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| Virginia Municipal League |
| The Virginia Public Procurement Act: A Guide for Public Officials |
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**The Virginia Public Procurement Act—A Guide for Local Officials**

# Preface

The purpose of this publication is to give an overview of the Virginia Public Procurement Act and its application to local public bodies, to identify sources of procurement information, and to provide sample documents that may be of use to local officials when conducting a procurement process. References to the Virginia Code are provided to assist local officials in navigating the VPPA.

# The Virginia Public Procurement Act

The Virginia Public Procurement Act (VPPA) is set forth within §§2.2-4300 et seq. of the Code of Virginia. VPPA articulates Virginia’s public policy relating to the purchase of goods and services by public bodies. The General Assembly specifies the following ends to be served by VPPA:

* That public bodies obtain high quality goods and services at reasonable cost;
* That all procurement procedures be conducted in a fair and impartial manner, with avoidance of any impropriety or appearance of impropriety; and
* That all qualified vendors have access to public business and that no vendor be arbitrarily or capriciously excluded.

§ 2.2-4300(C).

The Commonwealth of Virginia has established a centralized electronic procurement program. known as eVA. Through revisions to VPPA, the General Assembly has strongly encouraged local participation in this program. The Virginia Department of General Services (DGS) sponsors the program, through its Division of Purchases and Supply. More information about this Division of DGS can be found at: www.dgs.virginia.gov/DivisionofPurchasesandSupply/tabid/418/Default.aspx.

The eVA webpage islocated at: [www.eva.virginia.gov](http://www.eva.virginia.gov).

These two sites, together, will be referred simply as “eVA” for the remainder of this publication. eVA provides free access to ITBs, RFPs, and sample specifications and forms used by the state and other public bodies. Every public body and its purchasing agent should utilize this resource.

## What Local Official is Responsible for Compliance with VPPA?

The requirements of VPPA may be implemented by ordinances, resolutions, or regulations enacted by a public body and administered by authorized public officials or employees. § 2.2-4300.

The term “public body” refers to counties, cities, and towns, their departments and officials; and also refers to any other body, agency, office, department, authority, commission, committee, institution, board, or political subdivision. Airport authorities and commissions, jail authorities and commissions, MPOs and planning district commissions that operate exclusively in Virginia, water and sewer authorities, school boards, and constitutional offices/officers are all examples of “public bodies”. § 2.2-4301.

Many public bodies designate an employee, known as a “purchasing agent,” to exercise day-to-day responsibility for procurement, including preparation of determinations, solicitations, standardized forms, and other record-keeping duties. Regulations and policies developed by the purchasing agent should be approved by the public body itself. A purchasing agent is typically delegated broad authority to make decisions in accordance with the guidelines set forth within the public body’s ordinances, resolutions, regulations, and policies. § 15.2-1235.

Each public body’s approach to implementing VPPA and to approving contracts will reflect its own financial, political, and administrative structure. For example, the governing board of a public body may reserve itself the right to authorize initiation of certain procurement transactions and/or the final authority to approve large-dollar contracts. Also, prior to approval of a contract, a public body may require its attorney to approve the form of contract document(s) to meet the requirement that all contracts must be approved by a qualified attorney. § 15.2-1237. However, before approving any contract, a public body must require its financial officer to certify that funds are available and appropriated to cover contract costs. § 15.2-1238.

## What Transactions Are Covered?

The requirements of the VPPA apply to public contracts with any non-governmental contractor, for the acquisition (by purchase or lease) of goods and services, including, without limitation: insurance and construction. § 2.2-4303. Notice that neither purchasing land nor hiring employees is subject to VPPA.

“*Goods*” means all material, equipment, supplies, printing and automated data processing hardware and software.

“*Services*” means any work performed by an independent contractor wherein the service rendered does not consist primarily of acquisition of equipment or materials, or the rental of equipment, material and supplies.

“*Construction*” means building, altering, repairing, improving or demolishing any structure, building or highway, and any draining, dredging, excavation, grading or similar work upon real property.

§ 2.2-4301.

The requirements of VPPA apply regardless of whether the consideration (benefit) supporting the transaction is monetary or non-monetary, and regardless of whether a public body, a contractor, or some third party is providing the consideration. § 2.2-4300(B). For example, if a public body enters into an agreement to allow a vendor to sell hot dogs at a public park, in return for a concession fee paid to the public body, that arrangement should go through a procurement process. If a citizen offers to donate money to pay costs of purchasing new computers for city council, the city must comply with VPPA in purchasing the new computers.

## What Constitutes a Public Contract?

A public contract means any agreement between a public body and a nongovernmental source. VPPA does not apply to contracts between two public bodies, as “public body” is defined within VPPA. A public body may not avoid the requirements of competitive procurement by using a purchase order instead of a formal written agreement, by placing oral orders, or by ordering “on account” with a particular vendor. § 2.2-4301.

## What Types of Contractor Selection Procedures Are Required and Authorized?

Unless otherwise authorized by law, public contracts may be awarded only after completion of a competitive sealed bidding (ITB) or competitive negotiation (RFP) process. § 2.2-4303(A).

### Competitive Sealed Bidding—ITB

Competitive sealed bidding is a method of contractor selection in which price is the primary determinative factor. Bidders review a set of specifications and offer to provide goods and services for a specific price. The price is delivered in a sealed envelope to be opened publicly on a specific date. The contractor who has submitted the lowest price may receive the contract. § 2.2-4302.1. Competitive sealed bidding is the preferred process specified by FPPA for selection of a contractor to provide goods, non-professional services, and insurance. Construction may be procured only by competitive sealed bidding, with limited exceptions. § 2.2-4303(D).

