

Enforcement/Oversight Discussion

I. Review of Vendor Remedies

A. Overview of remedies

B. Process fixes

1. Choice between Notice of Intent to Award and Notice of Award.

1. The Act allows a protest only after the agency has posted either a NOIA or a NOA. Currently the VPPA allows use of either type of notice, regardless of the likelihood of protest and regardless of the urgency of the purchase.
2. For consideration: Mandate the use of a NOIA unless there are circumstances that require proceeding without delay.

2. Automatic Stay

- a. Section 2.2-4362 may be interpreted as permitting a contract to be awarded after the protest is denied but before the protester actually files his appeal in circuit court.

For consideration: Clarify the status of the automatic stay during the period after the protest is denied but before the protester actually files his appeal in circuit court.

- b. Section 2.2-4362 establishes the factors that should determine how to balance the agency's need to go forward against the impact this will have on meaningful enforcement. However, courts tend to apply a more general standard in deciding whether to grant an appellant's request for an injunction.

For consideration: Clarify that the standard for an automatic stay provided by § 2.2-4362 applies regardless of the stage of the protest or appeal process.

3. Sole relief language.

- a. Sections 2.2-4357, 2.2-4358, and 2.2-4359 all prescribe what the sole relief shall be and expressly state that this shall be the sole relief "upon appeal." Section 2.2-4360 also states what the sole relief shall be but does not expressly state that this shall be the sole relief upon appeal.

- b. For consideration: Clarify that the sole relief language in § 2.2-4360 applies upon protest or appeal.
4. Appeals procedure; clarification of administrative process for “protest” appeals in § 2.2-4365.
 - a. Section 2.2-4365 provides, in pertinent part, that “a public body 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”. It appears that the reference to “protests” in part (i) was meant to be “appeals after denial of protests”
 - b. For consideration: Clarify that the administrative appeal reference in §2.2-4365 for **protests** refers to appeals *after* denial of protest.

II. Increased Enforcement and Oversight within the Current Structure

- A. Require all public bodies to have an administrative appeal process for procurement. (Section 2.2-4365 specifies that a public body “may” establish an administrative appeal procedure.)
- B. Establish uniformity of authority between the Virginia Information Technologies Agency (VITA) and the Department of General Services (DGS)
- C. Comptroller. Review function to be performed by the Comptroller in § 2.2-1115 D and how it can be improved.
- D. Office of the Inspector General. Review role of OSIG regarding the investigation of procurement decisions and contracts

III. Creation of a Central Appeal or Advisory Entity

Initial concerns:

- Should a central appeals board exist as an administrative appeal option for vendors where the agency has not chosen to create an appeal board?
- Determination of which agency procurement actions will be covered (i) eligibility determinations under §2.2-4363, (ii) bid withdrawal decisions under §2.2-4358, (iii) non-responsibility determination under §2.2-4359, and (iv) protests under §2.2-4360
- Use of monetary thresholds
- Consideration of a public body's choice of procurement method

A. Central Procurement Appeals Entity.

1. Location (Executive or Legislative Branch; Independent agency)
2. Structure (Governing board? membership/appointments?)
3. Scope
 - a. All public bodies or subset(s) of public bodies?
 - b. Which public body procurement actions will be subject to the entity's jurisdiction?
4. Authority
 - a. What actions can the entity take?
 - b. How will the entity enforce its decisions?
 - c. Costs

B. Central Procurement Advisory Entity

1. Location (Executive or Legislative Branch; Independent agency)
2. Structure (Governing board? membership/appointments?)
3. Scope
 - a. All public bodies or subset(s) of public bodies?
 - b. Which public body procurement actions will be subject to the entity's jurisdiction?
4. Authority
 - a. Advisory opinions
 - b. Review of procurement processes
 - c. Review and recommendation of legislative proposals
 - d. Forum for stakeholders; dialogue platform for issues related to procurement processes