

25

PUBLIC PROCUREMENT LAW

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25-1 SCOPE AND INTRODUCTION

25-1.01 History

The Virginia Public Procurement Act (VPPA), Va. Code § 2.2-4300 et seq., was adopted by the General Assembly in 1982 following a thorough review of procurement laws around the country authorized by the General Assembly in 1979. The Virginia Procurement Law Study Advisory Committee, which consisted primarily of purchasing officials from local and state government, issued a final report, titled *Virginia Procurement Law Study Final Report*, on November 1, 1980. This is excellent legislative history. For example, the Report on its twelfth page of text states that

the legislation codifies and makes applicable to all public bodies the holding of *Taylor v. County Board*, 189 Va. 472 (1949): “When the decision of the authorities is based upon a fair and honest exercise of their discretion, it will not be interfered with by the courts, even if erroneous. Courts do not in such cases substitute their judgment for the judgment of the body to which the decision is confided. Interference by the courts is limited to cases in which the public body has proceeded illegally or acted arbitrarily or fraudulently.”

The VPPA became effective January 1, 1983.¹

25-1.02 Purpose

The purposes of the VPPA are set forth in Va. Code § 2.2-4300:

To the end that public bodies in the Commonwealth 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, that all qualified vendors have access to public business and that no offeror be arbitrarily or capriciously excluded, it is the intent of the General Assembly that competition be sought to the maximum feasible degree, that procurement procedures involve openness and administrative efficiency, that individual public bodies enjoy broad flexibility in fashioning details of such competition, that the rules governing contract awards be made clear in advance of the competition, that specifications reflect the procurement needs of the purchasing body rather than being drawn to favor a particular vendor, and that the purchaser and vendor freely

¹ In furtherance of the desire expressed in 2013 Va. Acts ch. 583, cl. 3 to study the Procurement Act, a Special Joint General Laws Subcommittee was established in 2013 to undertake the study. The first year of the study was devoted to fact-finding and providing interested parties with the opportunity to share information and identify concerns related to the public procurement process. The second year focused on consensus building and statutory recommendations. The final report may be found [here](#).

exchange information concerning what is sought to be procured and what is offered.

This section is the only place in the Act that mentions “appearance of impropriety,” but it has been cited in at least two cases by circuit court judges to uphold protests of procurement decisions. See cases cited at section 25-3.03. It also is important that this section mentions “arbitrary and capricious” actions of localities as being the standard for overturning a purchasing decision.

25-2 APPLICATION

25-2.01 Types of Procurement Subject to VPPA

The VPPA applies to four types of procurement by local governments: (1) purchase or lease of goods; (2) purchase of services; (3) purchase of insurance; and (4) purchase of construction. Va. Code § 2.2-4303(A).

“Goods,” “services,” and “construction”² are defined in Va. Code § 2.2-4301. Note that the VPPA does not cover purchases from other governments, nor does it cover the purchase or lease of real property. *R.I.S.E., Inc. v. Kay*, 768 F. Supp. 1141 (E.D. Va. 1991).³ In *Flory Small Business Development Center v. Commonwealth*, 261 Va. 230, 541 S.E.2d 915 (2001), the Court held that a local small business development center created by the county’s industrial development authority was not a governmental source and thus the Act applied to it as a nongovernmental source.⁴

One important change to the Act since it was first adopted is the addition of language to Va. Code § 2.2-4300 which now states that the Act covers governmental procurement “that may or may not result in monetary consideration for either party.” The Act applies “whether the consideration is monetary or nonmonetary and regardless of whether the public body, the contractor, or some third party is providing the consideration.” Thus, the VPPA covers those cases in which the local government receives

² The Act defines “goods” as “all material, equipment, supplies, printing, and automated data processing hardware and software”; “services” are “any work performed by an independent contractor wherein service rendered does not consist primarily of acquisition of equipment or materials, or the rental of equipment, materials and supplies”; and “construction” is defined as “building, altering, repairing, improving or demolishing any structure, building or highway, and any draining, dredging, excavation, grading or similar work upon real property.” The term “construction services” is also used throughout the Act, but is not defined; presumably, it means construction work (other than acquisition of equipment or materials) performed by an independent contractor.