To commence a competitive sealed bidding process, the public body must issue a written Invitation to Bid (also commonly referred to as “Invitation for Bids”, this invitation will hereafter be referred to as the “ITB”) containing specifications sufficiently detailed to support award of a contract based on prices. Terms and conditions applicable to the procurement, along with any mandatory qualifications required of potential contractors, must be set forth within an ITB. An ITB should reference any mandatory requirements (e.g., bonds; required licenses and certifications; insurance, etc.) which may affect a vendor’s pricing. An ITB may also include criteria for life-cycle costing; value analysis; and other specifications (such as inspection, testing, quality, workmanship, delivery and suitability for a particular purpose). Standards should be given as to what level of information or evidence must be included within a bid in order for it the bid to be deemed responsive to the requirements and specifications. § 2.2-4302.1(1) & (4).

Samples of written specifications for various goods and services can be found on the DGS website, [www.dgs.virginia.gov](http://www.dgs.virginia.gov) and within ITB documents posted on eVA.

Public notice of the ITB must be given at least 10 days prior to the date set for receipt of bids. In the “old days” public bodies were required to physically post this notice in a public area. Now the notice is required to be posted electronically—either on eVA or other appropriate websites, which may include the public body’s own website. The public notice may also be published by newspaper, but this is not mandatory for an ITB. Bids may be solicited directly from potential contractors, and should include businesses selected from a list published by the Va. Dept. of Minority Business Enterprise. § 2.2-4302.1(2). Each ITB must specify the manner in which public notice will be given of an award, or decision to award, any contract resulting from the ITB. § 2.2-4360(A).

Bidders responding to an ITB must submit the bids in sealed envelopes, and the ITB must specify a date, time, and location at which all bids received will be publicly opened and announced. At the public bid opening, a public body is not required to immediately award a contract, but it must identify the apparent low bidder. The public body may then take time to evaluate the bids based on the ITB’s requirements, and may conduct inquiries to determine whether the apparent low bidder is both “responsive” and “responsible.” § 2.2-4302.1(3) & (5).

The term “responsive” refers to whether a bidder has submitted a bid that conforms in all material respects to the requirements and specifications set forth in the ITB. An informality is a minor defect or variation of a bid from the exact requirements of the ITB, but which does not affect the price, quality, quantity, or delivery schedule. A public body may waive any informality. § 2.2-4301.

The term “responsible” refers to a bidder who has the ability, in all respects, to perform the contract requirements, and the moral and business integrity and reliability that will assure good faith performance of the contract requirements. § 2.2-4301.

 A public body must give an apparent low bidder advance written notice before making a determination of *non-responsibility* and must allow an opportunity for the bidder to respond with rebuttal information before moving to the next low bidder. § 2.2-4359(A)(1). The public body’s determination cannot be arbitrary—it must be an honest exercise of discretion, based on the requirements of the ITB, and consistent with state law. § 2.2-4359(B).

After bid-opening, a public body may not change the terms or specifications of the ITB, however, it may waive a minor defect or variation of a bid from the requirements of the ITB (known as an “informality”) if the defect/variation does not affect the price, quality, quantity, or delivery schedule for the goods or services being procured. §§ 2.2-4302.1 & 2.2-4301.

A public body may not negotiate with individual bidders. Aresponsive bid from the lowest responsible bidder must be accepted as submitted, unless the entire ITB is cancelled. One exception to this rule: if the bid from the lowest responsive and responsible bidder exceeds available funds, a public body may negotiate with that bidder to obtain a contract price within available funds—but only if the ITB, when issued, identified the conditions and procedures under which the negotiation would be conducted. § 2.2-4318.

The public body may award a contract to the lowest bidder who is both responsive and responsible. If an award will be made, public notice must be given in the manner prescribed in the ITB. § 2.2-4360(A).

Alternatively, the public body may cancel or reject the entire ITB, or any and all bids received. The reasons for cancellation or rejection must be set forth in writing, and shall be made a part of the contract file. A public body may not cancel or reject any ITB or bid, simply to avoid contracting with a particular bidder. § 2.2-4319(A).

### Competitive Negotiation—RFP

Competitive negotiation is a method of contractor selection in which a public body issues a written Request for Proposals (“RFP”), describing the goods or services proposed to be procured, and identifying the factors that the locality will use to evaluate the relative merits of proposals received from persons or firms (“offerors”). § 2.2-4302.2(A)(1). The RFP must specify a deadline for submission of proposals; however, sealed envelopes are not required, and the public body is not required to publicly open or announce the proposals.

Contracts for “professional services,” (e.g., accounting, actuarial, architect and engineering services) must be procured by competitive negotiation. § 2.2-4303(B).

Other types of contracts may be procured by RFP, but only after a determination made in writing by a public body that an ITB is not either practicable or fiscally advantageous. §§ 2.2-4303(C) & (D).

Public notice of an RFP must be given at least 10 days prior to the deadline for receipt of proposals. The notice must be posted electronically—either on eVA or other appropriate websites, which may include the public body’s own website. A public body must also publish the notice by newspaper. Proposals may also be solicited directly from potential contractors. Additional solicitations must include businesses selected from a list published by the state Department of Small Business and Supplier Diversity. § 2.2-4302.2(A)(2). The RFP must also specify the manner in which public notice will be given of a contract award, or decision to award. § 2.2-4360(A).

