

Chapter highlights

Purpose: This chapter sets forth VITA's policies on protest procedures related to the procurement of IT goods and services.

Key points:

- VITA recommends that all IT requests for proposals and contracts undergo several layers and perspectives of review to yield a holistic review and to mitigate the risk of protest.
- It is VITA's policy to be open and transparent with its Suppliers to promote a fair and competitive procurement process.

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32.0 Introduction

VITA works diligently to prepare solicitations and contract documents and establish procurement processes in a manner that minimizes the likelihood of protests. VITA recommends that all IT solicitation and contract documents undergo several layers and perspectives of review to yield a holistic review and to mitigate the risk of protest. While every effort is made to mitigate the risk of protest, there is never any guarantee.

The most obvious areas subject to protest include: how the solicitation document is written (no holes, misguidance, preferential or swayed requirements or conflicting language), proposal evaluation/scoring/weighting content and process integrity, efficient and punctual public postings and supplier notifications, reliability of the procurement project/evaluation team (including conflict of interest and confidentiality), fair and equal communication with and treatment of suppliers prior to award, not adhering to

processes or obligations stated in the solicitation document, determination of supplier disqualification/ineligibility/non-responsibility, denial of withdrawal of a supplier's proposal, relationship with the incumbent supplier, if any, and the award decision itself.

32.1 Overview of VITA's protest policy

VITA's protest policy follows § 2.2-4360 et seq. of the *Code of Virginia* and provides that the following actions will be handled by the complaining Supplier instituting legal action as provided in §2.2-4364 of the *Code of Virginia*:

- Appeals from a determination that the supplier is ineligible to participate in public contracts, e.g., debarment
- Appeals from a denial of a request to withdraw a bid
- Appeals from a determination of non-responsibility
- Appeals from denial of a protest of a contract award

VITA's delegated IT procurements are not subject to protest processes established by the Department of General Services' Vendor's Manual or Agency Procurement and Surplus Property Manual (APSPM). Any reference to these publications in VITA delegated IT procurements should be removed from the solicitation documents. If such delegated agency does not have an established ADR process, contact: scminfo@vita.virginia.gov for assistance. VITA's ADR process may be utilized by these agencies.

32.2 Supplier ineligibility/disqualification determinations

Any supplier, actual or prospective, who is refused permission, or disqualified from participating in a public procurement shall be notified in writing by the purchasing agency. If the purchasing agency makes a written determination that a supplier is disqualified or ineligible to participate in solicitation or public contracting, the agency shall do the following:

- Notify the supplier in writing of the results of the evaluation for determination of disqualification or ineligibility,
- Disclose the factual basis for the determination, and
- Allow the supplier an opportunity to inspect any documents which relate to the determination. The supplier should be notified that it must request to inspect any documents within ten business days after receipt of the notice of ineligibility or disqualification.

Within ten business days after receipt of the notice of disqualification/ineligibility from the purchasing agency, the potential supplier may submit written rebuttal information challenging the determination. The purchasing agency shall issue a written response concerning its determination of disqualification or ineligibility based on all information known to the agency including any rebuttal information, within five business days of the date the agency received the rebuttal information.

If the agency's review of known information or rebuttal information indicates that the supplier should be allowed permission to participate in the solicitation or public contract, the disqualification action should be cancelled. If the agency's review indicates that the supplier should be determined ineligible to participate in the solicitation or disqualified from participation in the contract, the agency shall notify the supplier accordingly. The notice shall state the reasons for the disqualification/ineligibility determination/action. This decision shall be final unless the supplier appeals within ten (10) days of receipt of the agency's written notice by bringing an action in the appropriate circuit court challenging the agency's decision.

Any supplier, actual or prospective, who is refused permission or disqualified from participation in a solicitation or who is determined to not be a responsible supplier for a particular contract, may bring an action in the appropriate circuit court challenging that decision. The purchasing agency's decision will only be reversed by the court if the supplier establishes that the agency's decision was arbitrary or capricious.

32.3 Denial of supplier's withdrawal of bid/proposal

If a potential supplier requests permission to withdraw a bid and the purchasing agency denies permission to withdraw the bid, the agency must notify the supplier in writing stating the reasons for its decision. The decision denying withdrawal of a bid is final unless the supplier appeals the decision within ten (10) business days after

receipt of the decision.

