning

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

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

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.