

2006 Management Agreement Between the Commonwealth of Virginia and The College of William and Mary in Virginia, as amended in 2009 and 2013

**MANAGEMENT AGREEMENT**

**BY AND BETWEEN**

**THE COMMONWEALTH OF VIRGINIA**

**AND**

**THE COLLEGE OF WILLIAM AND MARY IN VIRGINIA**

This **MANAGEMENT AGREEMENT**, executed this 15th day of November, 2005, by and between the Commonwealth of Virginia (hereafter, the Commonwealth) and The College of William and Mary in Virginia (hereafter, the College) provides as follows:

**RECITALS**

**WHEREAS**, the College has satisfied the conditions precedent set forth in subsections A and B of § 23-38.97 of the Code of Virginia to become a public institution of higher education of the Commonwealth governed by Subchapter 3 (§ 23-38.91 et seq.) of the Restructured Higher Education Administrative and Financial Operations Act, Chapter 4.10 (§ 23-38.88 et seq.) of Title 23 of the Code of Virginia (Subchapter 3 and the Act, respectively), as evidenced by:

1. *Board of Visitors Approval.* The minutes of a meeting of the Board of Visitors of the College held on April 22, 2005, indicate that an absolute two-thirds or more of the members voted to approve the resolution required by subdivision A 1 of § 23-38.97 of the Act;

2. *Written Application to the Governor.* The College has submitted to the Governor a written Application, dated November 2, 2005, with copies to the Chairmen of the House Committee on Appropriations, the House Committee on Education, the Senate Committee on Finance, and the Senate Committee on Education and Health, expressing the sense of its Board of Visitors that the College is qualified to be, and should be, governed by Subchapter 3 of the Act, and substantiating that the College has fulfilled the requirements of paragraph 2 of subsection A of § 23-38.97 of the Act; and

3. *Finding by the Governor.* In accordance with subsection B of § 23-38.97 of the Act the Governor has found that the College has fulfilled the requirements of subdivision A 2 of § 23-38.97, and therefore has authorized Cabinet Secretaries to enter into this Management Agreement on behalf of the Commonwealth with the College; and

**WHEREAS**, the College is therefore authorized to enter into this Management Agreement as provided in subsection D of § 23-38.88 and Subchapter 3 of the Act.

## **AGREEMENT**

**NOW, THEREFORE**, in accordance with the provisions of the Restructured Higher Education Administrative and Financial Operations Act, Chapter 4.10 (§ 23-38.88 et seq.) of Title 23 of the Code of Virginia, and in consideration of the foregoing premises, the Commonwealth and the College do now agree as follows:

### **ARTICLE 1. DEFINITIONS.**

As used in this Agreement, the following terms have the following meanings, unless the context requires otherwise:

“Act” means the Restructured Higher Education Administrative and Financial Operations Act, Chapter 4.10 (§ 23-38.88 et seq.) of Title 23 of the Code of Virginia.

“Agreement” means “Management Agreement.”

“Board of Visitors” or “Board” means the Rector and Board of Visitors of the College of William and Mary in Virginia and the Virginia Institute of Marine Science.

“College” means the College of William and Mary in Virginia (State Agency 204) and the Virginia Institute of Marine Science (State Agency 268).

“Covered Employee” means any person who is employed by the College on either a salaried or wage basis.

“Covered Institution” means, on and after the effective date of its initial management agreement with the Commonwealth, a public institution of higher education of the Commonwealth of Virginia that has entered into a management agreement with the Commonwealth to be governed by and in accordance with the provisions of subsection D of § 23-38.88 and Subchapter 3 of the Act.

“Enabling legislation” means those chapters, other than Chapter 4.10, of Title 23 of the Code of Virginia, as amended, creating, continuing, or otherwise setting forth the powers, purposes, and missions of the individual public institutions of higher education of the Commonwealth.

“Management Agreement” means this agreement between the Commonwealth of Virginia and the College as required by subsection D of § 23-38.88 and Subchapter 3 of the Act.

“Parties” means the parties to this Management Agreement, the Commonwealth of Virginia and the College.

“Public institution of higher education” means those two-year and four-year institutions enumerated in § 23-14 of the Code of Virginia.

## **ARTICLE 2. SCOPE OF MANAGEMENT AGREEMENT.**

**SECTION 2.1. Enhanced Authority Granted and Accompanying Accountability.** Subchapter 3 of the Act provides that, upon the execution of, and as of the effective date for, this Management Agreement, the College shall become a Covered Institution entitled to be granted by the Commonwealth and to exercise the powers and authority provided in Subchapter 3 of the Act that are expressly contained in this Management Agreement. In general, subject to its management agreement with the Commonwealth, status as a Covered Institution governed by Subchapter 3 of the Act and this Management Agreement is intended to replace (i) the post-General Assembly authorization prior-approval system of reviews, approvals, policies and procedures carried out and implemented by a variety of central State agencies with (ii) a post-audit system of reviews and accountability under which a Covered Institution is fully responsible and fully accountable for managing itself pursuant to Subchapter 3 of the Act and its management agreement with the Commonwealth.

**SECTION 2.1.1. Assessments and Accountability.** The College and its implementation of the enhanced authority granted by Subchapter 3 of the Act and this Management Agreement, and the Board of Visitors policies attached hereto as Exhibits G through L, shall be subject to the reviews, assessments, and audits (i) set forth in the Act that are to be conducted by the Auditor of Public Accounts, the Joint Legislative Audit and Review Commission, and the State Council of Higher Education for Virginia, or (ii) as may be conducted periodically by the Secretaries of Finance, Administration, Education, or Technology, or by some combination of these four Secretaries, or (iii) as otherwise may be required by law other than the Act.

**SECTION 2.1.2. Express Grant of Powers and Authority.** Subject to the specific conditions and limitations contained in Article 4 (Institutional Management), Article 5 (Capital Projects; Procurement; Property Generally), and Article 6 (Human Resources) of Subchapter 3 of the Act, the Commonwealth and the College agree that the Commonwealth has granted to the College by this Management agreement all the powers and authority contained in certain policies adopted by the Board of Visitors of the College attached hereto as Exhibits G through L and governing (1) the undertaking and implementation of capital projects, and other acquisition and disposition of property (Exhibit G), (2) the leasing of property, including capital leases (Exhibit H), (3) information technology (Exhibit I), (4) the procurement of goods, services, including certain professional services, insurance, and construction (Exhibit J), (5) human resources (Exhibit K), and (6) its system of financial management (Exhibit L), including, as provided in subsection B of § 23-38.104 of the Act, the sole authority to establish tuition, fees, room, board, and other charges consistent with sum sufficient appropriation authority for non-general funds as provided by the Governor and the General Assembly in the Commonwealth's biennial appropriations authorization. Subject to the specific conditions and limitations contained in Article 3 (Powers and Authority Generally) of Subchapter 3 of the Act, in this Management Agreement, and in one or more of the Board of Visitors policies attached hereto as Exhibits G through L, the Commonwealth and the College agree that the Commonwealth has expressly granted to the College all the powers and authority permitted by Article 3 (Powers and Authority Generally) of Subchapter 3 of the Act.

The Board of Visitors of the College shall at all times be fully and ultimately accountable for the proper fulfillment of the duties and responsibilities set forth in, and for the appropriate implementation of, this Management Agreement and the policies adopted by it and attached as Exhibits G through L. Consistent with this full and ultimate accountability, however, the Board may, pursuant to its legally permissible procedures, specifically delegate the duties and responsibilities set forth in this Management Agreement to its officers, committees, and subcommittees, and, as set forth in the policies adopted by the Board and attached hereto as Exhibits G through L, to a person or persons within the College.

**SECTION 2.1.3. Reimbursement by the College of Certain Costs.** By July 1 of each odd-numbered year, the College shall inform the Secretary of Finance of any intent during the next biennium to withdraw from any health or other group insurance or risk management program made available to the College through any agency, body corporate, political subdivision, authority, or other entity of the Commonwealth, and in which the College is then participating, to enable the Commonwealth's actuaries to complete an adverse selection analysis of any such decision and to determine the additional costs to the Commonwealth that would result from any such withdrawal. If upon notice of such additional costs to the Commonwealth, the College proceeds to withdraw from such health or other group insurance or risk management program, the College shall, pursuant to subdivision D 2 c of § 23-38.88, reimburse the Commonwealth for all such additional costs attributable to such withdrawal as determined by the Commonwealth's actuaries.

**SECTION 2.1.4. Potential Impact on Virginia College Savings Plan.** As required by subdivision D 2 c of § 23-38.88 of the Act, the College has given consideration to potential future impacts of tuition increases on the Virginia College Savings Plan (§ 23-38.75 of the Code of Virginia) and has discussed those potential impacts with the Executive Director and staff of that Plan and with parties in the Administration who participated in the development of this Management Agreement. The Executive Director of the Plan has provided to the College and the Commonwealth the Plan's assumptions underlying the contract pricing of the program.

**SECTION 2.1.5. Justification for Deviations from the Virginia Public Procurement Act.** Pursuant to § 23-38.110 of the Act and subject to the provisions of this Management Agreement, the College may be exempt from the provisions of the Virginia Public Procurement Act (VPPA), Chapter 43 (§ 2.2-4300 et seq.) of Title 2.2 of the Code of Virginia. Any procurement policies or rules that deviate from the VPPA must be uniform across all institutions governed by Subchapter 3 of the Act, and the Board of Visitors shall adopt and comply with procurement policies that are based upon competitive principles and seek competition to the maximum practical degree. The Policy Governing the Procurement of Goods, Services, Insurance, and Construction, and the Disposition of Surplus Materials and the Rules Governing Procurement of Goods, Services, Insurance, and Construction (the Procurement Rules) attached to that Policy as Attachment 1 constitute the policies and uniform deviations from the VPPA required by subsections A and B of § 23-38.110 of the Act.

Subsection D of § 23-38.110 of the Act requires that the College identify the public, educational, and operational interests served by any procurement rule or rules that deviate from those in the VPPA. The adopted Board of Visitors policy on procurement and the Procurement Rules provide the College with the autonomy to administer its procurement process while fully adhering to the principle that competition should be sought to the maximum extent feasible. This autonomy will better position the College to support the requirements of its growing teaching, research and outreach missions. Greater autonomy in procurement will improve internal capacity to respond quickly to emergent material and service issues and, therefore, enable the College to be more efficient and effective in meeting the Commonwealth's goals for institutions of higher education. In some instances, costs will be reduced. Taken collectively, the College's procurement policies and rules that differ from those required by the VPPA will enhance procurement "best practices" as they currently are being observed within the higher education community nationally. Further, these changes will provide efficiencies to both the College and public sector suppliers.

**SECTION 2.1.6. Quantification of Cost Savings.** Subsection C of § 23-38.104 of the Act requires that a Covered Institution include in its management agreement with the Commonwealth the quantification of cost savings realized as a result of the additional operational flexibility provided pursuant to Subchapter 3 of the Act. Since this initial Management Agreement with the Commonwealth has not yet been implemented by the College, the parties agree that the College is not in a position to quantify any such cost savings at this time, although the College expects that there will be cost savings resulting from the additional authority granted to the College pursuant to Subchapter 3 of the Act and that such cost savings will be part of the determinations made during the reviews, assessments, and audits to be conducted pursuant to Subchapter 3 of the Act by the Auditor of Public Accounts, the Joint Legislative Audit and Review Commission, and the State Council of Higher Education for Virginia, and as otherwise described in Section 2.1.1 above.

**SECTION 2.1.7. Participation in State Programs.** The Commonwealth intends that the College shall continue to fully participate in, and receive funding support from the many and varied programs established now or in the future by the Commonwealth to provide support for Virginia's public institutions of higher education and for Virginians attending such institutions, including but not limited to: the state capital outlay and bond financing initiatives undertaken from time to time by the Commonwealth; the Higher Education Equipment Trust Fund established pursuant to (§ 23-30.24 et seq.) of the Code of Virginia; the Maintenance Reserve Fund as provided in the Appropriation Act; the Eminent Scholars program as provided in the Appropriation Act; the Commonwealth's various student financial assistance programs; and other statewide programs or initiatives that exist, or may be established, in support of the Commonwealth's higher education institutions, programs, or activities.

**SECTION 2.1.8. Implied Authority.** Pursuant to subdivision D 1 of § 23-38.88 of the Act, the only implied authority granted to the College by this Management Agreement is that implied

authority that is actually necessary to carry out the expressed grant of financial or operational authority contained in this Agreement or in the policies adopted by the College's Board of Visitors and attached hereto as Exhibits G through L.

**SECTION 2.1.9. Exercise of Authority.** The College and the Commonwealth acknowledge and agree that the execution of this Management Agreement constitutes the conclusion of a process that, as of the effective date of this Agreement, confers upon the College the enhanced authority and operating flexibility described above, all of which is in furtherance of the purposes of Subchapter 3 of the Act. Therefore, without any further conditions or requirements, the College shall, on and after the effective date of this Management Agreement, be authorized to exercise the authority conferred upon it by this Management Agreement, the policies adopted by its Board of Visitors attached hereto as Exhibits G through L, and by Article 3 (Powers and Authority Generally) of Subchapter 3 of the Act except to the extent that the powers and authority contained in Article 3 of Subchapter 3 of the Act have been limited by this Management Agreement or the Board of Visitors policies attached hereto as Exhibits G through L.

The College and the Commonwealth also acknowledge and agree that, pursuant to subsection A of § 23-38.91 of the Act and consistent with the terms of this Management Agreement, the Board of Visitors of the College shall assume full responsibility for management of the College, subject to the requirements and conditions set forth in Subchapter 3 of the Act, the general requirements for this Management Agreement as provided in § 23-38.88 of the Act, and this Management Agreement. The Board of Visitors shall be fully accountable for (a) the management of the College as provided in the Act, (b) meeting the requirements of §§ 2.2-5004, 23-9.2:3.02, and 23-9.6:1.01 of the Code of Virginia, and (c) meeting such other provisions as are set forth in this Management Agreement.

**SECTION 2.2. State Goals.**

**SECTION 2.2.1. Furthering State Goals.** As required for all public institutions of higher education of the Commonwealth by subsection B of § 23-38.88 of the Act, prior to August 1, 2005, the Board of Visitors of the College adopted the resolution setting forth its commitment to the Governor and the General Assembly to meet the State goals specified in that subsection B. In addition to the above commitments, the College commits to furthering these State goals by:

1. In addition to its six-year target of achieving \$68 million in external research by 2011-12, the College, including the Virginia Institute of Marine Science, commits to match from institutional funds, other than general funds or tuition, on a dollar for dollar basis, any additional research funds provided by the State in the Appropriation Act above the amount provided from institutional funds for research in 2005-06.

2. In a concerted effort to provide educational opportunities to Virginia students attending institutions in the Virginia Community College System (VCCS) and Richard Bland College, the College commits to work with Virginia Polytechnic Institute and State University (Virginia Tech) and the University of Virginia to establish a program under which these three institutions will increase significantly the number of such students transferring to their institutions. Specifically, pursuant to this program, the College, Virginia Tech and the University of Virginia collectively commit to enroll as transfer students from VCCS institutions and Richard Bland College (i) by the 2007-08 fiscal year, not less than approximately 300 new such transfer students each year over the number enrolled in 2004-05, for a total of approximately 900 such transfer students each year, and (ii) by the end of the decade, not less than approximately 650 new such transfer students each year over the number enrolled in 2004-05, for a total of approximately 1,250 such transfer students each year. The three institutions have agreed that they will mutually determine how to divide the responsibility for these additional transfer students equitably among themselves.

3. As an institutional priority and obligation, the College commits to the Governor and General Assembly to work meaningfully and visibly with an economically distressed region or local area of the Commonwealth, not smaller in size than a city or county, which lags the Commonwealth in education, income, employment, and other factors. The College commits to establish a formal partnership with that area to develop jointly a specific action plan that builds on the College's programmatic strengths and uses the College's faculty, staff and, where appropriate, student expertise to stimulate economic development in the area to make the area more economically viable, and to improve student achievement and teacher and administrator skill sets in a school, schools, or the school system in that area. The College shall submit the action plan to the Governor and General Assembly by no later than December 31, 2006, and shall report to the Governor and General Assembly by September 1 of each year on its progress in implementing the action plan during the prior fiscal year.

**SECTION 2.2.2. Student Enrollment, Tuition, and Financial Aid.** As required by § 23-9.2:3.02 of the Code of Virginia, the College, along with all other public institutions of higher education of the Commonwealth, has developed and submitted to the State Council of Higher Education for Virginia (SCHEV) by October 1, 2005, an institution-specific Six-Year Plan addressing the College's academic, financial, and enrollment plans for the six-year period of fiscal years 2006-07 through 2011-12. Subsection A of § 23-9.2:3.02 requires the College to update this Six-Year Plan by October 1 of each odd-numbered year. Subsection B of § 23-38.97 of the Act requires that a management agreement address, among other issues, such matters as the College's in-state undergraduate student enrollment, its financial aid requirements and capabilities, and its tuition policy for in-state undergraduate students. These matters are addressed below and in the College's Six-Year Plan submitted to SCHEV, and the parties therefore agree that the College's Six-Year Plan and the description below meet the requirement of subsection B of § 23-38.97 of the Act.

Subsection B of § 23-38.104 of the Act requires the Board of Visitors of the College to include in this Management Agreement the College's commitment to provide need-based grant aid for

middle- and lower-income Virginia students in a manner that encourages student enrollment and progression without respect to potential increases in tuition and fees. The College's commitment in this regard is clear.

The College of William and Mary, under the leadership of its new president, has set as a goal increasing the economic and social diversity of the student body at the College. The College is absolutely committed to assuring access to any qualified and admitted Virginian regardless of family income. The primary initiative in this area is Gateway William and Mary, which shall be substantially as described in the remainder of this Section 2.2.2, as may amended from time to time by the Board of Visitors of the College and reported to the Secretaries of Finance and Education and the Chairmen of the Senate Committee on Finance and the House Committee on Appropriations.

At the present time, any needy Virginian at the College receives a combination of grants and loans so that his or her indebtedness will not exceed one year's cost of education. This is as generous as any other public institution in the state or region. Nonetheless, this means that many needy Virginians, including those with low family incomes, will graduate with more than \$16,000 in indebtedness. This burdensome level of debt may discourage students from lower SES groups from applying to or accepting admission from the College. And, if they do attend, their legitimate concern with respect to debt repayment may discourage them from some career choices like K-12 education or from going on to graduate or professional school for fear of adding even more to their personal indebtedness. Hence, over the period of the six-year plan, the College of William and Mary is committed to seeking, from all sources – state-appropriated scholarship funds, federal, and private support -- sufficient funds to assure that 1) we meet 100% of financial need for in-state undergraduates and 2) any student whose family's annual income is less than \$40,000 can spend four years at the College and graduate debt-free. The Gateway William and Mary initiative is one of the highest priorities for our new president. In addition, both through our goal to increase the numbers of VCCS graduates who transfer to the College and aggressive efforts to recruit in-state students from lower SES groups, we hope to double the number of students who would receive assistance through the Gateway initiative from 280 students to 560 students by the end of the six-year planning period.

As noted, we will continue our commitment to providing additional financial aid through grants and loans to those Virginians whose families are not in the lower SES groups, but who still have demonstrable need. Currently approximately 900 in-state undergraduate students receive need-based aid. The College commits to meeting 100% of the need for these students consistent with the federal definition of unmet needs over the six year planning period. In addition, as tuition and fees increase over the period of the six-year plan, we will readjust the level of financial aid for all students to assure that insufficiency of family resources will not be a barrier to attending the College.

The Commonwealth and the College agree that this commitment meets the requirements of subsection B of § 23-38.104 of the Act.

**SECTION 2.3.** Authority Granted to the Virginia Institute of Marine Science. The Virginia Institute of Marine Science (hereafter, the Institute) shall receive the benefits of the additional financial and operational authority granted by this Management Agreement as it and the policies adopted by the Board of Visitors attached as Exhibits G through L are implemented by the College on behalf of the Institute, but the Institute shall not receive any additional independent financial or operational authority as a result of this Management Agreement or the attached Board of Visitors policies beyond the independent financial and operational authority that it had prior to the effective date of this Management Agreement or that it may be granted by law in the future.

**SECTION 2.4.** Other Law. As provided in subsection B of § 23-38.91 of the Act, the College shall be governed and administered in the manner provided not only in this Management Agreement, but also as provided in the Appropriation Act then in effect and the College's Enabling Legislation.

**SECTION 2.4.1.** The Appropriation Act. The Commonwealth and the College agree that, pursuant to the current terms of the Act and the terms of § 4-11.00 of the 2004-06 Appropriation Act, if there is a conflict between the provisions of the Appropriation Act and the provisions of Subchapter 3 of the Act, or this Management Agreement, or the Board of Visitors policies attached to this Management Agreement as Exhibits G through L, the provisions of the Appropriation Act shall control, and shall continue to control unless provided otherwise by law.

**SECTION 2.4.2.** The College's Enabling Legislation. As provided in subsection C of § 23-38.91 of the Act, in the event of a conflict between any provision of Subchapter 3 of this Act and the College's Enabling Legislation, the Enabling Legislation shall control.

**SECTION 2.4.3.** Title 2.2 of the Code of Virginia. As provided in subsection B of § 23-38.92 of the Act, except as specifically made inapplicable under Subchapter 3 of the Act and the express terms of this Management Agreement, the provisions of Title 2.2 relating generally to the operation, management, supervision, regulation, and control of public institutions of higher education shall be applicable to the College as provided by the express terms of this Management Agreement. As further provided in subsection C of § 23-38.92 of the Act, in the event of conflict between any provision of Title 2.2 and any provision of Subchapter 3 of the Act as expressed in this Management Agreement, the provisions of this Management Agreement shall control.

**SECTION 2.4.4.** Educational Policies of the Commonwealth. As provided in subsection A of § 23-38.93 of the Act, for purposes of §§ 2.2-5004, 23-1.01, 23-1.1, 23-2, 23-2.1, 23-2.2:1, 23-3, 23-4.2, 23-4.3, 23-4.4, 23-7.1:02, 23-7.4, 23-7.4:1, 23-7.4:2, 23-7.4:3, 23-7.5, 23-8.2:1, 23-9.1, 23-9.2, 23-9.2:3, 23-9.2:3.02, 23-9.2:3.1 through 23-9.2:5, 23-9.6:1.01, and Chapter 4.9 (§ 23-38.75 et seq.) of the Code of Virginia, the College shall remain a public institution of higher

education of the Commonwealth following the effective date of this Management Agreement, and shall retain the authority granted and any obligations required by such provisions, unless and until provided otherwise by law other than the Act. In addition, the College shall retain the authority, and any obligations related to the exercise of such authority, that is granted to institutions of higher education pursuant to Chapter 1.1 (§ 23-9.3 et seq.), Chapter 3 (§ 23-14 et seq.), Chapter 3.2 (§ 23-30.23 et seq.), Chapter 3.3 (§ 23-30.39 et seq.), Chapter 4 (§ 23-31 et seq.), Chapter 4.01 (§ 23-38.10:2 et seq.), Chapter 4.1 (§ 23-38.11 et seq.), Chapter 4.4 (§ 23-38.45 et seq.), Chapter 4.4:1 (§ 23-38.53:1 et seq.), Chapter 4.4:2 (§ 23-38.53:4 et seq.), Chapter 4.4:3 (§ 23-38.53:11), Chapter 4.4:4 (§ 23-38.53:12 et seq.), Chapter 4.5 (§ 23-38.54 et seq.), Chapter 4.7 (§ 23-38.70 et seq.), Chapter 4.8 (§ 23-38.72 et seq.), and Chapter 4.9 (§ 23-38.75 et seq.), unless and until provided otherwise by law other than the Act.

**SECTION 2.4.5.** Public Access to Information. As provided in § 23-38.95 of the Act, the College shall continue to be subject to § 2.2-4342 and to the provisions of the Virginia Freedom of Information Act, Chapter 37 (§ 2.2-3700 et seq.) of Title 2.2 of the Code of Virginia, but shall be entitled to conduct business pursuant to § 2.2-3709 if expressly named therein and, in all cases, may conduct business as a “state public body” for purposes of subsection B of § 2.2-3708.

**SECTION 2.4.6.** Conflicts of Interests. As provided in § 23-38.96 of the Act, the provisions of the State and Local Government Conflict of Interests Act, Chapter 32 (§ 2.2-3100 et seq.) that are applicable to officers and employees of a state governmental agency shall continue to apply to the members of the Board of Visitors of the College and to its Covered Employees.

**SECTION 2.4.7.** Other Provisions of the Code of Virginia. Other than as specified above, any other powers and authorities granted to the College pursuant to any other sections of the Code of Virginia, including other provisions of the Act, are not affected by this Management Agreement or the Board policies attached hereto as Exhibits G through L.

### **ARTICLE 3. AMENDMENTS TO, AND RIGHT AND POWER TO VOID OR REVOKE, MANAGEMENT AGREEMENT.**

**SECTION 3.1.** Amendments. Any change to or deviation from this Management Agreement or the Board of Visitors policies attached hereto as Exhibits G through L shall be reported to the Secretaries of Finance, Administration, Education, and Technology and to the Chairmen of the Senate Committee on Finance and the House Committee on Appropriations and shall be posted on the College's website. The change or deviation shall become effective unless one of the above persons notifies the College in writing within 60 days that the change or deviation is substantial and material. Any substantial and material change or deviation shall require the execution by the parties of an amendment to this Management Agreement or a new Management Agreement pursuant to the provisions of subsection D of § 23-38.88 and may lead to the Governor declaring this Management Agreement to be void pursuant to subdivision D 4 of § 23-38.88 of the Act.

**SECTION 3.2.** Right and Power to Void, Revoke, or Reinstate Management Agreement.

**SECTION 3.2.1.** Governor. Pursuant to subdivision D 4 of § 23-38.88, and § 23-38.98, of the Act, if the Governor makes a written determination that the College is not in substantial compliance with the terms of this Management Agreement or with the requirements of the Act in general, (i) the Governor shall provide a copy of that written determination to the Rector of the Board of Visitors of the College and to the members of the General Assembly, and (ii) the College shall develop and implement a plan of corrective action, satisfactory to the Governor, for purposes of coming into substantial compliance with the terms of this Management Agreement and with the requirements of the Act, as soon as practicable, and shall provide a copy of such corrective action plan to the members of the General Assembly. If after a reasonable period of time after the corrective action plan has been implemented by the College, the Governor determines that the institution is not yet in substantial compliance with this Management Agreement or the requirements of the Act, the Governor may void this Management Agreement. Upon the Governor voiding this Management Agreement, the College shall no longer be allowed to exercise any restructured financial or operational authority pursuant to the provisions of Subchapter 3 of the Act unless and until the College has entered into a subsequent management agreement with the Secretary or Secretaries designated by the Governor or the voided Management Agreement is reinstated by the General Assembly.

**SECTION 3.2.2.** General Assembly. As provided in subdivision D 4 of § 23-38.88 of the Act, the General Assembly may reinstate a Management Agreement declared void by the Governor. Pursuant to § 23-38.98 of the Act, the College's status as a Covered Institution governed by Subchapter 3 of the Act may be revoked by an act of the General Assembly (i) if the College fails to meet the requirements of Subchapter 3 of the Act, or (ii) if the College fails to meet the requirements of this Management Agreement.

**ARTICLE 4. GENERAL PROVISIONS.**

**SECTION 4.1.** No Third-Party Beneficiary Status. Nothing in this Agreement, express or implied, shall be construed as conferring any third-party beneficiary status on any person or entity.

**SECTION 4.2.** Sovereign Immunity. Pursuant to subsection E of § 23-38.88 of the Act, the College and the members of its Board of Visitors, officers, directors, employees, and agents shall be entitled to the same sovereign immunity to which they would be entitled if the College were not governed by the Act; provided that the Virginia Tort Claims Act, § 8.01-195.1 et seq. of the Code of Virginia, and its limitations on recoveries shall remain applicable with respect to the College.

**SECTION 4.3.** Term of Agreement. This Management Agreement shall expire at midnight on June 30, 2010.

**WHEREFORE**, the foregoing Management Agreement has been executed as of this 15th day of November, 2005, and shall become effective on the effective date of the legislation enacted into law providing for the terms of such Agreement.

**EXHIBIT G**  
**MANAGEMENT AGREEMENT**  
**BETWEEN**  
**THE COMMONWEALTH OF VIRGINIA**  
**AND**  
**THE COLLEGE OF WILLIAM AND MARY IN VIRGINIA**  
**PURSUANT TO**  
**THE RESTRUCTURED HIGHER EDUCATION**  
**FINANCIAL AND ADMINISTRATIVE OPERATIONS**  
**ACT OF 2005**  
**POLICY GOVERNING CAPITAL PROJECTS**  
**THE RECTOR AND VISITORS OF**  
**THE COLLEGE OF WILLIAM AND MARY IN VIRGINIA**  
**POLICY GOVERNING CAPITAL PROJECTS**

**I. PREAMBLE.**

The Restructured Higher Education Financial and Administrative Operations Act (the Act), Chapter 4.10 of Title 23 of the Code of Virginia, provides that, upon becoming a Covered Institution, The College of William and Mary in Virginia may be delegated the authority to establish its own system for undertaking the implementation of its capital projects. In general, status as a Covered Institution is designed to replace the post-authorization system of reviews, approvals, policies and procedures carried out by a variety of central State agencies, and also the traditional pre-authorization approval process for projects funded entirely with non-general funds and without any proceeds from State Tax Supported Debt. The College's system for carrying out its capital outlay process as a Covered Institution is to be governed by policies adopted by the Board of Visitors. The following provisions of this Policy, together with the Policy Governing the Procurement of Goods, Services, Insurance, and Construction, and the Disposition of Surplus Materials adopted by the Board, and the Rules Governing Procurement of Goods, Services, Insurance, and Construction, which is attached as Attachment 1 to that Policy, constitute the

adopted Board of Visitors policies regarding the College’s capital projects, whether funded by a state general fund appropriation, State Tax Supported Debt, or funding from other sources.

This Policy is intended to encompass and implement the authority that may be granted to the College pursuant to Subchapter 3 of the Act. Any other powers and authorities granted to the College pursuant to the Appropriation Act, or any other sections of the Code of Virginia, including other provisions of the Act and the College's Enabling Legislation, are not affected by this Policy.

## **II. DEFINITIONS.**

As used in this policy, the following terms shall have the following meanings, unless the context requires otherwise:

“Act” means the Restructured Higher Education Financial and Administrative Operations Act, Chapter 4.10 of Title 23 of the Code of Virginia.

“Board of Visitors” or “Board” means the Rector and Visitors of the College of William and Mary in Virginia.

“Capital Lease” means a lease that is defined as such within Generally Accepted Accounting Principles pursuant to the pronouncement of the Financial Accounting Standards Board.

“Capital Professional Services” means professional engineering, architecture, land surveying and landscape architecture services related to capital projects.