If, upon appeal, it is determined through legal action that the agency's denial of supplier's request to withdrawal a bid/proposal was arbitrary or capricious, or not in accordance with the Constitution of Virginia, statute or regulations, the sole relief shall be withdrawal of bid. (§ 2.2-4358 of the *Code of Virginia*)

A supplier who is denied withdrawal of a bid/proposal under § 2.2-4358 of the *Code of Virginia* may bring an action in the appropriate circuit court challenging that decision, which shall be reversed only if the supplier establishes that the decision of the purchasing agency was not an honest exercise of discretion, but 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 solicitation.

32.4 Determination of supplier non-responsibility

A supplier found to be nonresponsible for a particular procurement by a purchasing agency in accordance with § 2.2-4359 of the *Code of Virginia* will be notified in writing of the results of the finding and the purchasing agency shall disclose the factual support for the determination. The supplier has the opportunity to inspect any agency documents which relate to the determination if the supplier requests to do so within five (5) business days after receipt of the notice. The supplier may submit rebuttal information challenging the evaluation within ten (10) business days after receipt of the notice. 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, stating the basis for the determination. A determination of nonresponsibility will be final unless the supplier initiates action in the appropriate circuit court within ten (10) days after receipt of the notice,.

If the award has not been made, and the circuit court finds that the Supplier is a responsible bidder and is the apparent low bidder, the court may direct the public body to award the contract to such Supplier in accordance with §2.2-4364 and the IFB. Documentation reflecting the sole source determination of non-responsibility and any protest and decision with respect to such protest along with any written notification to supplier shall be included in the procurement file.

32.5 Protest of award

Any supplier who desires to protest a contract award shall submit a written protest to the purchasing agency no later than ten days (10) after public posting of the award. The purchasing agency shall publicly post the contract award in eVA as well as in any other public venue as outlined in the solicitation. Virginia Code § 2.2-4360 sets forth requirements and procedures for protests and the public body's decision on the protest. Virginia Code § 2.2-4364 addresses appeals through legal action.

Note that the deadline for a protest may be extended if it depends in whole or in part upon information contained in public records pertaining to the procurement transaction and such records are not available for inspection, so procurement professionals should ensure procurement file records are available at the time of posting the award or notice of intent to award.

The table below summarizes actions required by affected participants. Consult your agency's legal counsel if you have questions about legal requirements related to protests.

	Protesting supplier	Purchasing agency	Legal action
1	Files a timely written protest with agency		
2		Receives protest. Submits a timely written response to protester, which should approve or deny protest.	
3	Supplier may appeal decision within 10 days of receipt of agency's written decision on protest.		The agency's written decision on the protest shall be final unless the bidder or offeror institutes legal action as provided by §2.2-4364.

32.6 Roles and responsibilities of the parties during a protest

The following subsections describe the responsibilities of the primary protest participant roles:

32.6.1 Responsibilities of the purchasing agency

The purchasing agency should:

- Acknowledge receipt of the protest.
- Distribute all correspondence related to the protest to all parties.
- Immediately review the facts of the solicitation process:
 - Interview all participants in the solicitation and award process.
 - Thoroughly review all documentation in the procurement file.
 - Analyze the concerns raised in the protest and determine if valid issues have been raised.
 - Determine if contract award was made in compliance with terms and conditions of the solicitation as well as the *Code of Virginia*.
 - Determine if the solicitation process itself was handled properly, accurately and in a professional manner, which reflected fairness, objectivity and equal access to participants.
 - Determine if award decisions and actions were properly documented in the procurement file.
- Determine if the agency is likely to prevail if litigation is filed by the protesting supplier. Evaluate the risk and potential liabilities and determine the most likely outcomes.
- As required by Virginia Code § 2.2-4360, provide the protesting supplier with a timely written response which states whether the agency has determined if the protest is valid or invalid. The purchasing

agency's decision shall be final unless the supplier institutes legal action as provided in Virginia Code § 2.2-4364.