An RFP must specify the evaluation factors that the public body will use to compare proposals received. § 2.2-4302.2(A)(1). With RFPs for non-professional services, an offeror may be required to include pricing information in its initial proposal. § 2.2-4302.2(A)(3).

RFPs for professional services may not ask for estimates of man-hours or price/cost of services as part of an offeror’s initial proposal. § 2.2-4302.2(A)(4).

Proposals received must then be evaluated based on factors specified in the RFP, including price, if stated in the RFP, and then a public body must implement a process of negotiations with potential contractors. The requirednegotiations process differs, according to the item being procured:

Goods, non-professional services, and insurance

Following a public body’s determination that an ITB is not practical or fiscally advantageous, an RFP may be used. A public body must select at least two (2) offerors who are deemed fully qualified and best suited, and then must negotiate with each of those selected. Price must be considered, but is not required to be the sole determining factor. After completion of those negotiations, the public body may select the offeror who, in its opinion, has made the best proposal and award a contract. § 2.2-4302.2(A)(3).

Professional services

At the discussion stage, a public body must engage in individual discussions with two (2) or more offerors deemed fully qualified, responsible, and suitable on the basis of the initial responses, with emphasis on professional competence. Repetitive interviews are allowed, and offerors should be encouraged to elaborate on qualifications, performance data, and staff expertise relevant to the advertised contract. The public body may, as part of these discussions, seek non-binding estimates of total project costs. During the discussion stage, a public body may not disclose proprietary information about one offeror with any other offerors, or disclose such information publicly. § 2.2-4302.2(A)(4).

Upon the conclusion of initial discussions, the public body must select two (2) or more offerors whose qualifications and proposed services are deemed most meritorious, and the public body must rank them in order of preference. Negotiations shall then be conducted beginning with the first-ranked offeror. If a contract satisfactory and advantageous to the public body can be negotiated at a fair and reasonable price, a contract may be awarded to that offeror. Otherwise, negotiations with the first-ranked offeror shall be terminated, and negotiations with the second-ranked offeror shall commence, and so on, until a contract is successfully achieved. § 2.2-4302.2(A)(4).

### Job Order Contracting

The General Assembly recently enacted legislation authorizing a method for procuring construction services, known as “job order contracting.” Under this process, a locality must first establish a book of unit prices, quantities and specifications. The locality may then select a contractor to perform work as needed, using the book as the basis of its pricing. The contractor may be selected using either an ITB or RFP process. § 2.2-4301. All projects performed under a job order contract must require similar experience and expertise. A job order contract is limited to a term of one year, or when the cumulative total project fees reach specified amounts, whichever occurs first. The contract may be renewable for four (4) additional one-year terms, at the option of the public body. § 2.2-4302.2(B).

### Design-build and Construction Management Procurements

In the VPPA, competitive sealed bidding remains the standard method of contractor selection for construction services. However, VPPA authorizes a public body to enter into a contract for construction through use of the competitive negotiations process, for construction services to be performed on a design-build or construction management basis, under certain conditions. First, the public body must have a licensed architect or engineer on staff, capable of advising the public body on the use of such methods, and must document in writing for a specific project why design-build or construction management is more advantageous than competitive sealed bidding. §§ 2.2-4308(A) & (A)(2). Under the current law, for a transportation project, the determination must be rendered by a locality’s chief executive officer and must detail why design-build will best serve the public interest. § 33.1-223.2:16. This provision has been repealed effective October 1, 2014.

Second, prior to issuing an RFP for a design-build or construction management contract for a specific project, the public body must have adopted, by ordinance or resolution, procedures governing the contractor selection, consistent with competitive negotiation procedures for nonprofessional services (i.e., a two-step selection/ discussion process). At the end of the selection process, a contract may be awarded to the fully-qualified offeror who submits an acceptable proposal determined to be the best value. The contract price must be established as a fixed fee, or a not-to-exceed fee. §§2.2-4308(A)(1) & 2.2-4303(D)(4).

### Cooperative Procurement

Cooperative Procurement is a variation of competitive procurement in which vendors are requested to make the terms and conditions of their responsive bids/proposals (including price) available to multiple public bodies. Cooperative procurement, well-planned and properly executed, promotes administrative efficiency. § 2.2-4304(A).

Any public body in Virginia may participate in, sponsor, conduct or administer a cooperative procurement on behalf of, or in conjunction with, one or more other public bodies, including, without limitation, agencies of the Commonwealth of Virginia, other states, and the United States Government and its General Services Administration. § 2.2-4304(A).

Joint procurements

Often, two or more public bodies will enter into a written cooperative procurement agreement, in which they all agree in advance to a combined set of requirements, specifications, or administrative procedures, and they all participate directly in the ITB/RFP. The ITB/RFP will identify each of the individual public bodies on whose collective behalf the procurement is being conducted, and each is thereby identified as a direct participant in the transaction. Following selection of a vendor, each public body that participated in the procurement may enter into its own contract directly with the successful vendor, or the public bodies may have specified a joint, centralized contract administration process. § 2.2-4304(B).

Purchasing from another public contract, without participation in procurement

Even if one public body did not participate directly in a procurement transaction, it may purchase from another public body’s contract provided that the RFP or ITB by which the contract was procured specified that the procurement was being conducted on behalf of other public bodies. This process is sometimes referred to as “piggybacking”. “Piggybacking” cooperate procurement cannot be used for professional services contracts and certain construction contracts. § 2.2-4304(B). The eVA system contains numerous examples of state or locally-issued RFPs and ITBs requesting vendors, if awarded a contract, to extend their pricing to other public bodies seeking the same goods or services. This procedure does not work well for purchases that deviate substantially from the terms on which the pricing of the underlying contract was based.