“Capital project(s)” means the acquisition of any interest in land, including improvements on the acquired land at the time of acquisition, new construction, improvements or renovations, and Capital Leases.

“College” means The College of William and Mary in Virginia, (State Agency 204), and the Virginia Institute of Marine Science, (State Agency 268).

“Covered Institution” means, on and after the Effective Date of its initial Management Agreement, a public institution of higher education of the Commonwealth of Virginia that has entered into a management agreement with the Commonwealth to be governed by the provisions of Subchapter 3 of the Act.

“Enabling Legislation” means those chapters, other than Chapter 4.10, of Title 23 of the Code of Virginia, as amended, creating, continuing, or otherwise setting forth the powers, purposes, and missions of the individual public institutions of higher education of the Commonwealth, and as provided in §§ 2.2-2817.2, 2.2-2905, and 51.1-126.3.

“Major Capital Project(s)” means the acquisition of any interest in land, including improvements on the acquired land at the time of acquisition, new construction of 5,000 square feet or greater or costing \$1 million or more, improvements or renovations of \$1 million or more, and Capital Leases.

“State Tax Supported Debt” means bonds, notes or other obligations issued under Article X, Section 9(a), 9(b), or 9(c), or 9(d), if the debit service payments are made or ultimately are to be made from general government funds, as defined in the December 20, 2004 Report to the Governor and General Assembly of the Debt Capacity Advisory Committee or as that definition is amended from time to time.

### **III. SCOPE OF POLICY.**

This Policy applies to the planning and budget development for capital projects, capital project authorization, and the implementation of capital projects, whether funded by a general fund appropriation of the General Assembly, proceeds from State Tax Supported Debt, or funding from other sources.

This Policy provides guidance for 1) the process for developing one or more capital project programs for the College, 2) authorization of new capital projects, 3) procurement of Capital Professional Services and construction services, 4) design reviews and code approvals for capital projects, 5) environmental impact requirements, 6) building demolitions, 7) building and land acquisitions, 8) building and land dispositions, 9) project management systems, and 10) reporting requirements.

### **IV. BOARD OF VISITORS ACCOUNTABILITY AND DELEGATION OF AUTHORITY.**

The Board of Visitors of the College shall at all times be fully and ultimately accountable for the proper fulfillment of the duties and responsibilities set forth in, and for the appropriate implementation of, this Policy. Consistent with this full and ultimate accountability, however, the Board may, pursuant to its legally permissible procedures, specifically delegate either herein or by separate Board resolution the duties and responsibilities set forth in this Policy to a person or persons within the College, who, while continuing to be fully accountable for such duties and responsibilities, may further delegate the implementation of those duties and responsibilities pursuant to the College’s usual delegation policies and procedures.

### **V. CAPITAL PROGRAM.**

The President shall adopt a system for developing one or more capital project programs that defines or define the capital needs of the College for a given period of time consistent with the College’s published Master Plan. This process may or may not mirror the Commonwealth’s requirements for capital plans. The Board of Visitors shall approve the program for Major Capital Projects. Major Capital Projects that are to be funded entirely or in part by a general fund appropriation of the General Assembly or proceeds from State Tax Supported Debt shall

follow the Commonwealth's requirements for capital plans. The Board may approve amendments to the program for Major Capital Projects annually or more often if circumstances warrant.

It shall be College policy that each capital project program shall meet the College's mission and institutional objectives, and be appropriately authorized by the College. Moreover, it shall be College policy that each capital project shall be of a size and scope to provide for the defined program needs, designed in accordance with all applicable building codes and handicapped accessibility standards as well as the College's design guidelines and standards, and costed to reflect current costs and escalated to the mid-point of anticipated construction.

## **VI. AUTHORIZATION OF CAPITAL PROJECTS.**

The Board of Visitors shall authorize the initiation of each Major Capital Project by approving its size, scope, budget, and funding. The President, acting through his designee, shall adopt procedures for approving the size, scope, budget and funding of all other capital projects. Major Capital Projects that are to be funded entirely or in part by a general fund appropriation of the General Assembly or proceeds from State Tax Supported Debt, shall require both Board of Visitors approval and those pre-appropriation approvals of the State's governmental agencies then applicable, and shall follow the State's process for capital budget requests.

It shall be the policy of the College that the implementation of capital projects shall be carried out so that the capital project as completed is the capital project approved by the Board for Major Capital Projects and according to the procedures adopted by the President, acting through his designee, for all other capital projects. The President shall ensure strict adherence to this requirement.

Accordingly, the budget, size and scope of a capital project shall not be materially changed beyond the plans and justifications that were the basis for the capital project's approval, either before or during construction, unless approved in advance as described above. Minor changes shall be permissible if they are determined by the President, acting through his designee, to be justified.

Major Capital Projects may be submitted for Board of Visitors authorization at any time but must include a statement of urgency if not part of the approved Major Capital Project program.

## **VII. PROCUREMENT OF CAPITAL PROFESSIONAL SERVICES AND CONSTRUCTION SERVICES.**

It shall be the policy of the College that procurements shall result in the purchase of high quality services and construction at reasonable prices and shall be consistent with the Policy Governing the Procurement of Goods, Services, Insurance, and Construction, and the Disposition of Surplus Materials adopted by the Board, and with the Rules Governing Procurement of Goods, Services, Insurance, and Construction, which is attached as Attachment 1 to that Policy. Specifically, the College is committed to:

Seeking competition to the maximum practical degree, taking into account the size of the anticipated procurement, the term of the resulting contract and the likely extent of competition;

Conducting all procurements in a fair and impartial manner and avoiding any impropriety or the appearance of any impropriety prohibited by State law or College policy;

Making procurement rules clear in advance of any competition;

Providing access to the College's business to all qualified vendors, firms and contractors, with no potential bidder or offeror excluded arbitrarily or capriciously, while allowing the flexibility to engage in cooperative procurements and to meet special needs of the College;

Including in contracts of more than \$10,000 the contractor's agreement not to discriminate against employees or applicants because of race, religion, color, sex, national origin, age, disability or other basis prohibited by State law except where there is a bona fide occupational qualification reasonably necessary to the contractor's normal operations;

Providing for a non-discriminatory procurement process, and including appropriate and lawful provisions to effectuate fair and reasonable consideration of women-owned, minority-owned and small businesses and to promote and encourage a diversity of suppliers.

The President, acting through his designee, is authorized to develop implementing procedures for the procurement of Capital Professional Services and construction services at the College. The procedures shall implement this Policy and provide for:

A system of competitive negotiation for Capital Professional Services, including a procedure for expedited procurement of Capital Professional Services under \$50,000, pursuant to (i) subdivisions 1, 2, and 3 a of the defined term "competitive negotiation" in Rule 4 of the Rules Governing Procurement of Goods, Services, Insurance, and Construction, and (ii) § 4-5.06 of the 2004-2006 Appropriation Act;

A prequalification procedure for contractors or products;

A procedure for special construction contracting methods, including but not limited to design-build and construction management contracts; and

A prompt payment procedure.

The College also may enter into cooperative arrangements with other private or public health or educational institutions, healthcare provider alliances, purchasing organizations or state agencies where, in the judgment of the College, the purposes of this Policy will be furthered.

## **VIII. DESIGN REVIEWS AND CODE APPROVALS.**

The Board of Visitors shall review the design of all Major Capital Projects and shall provide final Major Capital Project authorization based on the size, scope and cost estimate provided with the design. Unless stipulated by the Board of Visitors at the design review, no further design reviews shall be required. For all capital projects other than Major Capital Projects, the President, acting through his designee, shall adopt procedures for design review and project authorization based on the size, scope and cost estimate provided with the design. It shall be the College's policy that all capital projects shall be designed and constructed in accordance with applicable Virginia Uniform Statewide Building Code (VUSBC) standards and the applicable accessibility code.

The President shall designate a Building Official responsible for building code compliance at the College, including the Virginia Institute of Marine Science, by either (i) hiring an individual to be the College Building Official, or (ii) continuing to use the services of the Department of General Services, Division of Engineering and Buildings, to perform the Building Official function. If option (i) is selected, the individual hired as the College Building Official shall be a full-time employee of the College who has no other assigned duties or responsibilities at the institution and who is not employed by any firm or business providing facility services to the College, a registered professional architect or engineer, and certified by the Department of Housing and Community Development to perform this Building Official function. The College Building Official shall issue building permits for each capital project required by the VUSBC to have a building permit, and shall determine the suitability for occupancy of, and shall issue certifications for building occupancy for, all capital projects requiring such certification. Prior to issuing any such certification, this individual shall ensure that the VUSBC and accessibility requirements are met for that capital project and that such capital project has been inspected by the State Fire Marshal or his designee as required. When serving as the College Building Official, such individual shall organizationally report directly and exclusively to the Board of Visitors. If the College hires its own College Building Official, it shall fulfill the code review requirement by maintaining a review unit of licensed professional architects or engineers supported by resources and staff who are certified by the Department of Housing and Community Development in accordance with § 36-137 of the Code of Virginia for such purpose

and who shall review plans, specifications and documents for compliance with building codes and standards and perform required inspections of work in progress and the completed capital project. No individual licensed professional architect or engineer hired under the College's personnel system as a member of the review unit or contracted with to perform these functions shall also perform other building code-related design, construction, facilities-related project management or facilities management functions for the College on the same capital project.

#### **IX. ENVIRONMENTAL IMPACT REPORTS.**

It shall be the policy of the College to assess the environmental, historic preservation, and conservation impacts of all capital projects and to minimize and otherwise mitigate all adverse impacts to the extent practicable. The College shall develop a procedure for the preparation and approval of environmental impact reports for capital projects, in accordance with State environmental, historic preservation, and conservation requirements generally applicable to capital projects otherwise meeting the definition of Major Capital Projects but, pursuant to § 23-38.109 C 1 of the Act, with a cost of \$300,000 or more.

#### **X. BUILDING DEMOLITIONS.**

It shall be the policy of the College to consider the environmental and historical aspects of any proposed demolitions. The Board of Visitors shall be responsible for approving demolition requests. The College shall develop a procedure for the preparation and review of demolition requests, including any necessary reviews by the Department of Historic Resources and the Art and Architectural Review Board in accordance with State historic preservation requirements generally applicable to capital projects in the Commonwealth. Further, for any property that was acquired or constructed with funding from a general fund appropriation of the General Assembly or from proceeds from State Tax Supported Debt, general laws applicable to State owned property shall apply.

#### **XI. BUILDING OR LAND ACQUISITIONS.**

It is the policy of the College that capital projects involving building or land acquisition shall be subjected to thorough inquiry and due diligence prior to closing on the acquisition of such real property. The President, acting through his designee, shall ensure that the project management system implemented pursuant to Section XIII below provides for a review and analysis of all pertinent matters relating to the acquisition of buildings and land as any prudent purchaser would perform to the end that any building or land acquired by the College shall be suitable for its intended purpose, that the acquisition can be made without substantial risk of liability to the College and that the cost of the real property to be acquired, together with any contemplated development thereof, shall be such that compliance with the provisions of Section VI of this Policy is achieved. In addition, the President, acting through his designee, shall ensure that,

where feasible and appropriate to do so, the following specific policies pertaining to the acquisition of buildings or land for capital projects are carried out.

**A. Environmental and Land Use Considerations.**

It is the policy of the College to reasonably cooperate with each locality affected by the acquisition. Such cooperation shall include but not be limited to furnishing any information that the locality may reasonably request and reviewing any requests by the locality with regard to any such acquisition. The College shall consider the zoning and comprehensive plan designation by the locality of the building or land and surrounding parcels, as well as any designation by State or federal agencies of historically or archeologically significant areas on the land. Nothing herein shall be construed as requiring the College to comply with local zoning laws and ordinances.

**B. Infrastructure and Site Condition.**

The President, acting through his designee, shall ensure that, in the case of capital projects involving the acquisition of buildings or land, the project management systems implemented under Section XIII below provide for a review of the following matters prior to acquisition of the building or land: that any land can be developed for its intended purpose without extraordinary cost; that an environmental engineer has been engaged by the College to provide an assessment of any environmental conditions on the land; that there is adequate vehicular ingress and egress to serve the contemplated use of the building or land; that utilities and other services to the land are adequate or can reasonably be provided or have been provided in the case of building acquisitions; and that the condition and grade of the soils have been examined to determine if any conditions exist that would require extraordinary site work or foundation systems.

**C. Title and Survey.**

A survey shall be prepared for any real property acquired, and an examination of title to the real property shall be conducted by a licensed attorney or, in the alternative, a commitment for title insurance shall be procured from a title insurance company authorized to do business in the Commonwealth. Based upon the survey and title examination or report, the President, acting through his designee, shall conclude, prior to acquisition of the real property, that title thereto will be conveyed to the College in fee simple, free and clear of all liens, encumbrances, covenants, restrictions, easements or other matters that may have a significant adverse effect upon the College's ability to own, occupy, convey or develop the real property.

**D. Appraisal.**

An appraisal shall be conducted of the real property to be acquired to determine its fair market value and the consistency of the fair market value with the price agreed upon by the College.

## **XII. BUILDING OR LAND DISPOSITIONS.**

The Board of Visitors shall approve the disposition of any building or land. Disposition of land or buildings, the acquisition or construction of which was funded entirely or in part by a general fund appropriation of the General Assembly or proceeds from State Tax Supported Debt, shall require both Board of Visitors approval and other approvals in accordance with general law applicable to State-owned property and with the College's Enabling Legislation.

## **XIII. PROJECT MANAGEMENT SYSTEMS.**

The President, acting through his designee, shall implement one or more systems for the management of capital projects for the College. The systems may include the delegation of project management authority to appropriate College officials, including a grant of authority to such officials to engage in further delegation of authority as the President deems appropriate.

The project management systems for capital projects shall be designed to ensure that such projects comply with the provisions of this Policy and other Board of Visitors policies applicable to closely related subjects such as selection of architects or policies applicable to College buildings and grounds.

The project management systems may include one or more reporting systems applicable to capital projects whereby College officials responsible for the management of such projects provide appropriate and timely reports to the President on the status of such projects during construction.

## **XIV. REPORTING REQUIREMENTS.**

In addition to complying with any internal reporting systems contained in the College's project management systems, as described in Section XIII above, the College shall comply with State reporting requirements for those Major Capital Projects funded entirely or in part by a general fund appropriation by the General Assembly or State Tax Supported Debt. Additionally, if any capital project constructs improvements on land, or renovates property, that originally was acquired or constructed in whole or in part with a general fund appropriation for that purpose or proceeds from State Tax Supported Debt, and such improvements or renovations are undertaken entirely with funds not appropriated by the General Assembly and, if the cost of such improvements or renovations is reasonably expected to exceed \$2 million, the decision to undertake such improvements or renovations shall be communicated as required by § 23-38.109

C 3 of the Act. As a matter of routine, the President, acting through his designee, shall report to the Department of General Services on the status of such capital projects at the initiation of the project, prior to the commencement of construction, and at the time of acceptance of any such capital project.

## **ATTACHMENT 1**

### **Rules Governing Procurement of Goods, Services, Insurance, and Construction by a Public Institution of Higher Education of the Commonwealth of Virginia Governed by Subchapter 3 of the Restructured Higher Education Financial and Administrative Operations Act, Chapter 4.10 (§ 23-38.88 et seq.) of Title 23 of the Code of Virginia**

In accordance with the provisions of the Restructured Higher Education Financial and Administrative Operations Act (the Act), Chapter 4.10 (§ 23-38.88 et seq.) of Title 23 of the Code of Virginia, and in particular § 23-38.110 of the Act, the governing body of a public institution of higher education of the Commonwealth of Virginia that has entered into a Management Agreement with the Commonwealth pursuant to Subchapter 3 of the Act, has adopted the following Rules Governing Procurement of Goods, Services, Insurance, and Construction to govern the procurement of goods, services, insurance, and construction by the Institution, excluding the University of Virginia Medical Center:

#### **§ 1. Purpose. –**

The purpose of these Rules is to enunciate the public policies pertaining to procurement of good, services, insurance, and construction by the Institution from nongovernmental sources, to include governmental procurement that may or may not result in monetary consideration for either party. These Rules shall apply whether the consideration is monetary or nonmonetary and regardless of whether the Institution, the contractor, or some third party is providing the consideration.

#### **§ 2. Scope of Procurement Authority. –**

Subject to these Rules, and the Institution's continued substantial compliance with the terms and conditions of its Management Agreement with the Commonwealth pursuant to § 23-38.88(D)(4) and the requirements of Chapter 4.10 of the Act, the Institution shall have and shall be authorized to have and exercise all of the authority relating to procurement of goods, services, insurance, and construction, including but not limited to capital outlay-related procurement and information technology-related procurement, that Institutions are authorized to exercise pursuant to Subchapter 3 of the Restructuring Act.

### **§ 3. Competition is the Priority. –**

To the end that the Institution shall obtain high quality goods and services at reasonable cost, that all procurement procedures be conducted in an open, fair and impartial manner with avoidance of any impropriety or appearance of impropriety, that all qualified vendors have access to the Institution's business and that no offeror be arbitrarily or capriciously excluded, it is the intent of the governing body of the Institution 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. The Institution may consider best value concepts when procuring goods and nonprofessional services, but not construction or professional services. Professional services will be procured using a qualification-based selection process. 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.

### **§ 4. Definitions. –**

As used in these Rules:

“Affiliate” means an individual or business that controls, is controlled by, or is under common control with another individual or business. A person controls an entity if the person owns, directly or indirectly, more than 10% of the voting securities of the entity. For the purposes of this definition “voting security” means a security that (i) confers upon the holder the right to vote for the election of members of the board of directors or similar governing body of the business or (ii) is convertible into, or entitles the holder to receive, upon its exercise, a security that confers such a right to vote. A general partnership interest shall be deemed to be a voting security.

“Best value,” as predetermined in the solicitation, means the overall combination of quality, price, and various elements of required services that in total are optimal relative to the Institution's needs.

“Business” means any type of corporation, partnership, limited liability company, association, or sole proprietorship operated for profit.

“Competitive negotiation” is a method of contractor selection that includes the following elements:

1. Issuance of a written Request for Proposal indicating in general terms that which is sought to be procured, specifying the factors that will be used in evaluating the proposal and containing or incorporating by reference the other applicable contractual

terms and conditions, including any unique capabilities or qualifications that will be required of the contractor.

2. Public notice of the Request for Proposal at least 10 days prior to the date set for receipt of proposals by publication in a newspaper or newspapers 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. Public notice also shall be published on the Department of General Services' central electronic procurement website and may be published on other appropriate websites. In addition, proposals may be solicited directly from potential contractors.

3. a. Procurement of professional services. The procurement of professional services for capital projects shall be conducted using a qualification-based selection process. The Institution shall engage in individual discussions with two or more offerors deemed fully qualified, responsible and suitable on the basis of initial responses and with emphasis on professional competence, to provide the required services. Repetitive informal interviews shall be permissible. The offerors shall be encouraged to elaborate on their qualifications and performance data or staff expertise pertinent to the proposed project, as well as alternative concepts. The Request for Proposal shall not, however, request that offerors furnish estimates of man-hours or cost for services. At the discussion stage, the Institution may discuss nonbinding estimates of total project costs, including, but not limited to, life-cycle costing, and where appropriate, nonbinding estimates of price for services. Proprietary information from competing offerors shall not be disclosed to the public or to competitors. At the conclusion of discussion, outlined in this subdivision, on the basis of evaluation factors published in the Request for Proposal and all information developed in the selection process to this point, the Institution shall select in the order of preference two or more offerors whose professional qualifications and proposed services are deemed most meritorious. Negotiations shall then be conducted, beginning with the offeror ranked first. If a contract satisfactory and advantageous to the Institution can be negotiated at a price considered fair and reasonable, the award shall be made to that offeror. Otherwise, negotiations with the offeror ranked first shall be formally terminated and negotiations conducted with the offeror ranked second, and so on until such a contract can be negotiated at a fair and reasonable price. Should the Institution determine in writing and in its sole discretion that only one offeror is fully qualified, or that one offeror is clearly more highly qualified and suitable than the others under consideration, a contract may be negotiated and awarded to that offeror.

A contract for architectural or professional engineering services relating to construction projects may be negotiated by the Institution, for multiple projects provided (i) the projects require similar experience and expertise, and (ii) the nature of the projects is clearly identified in the Request for Proposal. Under such contract, (a) the fair and reasonable prices, as negotiated, shall be used in determining the cost of each project performed, (b) the sum of all projects performed in one contract term shall be as set in the Request for Proposal; and (c) the project fee of any single project shall not exceed the term limit as set in the Request for Proposal. Any unused amounts from any contract term may be carried forward. Competitive negotiations for such contracts may result in

awards to more than one offeror provided the Request for Proposal stated the potential for a multi-vendor award.

Multiphase professional services contracts satisfactory and advantageous to the Institution for environmental, location, design and inspection work regarding construction of infrastructure projects may be negotiated and awarded based on qualifications at a fair and reasonable price for the first phase only, when completion of the earlier phases is necessary to provide information critical to the negotiation of a fair and reasonable price for succeeding phases. Prior to the procurement of any such contract, the Institution shall state the anticipated intended total scope of the project and determine in writing that the nature of the work is such that the best interests of such Institution require awarding the contract.

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

“Competitive sealed bidding” is a method of contractor selection, other than for professional services, which includes the following elements:

1. Issuance of a written Invitation to Bid containing or incorporating by reference the specifications and contractual terms and conditions applicable to the procurement. Unless the Institution has provided for prequalification of bidders, the Invitation to Bid shall include a statement of any requisite qualifications of potential contractors. When it is impractical to prepare initially a purchase description to support an award based on prices, an Invitation to Bid may be issued requesting the submission of unpriced offers to be followed by an Invitation to Bid limited to those bidders whose offers have been qualified under the criteria set forth in the first solicitation.

2. Public notice of the Invitation to Bid at least 10 days prior to the date set for receipt of bids by publication on the Department of General Services’ central electronic procurement website. Public notice also may be published in a newspaper of general circulation or on other appropriate websites, or both. In addition, bids may be solicited directly from potential contractors. Any additional solicitations shall include businesses selected from a list made available by the Department of Minority Business Enterprise.

3. Public opening and announcement of all bids received.

4. Evaluation of bids based upon the requirements set forth in the invitation, which may include special qualifications of potential contractors, life-cycle costing, value analysis, and any other criteria such as inspection, testing, quality, workmanship,

delivery, and suitability for a particular purpose, which are helpful in determining acceptability.

5. Award to the lowest responsive and responsible bidder. When the terms and conditions of multiple awards are so provided in the Invitation to Bid, awards may be made to more than one bidder.

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

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

“Covered Institution” or “Institution” means, on and after the effective date of the initial management agreement with the Commonwealth of Virginia, a public institution of higher education of the Commonwealth that has entered into a management agreement with the Commonwealth to be governed by the provisions of Subchapter 3 of the Restructuring Act.

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

“Goods” means all material, equipment, supplies, and printing, including information technology and telecommunications goods such as automated data processing hardware and software.

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

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

“Nonprofessional services” means any services not specifically identified as professional services in the definition of professional services and includes small construction projects valued not over \$1 million; provided that subdivision 3a of the definition of “competitive negotiation” in this section shall still apply to professional services for such small construction projects.

“Potential bidder or offeror” for the purposes of §§ 50 and 54 of these Rules means a person who, at the time the Institution negotiates and awards or proposes to award a contract, is engaged in the sale or lease of goods, or the sale of services, insurance or construction, of the type to be procured under the contract, and who at such time is eligible and qualified in all respects to perform that contract, and who would have been eligible and qualified to submit a bid or proposal had the contract been procured through competitive sealed bidding or competitive negotiation.

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

“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 these Rules.

“Public contract” means an agreement between the Institution and a nongovernmental source that is enforceable in a court of law.

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

“Responsive bidder” means a person who has submitted a bid that conforms in all material respects to the Invitation to Bid.

“Restructuring Act” or “Act” means the Restructured Higher Education Financial and Administrative Operations Act, Chapter 4.10 (§ 23-38.88 et seq.) of Title 23 of the Code of Virginia.

“Reverse auctioning” means a procurement method wherein 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 shall have the opportunity to modify their bid prices for the duration of the time period established for bid opening.

“Rules” means these Rules Governing Procurement of Goods, Services, Insurance, and Construction adopted by the governing body of the Covered Institution.

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

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

## **§ 5. Methods of procurement. –**

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

B. Professional services shall be procured by competitive negotiation. Qualification-based selection shall be used for design services.

C. Goods, services, or insurance may be procured by competitive negotiation.

D. Construction may be procured only by competitive sealed bidding, except that competitive negotiation may be used in the following instances upon a determination made in advance by the Institution and set forth in writing that competitive sealed bidding is either not practicable or not fiscally advantageous to the public, which writing shall document the basis for this determination:

1. By the Institution on a fixed price design-build basis or construction management basis under § 7;

2. By the Institution for the construction, alteration, repair, renovation or demolition of buildings; or

3. By the Institution for the construction of highways and any draining, dredging, excavation, grading or similar work upon real property.

E. Upon a determination in writing that there is only one source practicably available for that which is to be procured, a contract may be negotiated and awarded to that source without competitive sealed bidding or competitive negotiation. The writing shall document the basis for this determination. The Institution shall issue a written notice stating that only one source was determined to be practicably available, and identifying that which is being procured, the contractor selected, and the date on which the contract was or will be awarded. This notice shall be posted in a designated public area, which may be the Department of General Services' website for the Commonwealth's central electronic procurement system, or published in a newspaper of general circulation on the day the Institution awards or announces its decision to award the contract, whichever occurs first. Public notice shall also be published on the Department of General Services' website for the Commonwealth's central electronic procurement system and may be published on other appropriate websites.

F. In case of emergency, a contract may be awarded without competitive sealed bidding or competitive negotiation; however, such procurement shall be made with such competition as is practicable under the circumstances. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file. The Institution shall issue a written notice stating that the contract is being awarded on an emergency basis, and identifying that which is being procured, the contractor selected, and the date on which the contract was or will be awarded. This notice shall be posted in a designated public area, which

may be the Department of General Services' website for the Commonwealth's central electronic procurement system, or published in a newspaper of general circulation on the day the Institution awards or announces its decision to award the contract, whichever occurs first, or as soon thereafter as is practicable. Public notice may also be published on the Department of General Services' website for the Commonwealth's central electronic procurement system and other appropriate websites.

G. The Institution may establish purchase procedures, if adopted in writing, not requiring competitive sealed bids or competitive negotiation for single or term contracts for goods and services other than professional services if the aggregate or the sum of all phases is not expected to exceed \$50,000; however, such small purchase procedures shall provide for competition wherever practicable.

H. The Institution may establish purchase procedures, if adopted in writing, not requiring competitive negotiation for single or term contracts for professional services if the aggregate or the sum of all phases is not expected to exceed \$50,000; however such small purchase procedures shall provide for competition wherever practicable.

I. Upon a determination made in advance by the Institution and set forth in writing that the purchase of goods, products or commodities from a public auction sale is in the best interests of the public, such items may be purchased at the auction, including online public auctions. The writing shall document the basis for this determination.

J. The purchase of goods or nonprofessional services, but not construction or professional services, may be made by reverse auctioning.

#### **§ 6. Cooperative procurement. –**

A. In circumstances where the Institution determines and documents that statewide contracts for goods and services, including information technology and telecommunications goods and services, do not provide goods and services to the Institution that meet its business goals and objectives, the Institution is authorized to participate in, sponsor, conduct, or administer a cooperative procurement arrangement on behalf of or in conjunction with public bodies, public or private health or educational institutions, other public or private organizations or entities, including public-private partnerships, charitable organizations, health care provider alliances or purchasing organizations or entities, or with public agencies or institutions or group purchasing organizations of the several states, territories of the United States, or the District of Columbia, for the purpose of combining requirements to effect cost savings or reduce administrative expense in any acquisition of goods and services, other than professional services. The Institution may purchase from any authority, department, agency, institution, city, county, town, or other political subdivision of the Commonwealth's contract even if it did not participate in the

request for proposal or invitation to bid, if the request for proposal or invitation to bid specified that the procurement was being conducted on behalf of other public bodies. In such instances, deviation from the procurement procedures set forth in these Rules and the administrative policies and procedures established to implement these Rules shall be permitted. Notwithstanding all of the above, use of cooperative contracts shall conform to the business requirements of the Commonwealth's electronic procurement system, including the requirement for payment of applicable fees. Nothing herein shall prohibit the payment by direct or indirect means of any administrative fee that will allow for participation in any such arrangement.

B. In circumstances where statewide contracts for goods and services, including information technology and telecommunications goods and services, do not provide goods and services to meet the Institution's business goals and objectives, and as authorized by the United States Congress and consistent with applicable federal regulations, and provided the terms of the contract permit such purchases:

1. The Institution may purchase goods and nonprofessional services, from a United States General Services Administration contract or a contract awarded by any other agency of the United States government; and

2. The Institution may purchase telecommunications and information technology goods and nonprofessional services from a United States General Services Administration contract or a contract awarded by any other agency of the United States government.

#### **§ 7. Design-build or construction management contracts authorized. –**

A. Notwithstanding any other provisions of law, the Institution may enter into contracts on a fixed price design-build basis or construction management basis in accordance with the provisions of this section.

B. Procurement of construction by the design-build or construction management method shall be a two-step competitive negotiation process. In the first step, offerors shall be requested to submit their qualifications. Based upon the information submitted and any other relevant information which the Commonwealth may obtain, no more than five offerors deemed most suitable for the project shall be selected by the Commonwealth and requested to submit proposals.

#### **§ 8. Modification of the contract. –**

A. A contract awarded by the Institution 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, without the advance written approval of

the Institution's president or his designee. In no event may the amount of any contract, without adequate consideration, be increased for any purpose, including, but not limited to, relief of an offeror from the consequences of an error in its bid or offer.

B. The Institution 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.

C. Nothing in this section shall prevent the Institution from placing greater restrictions on contract modifications.

**§ 9. Discrimination prohibited; participation of small, women- and minority-owned business. –**

A. In the solicitation or awarding of contracts, the Institution shall not discriminate against a bidder or offeror because of race, religion, color, sex, national origin, age, disability, or any other basis prohibited by state law relating to discrimination in employment. Whenever solicitations are made, the Institution shall include businesses selected from a list made available by the Department of Minority Business Enterprise.

B. The Institution shall establish programs consistent with this section to facilitate the participation of small businesses and businesses owned by women and minorities in procurement transactions. The programs established shall be in writing and shall include cooperation with the Department of Minority Business Enterprise, the United States Small Business Administration, and other public or private agencies. The Institution shall submit annual progress reports on minority business procurement to the Department of Minority Business Enterprise.

C. Whenever there exists (i) a rational basis for small business enhancement or (ii) a persuasive analysis that documents a statistically significant disparity between the availability and utilization of women- and minority-owned businesses, the Governor is by law authorized and encouraged to require the Institution to implement appropriate enhancement or remedial measures consistent with prevailing law.