- Take immediate steps to correct the situation if there is a determination that the purchasing agency is in error or that the terms and conditions of the solicitation were not followed.
- Maintain an official protest file which includes copies of all documents relating to the protest.
- Coordinate with all parties to schedule any protest conferences or meetings, including distributing official notification of such meetings.
- Process and respond timely to any FOIA requests received in conjunction with the protest.
- Conduct a lessons-learned or debrief evaluation of the solicitation process and award decision. After lessons learned are documented and placed in the agency's protest file, the agency should work to make any changes to its current procedures or processes that may preclude similar protests in the future.

32.6.2 Responsibilities of the customer (if the customer is not the purchasing agency)

The customer should:

- Work with the purchasing agency to research and organize project and procurement information that may be required for the protest evaluation and response or any associated FOIA requests.
- Be ultimately responsible for all business decisions associated with the protest and with the underlying procurement.
- Assist the purchasing agency to promptly respond to any and all requests for information and documentation relating to the project, procurement and protest.
- Comply with the purchasing agency's policies, procedures and schedules.

32.6.3 Responsibilities of the protesting supplier

The protesting supplier must submit a timely written protest pursuant to Virginia Code § 2.2-4360. The written protest should:

- Include name of protesting supplier and name of the individual responsible for the submission of the protest.
- Contain facts and arguments on which the supplier's protest is based.
- Contain information about the solicitation and the procurement method used.
- Be specific and contain a complete statement of the purchasing agency's action which is protested and state all grounds for the protest.
- State a description of the relief sought or corrective action that the supplier is requesting.
- Be signed by a person authorized to bind the supplier to a contractual relationship.

32.7 Effect of protest appeal upon contract

Pending final determination of a protest or appeal, the validity of a contract awarded and accepted in good faith shall not be affected by the fact that a protest or appeal has been filed. See Virginia Code § 2.2-4361.

32.8 Stay of an award during protest

An award need not be delayed for the period allowed a supplier 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/proposal would expire. See Virginia Code § 2.2-4362. When such a written determination is made, copies shall be sent to all parties to a protest or appeal. The written determination shall be maintained in the purchasing agency's procurement file.

32.9 Review of protest by purchasing agency

Pursuant to Virginia Code § 2.2-4360, the purchasing agency has ten days from contract award to review the supplier's protest and to decide if the protest is valid. After reviewing the protest, the purchasing agency has several options on how the protest will be handled:

- If the purchasing agency determines the contract award was an honest exercise of discretion, the purchasing agency should issue a decision in writing to the protesting supplier stating the reasons for the determination.
- If the purchasing agency decides that the contract award was not an honest exercise of discretion, but rather was arbitrary or capricious or not in accordance with law or the terms or conditions of the solicitation, the agency should take appropriate action to address the situation, in consultation with counsel.
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32.10 Legal action for protest appeal

Any protest denial by the purchasing agency will be final unless the protesting bidder or offeror appeals within ten (10) days of receipt of the agency's decision by instituting legal action as provided in Virginia Code §2.2-4364. The purchasing agency's decision shall be reversed only if the supplier establishes that the proposed award or the award is not an honest exercise of discretion, but rather is arbitrary or capricious or not in accordance with the Constitution of Virginia, statutes, regulations or the terms and conditions of the solicitation. If injunctive relief is granted, the court, upon the purchasing agency's request, shall require the posting of reasonable security.

32.11 Frivolous protests

As part of its effort to make technology procurements smarter, faster and better, VITA discourages frivolous protests and encourages objective fair dealing with its suppliers. Toward that end, VITA works with customer agencies to establish and maintain procedures for identifying frivolous protests. A frivolous protest is one that VITA determines has no valid basis for complaint, such as a protest directed at the procurement outcome or successful supplier instead of the procurement process itself. If VITA identifies a protest as frivolous and notifies the protesting supplier that its protest has been deemed frivolous, the supplier may promptly withdraw any frivolous protest.

32.12 Appeals and disputes

32.12.1 Contractual disputes

Each purchasing agency shall include contractual claim procedures in all contracts. All contractual claim procedures should establish a time limit for the purchasing agency's final written decision on the supplier's contractual claim. A supplier may not invoke institute legal action as provided in Virginia Code § 2.2-4364 prior to receipt of the purchasing agency's decision on the claim. If the purchasing agency fails to provide the supplier with a decision within the time limit set in the contract, the supplier may institute legal action without first receiving the agency's decision. The agency's decision shall be final unless the supplier appeals within six (6) months of the date of the final decision by the agency by instituting legal action. See Virginia Code § 2.2-4364.