Purchasing from federal schedules

If authorized by federal law or regulations, any county, city, town or school board may purchase goods or nonprofessional services from a U.S. General Services Administration (GSA) contract or a contract awarded by another U.S. government agency. § 2.2-4304(C)(3).

### Small Purchase Procedures

The General Assembly intends that public bodies should enjoy flexibility in fashioning the details of competition, and that purchasing procedures should be efficient. “Small Purchase Procedures” are authorized, under certain conditions, as an acceptable alternative to the more formal ITB and RFP procedures. A public body may establish written small purchase procedures, if competition is included wherever practicable and if the monetary consideration meets the following requirements:

*Goods and services (other than professional services):* Small purchase procedures may be used if the aggregate or the sum of all phases is not expected to exceed $100,000.

*Professional services:* Small purchase procedures may be used if the aggregate or sum of all phases is not expected to exceed $60,000.

The state strongly encourages local public bodies to utilize eVA to post a public notice of purchases expected to exceed $30,000 in order to provide the public with centralized visibility and access to procurement opportunities. § 2.2-4303(G).

Public bodies have broad leeway to create small purchase procedures suited to their individual needs. Typically, small purchase procedures require a purchasing agent to solicit price quotes from vendors, with the number of required solicitations varying with the nature and cost of the goods or services being procured. Some simply refer to this process as “getting quotes.” § 2.2-4303(G).

A price quote solicitation is not required to take any particular form—although it is often advisable to prepare a written description identifying the key attributes of the item for which a quote is sought. Responsive quotes may be tendered and accepted verbally, on paper, via fax, or by e-mail. Pricing obtained from eVA vendors may be counted as quotes, and pricing obtained from catalogs, or electronic websites may be counted as quotes.

There is no requirement that a contract be awarded to the contractor who submitted the lowest price quote. However, if price will not be the exclusive selection factor, the small purchase procedure, or the written solicitation, should identify the criteria on which selection of a contractor will be based. §§ 2.2-4303(G) & (H).

### The person who solicits the quotes should document verbal quotes obtained in-person or by telephone, quotes solicited or received electronically, and quotes obtained from catalogue price-checks. This documentation should be placed in a file containing information sufficient to demonstrate compliance with the public body’s approved small purchase procedures.

### Reverse auctioning.

Reverse auctioning is a process in which bidders are invited to bid on specified goods or services, through real-time electronic bidding, with the award made to the lowest responsive and responsible bidder. During the process, bidders’ prices are revealed and bidders have an opportunity to modify their bid prices for the duration of the time period established for bid opening. § 2.2-4301. Bulk purchases of commodities used in road and highway construction and maintenance, and aggregates, cannot be made via reverse auctioning. § 2.2-4303(J).

## In What Circumstances May Contracts be Awarded, or Purchases Made, with Little or No Competition?

### Emergency and Sole-Source Contracts

In emergency circumstances, or when there exists only one source practicably available for goods or services (“sole source”) a contract may be awarded without a competitive contractor selection process, or with limited competition. §§ 2.2-4303(E) & (F).

To comply with VPPA requirements, the following documentation must be created and preserved within a contract file for an emergency or sole-source procurement: (i) a written determination identifying the basis for the emergency or sole source determination and the basis for selection of a particular contractor; and (ii) a public notice, stating that an emergency or sole-source procurement is being conducted, identifying the specific goods or services being procured, identifying the contractor selected, and identifying the date on which the contract was or will be awarded. The notice must be posted on the eVA website or the public body’s website, or another appropriate website, and the notice may also be published by newspaper. The notice must be published on the same day that the public body awards or announces its decision to award the contract, whichever occurs first. §§ 2.2-4303(E) & (F).

Emergency procurement will be justified under circumstances that form the basis for declaration of a local emergency.§ 44-146.21(c1). Other circumstances may qualify as “emergency”, for instance: a ruptured water pipe in the restroom of a public office building, which requires an immediate response by a plumber. Emergency procurement must be made with such competition as is practicable under the circumstances. § 2.2-4303(F).

If the basis of a sole source determination is that a federal grant providing funds for a project requires a specific vendor, the governing body of a locality must provide a written determination that acceptance of the grant is in the public interest and the determination must reference the specific terms and conditions of the grant that conflict with requirements of VPPA and thereby require the sole source determination. § 2.2-4343(B).

### Public Auction Sale

Goods may be purchased from a public auction sale, including online public auctions, following an advance, written determination that purchase at public auction sale is in the best interests of the public. Bulk purchases of commodities used in road and highway construction and maintenance, and aggregates, cannot be made via online public auctions. § 2.2-4303(I).