D. In the solicitation or awarding of contracts, the Institution shall not discriminate against a bidder or offeror because the bidder or offeror employs ex-offenders unless it has made a written determination that employing ex-offenders on the specific contract is not in its best interest.

**§ 10. Employment discrimination by contractor prohibited; required contract provisions. –**

The Institution shall include in every contract of more than \$10,000 the following provisions:

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

a. The contractor will not discriminate against any employee or applicant for employment because of race, religion, color, sex, national origin, age, disability, 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.

**§ 11. Drug-free workplace to be maintained by contractor; required contract provisions. –**

The Institution 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 these Rules, 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.

**§ 12. 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 Institution 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.

**§ 13. Comments concerning specifications. –**

The Institution shall establish procedures whereby comments concerning specifications or other provisions in Invitations to Bid or Requests for Proposal can be received and considered prior to the time set for receipt of bids or proposals or award of the contract.

**§ 14. Prequalification generally; prequalification for construction. –**

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

B. Any prequalification of prospective contractors for construction by the Institution shall be pursuant to a prequalification process for construction projects adopted by the Institution. The process shall be consistent with the provisions of this section.

The application form used in such process shall set forth the criteria upon which the qualifications of prospective contractors will be evaluated. The application form shall request of prospective contractors only such information as is appropriate for an objective evaluation of all prospective contractors pursuant to such criteria. The form shall allow the prospective contractor seeking prequalification to request, by checking the appropriate box, that all information voluntarily submitted by the contractor pursuant to this subsection shall be considered a trade secret or proprietary information subject to the provisions of subsection D of § 34 of these Rules.

In all instances in which the Institution requires prequalification of potential contractors for construction projects, advance notice shall be given of the deadline for the submission of prequalification applications. The deadline for submission shall be sufficiently in advance of the date set for the submission of bids for such construction so as to allow the procedures set forth in this subsection to be accomplished.

At least 30 days prior to the date established for submission of bids or proposals under the procurement of the contract for which the prequalification applies, the Institution shall advise in writing each contractor who submitted an application whether that contractor has been prequalified. In the event that a contractor is denied prequalification, the written notification to the contractor shall state the reasons for the denial of prequalification and the factual basis of such reasons.

A decision by the Institution denying prequalification under the provisions of this subsection shall be final and conclusive unless the contractor appeals the decision as provided in § 54 of these Rules.

C. The Institution may deny prequalification to any contractor only if the Institution finds one of the following:

1. The contractor 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 contractor 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 Institution shall be sufficient to establish the financial ability of the contractor to perform the contract resulting from such procurement;

2. The contractor does not have appropriate experience to perform the construction project in question;

3. The contractor or any officer, director or owner thereof has had judgments entered against him within the past 10 years for the breach of contracts for governmental or nongovernmental construction, including, but not limited to, design-build or construction management;

4. The contractor has been in substantial noncompliance with the terms and conditions of prior construction contracts with the Institution without good cause. If the Institution has not contracted with a contractor in any prior construction contracts, the Institution may deny prequalification if the contractor has been in substantial noncompliance with the terms and

conditions of comparable construction contracts with another public body without good cause. The Institution may not utilize this provision to deny prequalification unless the facts underlying such substantial noncompliance were documented in writing in the prior construction project file and such information relating thereto given to the contractor at that time, with the opportunity to respond;

5. The contractor or any officer, director, owner, project manager, procurement manager or chief financial official thereof has been convicted within the past 10 years of a crime related to governmental or nongovernmental construction or contracting, including, but not limited to, a violation of (i) Article 6 (§ 2.2-4367 et seq.) of Chapter 43 of Title 2.2 of the Code of Virginia, (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;

6. The contractor or any officer, director or owner thereof is currently debarred pursuant to an established debarment procedure from bidding or contracting by any public body, agency of another state or agency of the federal government; and

7. The contractor failed to provide to the Institution in a timely manner any information requested by the Institution relevant to subdivisions 1 through 6 of this subsection.

**§ 15. Negotiation with lowest responsible bidder. –**

Unless canceled or rejected, a responsive bid from the lowest responsible bidder shall be accepted as submitted, except that if the bid from the lowest responsible bidder exceeds available funds, the Institution 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 Institution prior to issuance of the Invitation to Bid and summarized therein.

**§ 16. Cancellation, rejection of bids; waiver of informalities. –**

A. An Invitation to Bid, a Request for Proposal, any other solicitation, or any and all bids or proposals, may be canceled or rejected. The reasons for cancellation or rejection shall be made part of the contract file. The Institution 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.

B. The Institution may waive informalities in bids.

**§ 17. Exclusion of insurance bids prohibited. –**

Notwithstanding any other provision of law, no insurer licensed to transact the business of insurance in the Commonwealth or approved to issue surplus lines insurance in the Commonwealth shall be excluded from presenting an insurance bid proposal to the Institution in response to a request for proposal or an invitation to bid. Nothing in this section shall preclude the Institution from debarring a prospective insurer pursuant to § 18.

**§ 18. Debarment. –**

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

**§ 19. Purchase programs for recycled goods; Institution responsibilities. –**

A. The Institution may implement a purchase program for recycled goods and may coordinate its efforts so as to achieve the goals and objectives set forth in §§ 10.1-1425.6, 10.1-1425.7, and 10.1-1425.8 of the Code of Virginia and §§ 20 and 22 of these Rules.

B. The Department of Environmental Quality, with advice from the Virginia Recycling Markets Development Council, shall advise the Institution concerning the designation of recycled goods.

**§ 20. Preference for Virginia products with recycled content and for Virginia firms. –**

A. In the case of a tie bid, preference shall be given to goods produced in Virginia, goods or services or construction provided by Virginia persons, firms or corporations; otherwise the tie shall be decided by lot.

B. Whenever any bidder is a resident of any other state and such state under its laws allows a resident contractor of that state a preference, a like preference may be allowed by the Institution to the lowest responsive and responsible bidder who is a resident of Virginia.

C. Notwithstanding the provisions of subsections A and B, 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.

**§ 21. Preference for Virginia coal used in the Institution. –**

In determining the award of any contract for coal to be purchased for use in the Institution with state funds, the Institution shall procure using competitive sealed bidding and shall award to the lowest responsive and responsible bidder offering coal mined in Virginia so long as its bid price is not more than 4% greater than the bid price of the low responsive and responsible bidder offering coal mined elsewhere.

**§ 22. Preference for recycled paper and paper products used by the Institution. –**

A. In determining the award of any contract for paper and paper products to be purchased for use by the Institution, it shall competitively procure recycled paper and paper products of a quality suitable for the purpose intended, so long as the price is not more than 10% greater than the price of the low responsive and responsible bidder or offeror offering a product that does not qualify under subsection B.

B. For purposes of this section, recycled paper and paper products means any paper or paper products meeting the EPA Recommended Content Standards as defined in 40 C.F.R. Part 247.

**§ 23. Withdrawal of bid due to error. –**

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

If a bid contains both clerical and judgment mistakes, a bidder may withdraw his bid from consideration if the price bid would have been substantially lower than the other bids due solely to the clerical mistake, that was an unintentional arithmetic error or an unintentional omission of a quantity of work, labor or material made directly in the compilation of a bid that shall be clearly shown by objective evidence drawn from inspection of original work papers, documents and materials used in the preparation of the bid sought to be withdrawn.

One of the following procedures for withdrawal of a bid shall be selected by the Institution and stated in the advertisement for bids: (i) the bidder shall give notice in writing of his claim of right to withdraw his bid within two business days after the conclusion of the bid opening procedure and shall submit original work papers with such notice; or (ii) the bidder shall submit to the Institution or designated official his original work papers, documents and materials used in the preparation of the bid within one day after the date fixed for submission of bids. The work papers shall be delivered by the bidder in person or by registered mail at or prior to the time fixed for the opening of bids. In either instance, the work papers, documents and materials may be considered as trade secrets or proprietary information subject to the conditions of subsection F of § 34 of these Rules. The bids shall be opened one day following the time fixed by the Institution for the submission of bids. Thereafter, the bidder shall have two hours after the opening of bids within which to claim in writing any mistake as defined herein and withdraw his bid. The contract shall not be awarded by the Institution until the two-hour period has elapsed. The mistake shall be proved only from the original work papers, documents and materials delivered as required herein.

B. The Institution may establish procedures for the withdrawal of bids for other than construction contracts.

C. No bid shall be withdrawn under this section when the result would be the awarding of the contract on another bid of the same bidder or of another bidder in which the ownership of the withdrawing bidder is more than 5%.

D. If a bid is withdrawn in accordance with this section, the lowest remaining bid shall be deemed to be the low bid.

E. No bidder who is permitted to withdraw a bid shall, for compensation, supply any material or labor to or perform any subcontract or other work agreement for the person or firm to whom the contract is awarded or otherwise benefit, directly or indirectly, from the performance of the project for which the withdrawn bid was submitted.

F. If the Institution denies the withdrawal of a bid under the provisions of this section, it shall notify the bidder in writing stating the reasons for its decision and award the contract to such bidder at the bid price, provided such bidder is a responsible and responsive bidder.

#### **§ 24. Contract Pricing Arrangements. –**

A. Public contracts may be awarded on a fixed price or cost reimbursement basis, or on any other basis that is not prohibited by these Rules.

B. 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.

C. A policy or contract of insurance or prepaid coverage having a premium computed on the basis of claims paid or incurred, plus the insurance carrier's administrative costs and retention stated in whole or part as a percentage of such claims, shall not be prohibited by this section.

**§ 25. Workers' compensation requirements for construction contractors and subcontractors. –**

A. No contractor shall perform any work on a construction project of the Institution unless he (i) has obtained, and continues to maintain for the duration of the work, workers' compensation coverage required pursuant to the provisions of Chapter 8 (§ 65.2-800 et seq.) of Title 65.2 of the Code of Virginia, and (ii) provides prior to the award of contract, on a form furnished by the Institution, evidence of such coverage.

B. The Department of General Services shall provide the form to the Institution. Failure of the Institution to provide the form prior to the award of contract shall waive the requirements of clause (ii) of subsection A.

C. No subcontractor shall perform any work on a construction project of the Institution unless he has obtained, and continues to maintain for the duration of such work, workers' compensation coverage required pursuant to the provisions of Chapter 8 (§ 65.2-800 et seq.) of Title 65.2 of the Code of Virginia.

**§ 26. Retainage on construction contracts. –**

A. In any contract issued by the Institution for construction that provides for progress payments in installments based upon an estimated percentage of completion, the contractor shall be paid at least 95% of the earned sum when payment is due, with no more than 5% being retained to ensure faithful performance of the contract. All amounts withheld may be included in the final payment.

B. Any subcontract for a public project that provides for similar progress payments shall be subject to the provisions of this section.

**§ 27. Public construction contract provisions barring damages for unreasonable delays declared void. –**

A. Any provision contained in any public construction contract of the Institution that purports to waive, release, or extinguish the rights of a contractor to recover costs or damages for unreasonable delay in performing such contract, either on his behalf or on behalf of his subcontractor if and to the extent the delay is caused by acts or omissions of the Institution, its agents or employees and due to causes within their control shall be void and unenforceable as against public policy.

B. Subsection A shall not be construed to render void any provision of a public construction contract awarded by the Institution that:

1. Allows the recovery of that portion of delay costs caused by the acts or omissions of the contractor, or its subcontractors, agents or employees;

2. Requires notice of any delay by the party claiming the delay;

3. Provides for liquidated damages for delay; or

4. Provides for arbitration or any other procedure designed to settle contract disputes.

C. A contractor making a claim against the Institution for costs or damages due to the alleged delaying of the contractor in the performance of its work under any public construction contract of the Institution shall be liable to the Institution and shall pay it for a percentage of all costs incurred by the Institution in investigating, analyzing, negotiating, litigating and arbitrating the claim, which percentage shall be equal to the percentage of the contractor's total delay claim that is determined through litigation or arbitration to be false or to have no basis in law or in fact.

D. If the Institution denies a contractor's claim for costs or damages due to the alleged delaying of the contractor in the performance of work under any public construction contract for the Institution, it shall be liable to and shall pay such contractor a percentage of all costs incurred by the contractor to investigate, analyze, negotiate, litigate and arbitrate the claim. The percentage paid by the Institution shall be equal to the percentage of the contractor's total delay claim for which the Institution's denial is determined through litigation or arbitration to have been made in bad faith.

**§ 28. Bid bonds. –**

A. Except in cases of emergency, all bids or proposals for construction contracts in excess of \$1 million shall be accompanied by a bid bond from a surety company selected by the bidder that is authorized to do business in Virginia, as a guarantee that if the contract is awarded to the bidder, he will enter into the contract for the work mentioned in the bid. The amount of the bid bond shall not exceed 5% of the amount bid.

B. No forfeiture under a bid bond shall exceed the lesser of (i) the difference between the bid for which the bond was written and the next low bid, or (ii) the face amount of the bid bond.

C. Nothing in this section shall preclude the Institution from requiring bid bonds to accompany bids or proposals for construction contracts anticipated to be less than \$1 million.

**§ 29. Performance and payment bonds. –**

A. Upon the award by the Institution of any (i) public construction contract exceeding \$1 million awarded to any prime contractor or (ii) public construction contract exceeding \$1 million awarded to any prime contractor requiring the performance of labor or the furnishing of materials for buildings, structures or other improvements to real property owned by the Institution, the contractor shall furnish to the Institution the following bonds:

1. Except for transportation-related projects, a performance bond in the sum of the contract amount conditioned upon the faithful performance of the contract in strict conformity with the plans, specifications and conditions of the contract. For transportation-related projects, such bond shall be in a form and amount satisfactory to the Institution.

2. A payment bond in the sum of the contract amount. The bond shall be for the protection of claimants who have and fulfill contracts to supply labor or materials to the prime contractor to whom the contract was awarded, or to any subcontractors, in furtherance of the work provided for in the contract, and shall be conditioned upon the prompt payment for all materials furnished or labor supplied or performed in the furtherance of the work.

"Labor or materials" shall include public utility services and reasonable rentals of equipment, but only for periods when the equipment rented is actually used at the site.

B. Each of the bonds shall be executed by one or more surety companies selected by the contractor that are authorized to do business in Virginia.

C. The bonds shall be payable to the Commonwealth of Virginia naming also the Institution.

D. Each of the bonds shall be filed with the Institution, or a designated office or official thereof.

E. Nothing in this section shall preclude the Institution from requiring payment or performance bonds for construction contracts below \$1 million.

F. Nothing in this section shall preclude the contractor from requiring each subcontractor to furnish a payment bond with surety thereon in the sum of the full amount of the contract with such subcontractor conditioned upon the payment to all persons who have and fulfill contracts that are directly with the subcontractor for performing labor and furnishing materials in the prosecution of the work provided for in the subcontract.

**§ 30. Alternative forms of security. –**

A. In lieu of a bid, payment, or performance bond, a bidder may furnish a certified check or cash escrow in the face amount required for the bond.

B. If approved by the Institution's General Counsel or his equivalent, a bidder may furnish to the Institution a personal bond, property bond, or bank or savings institution's letter of credit on certain designated funds in the face amount required for the bid, payment or performance bond. Approval shall be granted only upon a determination that the alternative form of security proffered affords protection to the Institution equivalent to a corporate surety's bond.

**§ 31. Bonds on other than construction contracts. –**

The Institution may require bid, payment, or performance bonds for contracts for goods or services if provided in the Invitation to Bid or Request for Proposal.

**§ 32. Action on performance bond. –**

No action against the surety on a performance bond shall be brought by the Institution unless brought within one year after (i) completion of the contract, including the expiration of all warranties and guarantees, or (ii) discovery of the defect or breach of warranty that gave rise to the action.

**§ 33. Actions on payment bonds; waiver of right to sue. –**

A. Subject to the provisions of subsection B, any claimant who has performed labor or furnished material in accordance with the contract documents in furtherance of the work provided in any contract for which a payment bond has been given, and who has not been paid in full before the expiration of 90 days after the day on which the claimant performed the last of the labor or furnished the last of the materials for which he claims payment, may bring an action on the payment bond to recover any amount due him for the labor or material. The obligee named in the bond need not be named a party to the action.

B. Any claimant who has a direct contractual relationship with any subcontractor but who has no contractual relationship, express or implied, with the contractor, may bring an action on the contractor's payment bond only if he has given written notice to the contractor within 180 days from the day on which the claimant performed the last of the labor or furnished the last of the materials for which he claims payment, stating with substantial accuracy the amount claimed and the name of the person for whom the work was performed or to whom the material was furnished. Notice to the contractor shall be served by registered or certified mail, postage prepaid, in an envelope addressed to such contractor at any place where his office is regularly maintained for the transaction of business. Claims for sums withheld as retainages with respect to labor performed or materials furnished, shall not be subject to the time limitations stated in this subsection.

C. Any action on a payment bond shall be brought within one year after the day on which the person bringing such action last performed labor or last furnished or supplied materials.

D. Any waiver of the right to sue on the payment bond required by this section shall be void unless it is in writing, signed by the person whose right is waived, and executed after such person has performed labor or furnished material in accordance with the contract documents.

### **§ 34. Public inspection of certain records. –**

A. Except as provided in this section, all proceedings, records, contracts and other public records relating to procurement transactions shall be open to the inspection of any citizen, or any interested person, firm or corporation, in accordance with the Virginia Freedom of Information Act (§ 2.2-3700 et seq.).

B. Cost estimates relating to a proposed procurement transaction prepared by or for the Institution shall not be open to public inspection.

C. Any competitive sealed bidding bidder, upon request, shall be afforded the opportunity to inspect bid records within a reasonable time after the opening of all bids but prior to award,

except in the event that the Institution decides not to accept any of the bids and to reopen the contract. Otherwise, bid records shall be open to public inspection only after award of the contract.

D. Any competitive negotiation offeror, upon request, shall be afforded the opportunity to inspect proposal records within a reasonable time after the evaluation and negotiations of proposals are completed but prior to award, except in the event that the Institution decides not to accept any of the proposals and to reopen the contract. Otherwise, proposal records shall be open to public inspection only after award of the contract.

E. Any inspection of procurement transaction records under this section shall be subject to reasonable restrictions to ensure the security and integrity of the records.

F. Trade secrets or proprietary information submitted by a bidder, offeror or contractor in connection with a procurement transaction or prequalification application submitted pursuant to subsection B of § 14 shall not be subject to the Virginia Freedom of Information Act (§ 2.2-3700 et seq.); however, the bidder, offeror or contractor shall (i) invoke the protections of this section prior to or upon submission of the data or other materials, (ii) identify the data or other materials to be protected, and (iii) state the reasons why protection is necessary.

**§ 35. Exemption for certain transactions. –**

A. The provisions of these Rules shall not apply to:

1. The selection of services related to the management and investment of the Institution's endowment funds, endowment income, or gifts pursuant to § 23-76.1. However, selection of these services shall be governed by the Uniform Management of Institutional Funds Act (§ 55-268.1 et seq.) as required by § 23-76.1.

2. The purchase of items for resale at retail bookstores and similar retail outlets operated by the Institution. However, such purchase procedures shall provide for competition where practicable.

3. Procurement of any construction or planning and design services for construction by the Institution when (i) the planning, design or construction is \$50,000 or less or (ii) the Institution is obligated to conform to procurement procedures that are established by federal statutes or regulations, whether or not those federal procedures are in conformance with the provisions of these Rules.

4. The University of Virginia Medical Center.

5. The purchase of goods and services by the Institution when such purchases are made under a remedial plan established by the Governor pursuant to subsection C of § 9 of these Rules.

B. Where a procurement transaction involves the expenditure of federal assistance or contract funds, the receipt of which is conditioned upon compliance with mandatory requirements in federal laws or regulations not in conformance with the provisions of these Rules, the Institution may comply with such federal requirements, notwithstanding the provisions of these Rules, only upon the written determination of the Institution's President or his designee that acceptance of the grant or contract funds under the applicable conditions is in the public interest. Such determination shall state the specific provision of these Rules in conflict with the conditions of the grant or contract.

**§ 36. Permitted contracts with certain religious organizations; purpose; limitations. –**

A. The Opportunity Reconciliation Act of 1996, P.L. 104-193, authorizes public bodies to enter into contracts with faith-based organizations for the purposes described in this section 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.

B. For the purposes of this section, "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.

C. The Institution, in procuring 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.

D. The Institution shall ensure that all invitations to bid, requests for proposals, contracts, and purchase orders prominently display a nondiscrimination statement indicating that it does not discriminate against faith-based organizations.

E. A faith-based organization contracting with the Institution (i) shall not discriminate against any recipient of goods, services, or disbursements made pursuant to a contract authorized by this section on the basis of the recipient's religion, religious belief, refusal to participate in a religious practice, or on the basis of race, age, color, gender or national origin and (ii) shall be subject to the same rules as other organizations that contract with public bodies to account for the use of the funds provided; however, if the faith-based organization segregates public funds into separate accounts, only the accounts and programs funded with public funds shall be subject to audit by the Institution. Nothing in clause (ii) shall be construed to supercede supersede or otherwise override any other applicable state law.

F. Consistent with the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P.L. 104-193, funds provided for expenditure pursuant to contracts with public bodies shall not be spent for sectarian worship, instruction, or proselytizing; however, this prohibition shall not apply to expenditures pursuant to contracts, if any, for the services of chaplains.

G. Nothing in this section shall be construed as barring or prohibiting a faith-based organization from any opportunity to make a bid or proposal or contract on the grounds that the faith-based organization has exercised the right, as expressed in 42 U.S.C. (§ 2000e-1 et seq.), to employ persons of a particular religion.

H. If an individual, who applies for or receives goods, services, or disbursements provided pursuant to a contract between the Institution and a faith-based organization, objects to the religious character of the faith-based organization from which the individual receives or would receive the goods, services, or disbursements, the Institution shall offer the individual, within a reasonable period of time after the date of his objection, access to equivalent goods, services, or disbursements from an alternative provider.

The Institution shall provide to each individual who applies for or receives goods, services, or disbursements provided pursuant to a contract between the Institution and a faith-based organization a notice in bold face type that states: "Neither the Institution's selection of a charitable or faith-based provider of services nor the expenditure of funds under this contract is an endorsement of the provider's charitable or religious character, practices, or expression. No provider of services may discriminate against you on the basis of religion, a religious belief, or your refusal to actively participate in a religious practice. If you object to a particular provider because of its religious character, you may request assignment to a different provider. If you believe that your rights have been violated, please discuss the complaint with your provider or notify the appropriate person as indicated in this form."

**§ 37. Exemptions from competition for certain transactions. –**

The Institution may enter into contracts without competition, as that term is described in subsections A through J of § 5 (Methods of procurement) of these Rules, for:

1. The purchase of goods or services that are produced or performed by or related to:
  - a. Persons, or in schools or workshops, under the supervision of the Virginia Department for the Blind and Vision Impaired;
  - b. Nonprofit sheltered workshops or other nonprofit organizations that offer transitional or supported employment services serving the handicapped;
  - c. Private educational institutions; or
  - d. Other public educational institutions.
2. Speakers and performing artists;
3. Memberships and Association dues;
4. Sponsored research grant sub-awards and contract sub-awards, not to include the purchase of goods or services by the Institution;
5. Group travel in foreign countries;
6. Conference facilities and services;
7. Participation in intercollegiate athletic tournaments and events including team travel and lodging, registration and tournament fees;
8. Royalties; or
9. The purchase of legal services, provided that the Office of the Attorney General has been consulted, or expert witnesses or other services associated with litigation or regulatory proceedings; or

10. Maintenance contract renewals for scientific research equipment and software, provided that the Institution has posted the renewal to eVA and documented that there was only one response or less and such documentation includes a statement signed by the buyer indicating that no firm other than the original manufacturer/developer offers the service.

**§ 38. Exemptions from competitive sealed bidding and competitive negotiation for certain transactions; limitations. –**

The Institution may enter into contracts for insurance or electric utility service without competitive sealed bidding or competitive negotiation if purchased through an association of which the Institution is a member if the association was formed and is maintained for the purpose of promoting the interest and welfare of and developing close relationships with similar public bodies, provided such association has procured the insurance or electric utility services by use of competitive principles and provided that the Institution has made a determination in advance after reasonable notice to the public and set forth in writing that competitive sealed bidding and competitive negotiation are not fiscally advantageous to the public. The writing shall document the basis for this determination.

**§ 39. Definitions. –**

As used in §§ 39 through 46, unless the context requires a different meaning:

"Contractor" means the entity that has a direct contract with the Institution.

"Debtor" means any individual, business, or group having a delinquent debt or account with any state agency that obligation has not been satisfied or set aside by court order or discharged in bankruptcy.

"Payment date" means either (i) the date on which payment is due under the terms of a contract for provision of goods or services; or (ii) if such date has not been established by contract, (a) 30 days after receipt of a proper invoice by the Institution or its agent or (b) 30 days after receipt of the goods or services by the Institution.

"Subcontractor" means any entity that has a contract to supply labor or materials to the contractor to whom the contract was awarded or to any subcontractor in the performance of the work provided for in such contract.

**§ 40. Exemptions. –**

The provisions of §§ 39 through 46 shall not apply to the late payment provisions contained in any public utility tariffs prescribed by the State Corporation Commission.

**§ 41. Retainage to remain valid. –**

Notwithstanding the provisions of §§ 39 through 46, the provisions of § 26 relating to retainage shall remain valid.

**§ 42. Prompt payment of bills by the Institution. –**

A. The Institution shall promptly pay for the completely delivered goods or services by the required payment date.

Payment shall be deemed to have been made when offset proceedings have been instituted, as authorized under the Virginia Debt Collection Act (§ 2.2-4800 et seq.) of the Code of Virginia.

B. Separate payment dates may be specified for contracts under which goods or services are provided in a series of partial deliveries or executions to the extent that such contract provides for separate payment for such partial delivery or execution.

**§ 43. Defect or impropriety in the invoice or goods and/or services received. –**

In instances where there is a defect or impropriety in an invoice or in the goods or services received, the Institution shall notify the supplier of the defect or impropriety, if the defect or impropriety would prevent payment by the payment date. The notice shall be sent within 15 days after receipt of the invoice or the goods or services.

**§ 44. Date of postmark deemed to be date payment is made. –**

In those cases where payment is made by mail, the date of postmark shall be deemed to be the date payment is made for purposes of these Rules.

**§ 45. Payment clauses to be included in contracts. –**

Any contract awarded by the Institution shall include:

1. 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 Institution for work performed by the subcontractor under that contract:

a. Pay the subcontractor for the proportionate share of the total payment received from the Institution attributable to the work performed by the subcontractor under that contract; or

b. Notify the Institution and subcontractor, in writing, of his intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment.

2. 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.

3. 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 Institution for work performed by the subcontractor under that contract, except for amounts withheld as allowed in subdivision 1.

4. An interest rate clause stating, "Unless otherwise provided under the terms of this contract, interest shall accrue at the rate of 1% 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 Institution. 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.

**§ 46. Interest penalty; exceptions. –**

A. Interest shall accrue, at the rate determined pursuant to subsection B, on all amounts owed by the Institution to a vendor that remain unpaid after seven days following the payment date. However, nothing in this section shall affect any contract providing for a different rate of interest, or for the payment of interest in a different manner.

B. The rate of interest charged the Institution pursuant to subsection A shall be the base rate on corporate loans (prime rate) at large United States money center commercial banks as reported daily in the publication entitled The Wall Street Journal. Whenever a split prime rate is published, the lower of the two rates shall be used. However, in no event shall the rate of interest charged exceed the rate of interest established pursuant to § 58.1-1812 of the Code of Virginia.

C. Notwithstanding subsection A, no interest penalty shall be charged when payment is delayed because of disagreement between the Institution and a vendor regarding the quantity, quality or time of delivery of goods or services or the accuracy of any invoice received for the goods or services. The exception from the interest penalty provided by this subsection shall apply only to that portion of a delayed payment that is actually the subject of the disagreement and shall apply only for the duration of the disagreement.

D. This section shall not apply to § 26 pertaining to retainage on construction contracts, during the period of time prior to the date the final payment is due. Nothing contained herein shall prevent a contractor from receiving interest on such funds under an approved escrow agreement.

E. Notwithstanding subsection A, no interest penalty shall be paid to any debtor on any payment, or portion thereof, withheld pursuant to the Comptroller's Debt Setoff Program, as authorized by the Virginia Debt Collection Act (§ 2.2-4800 et seq.) of the Code of Virginia), commencing with the date the payment is withheld. If, as a result of an error, a payment or portion thereof is withheld, and it is determined that at the time of setoff no debt was owed to the Commonwealth, then interest shall accrue at the rate determined pursuant to subsection B on amounts withheld that remain unpaid after seven days following the payment date.

**§ 47. Ineligibility. –**

A. Any bidder, offeror or contractor refused permission to participate, or disqualified from participation, in public contracts to be issued by the Institution shall be notified in writing. Prior to the issuance of a written determination of disqualification or ineligibility, the Institution shall (i) notify the bidder in writing of the results of the evaluation, (ii) disclose the factual support for the determination, and (iii) allow the bidder an opportunity to inspect any documents that relate to the determination, if so requested by the bidder within five business days after receipt of the notice.

Within 10 business days after receipt of the notice, the bidder may submit rebuttal information challenging the evaluation. The Institution shall issue its written determination of disqualification or ineligibility based on all information in the possession of the Institution, including any rebuttal information, within five business days of the date the Institution received such rebuttal information.

If the evaluation reveals that the bidder, offeror or contractor should be allowed permission to participate in the public contract, the Institution shall cancel the proposed disqualification action. If the evaluation reveals that the bidder should be refused permission to participate, or disqualified from participation, in the public contract, the Institution shall so notify the bidder, offeror or contractor. The notice shall state the basis for the determination, which shall be final unless the bidder appeals the decision within 10 days after receipt of the notice by invoking administrative procedures meeting the standards of § 55 of these Rules, if available, or in the alternative by instituting legal action as provided in § 54.

B. If, upon appeal, it is determined that the action taken was arbitrary or capricious, or not in accordance with the Constitution of Virginia, applicable state law or regulations, the sole relief shall be restoration of eligibility.

**§ 48. Appeal of denial of withdrawal of bid. –**

A. A decision denying withdrawal of bid under the provisions of § 23 of these Rules shall be final and conclusive unless the bidder appeals the decision within 10 days after receipt of the decision by invoking administrative procedures meeting the standards of § 55, if available, or in the alternative by instituting legal action as provided in § 54.

B. If no bid bond was posted, a bidder refused withdrawal of a bid under the provisions of § 23, prior to appealing, shall deliver to the Institution a certified check or cash bond in the amount of the difference between the bid sought to be withdrawn and the next low bid. Such security shall be released only upon a final determination that the bidder was entitled to withdraw the bid.

C. If, upon appeal, it is determined that the decision refusing withdrawal of the bid was 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, the sole relief shall be withdrawal of the bid.

