

Commonwealth of Virginia



VENDORS MANUAL

A Vendor's Guide on How to do Business with the Commonwealth of Virginia

Revised
December 1998

Department of General Services
Division of Purchases and Supply
805 East Broad Street
Richmond, VA 23219

CHAPTER 9

APPEALS

In this Chapter look for . . .

- 9. General
 - 9.1 Creation of the DGS/DPS Procurement Appeals Board
 - 9.2 Jurisdiction of the Board
 - 9.3 Appeal of Ineligibility or Disqualification Determination or Debarment
 - 9.4 Appeal of a Denial of Bid Withdrawal
 - 9.5 Appeal of Nonresponsibility Determination
 - 9.6 Protest of Award or Decision to Award
 - 9.7 Initiation of Appeal to the DGS/DPS Board
 - 9.8 Exhaustion of Administrative Procedures
 - 9.9 Effect of the Appeal on Procurement Proceedings
 - 9.10 Time and Place of Hearings
 - 9.11 Parties to the Appeal
 - 9.12 Hearing Procedures
 - 9.13 Small Purchase Procedures
 - 9.14 Administrative Support
 - 9.15 Board's Decision
 - 9.16 Judicial Review
-

9. **General.** The *Virginia Public Procurement Act* provides that a public body may establish administrative procedures for hearing procurement protests and appeals.

9.1 **Creation of the DGS/DPS Procurement Appeals Board**

- a. **DGS/DPS Procurement Appeals Board.** The DGS/DPS Procurement Appeals Board (hereinafter referred to as the Board) is established under the *Code of Virginia*, § 11-71, to provide an impartial administrative review of contested decisions on the procurement of goods made by any agency of the Commonwealth that is required to follow the purchasing procedures set forth in this manual.

See paragraphs 1.1, 1.2 and 1.3 of this manual and *Code of Virginia* §§ 2.1-440 and 2.1-442. The Board is neither empowered to review contested procurement decisions by the Department of Transportation, the Alcoholic Beverage Commission, nor is it empowered to review matters relating to service contracts or construction contracts, except that it may review appeals on the procurement of supplies, material, and equipment which are not part of a construction contract but which are purchased under the provisions of this manual.

b. **Membership of the Board, Voting, and Conflicts of Interest**

- (1) The Board will consist of members to be appointed by the Governor or his or her designee.

The term of office for each member will be four years except that in the initial appointments two members will be appointed to serve terms of only two years.

- (2) The Board will elect a chairperson from among its members to serve in that capacity for two years. The chairperson will be responsible for the administration of the Board and will preside over all meetings and hearings. The chairperson may appoint a member of the Board to act in his or her absence.
- (3) The Board may, by a simple majority of a quorum present and voting, adopt such procedures as are not inconsistent with law and this manual.
- (4) Any number of the Board shall be sufficient to hear an appeal. When an odd number is present, decisions on the appeal shall be made by a simple majority vote of those present. When an even number is present, the chairperson or the person presiding shall not vote. Since this is done only to avoid tie votes, the chairperson may participate fully in all deliberations prior to voting.
- (5) Members of the Board shall not discuss any issue on appeal with anyone other than members of the Board and its legal counsel prior to hearing an appeal. During the hearing, members shall not discuss the appeal with any party unless all parties or their legal counsel are present.
- (6) On any matter, including but not limited to the hearing of an appeal, if any member of the Board determines that he or she has a conflict of interest and will be unable to consider the matter fairly and impartially or determines that a reasonable person could think that he or she has a conflict or would be unable to consider the matter fairly and impartially, then he or she should withdraw from all further deliberations and votes on that matter. Any party appearing before the Board may challenge a member on these same grounds and, if the challenged member decides not to withdraw from the matter under consideration, then the remaining members of the Board shall make such inquiries as they deem necessary and shall vote to determine whether or not the challenged member should be disqualified from further deliberation and votes on the matter under consideration. The Board may likewise vote to disqualify a member from consideration of a particular matter at any time on its own motion.

9.2 **Jurisdiction of the Board**

- a. The Board may review appeals from procurement decisions on the purchase of goods made by any agency of the Commonwealth required to follow the purchasing procedures set forth in this manual.
- b. The Board has the authority to review the following:
 - (1) Appeals from a determination that the vendor is ineligible to participate in public contracts, e.g., debarment (*Code of Virginia*, § 11-63).
 - (2) Appeals from a denial of a request to withdraw a bid (*Code of Virginia*, § 11-64).

(3) Appeals from a determination of nonresponsibility (*Code of Virginia*, § 11-65).

(4) Appeals from denial of a protest of an award or decision to award (*Code of Virginia*, § 11-66).

It is not intended that the establishment of this board supplants or interferes with the informal resolution of disputes between the procuring agency and the contractor. Informal resolution of complaints in lieu of appealing is encouraged.