## What Public Contracts Are Exempt from VPPA Requirements?

VPPA lists various entities and transactions that may be exempt from some or all aspects of competitive procurement. §§ 2.2-4343, 2.2-4344, 2.2-4345, & 2.2-4346. The list of such exemptions is too lengthy to repeat; however, the following may be of particular interest to local officials:

* **Towns with a population of less than 3,500** are exempt from VPPA. This exemption has a few exceptions that can be found in § 2.2-4343(A)(9).
* **Contracts for legal services** are exempt from competitive procurement, provided that the relevant portions of § 2.2-500 et seq. are applicable. Likewise, contracts for expert witnesses or other litigation services are exempt. § 2.2-4344(A)(2).
* **Contracts for** **insurance, or utility services**, **if purchased through an association** of which the public body is a member, and the purpose of the association is to promote the interests of public bodies, provided that these contracts were procured by the association through competitive procurement. Examples of this type of association include the VML Insurance Program. § 2.2-4345(A)(13).
* **Purchases of goods or services for direct use by individual clients** of a community service board or a public body that is administering social services programs or purchasing services under the Comprehensive Services Act for At-Risk Youth and Families or the Virginia Juvenile Community Crime Control Act.§2.2-4345(A)(14). For example, the purchase of one blood glucose monitor for an individual foster care child would be exempt; however, the bulk purchase of monitors, so as to have a supply available for any clients who might need them, would be subject to procurement.
* **Contracts for certain essential election materials and services** are exempt from certain provisions of VPPA. §§ 2.2-4346(A) & 24.2-602.
* **The Public-Private Education Facilities and Infrastructure Act (PPEA)** allows a public body to consider solicited or unsolicited proposals for construction of public facilities or acquisition of technology, without public procurement, BUT ONLY IF the public body has adopted guidelines encouraging competition and standards to guide the selection of its PPEA projects. §§ 56-575.3 & 56-575.3:1. A locality must post any proposals received on its website, or on the eVA website, and make at least one copy available for public inspection. § 56-576.17(A)(2). Upon a decision to award a contract, the procurement records must be made available for inspection. Exemptions to this requirement include trade secrets, financial records, cost estimates, and other reasonable restrictions. §§ 56-576.17(D), (E), & (F).

## What Vendors Must be Included? May Vendors be Excluded?

In the solicitation or awarding of contracts, the VPPA prohibits every public body from discriminating against any bidder or offeror because of race, religion, color, sex, national origin, age, disability, or any other basis prohibited by Virginia law relating to discrimination in employment. § 2.2-4310(A). Further, VPPA requires every public body to ensure that all ITBs, RFPs, contracts, and purchase orders prominently display a statement affirming that the public body does not discriminate against faith-based organizations. § 2.2-4343.1(D).

Under certain limited circumstances, VPPA authorizes public bodies to exclude certain vendors, or requires certain vendors to be included, in the competition for public contracts. Those circumstances are as follows:

### Debarment

Prospective contractors may be entirely disqualified (“debarred”) from competing for a public body’s contracts, for specified periods of time. Any decision to debar a contractor must be made pursuant to a pre-established, written debarment procedure. Debarment procedures must be adopted by a public body’s governing board; however, the decision to debar a particular contractor may be made administratively, so long as the official making the decision is authorized to do so and the decision is guided by standards and criteria specified in the written procedure. Debarment procedures may provide for debarment on the basis of a contractor’s prior unsatisfactory performance for a public body, even if the unsatisfactory performance was for another public body. § 2.2-4321.

###  Prequalification

A public body may find it desirable to determine, in advance of accepting bids/proposals, whether potential contractors or their products meet specific requirements of a particular contract. For example, when it is impractical to prepare initially a description or set of specifications sufficient to support an award based on price, an ITB may be issued requesting the submission of un-priced offers. This will be followed by a second ITB limited to those bidders whose offers were qualified under criteria set forth in the first ITB. § 2.2-4317. State law requires prequalification of bidders for non-transportation construction projects between $100,000 and $500,000, in situations where a no bid bond will be required. § 2.2-4336(B).

The most common type of prequalification involves situations in which the vendor’s own qualifications and experience are of importance. In these situations, an ITB or RFP may specify that a public body’s consideration of bids or proposals will be limited to those submitted by prequalified contractors. The criteria and requirements that will be applied, and the process for obtaining prequalification, must be referenced in the ITB or RFP. § 2.2-4317(B).

A valid prequalification procedure must be set forth in writing, sufficiently in advance to allow potential contractors a fair opportunity to complete the process. Notice must be given of the deadline for submission of prequalification applications, and a public body must structure the procurement process so that, at least 30 days prior to the deadline for submission of bids/proposals, the public body can provide written notification to each contractor as to whether that contractor was prequalified. § 2.2-4317(B).

Under VPPA, there exist only 7 grounds upon which a public body may deny prequalification to a contractor: (1) lack of financial ability to perform contract requirements; (2) lack of appropriate experience; (3) court judgments against contractor for breach of contract, within the past 10 years; (4) documented history of prior non-compliance with conditions of prior public contracts without good cause; (5) officers’ conviction of crimes relating to public contracts, within the past 10 years; (6) current debarment by any public body; or (7) failure to timely provide information requested by the public body relative to prequalification. § 2.2-4317(C).

Each applicant who is to be denied prequalification must be advised of which specific grounds serve as the basis of the denial, and of the factual basis of the public body’s conclusions. § 2.2-4317(B). The applicant has the right to, (i) within 5 days after receipt of the notice, inspect any documents that relate to the determination, and (ii) within 10 days after receipt of the notice, submit rebuttal information. The public body must submit a final written prequalification determination within 5 days after receipt of rebuttal information. Following the final determination, the applicant may initiate legal action as provided in §2.2-4364, or an administrative procedure as provided in §2.2-4365. § 2.2-4357(A).

### Small Businesses and Minority-Owned Businesses

Public bodies are required to establish, in writing, programs to facilitate the participation of small businesses and businesses owned by women, minorities, and service disabled veterans in procurement transactions. The programs must include cooperation with the Virginia Department of Small Business and Supplier Diversity and may include other public or private agencies having similar purposes. § 2.2-4310(B). This requirement does not apply to towns with a population under 3,500. § 2.2-4343(A)(9).

