

December 1, 2025

Determination of Nonresponsibility
Harbor Boardwalk Reconstruction, Phase 2

A. Town Code and Code of Virginia

Section 2-28 of the Town Code states that the town shall comply with the Virginia Public Procurement Act:

Code of Virginia, § 2.2-4300 et seq., is the Virginia Public Procurement Act. Code of Virginia, § 2.2-4343.A.9, exempts towns with a population of less than 3,500 from most provisions of the Act. However, it shall be the policy of the town to comply with the provisions of the Act, except that the small purchase threshold in Code of Virginia, § 2.2-4303.G, shall be \$50,000.00 for goods and services other than professional services and \$30,000.00 for professional services.

Sec. 2.2-4303 requires that **construction be procured via competitive sealed bidding** except for specific circumstances.

Sec. 2.2-4302.1 defines the process for evaluation of bids and **requires award of the contract to the lowest responsive and responsible bidder:**

4. Evaluation of bids based upon the requirements set forth in the Invitation to Bid, 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; and

5. Award to the lowest responsive and responsible bidder.

Sec. 2.2-4301 provides the following definitions:

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

"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.

Sec. 2.2-4319 provides that **bids may be rejected for valid reasons:**

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. A public body shall not cancel or reject an Invitation to Bid, a Request for Proposal, any other solicitation, bid or proposal pursuant to this section solely to avoid awarding a contract to a particular responsive and responsible bidder or offeror.

Sec. 2.2-4359 specifies the **procedures for determining whether a bidder is nonresponsible:**

A. Following public opening and announcement of bids received on an Invitation to Bid, the public body shall evaluate the bids in accordance with element 4 of the process for competitive sealed bidding set forth in § [2.2-4302.1](#). At the same time, **the public body shall determine whether the apparent low bidder is responsible**. If the public body so determines, then it may proceed with an award in accordance with element 5 of the process for competitive sealed bidding set forth in § [2.2-4302.1](#). **If the public body 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 public body 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 public body shall issue its written determination of responsibility based on all information in the possession of the public body, including any rebuttal information, within five business days of the date the public body received the rebuttal information. At the same time, the public body 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 § [2.2-4365](#), if available, or in the alternative by instituting legal action as provided in § [2.2-4364](#).**

B. Procurement for Harbor Boardwalk Reconstruction, Phase 2

1. A contract was awarded to Carolina Marine Structures (CMS) pursuant to an Invitation for Bids (IFB) dated July 18, 2025. The other three bidders in ascending bid price order were Pratte Construction, Harmonia Contracting, and Docks of the Bay. **CMS defaulted on the contract after performing partial demolition of the boardwalk decking over a few days.**
2. **The three remaining bidders were invited to submit revised bids** based on a scope of work that recognized the partial demolition. **Harmonia Contracting submitted the lowest bid.** The bid is considered responsive in that it complied with the IFB requirements for lump sum pricing of the Base Bid and four Bid Alternates. However, **the very low Base Bid raises the question whether Harmonia “has the capability, in all respects, to perform fully the contract requirements”, as demonstrated below:**

<u>Contractor</u>	<u>Original Bid</u>	<u>Revised Bid</u>	<u>Change</u>
Pratte	\$122,380	\$113,380	- 7.4%
Harmonia	\$159,500	\$ 88,545	-44.5%
Docks of the Bay	\$176,000	\$176,000	0.0%

The revised bid submitted by Harmonia **suggests either a fundamental misunderstanding of the minor amount of work performed by CMS prior to default, or a deliberate underbid of the work** with the possibility of recovery via change orders.

3. **Additionally, Harmonia demonstrated poor management of the contract for the first phase of the boardwalk reconstruction.** Harmonia was awarded the contract and subcontracted all the work to Pratte. **There is no evidence that Harmonia performed any on-site supervision of the subcontractor's work. This resulted in the subcontractor performing significant unauthorized additional work that had to be ratified by an after-the-fact contract change order.** The Town spent an inordinate amount of time directly overseeing the work of the subcontractor.
4. Finally, a **payment dispute emerged between Harmonia and Pratte, resulting in the latter filing a criminal complaint with the Virginia State Police.** The Town has had to dedicate time to this investigation as well.
5. Based on the above, it is **staff's judgement that Harmonia does not meet the requirements of a responsible bidder as defined in the Code of Virginia:** "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.

C. Appeal of Determination of Nonresponsibility

In addition to the notification requirements described above, the Code of Virginia provides for an appeal process after the determination has been made:

Sec. 2.2-4359

B. If, upon appeal pursuant to § [2.2-4364](#) or [2.2-4365](#), it is determined that the decision of the public body was not (i) an honest exercise of discretion, but rather was arbitrary or capricious or (ii) in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms or conditions of the Invitation to Bid, 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 § [2.2-4364](#) or both. If it is determined that the decision of the public body 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 § [2.2-4360](#).

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 § [2.2-4360](#).

Sec. 2.2-4360

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 public body 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 public body 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.

Sec. 2.2-4361

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

Sec. 2.2-4362

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 § [2.2-4360](#), or the filing of a timely legal action as provided in § [2.2-4364](#), 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.

Sec. 2.2-4364

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 § [2.2-4317](#). In the event the apparent low bidder, having been previously determined by the public body to be not responsible in accordance with § [2.2-4301](#), is found by the court to be a responsible bidder, the court may direct the public body to award the contract to such bidder in accordance with the requirements of this section and the Invitation to Bid.