

# CHAPTER 11

## APPEALS AND DISPUTES

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11. **General.** The *Virginia Public Procurement Act (VPPA)* provides remedies that are available to a vendor in the event of a challenge on a procurement action.

11.1 Deleted.

11.2 **Judicial and Administrative Appeals.** *Code of Virginia*, § 2.2-4365, provides that agencies may establish an administrative procedure for hearing appeals from refusals to allow withdrawal of bids, appeals from disqualifications, appeals from determinations of nonresponsibility, appeals of denials of protests of award or decision to award a contract, and appeals from decisions on disputes arising during the performance of a contract. Such administrative procedures 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 fraudulent, arbitrary, or capricious, or so grossly erroneous as to imply bad faith. No determination on an issue of law shall be final if appropriate legal action is instituted in a timely manner. Any party to the administrative procedure, including the public body, shall be entitled to institute judicial review if such action is brought within thirty days of receipt of the written decision (*Code of Virginia*, § 2.2-4365). Any appeals procedures that are established must be consistent with the *VPPA*, can apply only to appeals filed after the procedure is established, and must provide for the vendor to receive written notification of the action taken. A bidder, offeror or contractor need not utilize administrative procedures meeting the standards of § [2.2-4365](#), 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 public body agrees otherwise. The types of appeals are as follows:

- a. **Ineligibility.** Any bidder, offeror, or contractor refused permission to, 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 reasons for the action taken. This decision shall be final unless the bidder, offeror, or contractor appeals within ten days of receipt 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 of the *Code of Virginia*.

If, upon appeal, it is determined that the action taken was arbitrary or capricious, or not in accordance with the Constitution of Virginia, statute or regulations, the sole relief shall be restoration of eligibility (*Code of Virginia*, § 2.2-4357).

- b. **Appeal of Denial of Withdrawal of Bid.** A decision denying withdrawal of bid under the provisions of § 2.2-4330 of the *Code of Virginia* shall be final and conclusive unless the bidder appeals the decision within ten days after receipt of the decision 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 of the *Code of Virginia*.

If no bid bond is posted, a bidder refused withdrawal of a bid under the provisions of the *Code of Virginia*, § 2.2-4330, prior to appealing, shall deliver to the agency 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.

If, upon appeal, it is determined that the action taken was arbitrary or capricious, or not in accordance with the Constitution of Virginia, statute or regulations, the sole relief shall be withdrawal of bid (*Code of Virginia*, § 2.2-4358).

c. **Determination of Nonresponsibility:**

- (1) Following public opening and announcement of bids received on an Invitation to Bid, the public body shall evaluate the bids based upon the requirements set forth in the IFB, 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 (*Code of Virginia*, § 2.2-4301, Definition of Competitive sealed bidding, Element 4). At the same time, the agency shall determine whether the apparent low bidder is responsible. If the agency so determines, then it may proceed with an award to the lowest responsive and responsible bidder (*Code of Virginia*, § 2.2-4301, Definition of Competitive sealed bidding, Element 5). If the public body determines that the apparent low bidder is not responsible, it shall proceed as follows:

- (a) 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 which relate to the determination, if so requested by the bidder within five business days after receipt of the notice.
- (b) 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 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 such rebuttal information. At the same time, the public body shall notify, with return receipt requested, the bidder in writing of its determination.
- (c) Such notice shall state the basis for the determination, which shall be final unless the bidder appeals the decision within ten days after the receipt of the notice, by invoking administrative procedures meeting the standards of the *Code of Virginia*, § 2.2-4365, if available, or in the alternative by instituting legal action as provided in the *Code of Virginia*, § 2.2-4364.
- (d) 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.

- (2) If, upon appeal pursuant to the *Code of Virginia*, § 2.2-4364 or § 2.2-4365, 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 for Bids, 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. 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 for Bids, and the award of the contract has been made, the relief shall be as set forth in § 2.2-4360B of the *Code of Virginia*.

- (3) 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 § 2.2-4360 of the *Code of Virginia*.
  - (4) Nothing contained in this section shall be construed to require a public body, when procuring by competitive negotiation, to furnish a statement of the reasons why a particular proposal was not deemed to be the most advantageous.
- d. **Protest of Award or Decision to Award.** Any bidder or offeror may protest the award or decision to award a contract by submitting such protest in writing to the procuring agency, or an official designated by the agency, no later than ten days after public notice of 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 public body in the manner prescribed in the terms or conditions of the IFB or RFP. Any bidder, offeror, or contractor, or a 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 (10) days after posting or publication of the notice of such contract as provided in 3.18c. The written protest must be received in the purchasing office no later than 5:00 p.m. on the tenth day. If the tenth day falls on a weekend or an official holiday, the ten-day period expires at 5:00 p.m. on the next regular workday. 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, then the time within which the protest must be submitted shall expire ten (10) days after those records are available for inspection by such bidder or offeror, 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 procuring agency or an official designated by that agency shall issue a decision in writing within ten (10) days stating the reasons for the action taken. This decision shall be final unless the bidder or offeror appeals within ten (10) days of receipt of the written decision by invoking administrative procedures under § 2.2-4365 of the Code of Virginia, if available, or in the alternative by instituting legal action under § 2.2-4364 of the Code of Virginia. Nothing in this subsection (§ 2.2-4364) shall be construed to permit a bidder to challenge the validity of the terms or conditions of the Invitation for Bids or Request for Proposals.