In an ITB or RFP process, if a public body solicits bids directly from any potential contractors, it must solicit bids directly from at least some businesses selected from a list made available by the Department of Small Business and Supplier Diversity. §§ 2.2-4302.1(2) & 2.2-4302.2(2).

### Preferences

Low bid from out-of-state bidder

If the lowest responsive and responsible bidder is a resident of another state, and if that state allows a preference to its own contractors, then a public body must apply a like preference to the next lowest responsive and responsible bidder who is a resident of Virginia. The Virginia Department of General Services, on its website, publishes a current list of all states that provide preferences for their own contractors. § 2.2-4324(B).

Community reinvestment activities

This preference is permitted in localities that have established affordable housing programs. If authorized in advance by the local governing body, in making a decision to award a contract to a financial institution for time deposits or investment of public funds, a public body’s treasurer/director of finance may consider, as one applicable criteria for selection, a vendor’s local investment activities that enhance the supply of, or accessibility to, affordable housing in the public body. § 2.2-4327.

“Made in Virginia”

In the case of a tie bid, a public body must give preference to the following, if applicable: (i) goods produced in Virginia; (ii) goods and services, including construction, provided by Virginia persons, firms or corporations. § 2.2-4324(A).

Recycled content

 In the case of a tie bid, where goods are being procured and existing price preferences have already been taken into account, a public body must give preference to the bidder whose goods contain the greatest amount of recycled content. § 2.2-4324(C).

Local contractors

A county, city, or town may, in case of a tie bid, give preference to goods, services, and construction produced in its locality or provided by persons, firms, or corporations having principal places of business in its locality. § 2.2-4328(A). This authority is expressly limited to bids received in a competitive sealed bidding (ITB) process. § 2.2-4328(B).

If no preferences apply in a given situation, a tie bid must be decided by lot.

### Licensing Requirements, Construction Contracts

It is a criminal misdemeanor offense for any person to receive or consider a bid on a construction project, if that person knows that the bidder does not hold a Virginia contractor’s license (or certification) required for such work. An awarding authority must require a contractor to submit his state license or certificate number, prior to considering the bid. § 54.1-1115(A)(6). It is recommended that a public body should expressly state, within the instructions to bidders in the ITB, that a construction contractor’s license or certificate number must be printed clearly on the outside of the sealed bid envelope. Any bid without this information should not be accepted or considered.

## What Dispute Resolution Procedures Are Specified by VPPA?

VPPA sets forth procedures for resolving several types of disputes that may arise between public bodies and contractors/prospective contractors. The procedures vary, depending on the nature of the dispute and the stage of contract award or performance.

### Protests of Contract Awards

A disappointed contractor may protest a contract awarded to another bidder/offeror. A written protest must be submitted to the public body within 10 days of the award or announcement of the decision to award, whichever occurs first. The written protest must describe the basis for the protest and a statement of the relief sought. § 2.2-4360(A).

An unsuccessful bidder/offeror may not file a protest based on a claim that the successful bidder/offeror is non-responsible. § 2.2-4360(A). Likewise, a bidder determined to be “non-responsible” may not protest a contract award to another contractor, but must timely challenge the “non-responsibility” determination through a separate process. § 2.2-4359(A).

Within 10 days of the receipt of a protest, a public body must render its written decision. Thereafter, a protester has 10 days to initiate an appeal. § 2.2-4360.

The validity of a contract that has been awarded and accepted in good faith will not be affected by the filing of a protest or appeal. § 2.2-4361. VPPA does not require a public body to delay a contract award for the period allowed to a bidder to protest. However, in the event that a timely protest is received, or if legal action is timely filed, no further action to award the contract may be taken unless there is a written determination that proceeding without delay is necessary to protect the public interest, or the bid or offer would expire. § 2.2-4362.

### Appeals of “Non-Responsibility” Determinations; appeals of protest decisions and disputed claims

Following public opening and announcement of bids received in response to an ITB, if a public body determines that the apparent low bidder is not responsible, then the public body must follow procedures specified in Va. Code §2.2-4359. The bidder must be notified in writing and given an opportunity to present rebuttal information. Within 10 days of the receipt of the public body’s final non-responsibility determination, the bidder may initiate legal action or an administrative appeal. § 2.2-4359(A).

If any protest or appeal is ultimately successful, there are three possible results, depending on the status of the contracting process:

*Prior to award:* The public body must cancel the proposed award or revise it to comply with applicable law. If a bidder wins an appeal of a “non-responsible” determination, the court may simply find the bidder responsible, or the court may direct an award to that bidder.

*Post-award, if performance has not begun*: The performance of the contract may be enjoinedby a court.

*Post-award, if performance has begun*: The public body may declare the contract void, upon a finding that such action would be in the best interests of the public. In that event, the performing contractor must be compensated for the cost of performance up to the date his contract is voided, but he is not entitled to lost profits. § 2.2-4360(B).

### Legal Action

Under certain circumstances, articulated in Va. Code § 2.2-4364, if a contractor’s protest has been denied, or a contractor’s appeal of a disqualification/exclusion determination is rejected, the contractor may file a lawsuit. Legal actions must be filed within 10 days after the aggrieved contractor receives the determination that is the basis of the legal challenge. §§ 2.2-4357(A), 2.2-4359(A)(3), 2.2-4360(A), & 2.2-4364.