**§ 49. Determination of nonresponsibility. –**

A. Following public opening and announcement of bids received on an Invitation to Bid, the Institution shall evaluate the bids in accordance with element 4 of the definition of "Competitive sealed bidding" in § 4 of these Rules. At the same time, the Institution shall determine whether the apparent low bidder is responsible. If the Institution so determines, then it may proceed with an award in accordance with element 5 of the definition of "Competitive sealed bidding" in § 4. If the Institution determines that the apparent low bidder is not responsible, it shall proceed as follows:

1. Prior to the issuance of a written determination of nonresponsibility, the Institution shall (i) notify the apparent low bidder in writing of the results of the evaluation, (ii) disclose the factual support for the determination, and (iii) allow the apparent low bidder an opportunity to inspect any documents that relate to the determination, if so requested by the bidder within five business days after receipt of the notice.

2. Within 10 business days after receipt of the notice, the bidder may submit rebuttal information challenging the evaluation. The Institution shall issue its written determination of responsibility based on all information in the possession of the Institution, including any rebuttal information, within five business days of the date the Institution received the rebuttal information. At the same time, the Institution shall notify, with return receipt requested, the bidder in writing of its determination.

3. Such notice shall state the basis for the determination, which shall be final unless the bidder appeals the decision within 10 days after receipt of the notice by invoking administrative procedures meeting the standards of § 55 of these Rules, if available, or in the alternative by instituting legal action as provided in § 54.

The provisions of this subsection shall not apply to procurements involving the prequalification of bidders and the rights of any potential bidders under such prequalification to appeal a decision that such bidders are not responsible.

B. If, upon appeal pursuant to § 54 or 55 of these Rules, it is determined that the decision of the Institution 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, and the award of the contract in question has not 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 subsection A of § 54, or both.

If it is determined that the decision of the Institution 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 Invitation to Bid, and an award of the contract has been made, the relief shall be as set forth in subsection B of § 54 of these Rules.

C. A bidder contesting a determination that he is not a responsible bidder for a particular contract shall proceed under this section, and may not protest the award or proposed award under the provisions of § 50 of these Rules.

D. Nothing contained in this section shall be construed to require the Institution, when procuring by competitive negotiation, to furnish a statement of the reasons why a particular proposal was not deemed to be the most advantageous.

**§ 50. Protest of award or decision to award. –**

A. Any bidder or offeror, who desires to protest the award or decision to award a contract shall submit the protest in writing to the Institution, or an official designated by the Institution, no later than 10 days after the award or the announcement of the decision to award, whichever occurs first. Public notice of the award or the announcement of the decision to award shall be given by the Institution in the manner prescribed in the terms or conditions of the Invitation to Bid or Request for Proposal. Any potential bidder or offeror on a contract negotiated on a sole source or emergency basis who desires to protest the award or decision to award such contract shall submit the protest in the same manner no later than 10 days after posting or publication of the notice of such contract as provided in § 5 of these Rules. However, if the protest of any actual or potential bidder or offeror depends in whole or in part upon information contained in public records pertaining to the procurement transaction that are subject to inspection under § 34 of these Rules, then the time within which the protest shall be submitted shall expire 10 days after those records are available for inspection by such bidder or offeror under § 34, or at such later time as provided in this section. No protest shall lie for a claim that the selected bidder or offeror is not a responsible bidder or offeror. The written protest shall include the basis for the protest and the relief sought. The Institution or designated official shall issue a decision in writing within 10 days stating the reasons for the action taken. This decision shall be final unless the bidder or offeror appeals within 10 days of receipt of the written decision by invoking administrative procedures meeting the standards of § 55 of these Rules, if available, or in the alternative by instituting legal action as provided in § 54. Nothing in this subsection shall be construed to permit a bidder to challenge the validity of the terms or conditions of the Invitation to Bid or Request for Proposal. The use of Alternative Dispute Resolution (ADR) shall constitute an administrative appeal procedure meeting the standards of § 55 of these Rules.

B. If prior to an award it is determined that the decision to award is arbitrary or capricious, then the sole relief shall be a finding to that effect. The Institution shall cancel the proposed award or revise it to comply with the law. If, after an award, it is determined that an award of a contract was arbitrary or capricious, then the sole relief shall be as hereinafter provided.

Where the award has been made but performance has not begun, the performance of the contract may be enjoined. Where the award has been made and performance has begun, the Institution may declare the contract void upon a finding that this action is in the best interest of the public. Where a contract is declared void, the performing contractor shall be compensated for the cost of performance up to the time of such declaration. In no event shall the performing contractor be entitled to lost profits.

C. Where the Institution, an official designated by it, or an appeals board determines, after a hearing held following reasonable notice to all bidders, that there is probable cause to believe that a decision to award was based on fraud or corruption or on an act in violation of these Rules, the Institution, designated official or appeals board may enjoin the award of the contract to a particular bidder.

**§ 51. Effect of appeal upon contract. –**

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

**§ 52. Stay of award during protest. –**

An award need not be delayed for the period allowed a bidder or offeror to protest, but in the event of a timely protest as provided in § 50 of these Rules, or the filing of a timely legal action as provided in § 54, no further action to award the contract shall be taken unless there is a written determination that proceeding without delay is necessary to protect the public interest or unless the bid or offer would expire.

**§ 53. Contractual disputes. –**

A. Contractual claims, whether for money or other relief, shall be submitted in writing no later than 60 days after final payment. However, written notice of the contractor's intention to file a claim shall be given at the time of the occurrence or beginning of the work upon which the claim is based. Nothing herein shall preclude a contract from requiring submission of an invoice for final payment within a certain time after completion and acceptance of the work or acceptance of the goods. Pendency of claims shall not delay payment of amounts agreed due in the final payment.

B. The Institution shall include in its contracts a procedure for consideration of contractual claims. Such procedure, which may be contained in the contract or may be specifically incorporated into the contract by reference and made available to the contractor, shall establish a time limit for a final decision in writing by the Institution. If the Institution has established administrative procedures meeting the standards of § 55 of these Rules, such procedures shall be contained in the contract or specifically incorporated in the contract by reference and made available to the contractor. The Institution may require the submission of contractual claims pursuant to any contract to Alternative Dispute Resolution (ADR) as an administrative procedure.

C. A contractor may not invoke administrative procedures meeting the standards of § 55 of these Rules, if available, or institute legal action as provided in § 54, prior to receipt of the Institution's decision on the claim, unless the Institution fails to render such decision within the time specified in the contract.

D. The decision of the Institution shall be final and conclusive unless the contractor appeals within six months of the date of the final decision on the claim by the Institution by invoking administrative procedures meeting the standards of § 55 of these Rules, if available, or in the alternative by instituting legal action as provided in § 54.

#### **§ 54. Legal actions. –**

A. A bidder or offeror, actual or prospective, who is refused permission or disqualified from participation in bidding or competitive negotiation, or who is determined not to be a responsible bidder or offeror for a particular contract, may bring an action in the appropriate circuit court challenging that decision, which shall be reversed only if the petitioner establishes that the decision was not (i) an honest exercise of discretion, but rather was arbitrary or capricious; (ii) in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms or conditions of the Invitation to Bid; or (iii) in the case of denial of prequalification, based upon the criteria for denial of prequalification set forth in subsection B of § 14 of these Rules. In the event the apparent low bidder, having been previously determined by the Institution to be not responsible in accordance with § 4, is found by the court to be a responsible bidder, the court may direct the Institution to award the contract to such bidder in accordance with the requirements of this section and the Invitation to Bid.

B. A bidder denied withdrawal of a bid under § 23 of these Rules 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 Institution 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.

C. A bidder, offeror or contractor, or a potential bidder or offeror on a contract negotiated on a sole source or emergency basis in the manner provided in § 5 of these Rules, whose protest of an award or decision to award under § 50 of these Rules is denied, may bring an action in the appropriate circuit court challenging a proposed award or the award of a contract, which shall be reversed only if the petitioner establishes that the proposed award or the award is not (i) an honest exercise of discretion, but rather is arbitrary or capricious or (ii) in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms and conditions of the Invitation to Bid or Request for Proposal.

D. If injunctive relief is granted, the court, upon request of the Institution, shall require the posting of reasonable security to protect the Institution.

E. A contractor may bring an action involving a contract dispute with the Institution in the appropriate circuit court. Notwithstanding any other provision of law, the Comptroller shall not be named as a defendant in any action brought pursuant to these Rules or § 33.1-387 of the Code of Virginia, except for disputes involving contracts of the Office of the Comptroller or the Department of Accounts.

F. A bidder, offeror or contractor need not utilize administrative procedures meeting the standards of § 55 of these Rules, if available, but if those procedures are invoked by the bidder, offeror or contractor, the procedures shall be exhausted prior to instituting legal action concerning the same procurement transaction unless the Institution agrees otherwise.

G. Nothing herein shall be construed to prevent the Institution from instituting legal action against a contractor.

**§ 55. Administrative appeals procedure. –**

A. The Institution may establish an administrative procedure for hearing (i) protests of a decision to award or an award, (ii) appeals from refusals to allow withdrawal of bids, (iii) appeals from disqualifications and determinations of nonresponsibility, and (iv) appeals from decisions on disputes arising during the performance of a contract, or (v) any of these. Such administrative procedure may include the use of Alternative Dispute Resolution (ADR) or shall provide for a hearing before a disinterested person or panel, the opportunity to present pertinent information and the issuance of a written decision containing findings of fact. The disinterested person or panel shall not be an employee of the governmental entity against whom the claim has been filed. The findings of fact shall be final and conclusive and shall not be set aside unless the same are (a) fraudulent, arbitrary or capricious; (b) so grossly erroneous as to imply bad faith; or (c) in the case of denial of prequalification, the findings were not based upon the criteria for denial of prequalification set forth in subsection B of § 14 of these Rules. No determination on an issue of law shall be final if appropriate legal action is instituted in a timely manner. The Institution may seek advice and input from the Alternative Dispute Resolution Council in establishing an Alternative Dispute Resolution (ADR) procedure.

B. Any party to the administrative procedure, including the Institution, shall be entitled to institute judicial review if such action is brought within 30 days of receipt of the written decision.

**§ 56. Alternative dispute resolution. –**

The Institution may enter into agreements to submit disputes arising from contracts entered into pursuant to these Rules to arbitration and utilize mediation and other alternative dispute resolution procedures. However, such procedures shall be nonbinding and subject to § 2.2-514 of the Code of Virginia, as applicable.

**§ 57. Ethics in public contracting. –**

The Institution and its governing body, officers and employees shall be governed by the Ethics in Public Contracting provisions of the Virginia Public Procurement Act, Article 6 (§ 2.2-4367 et seq.) of Chapter 43 of Title 2.2 of the Code of Virginia.

**EXHIBIT H**

**MANAGEMENT AGREEMENT**

**BETWEEN**

**THE COMMONWEALTH OF VIRGINIA**

**AND**

**THE COLLEGE OF WILLIAM AND MARY IN VIRGINIA**

**PURSUANT TO**

**THE RESTRUCTURED HIGHER EDUCATION**

**FINANCIAL AND ADMINISTRATIVE OPERATIONS**

**ACT OF 2005**

**POLICY GOVERNING**

**LEASES OF REAL PROPERTY**

**THE RECTOR AND VISITORS OF**

**THE COLLEGE OF WILLIAM AND MARY IN VIRGINIA**

**POLICY GOVERNING LEASES OF REAL PROPERTY**

**I. PREAMBLE.**

In 1996 the Board of Visitors adopted a Policy Statement Governing Exercise of Autonomy in Leases of Property for certain leases entered into by the College of William and Mary in Virginia, which was amended in 2003 as the Policy Statement Governing Exercise of Autonomy in Operating and Capital Leases of Property. The Restructured Higher Education Financial and Administrative Operations Act (the Act), Chapter 4.10 (§ 23-38.88 et seq.) of Title 23 of the Code of Virginia, provides that, upon becoming a Covered Institution, the College may have the authority to establish its own system for the leasing of real property. The College's system for implementing this authority is to be governed by policies adopted by the Board of Visitors. The following provisions of this Policy constitute the adopted Board of Visitors policies regarding Leases of real property entered into by the College.

This Policy is intended to cover the authority that may be granted to the College pursuant to Subchapter 3 of the Act. Any other powers and authorities granted to the College pursuant to the Appropriation Act, or any other sections of the Code of Virginia, including other provisions of the Act and the College's Enabling Legislation, as defined in § 23-38.89 of the Act, are not affected by this Policy.

## **II. DEFINITIONS.**

The following words and terms, when used in this Policy, shall have the following meaning unless the context clearly indicates otherwise:

“Act” means the Restructured Higher Education Financial and Administrative Operations Act, Chapter 4.10 (§ 23-38.88 et seq.) of Title 23 of the Code of Virginia.

“Board of Visitors” means the Rector and Visitors of the College of William and Mary in Virginia.

“Capital Lease” means a lease that is defined as such within Generally Accepted Accounting Principles pursuant to the pronouncement of the Financial Accounting Standards Board.

“College” means the College of William and Mary in Virginia, (State Agency 204), and the Virginia Institute of Marine Science, (State Agency 268).

“Covered Institution” means a public institution of higher education of the Commonwealth of Virginia that has entered into a Management Agreement with the Commonwealth to be governed by Subchapter 3 of the Act.

“Expense Lease” means an Operating Lease of real property under the control of another entity to the College.

“Income Lease” means an Operating Lease of real property under the control of the College to another entity.

“Lease” or “Leases” means any type of lease involving real property.

“Operating Lease” means any lease involving real property, or improvements thereon, that is not a Capital Lease.

### **III. SCOPE OF POLICY.**

This Policy provides guidance for the implementation of all College Leases.

### **IV. BOARD OF VISITORS ACCOUNTABILITY AND DELEGATION OF AUTHORITY.**

The Board of Visitors of the College shall at all times be fully and ultimately accountable for the proper fulfillment of the duties and responsibilities set forth in, and for the appropriate implementation of, this Policy. Consistent with this full and ultimate accountability, however, the Board may, pursuant to its legally permissible procedures, specifically delegate either herein or by separate Board resolution the duties and responsibilities set forth in this Policy to a person or persons within the College, who, while continuing to be fully accountable for such duties and responsibilities, may further delegate the implementation of those duties and responsibilities pursuant to the College’s usual delegation policies and procedures.

### **V. REQUIREMENTS FOR LEASES.**

#### **A. Factors to Be Considered When Entering into Leases.**

All Leases shall be for a purpose consistent with the mission of the College. The decision to enter into a Lease shall be further based upon cost, demonstrated need, compliance with this Policy, consideration of all costs of occupancy, and a determination that the use of the property to be leased is necessary and is efficiently planned. Leases shall also conform to the space planning procedures that may be adopted by the President, acting through his designee, to ensure that the plan for the space to be leased is consistent with the purpose for which the space is intended.

#### **B. Competition to Be Sought to Maximum Practicable Degree.**

Competition shall be sought to the maximum practicable degree for all Leases. The President, acting through his designee, is authorized to ensure that Leases are procured through competition to the maximum degree practicable and to determine when, under guidelines that may be developed and adopted by the President, acting through his designee, it is impractical to procure Leases through competition.

#### **C. Approval of Form of Lease Required.**

The form of Leases entered into by the College shall be approved by the College's legal counsel.

**D. Execution of Leases.**

All Leases entered into by the College shall be executed only by those College officers or persons authorized by the President or as may subsequently be authorized by the Board of Visitors, and subject to any such limits or conditions as may be prescribed in the delegation of authority. Subject to the College's Policy Governing Capital Projects adopted by the Board as part of the Management Agreement between the Commonwealth and the College, no other College approval shall be required for leases or leasing, nor state approval required except in the case of leases of real property as may be governed by general state law in accordance with §§ 23-38.109 and 23-38.112 of the Act.

**E. Capital Leases.**

The Board of Visitors shall authorize the initiation of Capital Leases pursuant to the authorization process included in the Policy Governing Capital Projects adopted by the Board as part of the Management Agreement between the Commonwealth and the College.

**F. Compliance with Applicable Law.**

All Leases of real property by the College shall be consistent with any requirements of law that are contained in the Act or are otherwise applicable.

**G. Certification of Occupancy.**

All real property covered by an Expense Lease or leased by the College under a Capital Lease shall be certified for occupancy by the appropriate public body or building official.

**EXHIBIT I**

**MANAGEMENT AGREEMENT**

**BETWEEN**

**THE COMMONWEALTH OF VIRGINIA**

**AND**

**THE COLLEGE OF WILLIAM AND MARY IN VIRGINIA**

**PURSUANT TO**

**THE RESTRUCTURED HIGHER EDUCATION FINANCIAL AND ADMINISTRATIVE  
OPERATIONS ACT OF 2005**

**POLICY GOVERNING  
INFORMATION TECHNOLOGY**

**THE RECTOR AND VISITORS OF  
THE COLLEGE OF WILLIAM AND MARY IN VIRGINIA  
POLICY GOVERNING INFORMATION TECHNOLOGY**

**I. PREAMBLE.**

The Restructured Higher Education Financial and Administrative Operations Act (the Act), Chapter 4.10 (§ 23-38.88 et seq.) of Title 23 of the Code of Virginia, provides, inter alia, that public institutions of higher education in the Commonwealth of Virginia that have entered into a Management Agreement with the Commonwealth “may be exempt from the provisions governing the Virginia Information Technologies Agency, Chapter 20.1 (§ 2.2-2005 et seq.) of Title 2.2., and the provisions governing the Information Technologies [sic] Investment Board, Article 20 of Chapter 24 (§ 2.2-2457 et seq.) of Title 2.2; provided, however, that the governing body of . . . [such] institution shall adopt, and . . . [such] institution shall comply with, policies” that govern the exempted provisions. See § 23-38.111 of the Code of Virginia. This Information Technology Policy shall become effective upon the effective date of a Management Agreement authorized by subsection D of § 23-38.88 and § 23-38.97 of the Act between the Commonwealth and the College of William and Mary in Virginia that incorporates this Policy.

The Board of Visitors of the College is authorized to adopt this Information Technology Policy pursuant to § 23-38.111 of the Code of Virginia.

**II. DEFINITIONS.**

As used in this Information Technology Policy, the following terms have the following meanings, unless the context requires otherwise:

“Act” means the Restructured Higher Education Financial and Administrative Operations Act, Chapter 4.10 (§ 23-38.88 et seq.) of Title 23 of the Code of Virginia.

“Board of Visitors” or “Board” means the Rector and Board of Visitors of the College of William and Mary in Virginia.

“College” means the College of William and Mary in Virginia, (State Agency 204), and the Virginia Institute of Marine Science, (State Agency 268).

“Information Technology” or “IT” shall have the same meaning as set forth in § 2.2-2006 of the Code of Virginia as it currently exists and from time to time may be amended.

“Major information technology project” or “major IT project” shall have the same meaning as set forth in § 2.2-2006 of the Code of Virginia as it currently exists and from time to time may be amended.

“Policy” means this Information Technology Policy adopted by the Board of Visitors.

“State Chief Information Officer” or “State CIO” means the Chief Information Officer of the Commonwealth of Virginia.

### **III. SCOPE OF POLICY.**

This Policy is intended to cover and implement the authority that may be granted to the College pursuant to Subchapter 3 (§ 23-38.91 et seq.) of the Act. This Policy is not intended to affect any other powers and authorities granted to the College pursuant to the Appropriation Act and the Code of Virginia, including other provisions of the Act or the College’s enabling legislation as that term is defined in § 23-38.89 of the Act.

This Policy shall govern the College’s information technology strategic planning, expenditure reporting, budgeting, project management, infrastructure, architecture, ongoing operations, security, and audits conducted within, by, or on behalf of the College. Upon the effective date of a Management Agreement between the Commonwealth and the College, as authorized by subsection D of § 23-38.88 and § 23-38.111, therefore, the College shall be exempt from those provisions of the Code of Virginia, including those provisions of Chapter 20.1 (§ 2.2-2005 et seq.) (Virginia Information Technologies Agency) and of Article 20 (§ 2.2-2457 et seq.) (Information Technology Investment Board) of Chapter 24 of Title 2.2 of the Code of Virginia, that otherwise would govern the College’s information technology strategic planning, expenditure reporting, budgeting, project management, infrastructure, architecture, ongoing operations, security, and audits conducted within, by, or on behalf of the College; provided, however, that the College still shall be subject to those provisions of Chapter 20.1 (§ 2.2-2005 et seq.) (Virginia Information Technologies Agency) and of Article 20 (§ 2.2-2457 et seq.) (Information Technology Investment Board) of Chapter 24 of Title 2.2 of the Code of Virginia, that are applicable to public institutions of higher education of the Commonwealth and that do not govern information technology strategic planning, expenditure reporting, budgeting, project management, infrastructure, architecture, ongoing operations, security, and audits within, by, or on behalf of the College.

The procurement of information technology and telecommunications goods and services, including automated data processing hardware and software, shall be governed by the Policy Governing the Procurement of Goods, Services, Insurance, and Construction, and the Disposition of Surplus Materials approved by the Board, and the Rules Governing Procurement of Goods, Services, Insurance, and Construction that are incorporated in and attached to that Policy.

## **IV. GENERAL PROVISIONS.**

### **A. Board of Visitors Accountability and Delegation of Authority.**

The Board of Visitors of the College shall at all times be fully and ultimately accountable for the proper fulfillment of the duties and responsibilities set forth in, and for the appropriate implementation of, this Policy. Consistent with this full and ultimate accountability, however, the Board may, pursuant to its legally permissible procedures, specifically delegate either herein or by separate Board resolution the duties and responsibilities set forth in this Policy to a person or persons within the College, who, while continuing to be fully accountable for such duties and responsibilities, may further delegate the implementation of those duties and responsibilities pursuant to the College's usual delegation policies and procedures.

### **B. Strategic Planning.**

The President shall be responsible for overall IT strategic planning at the College, which shall be linked to and in support of the College's overall strategic plan.

At least 45 days prior to each fiscal year, the President shall make available the College's IT strategic plan covering the next fiscal year to the State CIO for his review and comment with regard to the consistency of the College's plan with the intent of the currently published overall five-year IT strategic plan for the Commonwealth developed by the State CIO pursuant to § 2.2-2007 of the Code of Virginia, and into which the College's plan is to be incorporated.

### **C. Expenditure Reporting and Budgeting.**

The President shall approve and be responsible for overall IT budgeting and investments at the College. The College's IT budget and investments shall be linked to and in support of the College's IT strategic plan, and shall be consistent with general College policies, the Board-approved annual operating budget, and other Board approvals for certain procurements.

By October 1 of each year, the President shall make available to the State CIO and the Information Technology Investment Board a report on the previous fiscal year's IT expenditures.

The College shall be specifically exempt from:

Subdivision A 4 of § 2.2-2007 of the Code of Virginia (review by the State CIO of IT budget requests), as it currently exists and from time to time may be amended;

§§ 2.2-2022 through 2.2-2024 of the Code of Virginia (Virginia Technology Infrastructure Fund), as they currently exist and from time to time may be amended; and

Any other substantially similar provision of the Code of Virginia governing IT expenditure reporting and budgeting, as it currently exists and from time to time may be amended.

#### **D. Project Management.**

Pursuant to § 23-38.111 of the Act, the Board shall adopt the project management policies, standards, and guidelines developed by the Commonwealth or those based upon industry best practices for project management as defined by leading IT consulting firms, leading software development firms, or a nationally-recognized project management association, appropriately tailored to the specific circumstances of the College. Copies of the Board's policies, standards, and guidelines shall be made available to the Information Technology Investment Board.

The President, acting through his designee, shall oversee the management of all College IT projects. IT projects may include, but are not limited to, upgrades to network infrastructure, provision of technology to support research, database development, implementation of new applications, and development of IT services for students, faculty, staff, and patients. Day-to-day management of projects shall be the responsibility of appointed project directors and shall be in accord with the project management policies, standards, and guidelines adopted by the Board, as amended and revised from time to time.

On a quarterly basis, the President, acting through his designee, shall report to the Information Technology Investment Board on the budget, schedule, and overall status of the College's major IT projects. This requirement shall not apply to research projects, research initiatives, or instructional programs.

The President shall be responsible for decisions to substantially alter a project's scope, budget, or schedule after initial approval.

The College shall be specifically exempt from:

§ 2.2-2008 of Title 2.2 of the Code of Virginia (additional duties of the State CIO relating to project management), as it currently exists and from time to time may be amended;

§§ 2.2-2016 through 2.2-2021 of Title 2.2 of the Code of Virginia (Division of Project Management), as they currently exist and from time to time may be amended; and

Any other substantially similar provision of the Code of Virginia governing IT project management, as it currently exists or from time to time may be amended.

The State CIO and the Information Technology Investment Board shall continue to have the authority regarding project suspension and termination as provided in § 2.2-2015 and in subdivision A 3 of § 2.2-2458, respectively, and the State CIO and the Information Technology Investment Board shall continue to provide the College with reasonable notice of, and a reasonable opportunity to correct, any identified problems before a project is terminated.

**E. Infrastructure, Architecture, Ongoing Operations, and Security.**

Pursuant to § 23-38.111 of the Act, the Board shall adopt the policies, standards, and guidelines related to IT infrastructure, architecture, ongoing operations, and security developed by the Commonwealth or those of nationally-recognized associations, appropriately tailored to the specific circumstances of the College. Copies of the policies shall be made available to the Information Technology Investment Board.

The President, acting through his designee, shall be responsible for implementing such policies, standards, and guidelines adopted by the Board, as amended and revised from time to time.

For purposes of implementing this Policy, the President shall appoint an existing College employee to serve as a liaison between the College and the State CIO.

**F. Audits.**

Pursuant to § 23-38.111 of the Act, the Board shall adopt the policies, standards, and guidelines developed by the Commonwealth or those based upon industry best practices for project auditing as defined by leading IT experts, including consulting firms, or a nationally-recognized project auditing association, appropriately tailored to the specific circumstances of the College, which provide for Independent Validation and Verification (IV&V) of the College's major IT projects. Copies of the policies, standards, and guidelines, as amended and revised from time to time, shall be made available to the Information Technology Investment Board.

Audits of IT strategic planning, expenditure reporting, budgeting, project management, infrastructure, architecture, ongoing operations, and security, shall also be the responsibility of the College's Internal Audit Department and the Auditor of Public Accounts.

**EXHIBIT J**

**MANAGEMENT AGREEMENT  
BETWEEN**

**THE COMMONWEALTH OF VIRGINIA  
AND  
THE COLLEGE OF WILLIAM AND MARY IN VIRGINIA  
PURSUANT TO  
THE RESTRUCTURED HIGHER EDUCATION  
FINANCIAL AND ADMINISTRATIVE OPERATIONS  
ACT OF 2005**

**POLICY GOVERNING  
THE PROCUREMENT OF GOODS, SERVICES,  
INSURANCE, AND CONSTRUCTION AND  
THE DISPOSITION OF SURPLUS MATERIALS**

**THE RECTOR AND VISITORS OF THE COLLEGE OF WILLIAM AND MARY  
POLICY GOVERNING THE PROCUREMENT OF  
GOODS, SERVICES, INSURANCE AND CONSTRUCTION  
AND THE DISPOSITION OF SURPLUS MATERIALS**

**I. PREAMBLE.**

A. Subchapter 3 of the Restructured Higher Education Financial and Administrative Operations Act (the Act), Chapter 4.10 (§ 23-38.88 et seq.) of Title 23 of the Code of Virginia, provides that the College of William and Mary in Virginia, upon becoming a Covered Institution, shall be authorized to establish its own system for the procurement of goods, services, insurance, and construction, and for the independent disposition of surplus materials by public or private transaction.

B. The Act provides that a Covered Institution shall comply with policies adopted by its Board of Visitors for the procurement of goods, services, insurance, and construction, and the disposition of surplus materials. The provisions of this Policy set forth below, together with the Rules Governing Procurement of Goods, Services, Insurance, and Construction attached to this Policy as Attachment 1, constitute the adopted Board of Visitors policies required by the Act regarding procurement of goods, services, insurance, and construction, and the disposition of surplus materials by the College.

C. This Policy is intended to cover the authority that may be granted to the College pursuant to Subchapter 3 of the Act. Any other powers and authorities granted to the College pursuant to any other sections of the Code of Virginia, including other provisions of the Act, the Appropriation Act, and the College's Enabling Legislation are not affected by this Policy.

## **II. DEFINITIONS.**

As used in this Policy, the following terms shall have the following meanings, unless the context requires otherwise:

“Act” means the Restructured Higher Education Financial and Administrative Operations Act, Chapter 4.10 (§ 23-38.88 et seq.) of Title 23 of the Code of Virginia.

“Agreement” means “Management Agreement.”

“Board of Visitors” means the Rector and Visitors of the College of William and Mary in Virginia.

“College” means the College of William and Mary in Virginia, (State Agency 204), and the Virginia Institute of Marine Science, (State Agency 268).

“Covered Institution” means, on and after the Effective Date of its initial Management Agreement, a public institution of higher education of the Commonwealth of Virginia that has entered into a Management Agreement with the Commonwealth to be governed by the provisions of Subchapter 3 of the Act.

“Effective Date” means the effective date of the Management Agreement.

“Enabling Legislation” means those chapters, other than Chapter 4.10, of Title 23 of the Code of Virginia, as amended, creating, continuing, or otherwise setting forth the powers, purposes, and missions of the individual public institutions of higher education of the Commonwealth.

“Goods” means all material, equipment, supplies, and printing, including information technology and telecommunications goods such as automated data processing hardware and software.

“Management Agreement” means the agreement required by subsection D of § 23-38.88 between the Commonwealth of Virginia, and the College of William and Mary in Virginia.

“Rules” means the “Rules Governing Procurement of Goods, Services, Insurance, and Construction” attached to this Policy as Attachment 1.

“Services” as used in this Policy means any work performed by an independent contractor wherein the service rendered does not consist primarily of acquisition of equipment or materials, or the rental of equipment, materials and supplies, and shall include both professional services, which include the practice of accounting, actuarial services, law, dentistry, medicine, optometry, and pharmacy, and nonprofessional services, which include any service not specifically identified as professional services.

“Surplus materials” means personal property including, but not limited to, materials, supplies, equipment and recyclable items, that are determined to be surplus by the College.

### **III. BOARD OF VISITORS ACCOUNTABILITY AND DELEGATION OF AUTHORITY.**

The Board of Visitors of the College shall at all times be fully and ultimately accountable for the proper fulfillment of the duties and responsibilities set forth in, and for the appropriate implementation of, this Policy. Consistent with this full and ultimate accountability, however, the Board may, pursuant to its legally permissible procedures, specifically delegate either herein or by separate Board resolution the duties and responsibilities set forth in this Policy to a person or persons within the College, who, while continuing to be fully accountable for such duties and responsibilities, may further delegate the implementation of those duties and responsibilities pursuant to the College’s usual delegation policies and procedures.