9.3. **Appeal of Ineligibility or Disqualification Determination or Debarment** (*Code of Virginia*, § 11-63). Any bidder, offeror or contractor refused permission to participate, or disqualified from, participation in public contracts shall be notified in writing. Prior to the issuance of a written determination of disqualification or ineligibility, the public body 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 which relate to the determination, if so requested by the bidder within five business days after receipt of the notice.

Within ten 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 disqualification or ineligibility 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 such rebuttal information.

If the evaluation reveals that the bidder, offeror or contractor should be allowed permission to participate in the public contract, the public body 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 public body shall so notify the bidder, offeror or contractor. Such notice shall state the basis for the determination, which shall be final unless the bidder appeals the decision within ten days after receipt of the notice by initiating an appeal to the Board in accordance with paragraph 9.7 of this manual or appeals to the appropriate circuit court (*Code of Virginia*, § 11-70).

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

9.4. **Appeal of a Denial of Bid Withdrawal**. (*Code of Virginia*, § 11-64). Any bidder who requests in writing that a bid be withdrawn in accordance with paragraphs 5.13 and 5.14 of this manual will receive a written notice if that request is denied. The denial of bid withdrawal will be final unless the bidder, within ten days after receipt of the decision denying withdrawal, institutes an appeal to the Board in accordance with paragraph 9.7 of this manual or appeals to the appropriate circuit court (*Code of Virginia*, § 11-70). If the Board determines that the decision refusing withdrawal of the bid was arbitrary or capricious, the sole relief shall be withdrawal of the bid.

If no bid bond was posted, prior to appealing, the bidder must deliver to the procuring agency a certified check payable to the Treasurer of Virginia, or a cash bond naming the Commonwealth of Virginia as obligee, in the amount of the difference between the bid sought to be withdrawn and the next low bid. This security shall be released only upon the final determination that the bidder was entitled to withdraw the bid or upon acceptance of the awarded contract by the appealing bidder.

The security shall be forfeited to the Commonwealth if the final decision is adverse to the appealing bidder who then fails to accept and enter into the contract or to appeal to a circuit court. In the event the bidder appeals to a circuit court and that court issues a decision adverse to the bidder upholding the Board's decision, the security shall be forfeited.

- 9.5 **Appeal of Nonresponsibility Determination.** (*Code of Virginia, § 11-65*). A bidder found nonresponsible for a particular procurement by the purchasing agency will be notified in writing of the results of the evaluation and disclose the factual support for the determination. If requested by the bidder within five (5) business days after receipt of the notice, the bidder has an opportunity to inspect any documents which relate to the determination. Within ten (10) business days after receipt of the notice, the bidder may submit rebuttal information challenging the evaluation. Within five (5) business days of receipt of the rebuttal information, the purchasing agency shall issue its written determination of responsibility based on all information, with return receipt requested, stating the basis for the determination. A determination of nonresponsibility will be final unless the bidder, within ten days after receipt of the notice, initiates an appeal to the Board in accordance with paragraph 9.7 of this manual or appeals to the appropriate circuit court (*Code of Virginia, § 11-70*).

This 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.

If the Board finds that the decision of the purchasing agency 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, the relief shall be as follows.

- a. If the award has not been made, the bidder's sole relief shall be a finding that the bidder is a responsible bidder for the contract in question.
- b. If the award of the contract has been made but performance on the contract has not begun, the performance of the contract may be enjoined by the Board.
- c. Where the award of the contract has been made and performance of the contract has begun, the procuring agency, not the Board, may elect to terminate the contract upon a finding that this action is in the best interests of the public. In this case, the performing contractor will be compensated for the cost of performance up to the time of termination, as stated in paragraph 7.18 of this manual, but will not be entitled to lost profits.

If action is brought in the appropriate circuit court challenging the determination of nonresponsibility and is found by the court to be a responsible bidder, the court may direct the public body to award the contract, forthwith, to such bidder in accordance with the requirements of *Code of Virginia, §11-70* and the Invitation to Bid.

- 9.6 **Protest of Award or Decision to Award.** (*Code of Virginia, § 11-66*). Any bidder or offeror who wants to challenge an award or a decision to award a contract must submit a written protest in accordance with paragraph 6.6 of this manual within ten days after the award or the announcement of the decision to award, whichever occurs first. The protest shall include the specific basis for the protest and the relief sought. Any potential bidder or offeror on a contract negotiated on a sole

source or emergency basis who desires to protest the award or decision to award such contract shall submit such protest in the same manner no later than ten days after posting or publication of the notice as provided in paragraphs 2.7 or 2.8. The head of the purchasing office will issue a decision in writing within ten days of the written protest. This written decision will be final unless the vendor initiates an appeal to the Board in accordance with paragraph 9.7 of this manual within ten days of the written decision or in the alternative institutes legal action as provided in the *Code of Virginia*, § 11-70.