### Administrative Appeals

Any public body may establish an administrative procedure as an intermediate step, prior to legal (court) proceedings. Administrative procedures are authorized for hearings of: (i) protests of awards and decisions to award, (ii) appeals from refusals to allow withdrawals of bids, (iii) appeals from disqualifications and determinations of non-responsibility, (iv) appeals from decisions made as to disputes arising during performance of a contract, or (v) any of these. If a public body offers an administrative appeal process, the process must include, at a minimum, opportunity for a hearing before a disinterested person or panel, opportunity for presentation of pertinent information, and issuance of a final written decision containing findings of fact. The disinterested person or panel may not be, or include, any person who is an employee of the public body against whom the appeal is taken. § 2.2-4365(A).

Such disinterested persons or panels are sometimes referred to as “administrative hearing officers,” or “contract appeals boards.” In localities with substantial contracting activity, a specialized appeals person or panel may work well, if they will be called upon frequently enough to develop knowledge and expertise of procurement issues.

Many localities forego the specialized appeals board/ panel authorized by § 2.2-4365, in favor of the more simple “in-house” claims resolution procedure referenced in §§ 2.2-4363(B) & (C).

### Disputes Arising During Performance of a Contract

Contract claims

Every public body is required to include in each of its contracts a procedure for presentation and consideration of contractual claims. § 2.2-4363(B). If a public body fails to do so, the statutory procedure set forth in Va. Code § 2.2-4363(C) will apply (“Statutory Claims Procedure”).

Under the Statutory Claims Procedure, any contract claim, whether for money or other relief, such as additional time for performance, must be submitted in writing to the public body. Written notice of the contractor’s intention to file a claim must be given at the time of the occurrence, or at the beginning of the work upon which the claim is based. Thereafter, a claim must be presented to the public body no later than 60 days after receipt of final payment. The notice of claim does not need to be separate and distinct from the claim itself. § 2.2-4363(C)(1).

A public body must render a written decision, signed by its chief administrative officer or designee, within 90 days of receiving a claim. § 2.2-4363(C)(2). After the final decision has been issued, a contractor has six (6) months to initiate legal action or an administrative appeal. § 2.2-4363(E). If the public body does not render a decision within 90 days, the contractor has the right to institute immediate legal action. § 2.2-4363(C)(2).

When a claim is asserted against a County, a contractor must also comply with the notice of appeal and bond requirement set forth within § 15.2-1246.

Alternative dispute resolution

Public bodies may enter into agreements to submit contractual disputes to arbitration, and to utilize mediation and other alternative dispute resolution procedures. Alternative dispute resolution procedures entered into by school boards must be non-binding. § 2.2-4366.

An agreement arising out of a dispute resolution proceeding does not become binding unless it is affirmed by action of the public body. § 2.2-4116(C).

Records of alternative dispute resolution proceedings involving a public body will be treated as “confidential” and are exempt from the requirements of the Virginia Freedom of Information Act. § 2.2-4119(B). However, records concerning expenses incurred in connection with a dispute resolution proceeding, or the amount of money paid by a public body to settle a dispute, are not exempt from FOIA. § 2.2-4116(A).

## What Public Records Requirements Apply to Procurements?

All proceedings, records, contracts and other public records relating to procurement transactions must be open to the inspection of any citizen, or any interested person, firm or corporation, in accordance with the Virginia Freedom of Information Act. § 2.2-4342(A). VPPA provides limited exceptions:

1. Cost estimates relating to a proposed procurement transaction, prepared by or for a public body, shall not be open to public inspection. § 2.2-4342(B).
2. Bid and proposal records are open to public inspection after award of a contract, except that, during the time period between bid opening/ competitive negotiations and contract award, any actual bidder or offeror has a right to inspect bid/proposal records. §§ 2.2-4342(C) & (D). If a bid protest of an actual or potential bidder/offeror is dependent on information contained in the records of the procurement transaction, the deadline for submission of a protest will expire 10 days after the date on which the records are available for inspection. § 2.2-4360(A).
3. Trade secrets or proprietary information submitted in connection with a procurement transaction or prequalification application shall not be open to public inspection. However, the person submitting any such information has a responsibility to label it as such, identifying the data to be protected and stating why the protection is necessary. A general “confidential” label applied generally to the entire contents of a bid or proposal will not suffice. § 2.2-4342(F).

According to the records retention schedules established by the Library of Virginia, contracts and agreements entered into by a local public body, and purchasing records (e.g., ITBs, RFPs, bids, proposals, purchase orders, etc.) must be retained in a file for a period of 5 years after the end of the fiscal year in which they were created. The retention requirements apply regardless of whether the records are in paper, electronic, or some other format. The schedule effective as of June 26, 2104 can be found on the Library of Virginia website, at: http://www.lva.virginia.gov/agencies/records/sched\_local/gs-02.pdf.

# Ethics in Public Contracting

In addition to the provisions of the State and Local Government Conflicts of Interest Act (COIA) and the Virginia Governmental Frauds Act, the VPPA establishes standards of ethical conduct for public officials involved in procurement transactions. § 2.2-4367 et seq. The Ethics portion of the VPPA addresses multiple topics, including:

Financial interest in the outcome of contracting decisions

Persons having official responsibility for a procurement transaction are subject to restrictions, and are prohibited from participating in the transaction if they, or a member of their immediate family, would realize a financial benefit or detriment from the transaction. § 2.2-4369(3). The term “official responsibility” refers to any authority, whether intermediate or final, to initiate, approve, disapprove or otherwise affect a procurement transaction, or any resulting claim. The term “immediate family” refers to an individual’s spouse, children, parents, siblings, and “any other person living in the same household.” § 2.2-4368. Keep in mind that VPPA’s definition of “immediate family” is broader than that set forth in the COIA. For example:

* If the Director of Procurement responsible for evaluating proposals is married to the President and sole owner of a company who submits a proposal in response to the RFP, then the Director of Purchasing must not participate in the process.
* If a final contract resulting from the RFP must be approved by the governing board of the public body, and if a member of the governing board is a partner within the firm that has submitted the best proposal, that member of the governing board may not participate in the process.