### **IV. GENERAL PROVISIONS.**

#### **A. Adoption of This Policy and Continued Applicability of Other Board of Visitors' Procurement Policies.**

The College has had decentralization and pilot program autonomy in many procurement functions and activities since the Appropriation Act of 1994. The Act extends and reinforces the autonomy previously granted to the College in Item 330 E of the 1994 Appropriation Act. This Policy therefore is adopted by the Board of Visitors to enable the College to develop a procurement system, as well as a surplus materials disposition system. Any College electronic procurement system shall integrate or interface with the Commonwealth’s electronic procurement system.

This Policy shall be effective on the Effective Date of the College’s initial Management Agreement with the Commonwealth. The implementing policies and procedures adopted by the President to implement this Policy shall continue to be subject to any other policies adopted by the Board of Visitors affecting procurements at the College, including policies regarding the nature and amounts of procurements that may be undertaken without the approval of the Board of Visitors, or of the President.

#### **B. Scope and Purpose of College Procurement Policies.**

This Policy shall apply to procurements of goods, services, insurance, and construction. It shall be the policy of the College that procurements conducted by the College result in the purchase of high quality goods and services at reasonable prices, and that the College be free, to the maximum extent permitted by law and this Policy, from constraining policies that hinder the ability of the College to do business in a competitive environment. This Policy, together with the

Rules Governing Procurement of Goods, Services, Insurance, and Construction attached to this Policy as Attachment 1, shall apply to all procurements undertaken by the College, regardless of the source of funds.

**C. Collaboration, Communication, and Cooperation with the Commonwealth.**

The College is committed to developing, maintaining, and sustaining collaboration, communication, and cooperation with the Commonwealth regarding the matters addressed in this Policy, particularly with the Offices of the Secretaries of Administration and Technology, the Department of General Services, and the Virginia Information Technologies Agency. Identifying business objectives and goals common to both the College and the Commonwealth and the mechanisms by which such objectives and goals may be jointly pursued and achieved are among the desired outcomes of such collaboration, communication, and cooperation.

**D. Commitment to Statewide Contracts, Electronic Procurement, and SWAM Participation and Use.**

The College is committed to maximizing its internal operational efficiencies, economies of scale among institutions of higher education, and the leveraged buying power of the Commonwealth as a whole.

Consistent with this commitment, the College:

i) May purchase from and participate in all statewide contracts for goods and services, including information technology goods and services, except that the College shall purchase from and participate in contracts for communications services and telecommunications facilities entered into by the Virginia Information Technologies Agency pursuant to § 2.2-2011 of the Code of Virginia unless an exception is provided in the Appropriation Act or by other law, and provided that orders not placed through statewide contracts shall be processed directly or by integration or interface through the Commonwealth's electronic procurement system;

ii) Shall use directly or by integration or interface the Commonwealth's electronic procurement system; and

iii) Shall adopt a small, woman-owned, and minority-owned (SWAM) business program that is consistent with the Commonwealth's SWAM program.

**E. Implementation.**

To effect its implementation under the Act, and if the College remains in continued substantial compliance with the terms and conditions of this Management Agreement with the

Commonwealth pursuant to § 23-38.88(D)(4) and the requirements of Chapter 4.10 of the Act, the College's procurement of goods, services, insurance, and construction, and the disposition of surplus materials shall be exempt from the Virginia Public Procurement Act, Chapter 43 (§ 2.2-4300 et seq.) of Title 2.2, except § 2.2-4342 and §§ 2.2-4367 through 2.2-4377; the oversight of the Virginia Information Technologies Agency, Chapter 20.1 (§ 2.2-2005 et seq.) of Title 2.2, and the Information Technology Investment Board, Article 20 (§ 2.2-2457 et seq.) of Chapter 24 of Title 2.2; the state agency requirements regarding disposition of surplus materials and distribution of proceeds from the sale or recycling of surplus materials in §§ 2.2-1124 and 2.2-1125; the requirement to purchase from the Department for the Blind and Vision Impaired (VIB) (§ 2.2-1117); and any other state statutes, rules, regulations or requirements relating to the procurement of goods, services, insurance, and construction, including but not limited to Article 3 (§ 2.2-1109 et seq.) of Chapter 11 of Title 2.2 of the Code of Virginia, regarding the duties, responsibilities and authority of the Division of Purchases and Supply of the Virginia Department of General Services, and Article 4 (§ 2.2-1129 et seq.) of Chapter 11 of Title 2.2 of the Code of Virginia, regarding the review and the oversight by the Division of Engineering and Buildings of the Virginia Department of General Services of contracts for the construction of College capital projects and construction-related professional services (§ 2.2-1132).

## **V. COLLEGE PROCUREMENT POLICIES.**

### **A. General Competitive Principles.**

In connection with College procurements and the processes leading to award of contracts for goods, services, insurance, and construction, the College is committed to:

Seeking competition to the maximum practical degree, taking into account the size of the anticipated procurement, the term of the resulting contract and the likely extent of competition;

Conducting all procurements in an open, fair and impartial manner and avoiding any impropriety or the appearance of any impropriety;

Making procurement rules clear in advance of any competition;

Providing access to the College's business to all qualified vendors, firms and contractors, with no potential bidder or offeror excluded arbitrarily or capriciously, while allowing the flexibility to engage in cooperative procurements and to meet special needs of the College;

Ensuring that specifications for purchases are fairly drawn so as not to favor unduly a particular vendor; and

Providing for the free exchange of information between the College, vendors, firms or contractors concerning the goods or services sought and offered while preserving the confidentiality of proprietary information.

#### **B. Access to Records.**

Procurement records shall be available to citizens or to interested persons, firms or corporations in accordance with the provisions of the Virginia Freedom of Information Act, Chapter 37 (§ 2.2-3700 et seq.) of Title 2.2 of the Code of Virginia, except those records exempt from disclosure pursuant to § 2.2-3705.1 (7), § 2.2-3705.1 (12), or § 2.2-3705.4 (4), or other applicable exemptions of the Virginia Freedom of Information Act, and § 2.2-4342 of the Virginia Public Procurement Act.

#### **C. Cooperative Procurements and Alliances.**

In circumstances where the College determines and documents that statewide contracts for goods and services, including information technology and telecommunications goods and services, do not provide goods and services to the College that meet its business goals and objectives, the College is authorized to participate in cooperative procurements with other public or private organizations or entities, including other educational institutions, public-private partnerships, public bodies, charitable organizations, health care provider alliances and purchasing organizations, so long as the resulting contracts are procured competitively pursuant to subsections A through J of § 5 of the Rules Governing Procurement of Goods, Services, Insurance, and Construction attached to this Policy as Attachment 1 and the purposes of this Policy are furthered. In the event the College engages in a cooperative contract with a private organization or public-private partnership and the contract was not competitively procured pursuant to subsections A through J of § 5 of the Rules Governing Procurement of Goods, Services, Insurance, and Construction attached to this Policy as Attachment 1, use of the contract by other state agencies, institutions and public bodies shall be prohibited. Notwithstanding all of the above, use of cooperative contracts shall conform to the business requirements of the Commonwealth's electronic procurement system, including the requirement for payment of applicable fees. By October 1 of each year, the President, or his designee, shall make available to the Secretaries of Administration and Technology, the Joint Legislative Audit and Review Commission, and the Auditor of Public Accounts a list of all cooperative contracts and alliances entered into or used during the prior fiscal year.

#### **D. Training; Ethics in Contracting.**

The President, acting through his designee, shall take all necessary and reasonable steps to assure (i) that all College officials responsible for and engaged in procurements authorized by the Act and this Policy are knowledgeable regarding the requirements of the Act, this Policy, and the Ethics in Public Contracting provisions of the Virginia Public Procurement Act, Article 6 (§ 2.2-4367 et seq.) of Chapter 43 of Title 2.2 of the Code of Virginia, (ii) that only officials authorized by this Policy and any procedures adopted by the President to implement this Policy are responsible for and engaged in such procurements, and (iii) that compliance with the Act and this Policy are achieved.

The College shall maintain an ongoing program to provide professional development opportunities to its buying staff and to provide methods training to internal staff who are engaged in placing decentralized small purchase transactions.

#### **E. Ethics and College Procurements.**

In implementing the authority conferred by this Policy, the personnel administering any procurement shall adhere to the following provisions of the Code of Virginia: the Ethics in Public Contracting provisions of the Virginia Public Procurement Act, Article 6 (§ 2.2-4367 et seq.) of Chapter 43 of Title 2.2 of the Code of Virginia, the State and Local Government Conflict of Interests Act, Chapter 31 (§ 2.2-3100 et seq.) of Title 2.2, and the Virginia Governmental Frauds Act, Article 1.1 (§ 18.2-498.1 et seq.) of Chapter 12 of Title 18.2.

#### **VI. COLLEGE SURPLUS MATERIALS POLICY AND PROCEDURES.**

The policy and procedures for disposal for surplus materials shall provide for the sale, environmentally-appropriate disposal, or recycling of surplus materials by the College and the retention of the resulting proceeds by the College.

#### **VII. ADOPTION AND EFFECTIVE DATES OF RULES AND IMPLEMENTING POLICIES AND PROCEDURES.**

The President shall adopt one or more comprehensive sets of specific procurement policies and procedures for the College, which, in addition to the Rules, implement applicable provisions of law and this Policy. College procurements shall be carried out in accordance with this Policy, the Rules, and any implementing policies and procedures adopted by the College. The implementing policies and procedures (i) shall include the delegation of procurement authority by the Board to appropriate College officials who shall oversee College procurements of goods, services, insurance, and construction, including a grant of authority to such officials to engage in further delegation of authority as the President deems appropriate, and (ii) shall remain consistent with the competitive principles set forth in Part V above.

Any implementing policies and procedures adopted pursuant to Part VII A above and the Rules shall become effective on the Effective Date of the College's initial Management Agreement with the Commonwealth, and, as of their effective date, shall be applicable to all procurements undertaken by the College on behalf of the College for goods, services, insurance, and construction. This Policy, the Rules, and any implementing policies and procedures adopted by the College shall not affect existing contracts already in effect.

The Rules and College implementing policies and procedures for all College procurements of goods, services, insurance, and construction, and the disposition of surplus property shall be substantially consistent with the Commonwealth of Virginia Purchasing

Manual for Institutions of Higher Education and their Vendors in their form as of the effective date of this Policy and as amended or changed in the future, and with College procedures specific to the Acquisition of Goods and Services. The Rules and College implementing policies and procedures shall implement a system of competitive negotiation, and competitive sealed bidding when appropriate, for goods, services, including professional services as defined in the Rules, insurance, and construction.

## **VIII. REQUIREMENTS FOR RULES AND IMPLEMENTING POLICIES AND PROCEDURES.**

### **A. Protests, Appeals and Debarment.**

The Rules and College implementing policies and procedures for procurements other than capital outlay shall include a process or processes for an administrative appeal by vendors, firms or contractors. Protests and appeals may challenge determinations of vendor, firm or contractor non-responsibility or ineligibility, or the award of contracts, provided that such protests and appeals are filed within the times specified by the Rules. Remedies available shall be limited to reversal of the action challenged or, where a contract already being performed is declared void, compensation for the cost of performance up to the time of such declaration. The Rules and College implementing policies and procedures also may establish the basis and process for debarment of any vendor, firm or contractor.

### **B. Prompt Payment of Contractors and Subcontractors.**

The Rules and College implementing policies and procedures shall include provisions related to prompt payment of outstanding invoices, which shall include payment of interest on properly-presented invoices outstanding more than seven (7) days beyond the payment date, at a rate no higher than the lowest prime rate charged by any commercial bank as published in the Wall Street Journal. The payment date shall be the later of thirty (30) days from the date of the receipt of goods or invoice, or the date established by the contract. All contracts also shall require prompt payment of subcontractors by the general contractor, upon receipt of payment by the College.

### **C. Types of Procurements.**

The Rules and College implementing policies and procedures shall implement a system of competitive negotiation for professional services, as defined in the Rules, and shall implement purchasing procedures developed to maximize competition given the size and duration of the contract, and the needs of the College. Such policies and procedures may include special provisions for procurements such as emergency procurements, sole source procurements, brand name procurements, small purchases, procurements in which only one qualified vendor responds, and others.

### **D. Approval and Public Notice of Procurements.**

The Rules and College implementing policies and procedures shall provide for approval of solicitation documents by an authorized individual and for reasonable public notice of procurements, given the size and nature of the need and the applicability of any Virginia Freedom of Information Act exemption.

#### **E. Administration of Contracts.**

The Rules and College implementing policies and procedures shall contain provisions related to the administration of contracts, including contract claims, modifications, extensions and assignments.

#### **F. Non-Discrimination.**

The Rules and College implementing policies and procedures shall provide for a non-discriminatory procurement process that prohibits discrimination because of race, religion, color, sex or national origin of the bidder or offeror in the solicitation and award of contracts; and shall include appropriate provisions to effectuate fair and reasonable consideration of women-owned, minority-owned and small businesses and to promote and encourage a diversity of suppliers.

## **ATTACHMENT 1**

### **Rules Governing Procurement of Goods, Services, Insurance, and Construction by a Public Institution of Higher Education of the Commonwealth of Virginia Governed by Subchapter 3 of the Restructured Higher Education Financial and Administrative Operations Act, Chapter 4.10 (§ 23-38.88 et seq.) of Title 23 of the Code of Virginia**

In accordance with the provisions of the Restructured Higher Education Financial and Administrative Operations Act (the Act), Chapter 4.10 (§ 23-38.88 et seq.) of Title 23 of the Code of Virginia, and in particular § 23-38.110 of the Act, the governing body of a public institution of higher education of the Commonwealth of Virginia that has entered into a Management Agreement with the Commonwealth pursuant to Subchapter 3 of the Act, has adopted the following Rules Governing Procurement of Goods, Services, Insurance, and Construction to govern the procurement of goods, services, insurance, and construction by the Institution, excluding the University of Virginia Medical Center:

#### **§ 1. Purpose. –**

The purpose of these Rules is to enunciate the public policies pertaining to procurement of good, services, insurance, and construction by the Institution from nongovernmental sources,

to include governmental procurement that may or may not result in monetary consideration for either party. These Rules shall apply whether the consideration is monetary or nonmonetary and regardless of whether the Institution, the contractor, or some third party is providing the consideration.

## **§ 2. Scope of Procurement Authority. –**

Subject to these Rules, and the Institution’s continued substantial compliance with the terms and conditions of its Management Agreement with the Commonwealth pursuant to § 23-38.88(D)(4) and the requirements of Chapter 4.10 of the Act, the Institution shall have and shall be authorized to have and exercise all of the authority relating to procurement of goods, services, insurance, and construction, including but not limited to capital outlay-related procurement and information technology-related procurement, that Institutions are authorized to exercise pursuant to Subchapter 3 of the Restructuring Act.

## **§ 3. Competition is the Priority. –**

To the end that the Institution shall obtain high quality goods and services at reasonable cost, that all procurement procedures be conducted in an open, fair and impartial manner with avoidance of any impropriety or appearance of impropriety, that all qualified vendors have access to the Institution’s business and that no offeror be arbitrarily or capriciously excluded, it is the intent of the governing body of the Institution 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. The Institution may consider best value concepts when procuring goods and nonprofessional services, but not construction or professional services. Professional services will be procured using a qualification-based selection process. 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.

## **§ 4. Definitions. –**

As used in these Rules:

“Affiliate” means an individual or business that controls, is controlled by, or is under common control with another individual or business. A person controls an entity if the person owns, directly or indirectly, more than 10% of the voting securities of the entity. For the purposes of this definition “voting security” means a security that (i) confers upon the holder the right to vote for the election of members of the board of directors or similar governing body of the business or (ii) is convertible into, or entitles the holder to receive, upon its exercise, a security that confers such a right to vote. A general partnership interest shall be deemed to be a voting security.

“Best value,” as predetermined in the solicitation, means the overall combination of quality, price, and various elements of required services that in total are optimal relative to the Institution’s needs.

“Business” means any type of corporation, partnership, limited liability company, association, or sole proprietorship operated for profit.

“Competitive negotiation” is a method of contractor selection that includes the following elements:

1. Issuance of a written Request for Proposal indicating in general terms that which is sought to be procured, specifying the factors that will be used in evaluating the proposal and containing or incorporating by reference the other applicable contractual terms and conditions, including any unique capabilities or qualifications that will be required of the contractor.

2. Public notice of the Request for Proposal at least 10 days prior to the date set for receipt of proposals by publication in a newspaper or newspapers 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. Public notice also shall be published on the Department of General Services’ central electronic procurement website and may be published on other appropriate websites. In addition, proposals may be solicited directly from potential contractors.

3. a. Procurement of professional services. The procurement of professional services for capital projects shall be conducted using a qualification-based selection process. The Institution shall engage in individual discussions with two or more offerors deemed fully qualified, responsible and suitable on the basis of initial responses and with emphasis on professional competence, to provide the required services. Repetitive informal interviews shall be permissible. The offerors shall be encouraged to elaborate on their qualifications and performance data or staff expertise pertinent to the proposed project, as well as alternative concepts. The Request for Proposal shall not, however, request that offerors furnish estimates of man-hours or cost for services. At the discussion stage, the Institution may discuss nonbinding estimates of total project costs, including, but not limited to, life-cycle costing, and where appropriate, nonbinding estimates of price for services. Proprietary information from competing offerors shall not be disclosed to the public or to competitors. At the conclusion of discussion, outlined in this subdivision, on the basis of evaluation factors published in the Request for Proposal and all information developed in the selection process to this point, the Institution shall select in the order of preference two or more offerors whose professional qualifications and proposed services are deemed most meritorious. Negotiations shall then be conducted, beginning with the offeror ranked first. If a contract satisfactory and advantageous to the Institution can be negotiated at a price considered fair and reasonable, the award shall be made to that offeror. Otherwise, negotiations with the offeror ranked first shall be formally terminated and negotiations conducted with the offeror ranked second, and so on until such a contract can be negotiated at a fair and reasonable price. Should the Institution determine in writing and in its sole discretion that only one offeror is fully qualified, or that one offeror is clearly more highly qualified

and suitable than the others under consideration, a contract may be negotiated and awarded to that offeror.

A contract for architectural or professional engineering services relating to construction projects may be negotiated by the Institution, for multiple projects provided (i) the projects require similar experience and expertise, and (ii) the nature of the projects is clearly identified in the Request for Proposal. Under such contract, (a) the fair and reasonable prices, as negotiated, shall be used in determining the cost of each project performed, (b) the sum of all projects performed in one contract term shall be as set in the Request for Proposal; and (c) the project fee of any single project shall not exceed the term limit as set in the Request for Proposal. Any unused amounts from any contract term may be carried forward. Competitive negotiations for such contracts may result in awards to more than one offeror provided the Request for Proposal stated the potential for a multi-vendor award.

Multiphase professional services contracts satisfactory and advantageous to the Institution for environmental, location, design and inspection work regarding construction of infrastructure projects may be negotiated and awarded based on qualifications at a fair and reasonable price for the first phase only, when completion of the earlier phases is necessary to provide information critical to the negotiation of a fair and reasonable price for succeeding phases. Prior to the procurement of any such contract, the Institution shall state the anticipated intended total scope of the project and determine in writing that the nature of the work is such that the best interests of such Institution require awarding the contract.

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

“Competitive sealed bidding” is a method of contractor selection, other than for professional services, which includes the following elements:

1. Issuance of a written Invitation to Bid containing or incorporating by reference the specifications and contractual terms and conditions applicable to the procurement. Unless the Institution has provided for prequalification of bidders, the Invitation to Bid shall include a statement of any requisite qualifications of potential contractors. When it is impractical to prepare initially a purchase description to support an award based on prices, an Invitation to Bid may be issued requesting the submission of unpriced offers to

be followed by an Invitation to Bid limited to those bidders whose offers have been qualified under the criteria set forth in the first solicitation.

2. Public notice of the Invitation to Bid at least 10 days prior to the date set for receipt of bids by publication on the Department of General Services' central electronic procurement website. Public notice also may be published in a newspaper of general circulation or on other appropriate websites, or both. In addition, bids may be solicited directly from potential contractors. Any additional solicitations shall include businesses selected from a list made available by the Department of Minority Business Enterprise.

3. Public opening and announcement of all bids received.

4. Evaluation of bids based upon the requirements set forth in the invitation, which may include special qualifications of potential contractors, life-cycle costing, value analysis, and any other criteria such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose, which are helpful in determining acceptability.

5. Award to the lowest responsive and responsible bidder. When the terms and conditions of multiple awards are so provided in the Invitation to Bid, awards may be made to more than one bidder.

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

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

“Covered Institution” or “Institution” means, on and after the effective date of the initial management agreement with the Commonwealth of Virginia, a public institution of higher education of the Commonwealth that has entered into a management agreement with the Commonwealth to be governed by the provisions of Subchapter 3 of the Restructuring Act.

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

“Goods” means all material, equipment, supplies, and printing, including information technology and telecommunications goods such as automated data processing hardware and software.

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

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

“Nonprofessional services” means any services not specifically identified as professional services in the definition of professional services and includes small construction projects valued not over \$1 million; provided that subdivision 3a of the definition of “competitive negotiation” in this section shall still apply to professional services for such small construction projects.

“Potential bidder or offeror” for the purposes of §§ 50 and 54 of these Rules means a person who, at the time the Institution negotiates and awards or proposes to award a contract, is engaged in the sale or lease of goods, or the sale of services, insurance or construction, of the type to be procured under the contract, and who at such time is eligible and qualified in all respects to perform that contract, and who would have been eligible and qualified to submit a bid or proposal had the contract been procured through competitive sealed bidding or competitive negotiation.

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

“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 these Rules.

“Public contract” means an agreement between the Institution and a nongovernmental source that is enforceable in a court of law.

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

“Responsive bidder” means a person who has submitted a bid that conforms in all material respects to the Invitation to Bid.

“Restructuring Act” or “Act” means the Restructured Higher Education Financial and Administrative Operations Act, Chapter 4.10 (§ 23-38.88 et seq.) of Title 23 of the Code of Virginia.

“Rules” means these Rules Governing Procurement of Goods, Services, Insurance, and Construction adopted by the governing body of the Covered Institution.

“Reverse auctioning” means a procurement method wherein 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 shall have the opportunity to modify their bid prices for the duration of the time period established for bid opening.

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

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

**§ 5. Methods of procurement. –**

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

B. Professional services shall be procured by competitive negotiation. Qualification-based selection shall be used for design services.

C. Goods, services, or insurance may be procured by competitive negotiation.

D. Construction may be procured only by competitive sealed bidding, except that competitive negotiation may be used in the following instances upon a determination made in advance by the Institution and set forth in writing that competitive sealed bidding is either not practicable or not fiscally advantageous to the public, which writing shall document the basis for this determination:

1. By the Institution on a fixed price design-build basis or construction management basis under § 7;

2. By the Institution for the construction, alteration, repair, renovation or demolition of buildings; or

3. By the Institution for the construction of highways and any draining, dredging, excavation, grading or similar work upon real property.

E. Upon a determination in writing that there is only one source practicably available for that which is to be procured, a contract may be negotiated and awarded to that source without competitive sealed bidding or competitive negotiation. The writing shall document the basis for this determination. The Institution shall issue a written notice stating that only one source was determined to be practicably available, and identifying that which is being procured, the contractor selected, and the date on which the contract was or will be awarded. This notice shall be posted in a designated public area, which may be the Department of General Services' website for the Commonwealth's central electronic procurement system, or published in a newspaper of general circulation on the day the Institution awards or announces its decision to award the contract, whichever occurs first. Public notice shall also be published on the Department of General Services' website for the Commonwealth's central electronic procurement system and may be published on other appropriate websites.

F. In case of emergency, a contract may be awarded without competitive sealed bidding or competitive negotiation; however, such procurement shall be made with such competition as is practicable under the circumstances. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file. The Institution shall issue a written notice stating that the contract is being awarded on an emergency basis, and identifying that which is being procured, the contractor selected, and the date on which the contract was or will be awarded. This notice shall be posted in a designated public area, which may be the Department of General Services' website for the Commonwealth's central electronic procurement system, or published in a newspaper of general circulation on the day the Institution awards or announces its decision to award the contract, whichever occurs first, or as soon

thereafter as is practicable. Public notice may also be published on the Department of General Services' website for the Commonwealth's central electronic procurement system and other appropriate websites.

G. The Institution may establish purchase procedures, if adopted in writing, not requiring competitive sealed bids or competitive negotiation for single or term contracts for goods and services other than professional services if the aggregate or the sum of all phases is not expected to exceed \$50,000; however, such small purchase procedures shall provide for competition wherever practicable.

H. The Institution may establish purchase procedures, if adopted in writing, not requiring competitive negotiation for single or term contracts for professional services if the aggregate or the sum of all phases is not expected to exceed \$50,000; however such small purchase procedures shall provide for competition wherever practicable.

I. Upon a determination made in advance by the Institution and set forth in writing that the purchase of goods, products or commodities from a public auction sale is in the best interests of the public, such items may be purchased at the auction, including online public auctions. The writing shall document the basis for this determination.

J. The purchase of goods or nonprofessional services, but not construction or professional services, may be made by reverse auctioning.

#### **§ 6. Cooperative procurement. –**

A. In circumstances where the Institution determines and documents that statewide contracts for goods and services, including information technology and telecommunications goods and services, do not provide goods and services to the Institution that meet its business goals and objectives, the Institution is authorized to participate in, sponsor, conduct, or administer a cooperative procurement arrangement on behalf of or in conjunction with public bodies, public or private health or educational institutions, other public or private organizations or entities, including public-private partnerships, charitable organizations, health care provider alliances or purchasing organizations or entities, or with public agencies or institutions or group purchasing organizations of the several states, territories of the United States, or the District of Columbia, for the purpose of combining requirements to effect cost savings or reduce administrative expense in any acquisition of goods and services, other than professional services. The Institution may purchase from any authority, department, agency, institution, city, county, town, or other political subdivision of the Commonwealth's contract even if it did not participate in the request for proposal or invitation to bid, if the request for proposal or invitation to bid specified that the procurement was being conducted on behalf of other public bodies. In such instances, deviation from the procurement procedures set forth in these Rules and the administrative policies and procedures established to implement these Rules shall be permitted. Notwithstanding all of the above, use of cooperative contracts shall conform to the business requirements of the Commonwealth's electronic procurement system, including the requirement for payment of applicable fees. Nothing herein shall prohibit the payment by direct or indirect means of any administrative fee that will allow for participation in any such arrangement.

B. In circumstances where statewide contracts for goods and services, including information technology and telecommunications goods and services, do not provide goods and services to meet the Institution's business goals and objectives, and as authorized by the United States Congress and consistent with applicable federal regulations, and provided the terms of the contract permit such purchases:

1. The Institution may purchase goods and nonprofessional services, from a United States General Services Administration contract or a contract awarded by any other agency of the United States government; and

2. The Institution may purchase telecommunications and information technology goods and nonprofessional services from a United States General Services Administration contract or a contract awarded by any other agency of the United States government.

**§ 7. Design-build or construction management contracts authorized. –**

A. Notwithstanding any other provisions of law, the Institution may enter into contracts on a fixed price design-build basis or construction management basis in accordance with the provisions of this section.

B. Procurement of construction by the design-build or construction management method shall be a two-step competitive negotiation process. In the first step, offerors shall be requested to submit their qualifications. Based upon the information submitted and any other relevant information which the Commonwealth may obtain, no more than five offerors deemed most suitable for the project shall be selected by the Commonwealth and requested to submit proposals.

**§ 8. Modification of the contract. –**

A. A contract awarded by the Institution 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, without the advance written approval of the Institution's president or his designee. In no event may the amount of any contract, without adequate consideration, be increased for any purpose, including, but not limited to, relief of an offeror from the consequences of an error in its bid or offer.

B. The Institution 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.

C. Nothing in this section shall prevent the Institution from placing greater restrictions on contract modifications.

**§ 9. Discrimination prohibited; participation of small, women- and minority-owned business. –**

A. In the solicitation or awarding of contracts, the Institution shall not discriminate against a bidder or offeror because of race, religion, color, sex, national origin, age, disability, or any other basis prohibited by state law relating to discrimination in employment. Whenever solicitations are made, the Institution shall include businesses selected from a list made available by the Department of Minority Business Enterprise.

B. The Institution shall establish programs consistent with this section to facilitate the participation of small businesses and businesses owned by women and minorities in procurement transactions. The programs established shall be in writing and shall include cooperation with the Department of Minority Business Enterprise, the United States Small Business Administration, and other public or private agencies. The Institution shall submit annual progress reports on minority business procurement to the Department of Minority Business Enterprise.

C. Whenever there exists (i) a rational basis for small business enhancement or (ii) a persuasive analysis that documents a statistically significant disparity between the availability and utilization of women- and minority-owned businesses, the Governor is by law authorized and encouraged to require the Institution to implement appropriate enhancement or remedial measures consistent with prevailing law.

D. In the solicitation or awarding of contracts, the Institution shall not discriminate against a bidder or offeror because the bidder or offeror employs ex-offenders unless it has made a written determination that employing ex-offenders on the specific contract is not in its best interest.

**§ 10. Employment discrimination by contractor prohibited; required contract provisions. –**

The Institution shall include in every contract of more than \$10,000 the following provisions:

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

a. The contractor will not discriminate against any employee or applicant for employment because of race, religion, color, sex, national origin, age, disability, 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.

**§ 11. Drug-free workplace to be maintained by contractor; required contract provisions.–**

The Institution 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 these Rules, 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.

**§ 12. 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 Institution 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.

**§ 13. Comments concerning specifications. –**

The Institution shall establish procedures whereby comments concerning specifications or other provisions in Invitations to Bid or Requests for Proposal can be received and considered prior to the time set for receipt of bids or proposals or award of the contract.

**§ 14. Prequalification generally; prequalification for construction. –**

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

B. Any prequalification of prospective contractors for construction by the Institution shall be pursuant to a prequalification process for construction projects adopted by the Institution. The process shall be consistent with the provisions of this section.

The application form used in such process shall set forth the criteria upon which the qualifications of prospective contractors will be evaluated. The application form shall request of prospective contractors only such information as is appropriate for an objective evaluation of all prospective contractors pursuant to such criteria. The form shall allow the prospective contractor seeking prequalification to request, by checking the appropriate box, that all information voluntarily submitted by the contractor pursuant to this subsection shall be considered a trade secret or proprietary information subject to the provisions of subsection D of § 34 of these Rules.

In all instances in which the Institution requires prequalification of potential contractors for construction projects, advance notice shall be given of the deadline for the submission of prequalification applications. The deadline for submission shall be sufficiently in advance of the date set for the submission of bids for such construction so as to allow the procedures set forth in this subsection to be accomplished.

At least 30 days prior to the date established for submission of bids or proposals under the procurement of the contract for which the prequalification applies, the Institution shall advise in writing each contractor who submitted an application whether that contractor has been prequalified. In the event that a contractor is denied prequalification, the written notification to the contractor shall state the reasons for the denial of prequalification and the factual basis of such reasons.