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 agency 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 agency 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 (*Code of Virginia*, § 2.2-4360).

When an agency, an official designated by that agency, 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 the agency-designated official or appeals board may enjoin the award of the contract to a particular bidder (*Code of Virginia*, § 2.2-4360).

- e. **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 this manual shall not be affected by the fact that a protest or appeal has been filed (*Code of Virginia*, § 2.2-4361).
- f. **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 or the filing of a timely legal action, no further action to award that contract will be

taken unless there is a written determination that proceeding without delay is necessary to protect the public interest or unless that bid or offer would expire (*Code of Virginia*, § 2.2-4362).

- g. **Legal Actions.** If injunctive relief is granted, the court, upon request of the public body, shall require the posting of reasonable security to protect the public body. 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, forthwith, to such bidder in accordance with the requirements of the *Code of Virginia* and the Invitation for Bids. A contractor may bring an action involving a contract dispute with a public body in the appropriate circuit court. A bidder, offeror, or contractor need not utilize administrative procedures meeting the standards of § 2.2-4365 of the *Code of Virginia*, 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 public body agrees otherwise. Nothing herein shall be construed to prevent a public body from instituting legal action against a contractor (*Code of Virginia*, § 2.2-4364).

### 11.3 **Disputes**

- a. **Claims.** Written notice of the contractor's intention to file a claim must be given at the time of the occurrence or beginning of the work upon which the claim is based. Contractual claims whether for money or other relief shall be submitted in writing no later than sixty days after final payment. Nothing herein shall preclude a contractor 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 (*Code of Virginia*, § 2.2-4363).

A contractor may not institute legal action prior to receipt of the purchasing office's decision on the claim unless that office fails to render such decision within thirty (30) days. The decision of the purchasing office shall be final and conclusive unless the contractor, within six months of the date of the final decision on the claim, institutes legal action as provided in the *Code of Virginia*, § 2.2-4364.

A public body denying 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 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 public body shall be equal to the percentage of the contractor's total delay claim for which the public body's denial is determined through litigation or arbitration to have been made in bad faith.

- b. **Claims Relief.** Under certain circumstances, beyond the control of the contractor such as acts of God, sabotage, and fire or explosion not caused by negligence, relief from performance of the contract or performance within the time required by the contract may be granted by the purchasing office (see Liquidated Damages Clause, Appendix B, Section II).
- c. Each public body 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 public body. If the public body has established administrative procedures meeting the standards of § 2.2-4365, such procedures shall be contained in the contract or specifically incorporated in the contract by reference and made available to the contractor.

### 11.4 **Alternative Dispute Resolution (ADR)**

- a. Alternative Dispute Resolution is designed to increase the opportunity for relatively inexpensive and expeditious resolution of contract disputes. If an agency's final decision denying a contractual claim is challenged, the contractor and the agency are encouraged to resolve the dispute through the informal ADR process described below. However, participating in the ADR process does not relieve the contractor from complying with the filing deadlines for claims listed in 11.3, and does not imply that the agency's previously-issued decision is suspended or no longer final.
- b. The contractor requesting ADR shall give written notice to the agency purchasing office identifying the portions of the agency's decision that are in dispute and requesting that ADR be used. If the agency agrees to ADR, the agency and contractor shall each appoint a representative to participate in ADR on its behalf. Each party's representative shall be a senior manager who is not an attorney and who was not previously involved in the dispute. Each party shall furnish

to the other party all non-privileged documents and information with respect to the dispute that either party believes to be appropriate and germane. The representatives may then negotiate in an effort to resolve the dispute without the need for legal counsel. The use of a facilitator to accelerate the resolution process is encouraged.

- c. No obligation to negotiate or continue negotiating shall be inferred from this paragraph 11.4 or from the parties' agreement to use ADR, and each party shall remain free to discontinue ADR at any time. No agreement shall be deemed to arise from any communication during the ADR process, unless the agreement is reduced to writing and signed by duly-authorized representatives of both parties. Any settlement or compromise of claim must be approved by the Commonwealth's Office of the Attorney General.
- d. Any compensation and expenses paid to the facilitator shall be shared equally by the two parties. In no event shall either party be entitled to reimbursement from the other party for any other cost incurred or effort expended as a result of the ADR process.