VITA's approved contract templates include the following language, which may be borrowed by other agencies, concerning contractual claim procedures under the General Provisions section, Dispute Resolution clause:

"In accordance with § 2.2-4363 of the Code of Virginia, contractual claims, whether for money or other relief, shall be submitted in writing to the public body from whom the relief is sought no later than 60 calendar days after final payment; however, written notice of the Supplier's intention to file such claim must be given to such public body at the time of the occurrence or beginning of the work upon which the claim is based. Pendency of claims shall not delay payment of amounts agreed due in the final payment. The relevant public body shall render a final decision in writing within 30 days after its receipt of the Supplier's written claim.

The Supplier may not invoke any available administrative procedure under the Code of Virginia nor institute legal action prior to receipt of the decision of the relevant public body on the claim, unless that public body fails to render its decision within 30 calendar days. The decision of the relevant public body will be final and conclusive unless the Supplier, within six (6) months of the date of the final decision on the claim, invokes appropriate action under § 2.2-4364 or the administrative procedure authorized by § 2.2-4365 of the Code of Virginia.

In the event of any contractual breach by a public body, Supplier's remedies shall be limited to claims for damages and Prompt Payment Act interest and, if available and warranted, equitable relief, all such claims to be processed pursuant to this Section. In no event shall Supplier's remedies include the right to terminate any license or support services hereunder."

32.12.2 Ways to minimize the likelihood of protests

Agencies should act to minimize the likelihood of protests, including:

- Developing specifications and solicitation requirements in an objective manner.
- Ensuring solicitations do not include conflicting language, provisions, requirements or specifications and that there are no confusing directions.
- Having multiple procurement team and agency subject matter experts review the solicitation for gaps, conflicting language, objectivity and process realism.
- Ensuring all procurement project/evaluation team members read and sign conflict of interest and confidentiality statements.
- Confirming all procurement project/evaluation team members are aware that they must not communicate with potential suppliers but direct all supplier-initiated communication to the procurement's single-point-of contact.
- Following the procurement processes and obligations stated in the solicitation.
- Ensuring that the solicitation fully defines responsibilities of both parties. If a supplier is able to fully identify their costs associated with a given project, they will generally be more willing to provide the agency with a better proposal or bid. If suppliers are uncertain as to future costs, they will add a cushion to their price to account for that uncertainty.
- Actively communicating with suppliers during the solicitation process on specification issues. Utilize a pre-bid conference for developing awareness of both supplier concerns and specification deficiencies. Make sure all supplier questions are submitted in writing and/or at a pre-bid conference. Respond to all supplier questions and communication in writing. Telephonic responses should not be included, as there is no objective record of the communication.
- Considering that the main objective of most suppliers is to participate in a fair and open process and ensuring that your actions and words communicate this to suppliers.
- Striving to resolve all concerns before contract award. Inform suppliers that they must raise all relevant concerns regarding specifications or bid/proposal requirements before the date and time specified in the IFB document, or in the case of an RFP, before negotiations are complete. Advise suppliers that if they fail to do so, subsequent protests based upon those issues will not be allowed.
- Thoroughly reviewing all issues raised by suppliers with customers and procurement team members and attempting to accommodate those concerns where feasible. If changes in the solicitation are necessary as a result of that review, publish an amendment for all potential suppliers.
- If the agency cannot accommodate the concerns of a supplier, informing that supplier as early as feasible in the solicitation process and doing so in a positive and proactive manner.
- Responding to potential suppliers promptly and providing suppliers with sufficient time to put together a bid/proposal that will meet the agency's IT business needs.
- Providing all suppliers with the same information and treating them with courtesy and respect and encourage them to submit their best possible bid/proposal.
- Documenting conversations or interactions with suppliers during the solicitation process. This documentation will prove invaluable if a supplier protests a contract award based on a misunderstanding during the solicitation.

For assistance, contact: scminfo@vita.virginia.gov .

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