A decision by the Institution denying prequalification under the provisions of this subsection shall be final and conclusive unless the contractor appeals the decision as provided in § 54 of these Rules.

C. The Institution may deny prequalification to any contractor only if the Institution finds one of the following:

1. The contractor 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 contractor 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 Institution shall be sufficient to establish the financial ability of the contractor to perform the contract resulting from such procurement;

2. The contractor does not have appropriate experience to perform the construction project in question;

3. The contractor or any officer, director or owner thereof has had judgments entered against him within the past 10 years for the breach of contracts for governmental or nongovernmental construction, including, but not limited to, design-build or construction management;

4. The contractor has been in substantial noncompliance with the terms and conditions of prior construction contracts with the Institution without good cause. If the Institution has not contracted with a contractor in any prior construction contracts, the Institution may deny prequalification if the contractor has been in substantial noncompliance with the terms and conditions of comparable construction contracts with another public body without good cause. The Institution may not utilize this provision to deny prequalification unless the facts underlying such substantial noncompliance were documented in writing in the prior construction project file and such information relating thereto given to the contractor at that time, with the opportunity to respond;

5. The contractor or any officer, director, owner, project manager, procurement manager or chief financial official thereof has been convicted within the past 10 years of a crime related to governmental or nongovernmental construction or contracting, including, but not limited to, a violation of (i) Article 6 (§ 2.2-4367 et seq.) of Chapter 43 of Title 2.2 of the Code of Virginia, (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;

6. The contractor or any officer, director or owner thereof is currently debarred pursuant to an established debarment procedure from bidding or contracting by any public body, agency of another state or agency of the federal government; and

7. The contractor failed to provide to the Institution in a timely manner any information requested by the Institution relevant to subdivisions 1 through 6 of this subsection.

**§ 15. Negotiation with lowest responsible bidder. –**

Unless canceled or rejected, a responsive bid from the lowest responsible bidder shall be accepted as submitted, except that if the bid from the lowest responsible bidder exceeds available funds, the Institution 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 Institution prior to issuance of the Invitation to Bid and summarized therein.

**§ 16. Cancellation, rejection of bids; waiver of informalities. –**

A. An Invitation to Bid, a Request for Proposal, any other solicitation, or any and all bids or proposals, may be canceled or rejected. The reasons for cancellation or rejection shall be made part of the contract file. The Institution 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.

B. The Institution may waive informalities in bids.

**§ 17. Exclusion of insurance bids prohibited. –**

Notwithstanding any other provision of law, no insurer licensed to transact the business of insurance in the Commonwealth or approved to issue surplus lines insurance in the Commonwealth shall be excluded from presenting an insurance bid proposal to the Institution in response to a request for proposal or an invitation to bid. Nothing in this section shall preclude the Institution from debarring a prospective insurer pursuant to § 18.

**§ 18. Debarment. –**

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

**§ 19. Purchase programs for recycled goods; Institution responsibilities. –**

A. The Institution may implement a purchase program for recycled goods and may coordinate its efforts so as to achieve the goals and objectives set forth in §§ 10.1-1425.6, 10.1-1425.7, and 10.1-1425.8 of the Code of Virginia and §§ 20 and 22 of these Rules.

B. The Department of Environmental Quality, with advice from the Virginia Recycling Markets Development Council, shall advise the Institution concerning the designation of recycled goods.

**§ 20. Preference for Virginia products with recycled content and for Virginia firms. –**

A. In the case of a tie bid, preference shall be given to goods produced in Virginia, goods or services or construction provided by Virginia persons, firms or corporations; otherwise the tie shall be decided by lot.

B. Whenever any bidder is a resident of any other state and such state under its laws allows a resident contractor of that state a preference, a like preference may be allowed by the Institution to the lowest responsive and responsible bidder who is a resident of Virginia.

C. Notwithstanding the provisions of subsections A and B, 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.

**§ 21. Preference for Virginia coal used in the Institution. –**

In determining the award of any contract for coal to be purchased for use in the Institution with state funds, the Institution shall procure using competitive sealed bidding and shall award to the lowest responsive and responsible bidder offering coal mined in Virginia so long as its bid price is not more than 4% greater than the bid price of the low responsive and responsible bidder offering coal mined elsewhere.

**§ 22. Preference for recycled paper and paper products used by the Institution. –**

A. In determining the award of any contract for paper and paper products to be purchased for use by the Institution, it shall competitively procure recycled paper and paper products of a quality suitable for the purpose intended, so long as the price is not more than 10% greater than the price of the low responsive and responsible bidder or offeror offering a product that does not qualify under subsection B.

B. For purposes of this section, recycled paper and paper products means any paper or paper products meeting the EPA Recommended Content Standards as defined in 40 C.F.R. Part 247.

**§ 23. Withdrawal of bid due to error. –**

A. A bidder for a public construction contract, other than a contract for construction or maintenance of public highways, may withdraw his bid from consideration if the price bid was substantially lower than the other bids due solely to a mistake in the bid, provided the bid was submitted in good faith, and the mistake was a clerical mistake as opposed to a judgment mistake, and was actually due to an unintentional arithmetic error or an unintentional omission of a quantity of work, labor or material made directly in the compilation of a bid, which unintentional arithmetic error or unintentional omission can be clearly shown by objective

evidence drawn from inspection of original work papers, documents and materials used in the preparation of the bid sought to be withdrawn.

If a bid contains both clerical and judgment mistakes, a bidder may withdraw his bid from consideration if the price bid would have been substantially lower than the other bids due solely to the clerical mistake, that was an unintentional arithmetic error or an unintentional omission of a quantity of work, labor or material made directly in the compilation of a bid that shall be clearly shown by objective evidence drawn from inspection of original work papers, documents and materials used in the preparation of the bid sought to be withdrawn.

One of the following procedures for withdrawal of a bid shall be selected by the Institution and stated in the advertisement for bids: (i) the bidder shall give notice in writing of his claim of right to withdraw his bid within two business days after the conclusion of the bid opening procedure and shall submit original work papers with such notice; or (ii) the bidder shall submit to the Institution or designated official his original work papers, documents and materials used in the preparation of the bid within one day after the date fixed for submission of bids. The work papers shall be delivered by the bidder in person or by registered mail at or prior to the time fixed for the opening of bids. In either instance, the work papers, documents and materials may be considered as trade secrets or proprietary information subject to the conditions of subsection F of § 34 of these Rules. The bids shall be opened one day following the time fixed by the Institution for the submission of bids. Thereafter, the bidder shall have two hours after the opening of bids within which to claim in writing any mistake as defined herein and withdraw his bid. The contract shall not be awarded by the Institution until the two-hour period has elapsed. The mistake shall be proved only from the original work papers, documents and materials delivered as required herein.

B. The Institution may establish procedures for the withdrawal of bids for other than construction contracts.

C. No bid shall be withdrawn under this section when the result would be the awarding of the contract on another bid of the same bidder or of another bidder in which the ownership of the withdrawing bidder is more than 5%.

D. If a bid is withdrawn in accordance with this section, the lowest remaining bid shall be deemed to be the low bid.

E. No bidder who is permitted to withdraw a bid shall, for compensation, supply any material or labor to or perform any subcontract or other work agreement for the person or firm to whom the contract is awarded or otherwise benefit, directly or indirectly, from the performance of the project for which the withdrawn bid was submitted.

F. If the Institution denies the withdrawal of a bid under the provisions of this section, it shall notify the bidder in writing stating the reasons for its decision and award the contract to such bidder at the bid price, provided such bidder is a responsible and responsive bidder.

**§ 24. Contract Pricing Arrangements. –**

A. Public contracts may be awarded on a fixed price or cost reimbursement basis, or on any other basis that is not prohibited by these Rules.

B. 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.

C. A policy or contract of insurance or prepaid coverage having a premium computed on the basis of claims paid or incurred, plus the insurance carrier's administrative costs and retention stated in whole or part as a percentage of such claims, shall not be prohibited by this section.

**§ 25. Workers' compensation requirements for construction contractors and subcontractors. –**

A. No contractor shall perform any work on a construction project of the Institution unless he (i) has obtained, and continues to maintain for the duration of the work, workers' compensation coverage required pursuant to the provisions of Chapter 8 (§ 65.2-800 et seq.) of Title 65.2 of the Code of Virginia, and (ii) provides prior to the award of contract, on a form furnished by the Institution, evidence of such coverage.

B. The Department of General Services shall provide the form to the Institution. Failure of the Institution to provide the form prior to the award of contract shall waive the requirements of clause (ii) of subsection A.

C. No subcontractor shall perform any work on a construction project of the Institution unless he has obtained, and continues to maintain for the duration of such work, workers' compensation coverage required pursuant to the provisions of Chapter 8 (§ 65.2-800 et seq.) of Title 65.2 of the Code of Virginia.

**§ 26. Retainage on construction contracts. –**

A. In any contract issued by the Institution for construction that provides for progress payments in installments based upon an estimated percentage of completion, the contractor shall be paid at least 95% of the earned sum when payment is due, with no more than 5% being retained to ensure faithful performance of the contract. All amounts withheld may be included in the final payment.

B. Any subcontract for a public project that provides for similar progress payments shall be subject to the provisions of this section.

**§ 27. Public construction contract provisions barring damages for unreasonable delays declared void. –**

A. Any provision contained in any public construction contract of the Institution that purports to waive, release, or extinguish the rights of a contractor to recover costs or damages for unreasonable delay in performing such contract, either on his behalf or on behalf of his subcontractor if and to the extent the delay is caused by acts or omissions of the Institution, its agents or employees and due to causes within their control shall be void and unenforceable as against public policy.

B. Subsection A shall not be construed to render void any provision of a public construction contract awarded by the Institution that:

1. Allows the recovery of that portion of delay costs caused by the acts or omissions of the contractor, or its subcontractors, agents or employees;

2. Requires notice of any delay by the party claiming the delay;

3. Provides for liquidated damages for delay; or

4. Provides for arbitration or any other procedure designed to settle contract disputes.

C. A contractor making a claim against the Institution for costs or damages due to the alleged delaying of the contractor in the performance of its work under any public construction contract of the Institution shall be liable to the Institution and shall pay it for a percentage of all costs incurred by the Institution in investigating, analyzing, negotiating, litigating and arbitrating the claim, which percentage shall be equal to the percentage of the contractor's total delay claim that is determined through litigation or arbitration to be false or to have no basis in law or in fact.

D. If the Institution denies a contractor's claim for costs or damages due to the alleged delaying of the contractor in the performance of work under any public construction contract for the Institution, it shall be liable to and shall pay such contractor a percentage of all costs incurred by the contractor to investigate, analyze, negotiate, litigate and arbitrate the claim. The percentage paid by the Institution shall be equal to the percentage of the contractor's total delay claim for which the Institution's denial is determined through litigation or arbitration to have been made in bad faith.

**§ 28. Bid bonds. –**

A. Except in cases of emergency, all bids or proposals for construction contracts in excess of \$1 million shall be accompanied by a bid bond from a surety company selected by the bidder that is authorized to do business in Virginia, as a guarantee that if the contract is awarded to the bidder, he will enter into the contract for the work mentioned in the bid. The amount of the bid bond shall not exceed 5% of the amount bid.

B. No forfeiture under a bid bond shall exceed the lesser of (i) the difference between the bid for which the bond was written and the next low bid, or (ii) the face amount of the bid bond.

C. Nothing in this section shall preclude the Institution from requiring bid bonds to accompany bids or proposals for construction contracts anticipated to be less than \$1 million.

**§ 29. Performance and payment bonds. –**

A. Upon the award by the Institution of any (i) public construction contract exceeding \$1 million awarded to any prime contractor or (ii) public construction contract exceeding \$1 million awarded to any prime contractor requiring the performance of labor or the furnishing of materials for buildings, structures or other improvements to real property owned by the Institution, the contractor shall furnish to the Institution the following bonds:

1. Except for transportation-related projects, a performance bond in the sum of the contract amount conditioned upon the faithful performance of the contract in strict conformity with the plans, specifications and conditions of the contract. For transportation-related projects, such bond shall be in a form and amount satisfactory to the Institution.

2. A payment bond in the sum of the contract amount. The bond shall be for the protection of claimants who have and fulfill contracts to supply labor or materials to the prime contractor to whom the contract was awarded, or to any subcontractors, in furtherance of the work provided for in the contract, and shall be conditioned upon the prompt payment for all materials furnished or labor supplied or performed in the furtherance of the work.

"Labor or materials" shall include public utility services and reasonable rentals of equipment, but only for periods when the equipment rented is actually used at the site.

B. Each of the bonds shall be executed by one or more surety companies selected by the contractor that are authorized to do business in Virginia.

C. The bonds shall be payable to the Commonwealth of Virginia naming also the Institution.

D. Each of the bonds shall be filed with the Institution, or a designated office or official thereof.

E. Nothing in this section shall preclude the Institution from requiring payment or performance bonds for construction contracts below \$1 million.

F. Nothing in this section shall preclude the contractor from requiring each subcontractor to furnish a payment bond with surety thereon in the sum of the full amount of the contract with such subcontractor conditioned upon the payment to all persons who have and fulfill contracts that are directly with the subcontractor for performing labor and furnishing materials in the prosecution of the work provided for in the subcontract.

**§ 30. Alternative forms of security. –**

A. In lieu of a bid, payment, or performance bond, a bidder may furnish a certified check or cash escrow in the face amount required for the bond.

B. If approved by the Institution's General Counsel or his equivalent, a bidder may furnish to the Institution a personal bond, property bond, or bank or savings institution's letter of credit on certain designated funds in the face amount required for the bid, payment or performance bond. Approval shall be granted only upon a determination that the alternative form of security proffered affords protection to the Institution equivalent to a corporate surety's bond.

**§ 31. Bonds on other than construction contracts. –**

The Institution may require bid, payment, or performance bonds for contracts for goods or services if provided in the Invitation to Bid or Request for Proposal.

**§ 32. Action on performance bond. –**

No action against the surety on a performance bond shall be brought by the Institution unless brought within one year after (i) completion of the contract, including the expiration of all warranties and guarantees, or (ii) discovery of the defect or breach of warranty that gave rise to the action.

**§ 33. Actions on payment bonds; waiver of right to sue. –**

A. Subject to the provisions of subsection B, any claimant who has performed labor or furnished material in accordance with the contract documents in furtherance of the work provided in any contract for which a payment bond has been given, and who has not been paid in full before the expiration of 90 days after the day on which the claimant performed the last of the labor or furnished the last of the materials for which he claims payment, may bring an action on the

payment bond to recover any amount due him for the labor or material. The obligee named in the bond need not be named a party to the action.

B. Any claimant who has a direct contractual relationship with any subcontractor but who has no contractual relationship, express or implied, with the contractor, may bring an action on the contractor's payment bond only if he has given written notice to the contractor within 180 days from the day on which the claimant performed the last of the labor or furnished the last of the materials for which he claims payment, stating with substantial accuracy the amount claimed and the name of the person for whom the work was performed or to whom the material was furnished. Notice to the contractor shall be served by registered or certified mail, postage prepaid, in an envelope addressed to such contractor at any place where his office is regularly maintained for the transaction of business. Claims for sums withheld as retainages with respect to labor performed or materials furnished, shall not be subject to the time limitations stated in this subsection.

C. Any action on a payment bond shall be brought within one year after the day on which the person bringing such action last performed labor or last furnished or supplied materials.

D. Any waiver of the right to sue on the payment bond required by this section shall be void unless it is in writing, signed by the person whose right is waived, and executed after such person has performed labor or furnished material in accordance with the contract documents.

#### **§ 34. Public inspection of certain records. –**

A. Except as provided in this section, all proceedings, records, contracts and other public records relating to procurement transactions shall be open to the inspection of any citizen, or any interested person, firm or corporation, in accordance with the Virginia Freedom of Information Act (§ 2.2-3700 et seq.).

B. Cost estimates relating to a proposed procurement transaction prepared by or for the Institution shall not be open to public inspection.

C. Any competitive sealed bidding bidder, upon request, shall be afforded the opportunity to inspect bid records within a reasonable time after the opening of all bids but prior to award, except in the event that the Institution decides not to accept any of the bids and to reopen the contract. Otherwise, bid records shall be open to public inspection only after award of the contract.

D. Any competitive negotiation offeror, upon request, shall be afforded the opportunity to inspect proposal records within a reasonable time after the evaluation and negotiations of proposals are completed but prior to award, except in the event that the Institution decides not to

accept any of the proposals and to reopen the contract. Otherwise, proposal records shall be open to public inspection only after award of the contract.

E. Any inspection of procurement transaction records under this section shall be subject to reasonable restrictions to ensure the security and integrity of the records.

F. Trade secrets or proprietary information submitted by a bidder, offeror or contractor in connection with a procurement transaction or prequalification application submitted pursuant to subsection B of § 14 shall not be subject to the Virginia Freedom of Information Act (§ 2.2-3700 et seq.); however, the bidder, offeror or contractor shall (i) invoke the protections of this section prior to or upon submission of the data or other materials, (ii) identify the data or other materials to be protected, and (iii) state the reasons why protection is necessary.

**§ 35. Exemption for certain transactions. –**

A. The provisions of these Rules shall not apply to:

1. The selection of services related to the management and investment of the Institution's endowment funds, endowment income, or gifts pursuant to § 23-76.1. However, selection of these services shall be governed by the Uniform Management of Institutional Funds Act (§ 55-268.1 et seq.) as required by § 23-76.1.
2. The purchase of items for resale at retail bookstores and similar retail outlets operated by the Institution. However, such purchase procedures shall provide for competition where practicable.
3. Procurement of any construction or planning and design services for construction by the Institution when (i) the planning, design or construction is \$50,000 or less or (ii) the Institution is obligated to conform to procurement procedures that are established by federal statutes or regulations, whether or not those federal procedures are in conformance with the provisions of these Rules.
4. The University of Virginia Medical Center.
5. The purchase of goods and services by the Institution when such purchases are made under a remedial plan established by the Governor pursuant to subsection C of § 9 of these Rules.

B. Where a procurement transaction involves the expenditure of federal assistance or contract funds, the receipt of which is conditioned upon compliance with mandatory requirements in federal laws or regulations not in conformance with the provisions of these Rules, the Institution may comply with such federal requirements, notwithstanding the provisions of these Rules, only upon the written determination of the Institution's President or his designee that acceptance of the grant or contract funds under the applicable conditions is in the public interest. Such determination shall state the specific provision of these Rules in conflict with the conditions of the grant or contract.

**§ 36. Permitted contracts with certain religious organizations; purpose; limitations. –**

A. The Opportunity Reconciliation Act of 1996, P.L. 104-193, authorizes public bodies to enter into contracts with faith-based organizations for the purposes described in this section 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.

B. For the purposes of this section, "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.

C. The Institution, in procuring 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.

D. The Institution shall ensure that all invitations to bid, requests for proposals, contracts, and purchase orders prominently display a nondiscrimination statement indicating that it does not discriminate against faith-based organizations.

E. A faith-based organization contracting with the Institution (i) shall not discriminate against any recipient of goods, services, or disbursements made pursuant to a contract authorized by this section on the basis of the recipient's religion, religious belief, refusal to participate in a religious practice, or on the basis of race, age, color, gender or national origin and (ii) shall be subject to the same rules as other organizations that contract with public bodies to account for the use of the funds provided; however, if the faith-based organization segregates public funds into separate accounts, only the accounts and programs funded with public funds shall be subject to audit by the Institution. Nothing in clause (ii) shall be construed to supercede or otherwise override any other applicable state law.

F. Consistent with the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P.L. 104-193, funds provided for expenditure pursuant to contracts with public bodies shall not be spent for sectarian worship, instruction, or proselytizing; however, this prohibition shall not apply to expenditures pursuant to contracts, if any, for the services of chaplains.

G. Nothing in this section shall be construed as barring or prohibiting a faith-based organization from any opportunity to make a bid or proposal or contract on the grounds that the faith-based organization has exercised the right, as expressed in 42 U.S.C. (§ 2000e-1 et seq.), to employ persons of a particular religion.

H. If an individual, who applies for or receives goods, services, or disbursements provided pursuant to a contract between the Institution and a faith-based organization, objects to the religious character of the faith-based organization from which the individual receives or would receive the goods, services, or disbursements, the Institution shall offer the individual, within a reasonable period of time after the date of his objection, access to equivalent goods, services, or disbursements from an alternative provider.

The Institution shall provide to each individual who applies for or receives goods, services, or disbursements provided pursuant to a contract between the Institution and a faith-based organization a notice in bold face type that states: "Neither the Institution's selection of a charitable or faith-based provider of services nor the expenditure of funds under this contract is an endorsement of the provider's charitable or religious character, practices, or expression. No provider of services may discriminate against you on the basis of religion, a religious belief, or your refusal to actively participate in a religious practice. If you object to a particular provider because of its religious character, you may request assignment to a different provider. If you believe that your rights have been violated, please discuss the complaint with your provider or notify the appropriate person as indicated in this form."

**§ 37. Exemptions from competition for certain transactions. –**

The Institution may enter into contracts without competition, as that term is described in subsections A through J of § 5 (Methods of procurement) of these Rules, for:

1. The purchase of goods or services that are produced or performed by or related to:
  - a. Persons, or in schools or workshops, under the supervision of the Virginia Department for the Blind and Vision Impaired;
  - b. Nonprofit sheltered workshops or other nonprofit organizations that offer transitional or supported employment services serving the handicapped;

- c. Private educational institutions; or
  - d. Other public educational institutions.
2. Speakers and performing artists;
  3. Memberships and Association dues;
  4. Sponsored research grant sub-awards and contract sub-awards, not to include the purchase of goods or services by the Institution;
  5. Group travel in foreign countries;
  6. Conference facilities and services;
  7. Participation in intercollegiate athletic tournaments and events including team travel and lodging, registration and tournament fees;
  8. Royalties; or
  9. The purchase of legal services, provided that the Office of the Attorney General has been consulted, or expert witnesses or other services associated with litigation or regulatory proceedings.

**§ 38. Exemptions from competitive sealed bidding and competitive negotiation for certain transactions; limitations. –**

The Institution may enter into contracts for insurance or electric utility service without competitive sealed bidding or competitive negotiation if purchased through an association of which the Institution is a member if the association was formed and is maintained for the purpose of promoting the interest and welfare of and developing close relationships with similar public bodies, provided such association has procured the insurance or electric utility services by use of competitive principles and provided that the Institution has made a determination in advance after reasonable notice to the public and set forth in writing that competitive sealed bidding and competitive negotiation are not fiscally advantageous to the public. The writing shall document the basis for this determination.

**§ 39. Definitions. –**

As used in §§ 39 through 46, unless the context requires a different meaning:

"Contractor" means the entity that has a direct contract with the Institution.

"Debtor" means any individual, business, or group having a delinquent debt or account with any state agency that obligation has not been satisfied or set aside by court order or discharged in bankruptcy.

"Payment date" means either (i) the date on which payment is due under the terms of a contract for provision of goods or services; or (ii) if such date has not been established by contract, (a) 30 days after receipt of a proper invoice by the Institution or its agent or (b) 30 days after receipt of the goods or services by the Institution.

"Subcontractor" means any entity that has a contract to supply labor or materials to the contractor to whom the contract was awarded or to any subcontractor in the performance of the work provided for in such contract.

**§ 40. Exemptions. –**

The provisions of §§ 39 through 46 shall not apply to the late payment provisions contained in any public utility tariffs prescribed by the State Corporation Commission.

**§ 41. Retainage to remain valid. –**

Notwithstanding the provisions of §§ 39 through 46, the provisions of § 26 relating to retainage shall remain valid.

**§ 42. Prompt payment of bills by the Institution. –**

A. The Institution shall promptly pay for the completely delivered goods or services by the required payment date.

Payment shall be deemed to have been made when offset proceedings have been instituted, as authorized under the Virginia Debt Collection Act (§ 2.2-4800 et seq.) of the Code of Virginia.

B. Separate payment dates may be specified for contracts under which goods or services are provided in a series of partial deliveries or executions to the extent that such contract provides for separate payment for such partial delivery or execution.

**§ 43. Defect or impropriety in the invoice or goods and/or services received. –**

In instances where there is a defect or impropriety in an invoice or in the goods or services received, the Institution shall notify the supplier of the defect or impropriety, if the

defect or impropriety would prevent payment by the payment date. The notice shall be sent within 15 days after receipt of the invoice or the goods or services.

**§ 44. Date of postmark deemed to be date payment is made. –**

In those cases where payment is made by mail, the date of postmark shall be deemed to be the date payment is made for purposes of these Rules.

**§ 45. Payment clauses to be included in contracts. –**

Any contract awarded by the Institution shall include:

1. 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 Institution for work performed by the subcontractor under that contract:

a. Pay the subcontractor for the proportionate share of the total payment received from the Institution attributable to the work performed by the subcontractor under that contract; or

b. Notify the Institution and subcontractor, in writing, of his intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment.

2. 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.

3. 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 Institution for work performed by the subcontractor under that contract, except for amounts withheld as allowed in subdivision 1.

4. An interest rate clause stating, "Unless otherwise provided under the terms of this contract, interest shall accrue at the rate of 1% 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 Institution. 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.

**§ 46. Interest penalty; exceptions. –**

A. Interest shall accrue, at the rate determined pursuant to subsection B, on all amounts owed by the Institution to a vendor that remain unpaid after seven days following the payment date. However, nothing in this section shall affect any contract providing for a different rate of interest, or for the payment of interest in a different manner.

B. The rate of interest charged the Institution pursuant to subsection A shall be the base rate on corporate loans (prime rate) at large United States money center commercial banks as reported daily in the publication entitled The Wall Street Journal. Whenever a split prime rate is published, the lower of the two rates shall be used. However, in no event shall the rate of interest charged exceed the rate of interest established pursuant to § 58.1-1812 of the Code of Virginia.

C. Notwithstanding subsection A, no interest penalty shall be charged when payment is delayed because of disagreement between the Institution and a vendor regarding the quantity, quality or time of delivery of goods or services or the accuracy of any invoice received for the goods or services. The exception from the interest penalty provided by this subsection shall apply only to that portion of a delayed payment that is actually the subject of the disagreement and shall apply only for the duration of the disagreement.

D. This section shall not apply to § 26 pertaining to retainage on construction contracts, during the period of time prior to the date the final payment is due. Nothing contained herein shall prevent a contractor from receiving interest on such funds under an approved escrow agreement.

E. Notwithstanding subsection A, no interest penalty shall be paid to any debtor on any payment, or portion thereof, withheld pursuant to the Comptroller's Debt Setoff Program, as authorized by the Virginia Debt Collection Act (§ 2.2-4800 et seq. of the Code of Virginia), commencing with the date the payment is withheld. If, as a result of an error, a payment or portion thereof is withheld, and it is determined that at the time of setoff no debt was owed to the Commonwealth, then interest shall accrue at the rate determined pursuant to subsection B on amounts withheld that remain unpaid after seven days following the payment date.

**§ 47. Ineligibility. –**

A. Any bidder, offeror or contractor refused permission to participate, or disqualified from participation, in public contracts to be issued by the Institution shall be notified in writing. Prior to the issuance of a written determination of disqualification or ineligibility, the Institution shall (i) notify the bidder in writing of the results of the evaluation, (ii) disclose the factual support for the determination, and (iii) allow the bidder an opportunity to inspect any documents that relate to the determination, if so requested by the bidder within five business days after receipt of the notice.

Within 10 business days after receipt of the notice, the bidder may submit rebuttal information challenging the evaluation. The Institution shall issue its written determination of disqualification or ineligibility based on all information in the possession of the Institution, including any rebuttal information, within five business days of the date the Institution received such rebuttal information.

If the evaluation reveals that the bidder, offeror or contractor should be allowed permission to participate in the public contract, the Institution shall cancel the proposed disqualification action. If the evaluation reveals that the bidder should be refused permission to participate, or disqualified from participation, in the public contract, the Institution shall so notify the bidder, offeror or contractor. The notice shall state the basis for the determination, which shall be final unless the bidder appeals the decision within 10 days after receipt of the notice by invoking administrative procedures meeting the standards of § 55 of these Rules, if available, or in the alternative by instituting legal action as provided in § 54.

B. If, upon appeal, it is determined that the action taken was arbitrary or capricious, or not in accordance with the Constitution of Virginia, applicable state law or regulations, the sole relief shall be restoration of eligibility.

#### **§ 48. Appeal of denial of withdrawal of bid. –**

A. A decision denying withdrawal of bid under the provisions of § 23 of these Rules shall be final and conclusive unless the bidder appeals the decision within 10 days after receipt of the decision by invoking administrative procedures meeting the standards of § 55, if available, or in the alternative by instituting legal action as provided in § 54.

B. If no bid bond was posted, a bidder refused withdrawal of a bid under the provisions of § 23, prior to appealing, shall deliver to the Institution a certified check or cash bond in the amount of the difference between the bid sought to be withdrawn and the next low bid. Such security shall be released only upon a final determination that the bidder was entitled to withdraw the bid.

C. If, upon appeal, it is determined that the decision refusing withdrawal of the bid was 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, the sole relief shall be withdrawal of the bid.

**§ 49. Determination of nonresponsibility. –**

A. Following public opening and announcement of bids received on an Invitation to Bid, the Institution shall evaluate the bids in accordance with element 4 of the definition of "Competitive sealed bidding" in § 4 of these Rules. At the same time, the Institution shall determine whether the apparent low bidder is responsible. If the Institution so determines, then it may proceed with an award in accordance with element 5 of the definition of "Competitive sealed bidding" in § 4. If the Institution determines that the apparent low bidder is not responsible, it shall proceed as follows:

1. Prior to the issuance of a written determination of nonresponsibility, the Institution shall (i) notify the apparent low bidder in writing of the results of the evaluation, (ii) disclose the factual support for the determination, and (iii) allow the apparent low bidder an opportunity to inspect any documents that relate to the determination, if so requested by the bidder within five business days after receipt of the notice.
2. Within 10 business days after receipt of the notice, the bidder may submit rebuttal information challenging the evaluation. The Institution shall issue its written determination of responsibility based on all information in the possession of the Institution, including any rebuttal information, within five business days of the date the Institution received the rebuttal information. At the same time, the Institution shall notify, with return receipt requested, the bidder in writing of its determination.
3. Such notice shall state the basis for the determination, which shall be final unless the bidder appeals the decision within 10 days after receipt of the notice by invoking administrative procedures meeting the standards of § 55 of these Rules, if available, or in the alternative by instituting legal action as provided in § 54.

The provisions of this subsection shall not apply to procurements involving the prequalification of bidders and the rights of any potential bidders under such prequalification to appeal a decision that such bidders are not responsible.

B. If, upon appeal pursuant to § 54 or 55 of these Rules, it is determined that the decision of the Institution 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, and the award of the contract in question has not 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 subsection A of § 54, or both.

If it is determined that the decision of the Institution 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 Invitation to Bid, and an award of the contract has been made, the relief shall be as set forth in subsection B of § 54 of these Rules.