If the Board finds that the action taken by the purchasing agency was arbitrary or capricious, the relief shall be as follows:

- a. If the award has not been made, the vendor's sole relief shall be a finding to that effect. The purchasing agency will either cancel the proposed award or revise it to comply with the decision of the Board.
- b. If the award of the contract has been made, but performance has not begun, the performance of the contract may be enjoined by the Board.
- c. Where the award of the contract has been made and performance has begun, the purchasing agency, not the Board, may elect to terminate the contract if it finds that this action is in the best interest of the public. The performing contractor will be compensated for the cost of performance up to the time of termination, but will not be entitled to lost profits. Immediately upon receiving notice of termination or learning of the termination order, the performing contractor shall comply with the provisions of paragraph 7.18.

If the Board determines, after a hearing which is held following reasonable notice to all bidders, that there is probable cause to believe that a decision to award was based on fraud or corruption or an act in violation of "Ethics in Public Contracting," as set forth in the *Code of Virginia*, §§ 11-72 through 11-80, the award of the contract to a particular bidder/offeror may be enjoined.

9.7 Initiation of Appeal to the DGS/DPS Board.

- a. An appeal to the Board must be initiated by the filing of a notice of appeal within the time limits prescribed in paragraphs 9.3 through 9.6 of this manual. It is not sufficient that notices of appeal be postmarked within the time limits. The appeal must actually be delivered within the time limits. Notice of an appeal to the Board may be sent by facsimile to (804) 371-7877 and will be considered timely if the transmission is received in full within the time limits prescribed in paragraphs 9.3 through 9.6. The original hard copy must be promptly submitted. The appealing party assumes whatever risks are inherent in the selected method of delivery.
- b. The notice must be in writing and state:
 - (1) That an appeal is being filed
 - (2) The agency or institution of the Commonwealth involved in the dispute
 - (3) The decision from which the appeal is being taken

- (4) The contract number and other identification of the contract
 - (5) The basis for the appeal
 - (6) The relief sought
- c. The notice must be submitted to:
- (1) Via mail: Procurement Appeals Board
c/o Director
Division of Purchases and Supply
PO Box 1199
Richmond VA 23218-1199
 - (2) Via hand delivery: Procurement Appeals Board
c/o Director
Division of Purchases and Supply
805 East Broad Street
Richmond VA 23219
- d. A copy must also be simultaneously delivered or mailed to the purchasing office involved in the procurement action and to the apparent successful vendor. In any appeal which alleges fraud, corruption, or an act in violation of *Code of Virginia*, § 11-72 et seq., the appellant shall notify all other bidders, which notice may be by U. S. Mail, mailed on the date the notice of appeal is filed.
- e. The Board may waive errors or a lack of complete information in the contents of the notice of appeal in the interest of justice if the notice is sufficient to make known the nature of the appeal and the agency involved. The Board may not waive the requirement that the appeal be filed within the prescribed time limits.

9.8 **Exhaustion of Administrative Procedures.** A vendor need not utilize the foregoing appeal procedure of the Board, but if the vendor initiates this procedure, it must be exhausted prior to instituting legal action concerning the same procurement transaction unless the procuring agency agrees otherwise (*Code of Virginia*, § 11-70F).

9.9 **Effect of the Appeal on Procurement Proceedings**

- a. Pending final determination of a protest or appeal, the validity of a contract awarded and accepted in good faith in accordance with Chapter 7, Title 11 of the *Code of Virginia* shall not be affected by the fact that a protest or appeal has been filed (*Code of Virginia*, § 11-67).
- b. An award need not be delayed for the period allowed a bidder or offeror to protest or appeal, but in the event of a timely protest or appeal as provided in § 11-66, or the filing of a timely legal action as provided in § 11-70, no further action to award the contract will be taken unless there is a written determination by the purchasing agency that award of the contract is necessary to protect the public interest or unless the bid or offer would expire (*Code of Virginia*, § 11-68). When such a written determination is made, copies shall be sent to all parties to a protest or

appeal, and in the case of an appeal, to the applicable Procurement Appeals Board.

9.10 **Time and Place of Hearings.** The parties will be given at least a ten day notice of the time and place of the appeal hearing. Appeals may be heard earlier upon the consent of all parties. In scheduling hearings, the Board will consider but will not be bound by the desires of the parties. It will also bear in mind the need for completion of the appeals process in a timely manner.