³ But see 1983-84 Op. Va. Att’y Gen. 290, in which the predominant purpose of what was called a lease was actually to acquire the services of a bookstore operator, thereby becoming a services contract subject to the VPPA. See also 1998 Op. Va. Att’y Gen. 74 (if a lease agreement for a school building provides that maintenance is the responsibility of the lessor, the VPPA is not applicable); 1996 Op. Va. Att’y Gen. 38 (development agreement that requires a city to make rental payments that ultimately will reimburse the financing of the construction of a building after its completion is not the purchase of construction); 1999 Op. Va. Att’y Gen. 142 (nonprofessional services contract with a retired employee to perform essentially the same services performed as employee is subject to the VPPA).

⁴ There is a reported decision, *Columbia Dentoform Corp. v. Virginia Board of Dentistry*, 64 Va. Cir. 222 (City of Richmond 2004), in which the circuit court granted a temporary restraining order against the award of a contract by a private entity for goods not purchased by a process of competitive bidding. Even though the contract was not awarded by a public body, the court found that the entity awarding the contract was so intertwined in the government activity for which the goods were purchased that the Procurement Act likely applied. The TRO was never entered, however, and the court subsequently entered an order denying the injunction, albeit without a written opinion. CH03-1972-1 (City of Richmond Cir. Ct. May 3, 2004). Thus, the reported opinion is a nullity.

payment for the service rather than pays for it. For example: public landfills that have contracts for recyclables where a contractor will pay the county or city to be allowed to take a certain product, or telephone companies that pay local jails a portion of their profits to have telephones installed for inmates to make collect calls. See *also* 1982-83 Op. Va. Att’y Gen. 635 (local treasurer’s selection of a bank depository is subject to the VPPA because the selection is a procurement of services). In *Advanced Transportation & Logistics, Inc. v. Botetourt County*, 77 Va. Cir. 164 (Botetourt Cnty. 2008), the court held that the award of a county contract for waste hauling services was subject to the VPPA even though the payments to the contractor were directly from the households and not from the county. The court also held that the list of exemptions in the VPPA does not include waste removal services contracts and that other provisions of the Code of Virginia dealing with solid waste did not preempt the VPPA. The court subsequently found the county’s action in extending the franchisees’ contracts without a competitive bidding process was in violation of the VPPA. 79 Va. Cir. 359 (Botetourt Cnty. 2009).

25-2.02 Application of VPPA to Local Governments

The VPPA does not apply (except as to certain mandated provisions) to towns with a population of less than 3,500 and to any county, city, town, or school board whose governing body adopts by resolution or ordinance alternative procurement policies “which are (i) based on competitive principles and (ii) generally applicable to procurement of goods and services by such governing body.” Va. Code §§ 2.2-4343(A)(9) to (11). This was put in the Act to allow local governments the flexibility to establish their own rules for procurement. While some localities have attempted to draft extensive ordinances, many have not.

Even when a locality has attempted to adopt alternative policies, however, Va. Code § 2.2-4343(A)(12) lists several mandatory provisions of the VPPA that cannot be changed. These include competitive negotiation; procurement of professional services when the cost is expected to exceed \$80,000; design-build/construction management contracts; bid, performance, and payment bonds; and ethics.

In *Carnell Const. Corp. v. Danville Redevelopment & Housing Authority*, No. 4:10CV00007 (W.D. Va. Jan. 27, 2011), *aff’d on other grounds*, 745 F.3d 703 (4th Cir. 2014), the contractor argued that the authority’s assignment of a contract to a private entity (an extension of the authority created to distribute tax credits to private investors) negated the applicability of the VPPA. The federal district court ruled that the assignment of the authority’s obligations and rights in the contract included those required and secured under the VPPA.

25-3 COMPETITIVE SEALED BIDDING

25-3.01 Invitation to Bid

Competitive sealed bidding is defined in Va. Code § 2.2-4302.1 and is used for the procurement of most goods and construction. Competitive sealed bidding is initiated by the locality issuing an Invitation to Bid containing or incorporating by reference the specifications and contractual terms and conditions applicable to the procurement.⁵

Public notice of the Invitation to Bid must be made by either posting on the Department of General Services’ central electronic procurement website or other appropriate websites at least ten days prior to the date set for receipt of the bids. In addition, public bodies may publish in a newspaper of general circulation. Va. Code § 2.2-

⁵ Invitations to Bid for construction services cannot require a “specified experience modification factor,” which is a value assigned to a contractor by a rate service organization. Va. Code § 2.2-4302.1(1). A rate service organization is an entity that assists insurers by collecting loss statistics and recommending or filing prospective loss costs or supplementary rate information.