C. A bidder contesting a determination that he is not a responsible bidder for a particular contract shall proceed under this section, and may not protest the award or proposed award under the provisions of § 50 of these Rules.

D. Nothing contained in this section shall be construed to require the Institution, when procuring by competitive negotiation, to furnish a statement of the reasons why a particular proposal was not deemed to be the most advantageous.

**§ 50. Protest of award or decision to award. –**

A. Any bidder or offeror, who desires to protest the award or decision to award a contract shall submit the protest in writing to the Institution, or an official designated by the Institution, no later than 10 days after the award or the announcement of the decision to award, whichever occurs first. Public notice of the award or the announcement of the decision to award shall be given by the Institution in the manner prescribed in the terms or conditions of the Invitation to Bid or Request for Proposal. Any potential bidder or offeror on a contract negotiated on a sole source or emergency basis who desires to protest the award or decision to award such contract shall submit the protest in the same manner no later than 10 days after posting or publication of the notice of such contract as provided in § 5 of these Rules. However, if the protest of any actual or potential bidder or offeror depends in whole or in part upon information contained in public records pertaining to the procurement transaction that are subject to inspection under § 34 of these Rules, then the time within which the protest shall be submitted shall expire 10 days after those records are available for inspection by such bidder or offeror under § 34, or at such later time as provided in this section. No protest shall lie for a claim that the selected bidder or offeror is not a responsible bidder or offeror. The written protest shall include the basis for the protest and the relief sought. The Institution or designated official shall issue a decision in writing within 10 days stating the reasons for the action taken. This decision shall be final unless the bidder or offeror appeals within 10 days of receipt of the written decision by invoking administrative procedures meeting the standards of § 55 of these Rules, if available, or in the alternative by instituting legal action as provided in § 54. Nothing in this subsection shall be construed to permit a bidder to challenge the validity of the terms or conditions of the Invitation to Bid or Request for Proposal. The use of Alternative Dispute Resolution (ADR) shall constitute an administrative appeal procedure meeting the standards of § 55 of these Rules.

B. If prior to an award it is determined that the decision to award is arbitrary or capricious, then the sole relief shall be a finding to that effect. The Institution shall cancel the proposed award or

revise it to comply with the law. If, after an award, it is determined that an award of a contract was arbitrary or capricious, then the sole relief shall be as hereinafter provided.

Where the award has been made but performance has not begun, the performance of the contract may be enjoined. Where the award has been made and performance has begun, the Institution may declare the contract void upon a finding that this action is in the best interest of the public. Where a contract is declared void, the performing contractor shall be compensated for the cost of performance up to the time of such declaration. In no event shall the performing contractor be entitled to lost profits.

C. Where the Institution, an official designated by it, or an appeals board determines, after a hearing held following reasonable notice to all bidders, that there is probable cause to believe that a decision to award was based on fraud or corruption or on an act in violation of these Rules, the Institution, designated official or appeals board may enjoin the award of the contract to a particular bidder.

**§ 51. Effect of appeal upon contract. –**

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

**§ 52. Stay of award during protest. –**

An award need not be delayed for the period allowed a bidder or offeror to protest, but in the event of a timely protest as provided in § 50 of these Rules, or the filing of a timely legal action as provided in § 54, no further action to award the contract shall be taken unless there is a written determination that proceeding without delay is necessary to protect the public interest or unless the bid or offer would expire.

**§ 53. Contractual disputes. –**

A. Contractual claims, whether for money or other relief, shall be submitted in writing no later than 60 days after final payment. However, written notice of the contractor's intention to file a claim shall be given at the time of the occurrence or beginning of the work upon which the claim is based. Nothing herein shall preclude a contract from requiring submission of an invoice for final payment within a certain time after completion and acceptance of the work or acceptance of the goods. Pendency of claims shall not delay payment of amounts agreed due in the final payment.

B. The Institution shall include in its contracts a procedure for consideration of contractual claims. Such procedure, which may be contained in the contract or may be specifically incorporated into the contract by reference and made available to the contractor, shall establish a

time limit for a final decision in writing by the Institution. If the Institution has established administrative procedures meeting the standards of § 55 of these Rules, such procedures shall be contained in the contract or specifically incorporated in the contract by reference and made available to the contractor. The Institution may require the submission of contractual claims pursuant to any contract to Alternative Dispute Resolution (ADR) as an administrative procedure.

C. A contractor may not invoke administrative procedures meeting the standards of § 55 of these Rules, if available, or institute legal action as provided in § 54, prior to receipt of the Institution's decision on the claim, unless the Institution fails to render such decision within the time specified in the contract.

D. The decision of the Institution shall be final and conclusive unless the contractor appeals within six months of the date of the final decision on the claim by the Institution by invoking administrative procedures meeting the standards of § 55 of these Rules, if available, or in the alternative by instituting legal action as provided in § 54.

#### **§ 54. Legal actions. –**

A. A bidder or offeror, actual or prospective, who is refused permission or disqualified from participation in bidding or competitive negotiation, or who is determined not to be a responsible bidder or offeror for a particular contract, may bring an action in the appropriate circuit court challenging that decision, which shall be reversed only if the petitioner establishes that the decision was not (i) an honest exercise of discretion, but rather was arbitrary or capricious; (ii) in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms or conditions of the Invitation to Bid; or (iii) in the case of denial of prequalification, based upon the criteria for denial of prequalification set forth in subsection B of § 14 of these Rules. In the event the apparent low bidder, having been previously determined by the Institution to be not responsible in accordance with § 4, is found by the court to be a responsible bidder, the court may direct the Institution to award the contract to such bidder in accordance with the requirements of this section and the Invitation to Bid.

B. A bidder denied withdrawal of a bid under § 23 of these Rules 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 Institution 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.

C. A bidder, offeror or contractor, or a potential bidder or offeror on a contract negotiated on a sole source or emergency basis in the manner provided in § 5 of these Rules, whose protest of an award or decision to award under § 50 of these Rules is denied, may bring an action in the appropriate circuit court challenging a proposed award or the award of a contract, which shall be reversed only if the petitioner establishes that the proposed award or the award is not (i) an

honest exercise of discretion, but rather is arbitrary or capricious or (ii) in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms and conditions of the Invitation to Bid or Request for Proposal.

D. If injunctive relief is granted, the court, upon request of the Institution, shall require the posting of reasonable security to protect the Institution.

E. A contractor may bring an action involving a contract dispute with the Institution in the appropriate circuit court. Notwithstanding any other provision of law, the Comptroller shall not be named as a defendant in any action brought pursuant to these Rules or § 33.1-387 of the Code of Virginia, except for disputes involving contracts of the Office of the Comptroller or the Department of Accounts.

F. A bidder, offeror or contractor need not utilize administrative procedures meeting the standards of § 55 of these Rules, if available, but if those procedures are invoked by the bidder, offeror or contractor, the procedures shall be exhausted prior to instituting legal action concerning the same procurement transaction unless the Institution agrees otherwise.

G. Nothing herein shall be construed to prevent the Institution from instituting legal action against a contractor.

#### **§ 55. Administrative appeals procedure. –**

A. The Institution may establish an administrative procedure for hearing (i) protests of a decision to award or an award, (ii) appeals from refusals to allow withdrawal of bids, (iii) appeals from disqualifications and determinations of nonresponsibility, and (iv) appeals from decisions on disputes arising during the performance of a contract, or (v) any of these. Such administrative procedure may include the use of Alternative Dispute Resolution (ADR) or shall provide for a hearing before a disinterested person or panel, the opportunity to present pertinent information and the issuance of a written decision containing findings of fact. The disinterested person or panel shall not be an employee of the governmental entity against whom the claim has been filed. The findings of fact shall be final and conclusive and shall not be set aside unless the same are (a) fraudulent, arbitrary or capricious; (b) so grossly erroneous as to imply bad faith; or (c) in the case of denial of prequalification, the findings were not based upon the criteria for denial of prequalification set forth in subsection B of § 14 of these Rules. No determination on an issue of law shall be final if appropriate legal action is instituted in a timely manner. The Institution may seek advice and input from the Alternative Dispute Resolution Council in establishing an Alternative Dispute Resolution (ADR) procedure.

B. Any party to the administrative procedure, including the Institution, shall be entitled to institute judicial review if such action is brought within 30 days of receipt of the written decision.

**§ 56. Alternative dispute resolution. –**

The Institution may enter into agreements to submit disputes arising from contracts entered into pursuant to these Rules to arbitration and utilize mediation and other alternative dispute resolution procedures. However, such procedures shall be nonbinding and subject to § 2.2-514 of the Code of Virginia, as applicable.

**§ 57. Ethics in public contracting. –**

The Institution and its governing body, officers and employees shall be governed by the Ethics in Public Contracting provisions of the Virginia Public Procurement Act, Article 6 (§ 2.2-4367 et seq.) of Chapter 43 of Title 2.2 of the Code of Virginia.

**EXHIBIT K**

**MANAGEMENT AGREEMENT**

**BETWEEN**

**THE COMMONWEALTH OF VIRGINIA**

**AND**

**THE COLLEGE OF WILLIAM AND MARY IN VIRGINIA**

**AND**

**THE VIRGINIA INSTITUTE OF MARINE SCIENCE**

**PURSUANT TO**

**THE RESTRUCTURED HIGHER EDUCATION FINANCIAL AND ADMINISTRATIVE  
OPERATIONS ACT OF 2005**

**POLICY GOVERNING**

**HUMAN RESOURCES FOR**

**PARTICIPATING COVERED EMPLOYEES**

**AND OTHER COLLEGE EMPLOYEES**

**THE RECTOR AND VISITORS OF**

**THE COLLEGE OF WILLIAM AND MARY IN VIRGINIA**

**POLICY GOVERNING HUMAN RESOURCES FOR**

## **PARTICIPATING COVERED EMPLOYEES AND OTHER COLLEGE EMPLOYEES**

### **I. PREAMBLE.**

The Restructured Higher Education Financial and Administrative Operations Act (the Act), Chapter 4.10 of Title 23 of the Code of Virginia, establishes a process for the restructuring of institutions of higher education of the Commonwealth of Virginia and provides that upon becoming a Covered Institution, the College of William and Mary in Virginia shall have responsibility and accountability for human resources management for all College employees, defined in the Act as “Covered Employees,” who pursuant to subsection A of § 23-38.114 of the Act, “are state employees of” the College. Specifically, the Act provides that, as of the Effective Date of its initial Management Agreement with the Commonwealth, all Classified Employees shall continue to be covered by the Virginia Personnel Act, Chapter 29 (§ 2.2-2900 et seq.) of Title 2.2 of the Code of Virginia, and shall be subject to the policies and procedures prescribed by the Virginia Department of Human Resource Management, provided that they may subsequently elect to become Participating Covered Employees. All Participating Covered Employees shall: (i) be exempt from the Virginia Personnel Act, Chapter 29 (§ 2.2-2900 et seq.) of Title 2.2; (ii) remain subject to the state grievance procedure for employees subject to the Virginia Personnel Act, Chapter 30 (§ 2.2-3000 et seq.) of Title 2.2, provided they were subject to the state grievance procedure prior to that Effective Date; (iii) participate in a compensation plan that is subject to the review and approval of the Board of Visitors; (iv) be hired pursuant to procedures that are based on merit and fitness; and (v) may, subject to certain specified conditions, continue to participate in either state- or College-sponsored benefit plans as described by the Management Agreement.

The provisions of this Policy are adopted by the Board of Visitors to implement the Governing Law and constitute the human resources policies to be included in any human resources system adopted by the College for its employees.

This Policy is intended to cover the authority that may be granted to the College pursuant to Subchapter 3 of the Act. Any other powers and authorities granted to the College pursuant to the Appropriation Act, or any other sections of the Code of Virginia, including other provisions of the Act and the College's Enabling Legislation, are not affected by this Policy.

### **II. DEFINITIONS.**

As used in this policy, the following terms shall have the following meanings, unless the context requires otherwise:

“Act” means the Restructured Higher Education Financial and Administrative Operations Act, Chapter 4.10 of Title 23 of the Code of Virginia.

“Board of Visitors” or “Board” means the Rector and Board of Visitors of the College of William and Mary and the Virginia Institute of Marine Science.

“Classified Employees” means employees who are covered by the Virginia Personnel Act, Chapter 29 (§ 2.2-2900 et seq.) of Title 2.2 of the Code of Virginia, and the policies and procedures established by the Virginia Department of Human Resource Management and who are not Participating Covered Employees.

“College” means the College of William and Mary in Virginia, formerly known as (State Agency 204) and the Virginia Institute of Marine Science, formerly known as (State Agency 268).

“College employee” means a Covered Employee.

“College Human Resources System” means the human resources system for College employees as provided for herein.

“Covered Employee” means any person who is employed by the College on either a salaried or nonsalaried (wage) basis.

“Covered Institution” means, on and after the Effective Date of its initial Management Agreement with the Commonwealth of Virginia, a public institution of higher education of the Commonwealth that has entered into a Management Agreement with the Commonwealth to be governed by the provisions of Subchapter 3 of the Act.

“Employee” means Covered Employee unless the context clearly indicates otherwise.

“Enabling Legislation” means those chapters, other than Chapter 4.10, of Title 23 of the Code of Virginia, as amended, creating, continuing, or otherwise setting forth the powers, purposes, and missions of the College.

“Effective Date” means the effective date of the initial Management Agreement between the College and the Commonwealth.

“Governing Law” means the Act and the College’s Enabling Legislation.

“Management Agreement” means the agreement required by subsection D of § 23-38.88 of the Act between the College and the Commonwealth.

“Participating Covered Employee” means (i) all salaried nonfaculty College employees who were employed as of the day prior to the Effective Date of the College’s initial Management Agreement with the Commonwealth, and who elect pursuant to § 23-38.115 of the Act, to participate in and be governed by such human resources program or programs, plans, policies, and procedures established by the College, (ii) all salaried nonfaculty College employees who are employed by the College on or after the Effective Date of the initial Management Agreement between the College and the Commonwealth, (iii) all nonsalaried nonfaculty College employees without regard to when they were hired, (iv) all faculty College employees without regard to when they were hired.

“Systems” means collectively the College Human Resources System that is in effect from time to time.

### **III. SCOPE AND PURPOSE OF COLLEGE HUMAN RESOURCES POLICIES.**

The College has had human resources system autonomy through decentralization for its employees for some time. For example, general faculty at the College are expressly exempt from the Virginia Personnel Act. The College has had decentralization in most human resources functions and activities since the late 1980s and early 1990s, including, but not limited to, the running of payrolls; the administration of hiring, classification, and promotion practices.

The Act extends and reinforces the human resources autonomy previously granted to the College. This Policy therefore is adopted by the Board of Visitors to enable the College to develop, adopt, and have in place by or after the Effective Date of its initial Management Agreement with the Commonwealth, a human resources system or systems for all College employees. On that Effective Date, and until changed by the College or unless otherwise specified in this Policy, the systems for College employees shall be the same systems applicable to those employees in effect immediately prior to that Effective Date.

### **IV. BOARD OF VISITORS ACCOUNTABILITY AND DELEGATION OF AUTHORITY.**

The Board of Visitors of the College shall at all times be fully and ultimately accountable for the proper fulfillment of the duties and responsibilities set forth in, and for the appropriate implementation of, this Policy. Consistent with this full and ultimate accountability, however, the Board may, pursuant to its legally permissible procedures, specifically delegate either herein or by separate Board resolution the duties and responsibilities set forth in this Policy to a person or persons within the College, who, while continuing to be fully accountable for such duties and responsibilities, may further delegate the implementation of those duties and responsibilities pursuant to the College's usual delegation policies and procedures.

### **V. COLLEGE OF WILLIAM AND MARY HUMAN RESOURCES SYSTEMS.**

#### **A. Adoption and Implementation of College Human Resources Systems.**

The President is hereby authorized to adopt and implement human resources systems for employees of the College that are consistent with the Governing Law, other applicable provisions of law, these College human resources policies for College employees, and any other human resources policies adopted by the Department of Human Resource Management or the Board of Visitors for College personnel, unless College employees are exempted from those other human resources policies by law or policy. The College Human Resources Systems shall include a delegation of personnel authority to appropriate College officials responsible for overseeing and implementing the College Human Resources Systems, including a grant of authority to such officials to engage in further delegation of authority as the President or his designee deems appropriate.

The College commits to regularly engage employees in appropriate discussions and to receive employee input as the new College Human Resources Systems are developed. The College will regularly communicate the details of new proposals to all employees who are eligible to participate in the College Human Resources System through written communication, open meetings, and website postings as appropriate, so that employees will have full information that will help them evaluate the merits of the new human resource system compared to the then-current State human resource system.

Effective on the Effective Date of its initial Management Agreement with the Commonwealth, and until amended as described below, the College's human resources systems shall consist of the following:

1. The current "College of William and Mary Faculty Handbook," as it is posted on the Provost's website, <http://www.wm.edu/provost/index.php>, and periodically amended; and
2. The current human resources system for Classified Employees in the College as posted on the Virginia Department of Human Resource Management website at <http://www.dhrm.state.va.us/hrpolicy/policy.html>; and
3. The human resources system for Participating Covered Employees, which shall include nonsalaried (wage) employees, as posted on the College Human Resources website, <http://www.wm.edu/hr.html> and periodically amended.

All the systems describe above, except the system described in paragraph 3, may be amended by the President, consistent with these human resources policies. The system described in paragraph 3 may be amended only by the State.

#### **B. Training in and Compliance with Applicable Provisions of Law and Board of Visitors' Human Resources Policies.**

The President, or designee, shall take all necessary and reasonable steps to assure (i) that the College officials who develop, implement and administer the College Human Resources Systems authorized by Governing Law and these human resources policies are knowledgeable regarding the requirements of the Governing Law, other applicable provisions of law, these College human resources policies, and other applicable Board of Visitors' human resources policies affecting College employees, and (ii) that compliance with such laws and human resources policies is achieved.

### **VI. HUMAN RESOURCES POLICIES.**

The College Human Resources Systems adopted by the College pursuant to Governing Law and this Policy, as set forth in Section V above, shall embody the following human resources policies and principles:

#### **A. Election by College Salaried Nonfaculty Employees.**

Upon the adoption by the College of a College Human Resources System, each salaried nonfaculty College employee who was in the employment of the College, as of the day prior to the Effective Date of its initial Management Agreement with the Commonwealth shall be permitted to elect to participate in and be governed by either (i) the State human resources program set forth in Chapters 28 (§ 2.2-2800 et seq.) and 29 (§ 2.2-2900 et seq.) of Title 2.2 of the Code of Virginia, and administered by the Department of Human Resource Management, or (ii) the College Human Resources System, as appropriate. A salaried nonfaculty College employee who elects to continue to be governed by the State human resources program described above shall continue to be governed by all State human resources and benefit plans, programs, policies and procedures that apply to and govern State employees. A salaried nonfaculty College employee who elects to participate in and be governed by the College Human Resources System, by that election, shall be deemed to have elected to be eligible to participate in and to be governed by the College human resources program, authorized alternative insurance, and severance plans, programs, policies and procedures that are or may be adopted by the College as part of that College Human Resources System.

The College shall provide each of its salaried nonfaculty College employees who was in the employment of the College as of the day prior to the Effective Date of the College's initial Management Agreement with the Commonwealth at least 90 days after the date on which the College Human Resources System becomes effective for that College employee's classification of employees to make the election required by the prior paragraph. If such a salaried nonfaculty College employee does not make an election by the end of that specified election period, that College employee shall be deemed not to have elected to participate in the College Human Resources System. If such a salaried nonfaculty College employee elects to participate in the College Human Resources System, that election shall be irrevocable. At least every two years, the College shall offer to salaried nonfaculty College employees who have elected to continue to participate in the state human resources program set forth in Chapters 28 (§ 2.2-2800 et seq.) and 29 (§ 2.2-2900 et seq.) of Title 2.2 of the Code of Virginia, an opportunity to elect to participate in the College Human Resources System, provided that, each time prior to offering such opportunity to such salaried nonfaculty College employees, and at least once every two years after the effective date of the College Human Resources System, the College shall make available to each of its salaried nonfaculty College employees a comparison of its human resources program for that classification of salaried nonfaculty College employee with the State human resources program for comparable State employees, including but not limited to a comparability assessment of compensation and benefits. A copy of the human resources program comparison shall be provided to the Department of Human Resource Management.

#### **B. Classification and Compensation.**

**General.** The Systems shall include classification and compensation plans that are fair and reasonable, and are based on the availability of College financial resources. The plans adopted by the College Participating Covered Employees shall be independent of, and need not be based on, the classification and compensation plans of the Commonwealth, do not require the approval of any State agency or officer, and shall be subject to the review and approval by the Board of Visitors as set forth in paragraph 3 below. The College shall provide information on its classification and compensation plans to all College employees. The plans applicable to Participating Covered Employees may or may not include changes in classification or compensation announced by the Commonwealth depending on such factors as the availability of necessary financial resources to fund any such changes, and subject to the review and approval by the Board of Visitors of any major changes in the College's compensation plans.

**Classification Plan.** The Systems shall include one or more classification plans for College employees that classify positions according to job responsibilities and qualifications. On the Effective Date of the College's initial Management Agreement with the Commonwealth, and until changed by the College, the classification plans shall be the same plans that are in effect for each group of employees immediately prior to that Effective Date.

**Compensation Plan.** The Systems shall include one or more compensation plans for each College employee classification or group. On the Effective Date of the College's initial Management Agreement with the Commonwealth, and until changed by the Department of Human Resource Management, the compensation plan for Classified Employees in the College shall be the compensation plan in effect immediately prior to that Effective Date, known as the Commonwealth's Classified Compensation Plan. On that Effective Date, and until changed by the College, the compensation plan or plans for all Participating Covered Employees shall be the compensation plan or plans in effect immediately prior to that Effective Date. The College may adopt one or more compensation plans for Participating Covered Employees that are non-graded plan(s) based on internal and external market data and other relevant factors to be determined annually. Any major change in compensation plans for Participating Covered Employees shall be reviewed and approved by the Board of Visitors before that change becomes effective. Any change recommended in the compensation plans may take into account the prevailing rates in the labor market for the jobs in question, or for similar positions, the relative value of jobs, the competency and skills of the individual employee, internal equity, and the availability of necessary financial resources to fund the proposed change. The compensation payable to College employees shall be authorized and approved only by designated College officers delegated such authority by the College, and shall be consistent with the approved compensation plan for the relevant position or classification. Further approval by any other State Agency, governmental body or officer is not required for setting, adjusting or approving the compensation payable to individual Participating Covered Employees.

**Wages.** The Systems shall include policies and procedures for the authorization, computation and payment of wages, where appropriate, for such premium pays as overtime, shift differential, on call, and call back, and for the payment of hourly employees.

**Payment of Compensation.** The Systems shall include policies and procedures for paying compensation to employees, including the establishment of one or more payday schedules.

**Work Schedule and Workweek.** The Systems shall include policies and procedures for the establishment of, and modifications to, work schedules and workweeks for all College employees, including alternative work schedules and sites, and telecommuting policies and procedures.

**Other Classification and Compensation Policies and Procedures.** The Systems may include any other reasonable classification and compensation policies and procedures the President deems appropriate.

### **C. Benefits.**

The Systems shall provide fringe benefits to all benefits eligible employees, including retirement benefits, health care insurance, life, disability, and accidental death and dismemberment insurance. The benefits provided shall include a basic plan of benefits for each benefits eligible employee, and may include an optional benefits plan for benefits eligible employees, including additional insurance coverage, long-term care, tax deferred annuities, flexible reimbursement accounts, employee assistance programs, employee intramural and recreational passes, and other wellness programs. As provided in § 23-38.119 B and C of the Act, the College may require Participating Covered Employees to pay all or a portion of the cost of group life, disability and accidental death and dismemberment insurance, which may be collected through a payroll deduction program. Participating Covered Employees shall not be required to present evidence of insurability for basic group life insurance coverage. The Board of Visitors may elect to provide benefits through Virginia Retirement System group insurance programs under the terms of and to the extent allowed by § 23-38.119 B and D of the Act or any other provision of law.

Notwithstanding the above, pursuant to subsection A of § 23-38.114 of the Act, and unless and until that section is amended, the state retirement system, state health insurance program, and state workers' compensation coverage program as they may be amended from time to time, shall continue to apply to and govern all eligible College employees.

The Systems may provide different benefits plans for reasonably different groups or classifications of employees, and may provide benefits to part-time employees. On the Effective Date of the College's initial Management Agreement with the Commonwealth, and until

changed by the appropriate governing authority, the benefits plans provided by the College to Classified Employees and Participating Covered Employees shall be the benefits plans provided to that group or classification as of the date immediately prior to that Effective Date. On or after that Effective Date, alternative College group life, accidental death and dismemberment, and short- and long-term disability plans may be provided to eligible Participating Covered Employees, or at the election of the Board of Visitors and subject to the execution of participation agreements as provided in subsections B and C of § 23-38.119 of the Act, they may be provided by the appropriate State programs, but no contributions to the state programs by the College shall be required for Participating Covered Employees who do not participate in the programs. Subject to the provisions of the Act, any new plans, programs and material changes permitted under current law in College employee benefit plans, other than Classified Employee benefit plans, shall be approved by the Board of Visitors, including the authority to increase the Cash Match Contribution rate up to the limit permitted by the Code of Virginia based on available resources, and the authority to implement cafeteria-style benefits for College employees other than Classified Employees.

Insurance and all proceeds therefrom provided pursuant to § 23-38.119 of the Act shall be exempt from legal process and may be subject to voluntary assignment as provided in subsection A of § 23-38.119.

#### **D. Employee Relations.**

**1. General.** The Systems shall contain provisions that protect the rights and privileges of College employees consistent with sound management principles and fair employment practice law.

**2. Employee Safety and Health.** The Systems shall contain provisions that promote workplace safety compliance with applicable law and regulations.

**3. Employee Work Environment.** The Systems shall promote a work environment that is conducive to the performance of job duties, and free from intimidation or coercion in violation of State or federal law, including sexual harassment or other discrimination.

**4. Employee Recognition.** The Systems may provide for the use of leave awards and bonuses specific to policies and procedures for awarding, honoring, or otherwise recognizing College employees, including but not limited to those who have performed particularly meritorious service for the College, have been employed by the College for specified periods of time, or have retired from the College after lengthy service.

**5. Counseling Services.** The Systems shall provide counseling services through the State's Employee Assistance Program or a College Employee Assistance Program to any eligible College employee experiencing job-related difficulties and seeking counseling for those difficulties, and shall establish the circumstances under which the time necessary to participate in such counseling may be granted.

**6. Unemployment Compensation.** The Systems shall ensure that College employees receive the full unemployment compensation benefits to which they are legally entitled, and that the College's liability is limited to legitimate claims for such benefits.

**7. Workers' Compensation.** The Systems shall ensure that College employees have workers' compensation benefits to which they are legally entitled pursuant to the State Employees Workers' Compensation Program administered by the Department of Human Resource Management.

**8. Performance Planning and Evaluation.** The Systems shall include one or more performance planning and evaluation processes for College employees that (i) establish and communicate the College's performance expectations, (ii) help develop productive working relationships, (iii) allow employees to present their views concerning their performance, (iv) identify areas for training or professional development, (v) establish the process by which evaluations shall be conducted, (vi) clarify how superlative or inadequate performance shall be addressed, and (vii) ensure that all College employees are provided relevant information on the evaluation process. The Systems may include separate performance and evaluation processes for reasonably distinguishable groups of College employees. On the Effective Date of the College's initial Management Agreement with the Commonwealth, the existing merit-based performance management system for faculty shall continue, until amended by the College. On or after that Effective Date, College nonfaculty salaried Participating Covered Employees may be subject to a variable merit-based performance management system.

**9. Standards of Conduct and Performance.** In order to protect the well-being and rights of all employees and to ensure safe, efficient College operations and compliance with the law, the Systems shall establish rules of personal conduct and standards of acceptable work performance for College salaried nonfaculty employees and policies for corrective discipline. In general, the policies for corrective discipline shall serve to (i) establish a uniform and objective process for correcting or disciplining unacceptable conduct or work performance, (ii) distinguish between less serious and more serious actions of misconduct and provide corrective action accordingly, and (iii) limit corrective action to employee conduct occurring only when employees are at work or are otherwise representing the College in an official or work-related capacity, unless otherwise specifically provided by the policies of the Systems or other applicable law. The Systems may provide for a probationary period for new and re-employed College salaried nonfaculty employees, during which period the policies for corrective discipline shall not be applicable and the employee may not use the grievance procedure set forth in the next paragraph. The Systems may include separate rules of personal conduct and standards of

acceptable work performance and policies for corrective discipline for reasonably distinguishable groups of College employees.

**10. Grievance Procedure.** As provided in the Governing Law, employees shall be encouraged to resolve employment-related problems and complaints informally, and shall be permitted to discuss their concerns freely and without fear of retaliation with immediate supervisors and management. In the event that such problems cannot be resolved informally, all salaried nonfaculty College employees, regardless of their date of hire, shall have access, as provided in subsection A of § 23-38.114 and in § 23-38.117 of the Act, to the State Grievance Procedure, Chapter 30 (§ 2.2-3000 et seq.) of Title 2.2 of the Code of Virginia, to the extent it was applicable to their classification of employees prior to the Effective Date of the College's initial Management Agreement with the Commonwealth. On that Effective Date, and until changed by the College, the faculty grievance procedures in effect immediately prior to the Effective Date shall continue.

**11. Discrimination Complaints.** If a Classified Employee believes discrimination has occurred, the Classified Employee may file a complaint with the Department of Human Resource Management Office of Equal Employment Services. All Covered Employees and applicants for employment after the Effective Date of the College's initial Management Agreement with the Commonwealth shall file a complaint with the appropriate College office or with the appropriate federal agencies.

**12. Layoff Policy.** The Systems shall include one or more layoff policies for salaried College employees who lose their jobs for reasons other than their job performance or conduct, such as a reduction in force or reorganization at the College. These College layoff policies shall govern such issues as (i) whether there is a need to effect a layoff, (ii) actions to be taken prior to a layoff, (iii) notice to employees affected by a layoff, (iv) placement options within the College or its respective major divisions and within other parts of the College, (v) the preferential employment rights, if any, of various College employees, (vi) the effect of layoff on leave and service, and (vii) the policy for recalling employees. In accordance with the terms of the Act, College employees who: (i) were employed prior to the Effective Date of the College's initial Management Agreement with the Commonwealth, (ii) would otherwise be eligible for severance benefits under the Workforce Transition Act, (iii) were covered by the Virginia Personnel Act prior to that Effective Date, and (iv) are separated because of a reduction in force shall have the same preferential hiring rights with State agencies and other executive branch institutions as Classified Employees have under § 2.2-3201 of the Code of Virginia. Conversely, the College shall recognize the hiring preference conferred by § 2.2-3201 on State employees who were hired by a State agency or executive branch institution before the Effective Date of the College's initial Management Agreement with the Commonwealth and who were separated after that date by that State agency or executive branch institution because of a reduction in workforce. If the College has adopted a classification system pursuant to § 23-38.116 of the Act that differs from the classification system administered by the Department of Human Resource Management, the College shall classify the separated employee according to its classification system and shall place the separated employee appropriately. The College may include separate policies for

reasonably distinguishable groups of College employees. On or after the Effective Date of the College's initial Management Agreement with the Commonwealth, all employees from other State agencies and executive branch institutions who are placed by the College under the provisions of the State Layoff Policy shall be Participating Covered Employees.