9.11 **Parties to the Appeal.**

a. Parties to the appeal shall consist of the following if they appear at the appeal hearing and ask to be made a party:

(1) In the case of an appeal from a determination of ineligibility for or disqualification from participation in public contracts, or from a determination of nonresponsibility:

(a) The party declared ineligible or disqualified

(b) The agency or institution of the Commonwealth which made the decision, and the Division of Purchases and Supply

(2) In the case of an appeal from the denial of a request to withdraw a bid:

(a) The bidder requesting that his or her bid be withdrawn

(b) The purchasing agency

(c) The agency or institution for which the procurement is being made if it is not the purchasing agency

(3) In the case of a vendor protesting an award or a decision to award a contract:

(a) The vendor appealing

(b) The purchasing agency

(c) The agency for which the procurement is being made, if it is not the purchasing agency

b. The Board may, on its own motion, make any of the above a party, even though they fail to appear or to request to be made a party, if it is necessary that they be heard for complete resolution of the matter on appeal. In cases where the Division of Purchases and Supply is not a party, it may appear before the Board and comment upon the matter being appealed and the implications of possible decisions upon the purchasing procedures of the Commonwealth.

9.12 **Hearing Procedures.** Hearings before the Procurement Appeals Boards are not trials and will not be conducted as such. The Administrative Process Act does not apply to these hearings (*Code of Virginia*, § 9-6.14:4.1B2). The hearings will be informal, and each party will be given a reasonable period of time to state their position. Any party may be represented by legal counsel at the hearing. Rules of evidence do not apply, except that the Board may exclude evidence which is irrelevant or

redundant and may limit testimony and argument as necessary to reasonably expedite the proceedings.

Witnesses may be called to testify, but the Board does not have subpoena power, and an oath will not be administered.

The Board may ask questions at any time but may not question any of the parties in closed session. The Board's chairperson may limit the number of witnesses and may permit or control the discussion to the extent that the Board, in its opinion, determines that the discussion will contribute to the identification and resolution of the issues.

Hearings will be open to the public, but the Board shall adjourn the hearing to deliberate and reach its decision in private.

Hearings will usually proceed in the following order subject to the desires of the Board:

- a. The appealing party will state its reasons for appealing and the desired relief. Points of contention between the vendor and the public body will be limited to those points raised to the public body by the vendor in its letter of protest.
- b. The appealing party will present its witnesses and evidence. The Board and other parties will be able to ask questions of each witness.
- c. Other parties may present their responses, the relief they desire, if any, and their witnesses and other evidence in the order determined by the Board. Questions may be asked of their witnesses by the Board or other parties to the appeal.
- d. When all evidence and final arguments of the parties have been presented, the Board shall deliberate in private session.

The hearings will be electronically recorded and the recordings retained for sixty days. If judicial review of the Board's decision is instituted, the recording will be retained until the judicial review has been completed. Any party may provide a court reporter at its own expense. If a court reporter is used, transcripts of the hearing shall be given to the Board at no expense upon its request. The Board may make such a transcript a part of its record. If the Board determines the transcript to be inaccurate or incomplete, it shall note for the record any inaccuracies or incomplete transcription of the hearing.

9.13 **Small Purchase Procedures.** If an appeal or protest involves the award of a contract or withdrawal of a bid on a contract for less than \$30,000, the vendor may request a small purchase appeals hearing. For such a hearing all appropriate provisions of this chapter will apply, except that the hearing may be conducted before a single member of the Board, designated by the chairperson, when the full Board is not scheduled to meet. The hearing may be held as soon as a member of the Board is available, and the notification time for the hearing may be shortened at the discretion of the chairperson.

9.14 **Administrative Support.** The Division of Purchases and Supply will furnish administrative support required including but not limited to arranging for a board hearing room, electronic recording

facilities and supplies, and the preparation and mailing of hearing materials.

- 9.15 **Board's Decision.** The Board hearing the appeal will issue a written decision within ten (10) business days of the hearing date except when it must await a transcript of the hearing, in which case it will issue a written decision within ten (10) business days of receiving the transcript. The Board's decision will include a brief statement of the relevant facts, as the Board determined them to be true, which caused it to make its decision. This will be called the "Findings of Fact." The Board will then state its decision, giving in such detail as it considers necessary the reasons for its decision. The decision will be signed by the chairperson or designee.

Copies of the decision will be mailed to the parties and the Director of DPS, and will be available to other interested persons upon request.

- 9.16 **Judicial Review.** Any party to a hearing before the Board will be entitled to institute judicial review if such action is brought within thirty days after receipt of the Board's written decision or within thirty days of attempted postal delivery of the Board's written decision to the last mailing address provided to the Board by the party.

The findings of fact by the Board will be final and conclusive and will not be set aside by a Court unless fraudulent, arbitrary or capricious, or so grossly erroneous as to imply bad faith. No determination on an issue of law will be final if appropriate legal action is instituted in a timely manner (*Code of Virginia*, § 11-71).

See Changes