

Special Joint General Laws Subcommittee
Studying the Virginia Public Procurement Act



Public Procurement Enforcement and Oversight

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Enforcement Authorization



- Presumption that officials have acted lawfully
- Sovereign immunity protects government from disruptive lawsuits except where the legislature has authorized lawsuits
- Legislature has authorized certain procurement remedies allowing review by court or panel outside the public body's management
- Protecting vendor's interests versus marshalling vendor's self-interest as a tool to implement and protect state policy and interests

Procurement Requirements



- Required process to award public contract
- Ethical rules
- Required and prohibited contract provisions
- Socio-economic requirements
- Openness v. shielding procurement records
- Rules for administration of public contracts
- Exclusion of unreliable vendors

VPPA Vendor Remedies



- Ineligibility determinations

Va. Code § 2.2-4357, § 2.2-4364.A

- Requests to withdraw bid

Va. Code § 2.2-4358, § 2.2-4364.B

- Responsibility determinations

Va. Code § 2.2-4359, § 2.2-4364.A

- Award or decision to award a contract

Va. Code § 2.2-4360, § 2.2-4364.C

- Contractual claims

Va. Code § 2.2-4363, § 2.2-4364.E

Award or Decision to Award



- Code Provisions: § 2.2-4360, § 2.2-4364
- Protest and appeal process: Step by Step
- Rules pertaining to status of contract award during possible legal challenge
- Remedies provided to vendor and how they are affected by contract status
- Administrative appeal option: § 2.2-4365

Protest & Appeal Steps



- Step 1: Notice of award or decision to award
 - Bid/proposal records available for vendor inspection
- Step 2: Written protest within ten days
 - Not to challenge validity of terms or responsibility of winner
 - No further action to award contract (exceptions)
- Step 3: Written response within ten days
 - Corrective options depend on contract status
 - But often, protest is denied in whole or in part
- Step 4: Appeal within ten days of protest denial
 - Must show award/proposed award is arbitrary or capricious or not in accordance with law or solicitation (§ 2.2-4364.C)

Protest & Appeal Remedy



- Agency's response to meritorious protest
 - Contract has not yet been awarded:
Rescind or revise proposed award, or cancel procurement
 - Contract awarded but performance not begun:
Enjoin performance
 - Contract awarded but performance has begun:
Void contract if public body finds this is in the public interest
(must compensate vendor's costs up to date of voiding)
- Court's response to meritorious appeal
 - Reverse award or decision to award (§ 2.2-4364.C)
 - Injunction? (Compare § 2.2-4364.D and § 2.2-4362)
- Protester cannot get damages, costs, or award
 - Protester's focus is to prevent/undo other vendor's award

Protest & Appeal Award Status



- VPPA balances agency's need for award against potential protester's interest in no award
- Agency's purchasing needs come first
 - Agency need not wait for protest period to run; may award immediately. See § 2.2-4360, § 2.2-4362.
 - Upon protest/appeal, must halt further action to award contract, but can proceed if bid/offer will expire or if public interest requires See § 2.2-4362
 - Contracts awarded remain valid while on appeal. § 2.2-4361
 - If award violated VPPA, contract not automatically void, but rather, only voidable. See § 2.2-4360.B, § 2.2-4364.C
- Agency interest in delaying award to maximize options for fixing problems found after posting

Key Points



- VPPA balances public, agency, and vendor interests
- VPPA's protest remedy is authorized only when decision is announced, not during the procurement process.
- Key issue for protester is timing of contract award
- Comments to procuring agency and oversight body can be at any time

Alternatives to Court



- Vendors sometimes desire alternative
- VPPA authorizes public bodies to create an administrative appeal option for dispute to be heard by neutral panel outside procuring agency's management
- Oversight authorities are another avenue-- not for vendor to enforce rights but to alert authority outside procuring agency's management

Administrative Appeals



- Public body may establish administrative appeal process (§ 2.2-4365)
 - Neutral -- panel cannot be public body's employees
 - Administrative process can be for any type of VPPA dispute
 - Either party can appeal panel's decision within thirty days
 - Usefulness depends on how it is set up
- Distinguish this from ADR
 - ADR authorized only for contract disputes (§ 2.2-4366)
 - Must be nonbinding for state agencies, school boards
 - Subject to § 2.2-514 (settlement approval procedures)

Oversight



- Legislature has assigned certain oversight responsibilities to officers outside the procuring agency's management
- Can be for specific purposes or occurrences, usually involving approvals, not detailed here
- More general oversight of procurement process is through powers of central purchasing agencies, DGS and VITA

Oversight Authority



- Delegation of purchasing authority
 - DGS: goods and nonprofessional services if costs to be paid from State Treasury. See *Va. Code* § 2.2-1110
 - VITA: technology and telecommunication goods and services. *Va. Code* § 2.2-2012.A, *Appropriation Act* § 4-5.04 b.1a)
- Issuance of procurement regulations
 - DGS: all state-level purchases of goods and nonprofessional services. See *Va. Code* § 2.2-1111.A and C
 - VITA: state executive branch purchases of information technology and telecommunications goods and services, § 2.2-2012.A.
- Exceptions

Oversight Authority



- Ability to grant/withdraw contracting authority is key legal foundation for oversight and to protect Commonwealth
- Contracts violating VPPA voidable (with conditions), but contracts signed without authority are void. (1984-85 VAAG 432)
 - No *quantum meruit* (*Flory v. Commonwealth*, 261 Va. 230 (2001))
 - No payment (*Va. Code* § 2.2-1115.D).
 - Section 2.2-1115.D apply to technology procurements?

Other Procurement Laws



- PPEA displaces VPPA but does not supply any enforcement provisions. See § 56-575.16
- Same for PPTA. See § 56-573.1
- Local public bodies can adopt alternative procedures without enforcement provisions. See § 2.2-4343.A(9)-(12).
- Many entities exempt from VPPA. See § 2.2-4343.A



Questions?