**13. Severance Benefits.** In accordance with the terms of the Act, the College shall adopt severance policies for salaried Participating Covered Employees who are involuntarily separated for reasons unrelated to performance or conduct. The terms and conditions of such policies shall be determined by the Board of Visitors. Classified Employees who otherwise would be eligible and were employed prior to the Effective Date of the College's initial Management Agreement with the Commonwealth shall be covered by the Workforce Transition Act, Chapter 32 (§ 2.2-3200 et seq.) of Title 2.2 of the Code of Virginia. The College and the Board of the Virginia Retirement System may negotiate a formula according to which cash severance benefits may be converted to years of age or creditable service for Participating Covered Employees who participate in the Virginia Retirement System. An employee's becoming, on the Effective Date, a Covered Employee shall not constitute a severance or reduction in force to which severance or Workforce Transition Act policies would apply.

**14. Use of Alcohol and Other Drugs.** The Systems shall include policies and procedures that (i) establish and maintain a work environment at the College that is free from the adverse effect of alcohol and other drugs, (ii) are consistent with the federal Drug-Free Workplace Act of 1988 and with the College of William and Mary Alcohol and Other Drugs Policy, (iii) describe the range of authorized disciplinary action, including termination where appropriate, for violations of such policies and procedures, and the process to be followed in taking such disciplinary action, (iv) provide College employees access to assistance and treatment for problems involving alcohol and other drugs, (v) provide for the circumstances under which employees are required to report certain violations of the policies and procedures to their supervisor, and the College is required to report those violations to a federal contracting or granting agency, (vi) describe the circumstances under which personnel records of actions taken under the College's alcohol and other drugs policy shall not be kept confidential, and (vii) provide notice to College employees of the scope and content of the College alcohol and other drugs policy. As part of this alcohol and other drugs policy, and in compliance with the federal Omnibus Transportation Employee Testing Act of 1991, the Systems may provide for pre-employment, reasonable suspicion, random, post-accident, return-to-duty and follow-up alcohol and other drug testing for College positions that are particularly safety sensitive, such as those requiring a Commercial Driver's License.

**15. Background Checks.** The Systems shall include a process for conducting background checks, which may include but is not limited to reference checks, educational/professional credentialing checks, and conviction and driver's records checks on applicants for full-time or part-time positions at the College, and for addressing situations where employees do not disclose a conviction on their application or otherwise falsify their application with regard to information concerning their education/professional credential and/or prior convictions.

**16. Other Employee Relations Policies and Procedures.** The Systems shall include any other reasonable employee relations policies or procedures that the President deems appropriate, which may include, but are not limited to, policies or procedures relating to orientation programs for new or re-employed College employees, an employee suggestion program, the responsibility of College employees for property placed in their charge, work breaks, inclement weather and emergencies, and employment outside the College.

#### **E. Leave and Release Time.**

The Systems shall include policies and procedures regarding leave for eligible employees. The Systems shall provide reasonable paid leave for purposes such as holidays, vacation, or other personal uses. The Systems may provide for release time for such matters as the donation of blood, participation in an employee assistance program and other appropriate employment-related matters. On or after the Effective Date of its initial Management Agreement with the Commonwealth, and until a new program is adopted by the appropriate authority, the College shall continue to provide leave and release time to Participating Covered Employees in accordance with the leave and release time policies and procedures applicable to each classification of employees prior to that Effective Date. On or after that Effective Date, the College may provide an alternative leave and release time system for salaried nonfaculty Participating Covered Employees.

#### **F. Equal Employment Opportunity, Nondiscrimination, Employment, and Separation.**

**1. Equal Employment Opportunity and Nondiscrimination.** The Systems shall contain policies and procedures to ensure that all aspects of human resources management, including the employment of College employees, meet all requirements of federal and state law, and of the relevant policies of the Board of Visitors, with regard to equal employment opportunity and nondiscrimination.

**Employment.** The Systems shall include policies and procedures for the recruitment, selection and hiring of College employees that are based on merit and fitness, including where appropriate a requirement for job posting, interviews, pre-employment testing, pre-employment drug testing, reference checks and conviction record checks. On and after the Effective Date of its initial Management Agreement with the Commonwealth, the College shall post all salaried nonfaculty position vacancies through the College's job posting system, the Commonwealth's job posting system, and other external media as appropriate. The Systems shall establish designated veterans' re-employment rights in accordance with applicable law.

In order to encourage employees to attain the highest level positions for which they are qualified, and to compensate employees for accepting positions of increased value and responsibility, the Systems shall include policies and procedures governing the promotion of employees, including the effect of promotion on an employee's compensation.

On or after the Effective Date of the College's initial Management Agreement with the Commonwealth, all employees hired from other state agencies shall be Participating Covered Employees. College Classified Employees who change jobs within the College through a competitive employment process – i.e., promotion or transfer – shall have the choice of remaining a Classified Employee or becoming a Participating Covered Employee. If a Classified Employee elects to become a Participating Covered Employee, that decision shall be irrevocable.

**Notice of Separation.** The Systems shall include policies and procedures requiring reasonable notice, where appropriate, of a decision either by the employee or by the College to separate the employee from the College in accordance with policies governing performance, conduct, or layoff.

#### **G. Information Systems.**

The College shall provide an electronic file transfer of information on all salaried College employees and shall continue to provide the Employee Position Reports to meet the human resources reporting requirements specified by law or by request of the Governor or the General Assembly, unless the College is specifically exempted from those requirements. The College shall conduct assessments to demonstrate its accountability for human resources practices that comply with laws and regulations. The Department of Human Resource Management and the College have entered into a Memorandum of Understanding, attached hereto as Attachment 2, which may be amended from time to time by agreement of the parties, regarding the specific data and reporting requirements. The College shall be accountable for ensuring the timeliness and integrity of the data transmitted to the Department of Human Resources Management.

#### **VII. CONTINUED APPLICABILITY OF OTHER PROVISIONS OF THE CODE OF VIRGINIA AND OTHER BOARD OF VISITORS' POLICIES AFFECTING COLLEGE PERSONNEL.**

On and after the Effective Date of its initial Management Agreement with the Commonwealth, College employees shall be subject to the terms and conditions of the Act and the Management Agreement between the Commonwealth and the College. Classified Employees shall continue to be subject to the human resources policies and exceptions to those policies adopted or approved by the Department of Human Resource Management.

In addition, all College employees also shall remain subject to any other human resources policies adopted by the Board of Visitors applicable to College personnel unless College employees or a subset thereof are specifically exempted from those other human resources policies either by those other policies or by this Policy.

## ATTACHMENT 2

### **Memorandum of Understanding Between The College of William and Mary and the Department of Human Resources Management Regarding The Reporting of Human Resources Management Data**

This Memorandum of Understanding, which may be amended from time to time by the agreement of all parties, is an attachment to the Policy Governing Human Resources for Participating Covered Employees and Other College Employees pursuant to the Restructured Higher Education Financial and Administrative Operations Act of 2005, and is hereby entered into between the College of William and Mary and the Department of Human Resource Management (DHRM).

I. This document outlines the provisions for information management pertaining to human resources data, consistent with the objectives to enable DHRM to meet the Commonwealth's reporting requirements, to ensure compliance with relevant federal and state laws and regulations, and to do so through efficient and cost-effective methods.

1. In lieu of data entry into the state's Personnel Management Information System (PMIS), data will be transmitted through an electronic file transfer to update DHRM's warehouse.

a. The College will provide a flat file of designated personnel data. For "Classified Employees," the data provided will match DHRM's data values for the designated fields. For salaried "Participating Covered Employees," the data provided will include the University's data values for the designated fields. The College will provide a data dictionary to DHRM. The file of designated data will be specifically described by an addendum to this Memorandum upon the agreement of the University and DHRM.

b. The College will provide a second flat file of salaried personnel actions for "Classified Employees" and salaried "Participating Covered Employees," such as promotions, separations, and salary adjustments. The file of relevant personnel actions and designated data to be provided for each action will be specifically described by an addendum to this Memorandum upon the agreement of the University and DHRM.

2. DHRM will accept the federal Affirmative Action Plan (AAP), including the adverse impact analyses of employment and compensation actions that are part of the AAP, as demonstration of the College's compliance with relevant federal and state employment laws and regulations.

3. The College may key data into the Benefits Enrollment System or provide a batch file, or employees may use Employee Direct (employee self-service).

4. Other reports to be provided by the College include the following:

a. Monthly Employment Position Report.

b. Annual report on salaried, wage, and contract employees.

The undersigned hereby agree to the provisions contained in the MOU.

APPROVALS:

The College of William and Mary:

By: .....Date.....

Vice President for Administration

Department of Human Resources Management:

By: .....Date.....

Director, Department of Human Resources Management

**EXHIBIT L**  
**MANAGEMENT AGREEMENT**  
**BETWEEN**  
**THE COMMONWEALTH OF VIRGINIA**  
**AND**  
**THE COLLEGE OF WILLIAM AND MARY**  
**PURSUANT TO**  
**THE RESTRUCTURED HIGHER EDUCATION**  
**FINANCIAL AND ADMINISTRATIVE OPERATIONS**  
**ACT OF 2005**  
**POLICY GOVERNING**  
**FINANCIAL OPERATIONS AND MANAGEMENT**  
**THE RECTOR AND BOARD OF VISITORS**  
**OF THE COLLEGE OF WILLIAM AND MARY**  
**POLICY GOVERNING FINANCIAL OPERATIONS AND MANAGEMENT**

**I. PREAMBLE.**

The Restructured Higher Education Financial and Administrative Operations Act (the Act), Chapter 4.10 (§ 23-38.88 et seq.) of Title 23 of the Code of Virginia, establishes by law a process for granting additional authority to institutions of higher education for financial operations and management, subject to the adoption of policies by their governing boards and the approval of management agreements to be negotiated with the Commonwealth.

The following provisions of this Policy constitute the adopted Board of Visitors policies regarding the College of William and Mary's financial operations and management.

This Policy is intended to cover the authority that may be granted to the College pursuant to Subchapter 3 of the Act. Any other powers and authorities granted to the College pursuant to the Appropriation Act, or any other sections of the Code of Virginia, including other provisions of the Act and the College's Enabling Legislation, are not affected by this Policy.

**II. DEFINITIONS.**

As used in this policy, the following terms shall have the following meanings, unless the context requires otherwise:

“Act” means the Restructured Higher Education Financial and Administrative Operations Act, Chapter 4.10 (§ 23-38.88 et seq.) of Title 23 of the Code of Virginia.

“Board of Visitors” or “Board” means the Rector and Board of Visitors of the College of William and Mary and the Virginia Institute of Marine Science.

“College” means the College of William and Mary (State Agency 204) and the Virginia Institute of Marine Science (State Agency 268).

“Covered Institution” means, on or after the Effective Date of its initial Management Agreement with the Commonwealth of Virginia, a public institution of higher education of the Commonwealth that has entered into a Management Agreement with the Commonwealth to be governed by the provisions of Subchapter 3 of the Act.

“Enabling Legislation” means those chapters, other than Chapter 4.10, of title 23 of the Code of Virginia, as amended, creating, continuing, or otherwise setting forth the powers, purposes, and missions of the College.

“Effective Date” means the effective date of the initial Management Agreement between the College and the Commonwealth.

“Management Agreement” means the agreement required by subsection D of § 23-38.88 of the Act between the College and the Commonwealth of Virginia.

“State Tax Supported Debt” means bonds, notes or other obligations issued under Article X, Section 9(a), 9(b), or 9(c), or 9(d), if the debt service payments are made or ultimately are to be made from general government funds, as defined in the December 20, 2004 Report to the Governor and General Assembly of the Debt Capacity Advisory Committee or as that definition is amended from time to time.

### **III. SCOPE OF POLICY.**

This Policy applies to the College’s responsibility for management, investment and stewardship of all its financial resources, including but not limited to, general, non-general and private funds. This responsibility includes maintaining an independent uniform system of accounting, financial reporting, and internal controls adequate to protect and account for the College’s financial resources.

The Virginia Institute of Marine Science (the Institute) shall receive the benefits of this Policy as it is implemented by the College on behalf of the Institute, but the Institute shall not receive any additional independent financial operations and management authority as a result of this Management Agreement beyond the independent financial operations and management authority that it had prior to the Effective Date of the College’s initial Management Agreement with the Commonwealth or that it may be granted by law in the future.

#### **IV. BOARD OF VISITORS ACCOUNTABILITY AND DELEGATION OF AUTHORITY.**

The Board of Visitors of the College shall at all times be fully and ultimately accountable for the proper fulfillment of the duties and responsibilities set forth in, and for the appropriate implementation of, this Policy. Consistent with this full and ultimate accountability, however, the Board may, pursuant to its legally permissible procedures, specifically delegate either herein or by separate Board resolution the duties and responsibilities set forth in this Policy to a person or persons within the College, who, while continuing to be fully accountable for such duties and responsibilities, may further delegate the implementation of those duties and responsibilities pursuant to the College's usual delegation policies and procedures.

#### **V. FINANCIAL MANAGEMENT AND REPORTING SYSTEM.**

The President, or designee, shall continue to be authorized by the Board to maintain existing and implement new policies governing the management of College financial resources. These policies shall continue to (i) ensure compliance with Generally Accepted Accounting Principles, (ii) ensure consistency with the current accounting principles employed by the Commonwealth, including the use of fund accounting principles, with regard to the establishment of the underlying accounting records of the College and the allocation and utilization of resources within the accounting system, including the relevant guidance provided by the State Council of Higher Education for Virginia chart of accounts with regard to the allocation and proper use of funds from specific types of fund sources, (iii) provide adequate risk management and internal controls to protect and safeguard all financial resources, including moneys transferred to the College pursuant to a general fund appropriation, and ensure compliance with the requirements of the Appropriation Act.

The financial management system shall continue to include a financial reporting system to satisfy both the requirements for inclusion into the Commonwealth's Comprehensive Annual Financial Report, as specified in the related State Comptroller's Directives, and the College's separately audited financial statements. To ensure observance of limitations and restrictions placed on the use of the resources available to the College, the accounting and bookkeeping system of the College shall continue to be maintained in accordance with the principles prescribed for governmental organizations by the Governmental Accounting Standards Board.

In addition, the financial management system shall continue to provide financial reporting for the President, or designee, and the Board of Visitors to enable them to provide adequate oversight of the financial operations of the College. Upon the Effective Date of the initial Management Agreement between the College and the Commonwealth, except for the recordation of daily revenue deposits of State funds as specified in Section VII below, the College shall not be required to record its financial transactions in of the Commonwealth's Accounting and Reporting System ("CARS"), including the current monthly interfacing with CARS , or be a part of any subsequent Commonwealth financial systems that replace CARS or are in addition to CARS, but shall have its own financial reporting system. The College's

financial reporting system shall provide (i) summary monthly reports for State agencies including, but not limited to, the Department of Accounts, the Department of Planning and Budget, the Joint Legislative Audit and Review Commission, the Auditor of Public Accounts, and the State Council of Higher Education for Virginia, and for the Chairmen of the Senate Committee on Finance and the House Committee on Appropriations at a sufficient level of detail, on such schedule, and using such format that is compatible with the Commonwealth's accounting system, as may be requested by the requesting State agency, and (ii) such other special reports as may be requested from time to time.

## **VI. FINANCIAL MANAGEMENT POLICIES.**

The President, or designee, shall create and implement any and all financial management policies necessary to establish a financial management system with adequate risk management and internal control processes and procedures for the effective protection and management of all College financial resources. Such policies will not address the underlying accounting principles and policies employed by the Commonwealth and the College, but rather will focus on the internal operations of the College's financial management. These policies shall include, but need not be limited to, the development of a tailored set of finance and accounting practices that seek to support the College's specific business and administrative operating environment in order to improve the efficiency and effectiveness of its business and administrative functions. In general, the system of independent financial management policies shall be guided by the general principles contained in the Commonwealth's Accounting Policies and Procedures such as establishing strong risk management and internal accounting controls to ensure College financial resources are properly safeguarded and that appropriate stewardship of public funds is obtained through management's oversight of the effective and efficient use of such funds in the performance of College programs.

Upon the Effective Date of its initial Management Agreement with the Commonwealth, the College shall continue to follow the Commonwealth's accounting policies until such time as specific alternate policies can be developed, approved and implemented. Such alternate policies shall include applicable accountability measures and shall be submitted to the State Comptroller for review and comment before they are implemented by the College.

## **VII. FINANCIAL RESOURCE RETENTION AND MANAGEMENT.**

Under § 23-38.104(A)(i) of the Act, subject to applicable accountability measures and audits, the College shall have the power and authority to manage all monies received by it. All State general funds to be allocated to the College shall remain subject to the appropriations process.

Pursuant to subsection C of § 23-9.6:1.01 of the Code of Virginia, the State Council of Higher Education for Virginia (SCHEV) annually shall assess and certify to the Governor and General Assembly the degree to which each public institution of higher education of the Commonwealth has met the financial and administrative management and educational-related

performance benchmarks called for by that subsection and approved as part of the Appropriation Act then in effect for the State goals and objectives set forth in subdivisions B 1 through B 11 of § 23-38.88 of the Act. Pursuant to § 2.2-5005 of the Code of Virginia, beginning with the fiscal year that immediately follows the first full fiscal year for which the financial and administrative management and educational-related performance benchmarks described in § 23-9.6:1.01 are effective, as provided in a general Appropriation Act, and for all fiscal years thereafter, each public institution of higher education of the Commonwealth that (i) has been certified during the fiscal year by SCHEV as having met such institutional performance benchmarks and (ii) meets the conditions prescribed in subsection B of § 23-38.88, shall receive certain financial incentives, including interest on the tuition and fees and other non-general fund Education and General Revenues deposited into the State Treasury by the public institution of higher education.

Consistent with the prior paragraph, beginning with the fiscal year following the first fiscal year for which it has received such certification from SCHEV, the College is authorized to hold and invest tuition, Educational and General (E&G) fees, research and sponsored program funds, auxiliary enterprise funds, and all other non-general fund revenues subject to the following requirements:

- i) The College shall deposit such funds in the State Treasury pursuant to the State process in place at the time of such deposit;.
- ii) Such non-general funds deposited in the State Treasury shall be disbursed as provided in Section IX below;.
- iii) The College shall remit to the State Comptroller quarterly and the State Comptroller shall hold in escrow all interest earned on the College's tuition and fees and other non-general fund Educational and General Revenues. Interest earned on the escrow account shall be deposited to the account. Upon receipt of the required State Council of Higher Education for Virginia certification that the College has met such institutional performance benchmarks and the conditions prescribed in subsection B of § 23-38.88, the Governor shall include in the next budget bill a non-general fund appropriation, payable no later than July 1 of the immediately following fiscal year, equivalent to the amount deposited in the escrow account as the financial incentive provided in subdivision 1 of § 2.2-5005, after which time the College may expend the funds for purposes related to its mission. If public institutions of higher education of the Commonwealth are permitted, or the College in particular is permitted, by the Appropriation Act or other law to retain or be paid the interest the Commonwealth would have earned on sponsored programs and research funds, then this paragraph shall not apply to such interest on such funds, and such interest shall not be held in escrow.
- iv) If in any given year the College does not receive the certification from the State Council of Higher Education for Virginia that it has met for that year the institutional

benchmarks called for by subsection C of § 23-9.6:1.01 and approved in the then-current Appropriation Act, the Comptroller shall transfer to the general fund the balance in the escrow account as of June 30 of that year.

v) Beginning on the effective date of its initial Management Agreement with the College until the beginning of the first fiscal year following the fiscal year for which it has received the required certification from SCHEV, the College shall continue to deposit tuition and all other non-general funds with the State Treasurer by the same process that it would have been required to use if it had not entered into a Management Agreement with the Commonwealth.

vi) On the first business day of the first fiscal year following the fiscal year for which it has received the required certification from SCHEV, the College may draw down all cash balances held by the State Treasurer on behalf of the College related to tuition, E&G fees, research and sponsored programs, auxiliary enterprises, and all other non-general fund revenues.

vii) The Commonwealth shall retain all funds related to general fund appropriations, but shall pay these funds to the College as specified in Section IX below.

The College also shall have sum sufficient appropriation authority for all non-general funds as approved by the Governor and the General Assembly in the Commonwealth's biennial appropriations process, and shall report to the Department of Planning and Budget (i) its estimate of the non-general fund revenues for the sum sufficient appropriation to be included in the biennial Budget Bill for each of the two years in the next biennium by November 1 of each odd numbered year and the estimate to be included in the Budget Bill for the first and second year of the then-current biennium by November 1 of each even numbered year, and (ii) report its actual non-general fund revenues for each fiscal year to the Department of Planning and Budget by July 31 of the subsequent fiscal year.

The Board of Visitors shall retain the authority to establish tuition, fee, room, board, and other charges, with appropriate commitment provided to need-based grant aid for middle- and lower-income undergraduate Virginians. Except as provided otherwise in the Appropriation Act then in effect, it is the intent of the Commonwealth and the College that the College shall be exempt from the revenue restrictions in the general provisions of the Appropriation Act related to non-general funds. In addition, unless prohibited by the Appropriation Act then in effect, it is the intent of the Commonwealth and the College that the College shall be entitled to retain non-general fund savings generated from changes in Commonwealth rates and charges, including but not limited to health, life, and disability insurance rates, retirement contribution rates, telecommunications charges, and utility rates, rather than reverting such savings back to the Commonwealth. This financial resource policy assists the College by providing the framework

for retaining and managing non-general funds, for the receipt of general funds, and for the use and stewardship of all these funds.

The President, or designee, shall continue to provide oversight of the College's cash management system which is the framework for the retention of non-general funds. The Internal Audit Department of the College shall periodically audit the College's cash management system in accordance with appropriate risk assessment models and make reports to the Audit Committee of the Board of Visitors. Additional oversight shall continue to be provided through the annual audit and assessment of internal controls performed by the Auditor of Public Accounts.

For the receipt of general and non-general funds, the College shall conform to the Security for Public Deposits Act, Chapter 44 (§ 2.2-4400 et seq.) of Title 2.2 of the Code of Virginia, as it currently exists and from time to time may be amended.

#### **VIII. ACCOUNTS RECEIVABLE MANAGEMENT AND COLLECTION.**

The President, or designee, shall continue to be authorized to create and implement any and all Accounts Receivable Management and Collection policies as part of a system for the management of College financial resources. The policies shall be guided by the requirements of the Virginia Debt Collection Act, Chapter 48 (§ 2.2-4800 et seq.) of the Code of Virginia, such that the College shall take all appropriate and cost effective actions to aggressively collect accounts receivable in a timely manner.

These shall include, but not be limited to, establishing the criteria for granting credit to College customers; establishing the nature and timing of collection procedures within the above general principles; and the independent authority to select and contract with collection agencies and, after consultation with the Office of the Attorney General, private attorneys as needed to perform any and all collection activities for all College accounts receivable such as reporting delinquent accounts to credit bureaus, obtaining judgments, garnishments, and liens against such debtors, and other actions. In accordance with sound collection activities, the College shall continue to utilize the Commonwealth's Debt Set Off Collection programs and procedures, shall develop procedures acceptable to the Tax Commissioner and the State Comptroller to implement such programs, and shall provide a quarterly summary report of receivables to the Department of Accounts in accordance with the reporting procedures established pursuant to the Virginia Debt Collection Act.

#### **IX. DISBURSEMENT MANAGEMENT.**

The President, or designee, shall continue to be authorized to create and implement any and all disbursement policies as part of a system for the management of College financial resources. The disbursement management policies shall continue to define the appropriate and reasonable uses of all funds, from whatever source derived, in the execution of the College's operations. These policies also shall continue to address the timing of appropriate and

reasonable disbursements consistent with the Prompt Payment Act, and the appropriateness of certain goods or services relative to the College's mission, including travel-related disbursements. Further, the College's disbursement policy shall continue to provide for the mechanisms by which payments are made including the use of charge cards, warrants, and electronic payments. Since the College no longer will interface to the CARS system or any replacement for the CARS system for disbursements, the College shall establish its own mechanisms for electronic payments to vendors through Electronic Data Interchange (EDI) or similar process and payments to the Commonwealth's Debt Set Off Collection Programs.

Beginning with the fiscal year after the first fiscal year for which it first receives the required certification from SCHEV, the College may draw down its general fund appropriations (subject to available cash) and tuition and E&G fees and other non-general fund revenues from the State Treasury. Such funds shall be available to the College for disbursement as provided in the then-current rules of the Automated Clearing House (ACH) Network. The draw down of funds may be initiated in accordance with the following schedule:

- i) The College may draw down one-twenty-fourth (1/24) of its annual general fund appropriation for Educational and General programs on or about the first and fifteenth days of each month with adjustments as needed to meet short-term cash requirements associated with the Commonwealth's bi-monthly pay dates, and up to 50% of its annual general fund appropriation for Student Financial Assistance on or after September 1 of each year with the remaining 50% to be drawn on or after February 1 of each year in order to meet student obligations;
- ii) The College may draw down the sum of all tuition and E&G fees and all other non-general revenues deposited to the State Treasury each day on the same business day they were deposited; and
- iii) The College anticipates that expenditures could exceed available revenues from time to time during the year if the above disbursement schedule is used. When the College projects a cost deficit in activities supported by general fund appropriations, the College may make a request to the State Comptroller for an early draw on its appropriated general funds deposited in the State Treasury, in a form and within a timeframe agreeable to the parties, in order to cover expenditures.

These disbursement policies shall authorize the President, or designee, to independently select, engage, and contract for such consultants, accountants, and financial experts, and other such providers of expert advice and consultation, and, after consultation with the Office of the Attorney General, private attorneys, as may be necessary or desirable in his or her discretion. The policies also shall continue to include the ability to locally manage and administer the Commonwealth's credit card and cost recovery programs related to disbursements, subject to any restrictions contained in the Commonwealth's contracts governing those programs, provided that

the College shall submit the credit card and cost recovery aspects of its financial and operations policies to the State Comptroller for review and comment prior to implementing those aspects of those policies. The disbursement policies shall ensure that adequate risk management and internal control procedures shall be maintained over previously decentralized processes for public records, payroll, and non-payroll disbursements. The College shall continue to provide summary quarterly prompt payment reports to the Department of Accounts in accordance with the reporting procedures established pursuant to the Prompt Payment Act.

The College's disbursement policies shall be guided by the principles of the Commonwealth's policies as included in the Commonwealth's Accounting Policy and Procedures Manual. Upon the Effective Date of its initial Management Agreement with the Commonwealth, the College shall continue to follow the Commonwealth's disbursement policies until such time as specific alternative policies can be developed, approved and implemented. Such alternate policies shall be submitted to the State Comptroller for review and comment prior to their implementation by the College.

## **X. DEBT MANAGEMENT.**

The President, or designee, shall continue to be authorized to create and implement any and all debt management policies as part of a system for the management of College financial resources.

Pursuant to § 23-38.108(B) of the Act, the College shall have the authority to issue bonds, notes, or other obligations that do not constitute State Tax Supported Debt, as determined by the Treasury Board, and that are consistent with debt capacity and management policies and guidelines established by its Board of Visitors, without obtaining the consent of any legislative body, elected official, commission, board, bureau, or agency of the Commonwealth or of any political subdivision, and without any proceedings or conditions other than those specifically required by Subchapter 3 of the Act; provided that, the College shall notify the Treasurer of Virginia of its intention to issue bonds pursuant to this Policy at the time it adopts the bond issuance planning schedule for those bonds. Any new or revised debt capacity and management policy shall be submitted to the Treasurer of Virginia for review and comment prior to its adoption by the College.

The College recognizes that there are numerous types of financing structures and funding sources available each with specific benefits, risks, and costs. All potential funding sources shall be reviewed by the President, or designee, within the context of the overall portfolio to ensure that any financial product or structure is consistent with the College's objectives. Regardless of the financing structure(s) utilized, the President, or designee, shall obtain sufficient documentation to gain a full understanding of the transaction, including (i) the identification of potential risks and benefits, and (ii) an analysis of the impact on College creditworthiness and debt capacity. All such debt or financial products issued pursuant to the provisions of §§ 23.38-107 and 23.38-108 of the Act, shall be authorized by resolution of the Board of Visitors, providing that they do not constitute State Tax Supported Debt.

The College will establish guidelines relating to the total permissible amount of outstanding debt by monitoring College-wide ratios that measure debt compared to College balance-sheet resources and annual debt service burden. These measures will be monitored and reviewed regularly in light of the College's current strategic initiatives and expected debt requirements. The Board of Visitors shall periodically review and approve the College's debt capacity and debt management guidelines. Any change in the guidelines shall be submitted to the Treasurer of Virginia for review and comment prior to their adoption by the College.

## **XI. INVESTMENT POLICY.**

It is the policy of the College to invest its operating and reserve funds solely in the interest of the College and in a manner that will provide the highest investment return with the maximum security while meeting daily cash flow demands and conforming to the Investment of Public Funds Act (§ 2.2-4500 et seq.) of the Code of Virginia). Investments shall be made with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

Endowment investments shall be invested and managed in accordance with the Uniform Management of Institutional Funds Act, §§ 55-268.1 through 55-268.10, and § 23-76.1 of the Code of Virginia.

The Board of Visitors shall periodically review and approve the investment guidelines governing the College's operating and reserve funds.

## **XII. INSURANCE AND RISK MANAGEMENT.**

By July 1 of each odd-numbered year, the College shall inform the Secretary of Finance of any intent during the next biennium to withdraw from any insurance or risk management program made available to the College through the Commonwealth's Division of Risk Management and in which the College is then participating, to enable the Commonwealth to complete an adverse selection analysis of any such decision and to determine the additional costs to the Commonwealth that would result from any such withdrawal. If upon notice of such additional costs to the Commonwealth, the College proceeds to withdraw from the insurance or risk management program, the College shall reimburse the Commonwealth for all such additional costs attributable to such withdrawal, as determined by the Commonwealth's actuaries. Such payment shall be made in a manner agreeable to both the College and the Commonwealth.

**SECTION 4.3. Term of Agreement.** This Management Agreement shall expire at midnight on June 30, 2012, provided that on or before November 15, 2011, the Governor provides to the Chairmen of the House Committee on Appropriations and the Senate Committee on Finance written notification that this Management Agreement needs to be renegotiated or revised. If such

notification is not received, this Management Agreement shall continue in effect until June 30, 2015.