Gifts

No person having official responsibility for a procurement transaction may accept from any bidder, offeror, contractor or subcontractor any payment, loan, subscription, services or anything of more than nominal value. § 2.2-4371(A). Examples of things having nominal value would be plastic cups; key-chains; plastic pens; calendars; etc.

Document preparation

No person who, for compensation, prepares an ITB or RFP on behalf of a public body may (i) submit a bid or proposal in response to that ITB or RFP, or (ii) disclose to any bidder or offeror information regarding the procurement that is not available to the public (for example, cost estimates prepared for the public body). § 2.2-4373. For example, if a public body engages an architectural firm to write the requirements and specifications for an RFP for construction management services, that same firm may not submit a proposal in response to that RFP.

Subsequent employment by contractor

A person having official responsibility for public procurement transactions may not accept employment with a contractor with whom he dealt in an official capacity, within one (1) year after leaving his public position, unless the person provided written notice to the public body prior to commencement of his employment with that contractor. § 2.2-4370.

Penalty

Any public employee or official who violates VPPA’s Ethics in Public Contracting requirements may be prosecuted for a Class 1 criminal misdemeanor offense. Upon conviction, that employee or official shall forfeit his employment, in addition to any other fine or penalty imposed. § 2.2-4377.

##  Conclusion

The scope and requirements of VPPA can be daunting; however, with the advent of state and local e-procurement web sites, resources are more accessible than ever before. We hope this Procurement Guide, and the resources referenced, will prove useful to elected and appointed officials throughout the Commonwealth.

In 2013 the General Assembly established a Special Joint Subcommittee on Procurement. The purpose of this Subcommittee is to identify and resolve problem areas relating to VPPA. Public bodies and their administrators should watch for legislation in 2014 and beyond, arising out of this Subcommittee’s findings and recommendations, in order to keep local policies and procedures up-to-date.

**SUMMARY OF PURCHASING PROCEDURES**

|  |  |
| --- | --- |
| **Anticipated Cost** | **Process** |
| **Informal Procurement Procedures Authorized (“Small Purchase Procedures”)** |
| **$100,000 OR LESS****(Goods and non-professional services)****$60,000 or less****(Professional services)** | Local public bodies are free to specify their own dollar limits and process for obtaining quotes and making purchases.  |
| **SAMPLE SMALL PURCHASE GUIDELINES:** |
| **$1,000 or less**: no quotes or competition is required; purchase exempt from all purchasing procedures(Note: local public bodies are free to select a higher or lower minimum purchase amount) |
| **$1,000.01 to $10,000**: solicit at least 2 telephone, catalog, electronic or written quotes; post notice on appropriate website |
| **$10,000.01 to $30,000**: solicit at least 3 electronic or written quotes; written solicitation encouraged; posting of notice on an appropriate website is encouraged. |
| **$30,000.01 to $100,000:** post notice on appropriate website; solicit, in writing, 4 written quotes (Note: *state* public bodies are *required* to solicit at least **four (4) written quotes** by informal written solicitation, e.g., “Request for Quotes”. Prior to 2012 this was also required for public bodies, and it remains a standard practice. |
| **Alternative Procurement Procedures Authorized** |
| Cooperative Procurement | Purchase off existing State Contract; Purchase off another public body’s existing contract. RFP or ITB for the “source” contract must expressly specify that pricing/terms will be extended to other public bodies. Not authorized for architect, engineering, or other professional services, or for certain construction services. |
| Purchase off existing U.S. General Services Administration (GSA) contract, if authorized |
| Sole Source/Emergency | Requires advance written determination of the basis for finding that a particular vendor is the “sole source practicably available,” or of an emergency |
| **Formal Competition Required (ITB or RFP)** |
| **$60,000.01** or more**(Professional services)****$100,000.01** **or more****(Goods and non-professional services)** | Formal competitive sealed bidding (ITB) is REQUIRED, per Va. Code §15.2-4303(C). RFP may be used for certain other contracts, following a written determination that an ITB is not practicable or fiscally advantageous |
| Formal competitive negotiation (RFP) process is REQUIRED for professional services, per Va. Code §15.2-4303(B) |
| **COMPONENTS OF FORMAL SOLICITATION DOCUMENTS** |
| Written determination that ITB is not practicable or not fiscally advantageous (*except RFPS for professional services*) |
| Public Notice |
| List of Vendors Contacted Directly (including state MBE businesses, if required) |
| Written ITB or RFP |
| Detailed specifications and requirements for goods and services  |
| Qualifications required of bidders/offerors; description of prequalification process (if applicable) |
| Factors Considered in Evaluating Bids or Proposals  |
| Bid Form (ITBs) |
| Instructions to Bidders/Offerors |
| Special Terms and Conditions (unique contract requirements); Specifications |
| General Terms and Conditions (general requirements for all contracts) |
| Public Notice of Intent to Award, or Notice to Award |

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