4302.1. No bids may be received after the time set for receiving bids. In *Holly's Inc. v. County of Greenville*, 250 Va. 12, 458 S.E.2d 454 (1995), the Virginia Supreme Court held that the county could not accept a bid that was received two minutes late even though the bidder was in the room prior to the time bids were due but could not hand the bid in because the clerk was out of the room. Bids are normally read at the time they are received, except in the case of construction contracts where the locality chooses the second option under Va. Code § 2.2-4330(A) of allowing bidders to withdraw their bids, in which case bids are opened one day following receipt. Changes to the bid on the outside of the bid package cannot be considered because they are not "sealed." *W. M. Jordan Co. v. Richmond Redev. & Hous. Auth.*, HE 963, 3 (City of Richmond Cir. Ct. Sept. 20, 1994).

A locality shall require a contractor to submit his license or certificate number prior to considering a bid. Receiving or considering a bid from anyone not properly licensed or certified under Va. Code § 54.1-1100 et seq. is a Class 1 misdemeanor. Va. Code § 54.1-1115.

All localities are encouraged to use [eVA](#), the state procurement system, for notice of Invitations to Bid. Va. Code § 2.2-4303.

25-3.02 Lowest Responsive and Responsible Bidder

The bid is awarded to the lowest responsive and responsible bidder. The terms "responsive" and "responsible" are defined in Va. Code § 2.2-4301. The bidder must also apparently be "eligible," see Va. Code § 2.2-4357, although neither "eligibility" nor "ineligibility" is defined in the VPPA. Although there is a question as to why two terms are used, ineligibility arguably refers to the "debarment" referenced in Va. Code § 2.2-4321. See *Specialty Mech. v. Va. Commonwealth Univ.*, 61 Va. Cir. 121 (City of Richmond 2003). In the case of a tie bid, it is possible pursuant to Va. Code § 2.2-4328 to award the contract to a Virginia company. *Cntex Constr. Co. v. Norfolk Airport Auth.*, 52 Va. Cir. 127 (City of Norfolk 2000). Otherwise, the tie shall be decided by lot. It is immaterial to the requirement that the award be to the lowest bidder that the source of construction funding is private. 2003 Op. Va. Att'y Gen. 11. In the event that the lowest responsive and responsible bidder is a resident of a state that allows a resident contractor of that state a price-matching preference, a like preference shall be allowed to responsive and responsible bidders who are residents of Virginia. Va. Code § 2.2-4324(B). A locality, however, does not have any authority to grant a preference for using contractors who employ local residents. 2013 Op. Va. Att'y Gen. 25.

A disappointed bidder may not file a protest on the basis that the low bidder is not responsible. Va. Code § 2.2-4360.

25-3.02(a) Responsive Bid

A "responsive" bid is one that conforms in all material respects to the Invitation to Bid. Although "material" is not defined, Va. Code § 2.2-4319 allows a public body to waive informalities in bids. "Informality" is defined in Va. Code § 2.2-4301 as "a minor defect or variation of a bid or proposal from the exact requirements of the Invitation to Bid, or Request for Proposal, which does not affect the price, quality, quantity, or delivery schedule for the goods, services, or construction being procured." Certainly if something is a "mandatory" portion of a bid, it cannot be waived. Many bid protests are based on the contention that the low bidder was non-responsive and that the locality could not waive the informality.⁶

⁶ See *Holly's Inc. v. County of Greenville*, 250 Va. 12, 458 S.E.2d 454 (1995); see also *Precon Constr. Co. v. City of Va. Beach*, Chy. No. 96-495 (City of Virginia Beach Cir. Ct. 1996) (omission of minority business participation statement was an informality because it did not affect price, quality, quantity, or delivery). Compare *Qualicon Corp. v. City of Norfolk*, 36 Va. Cir. 83 (City of Norfolk 1995) (low bidder's failure to include submittals on in-lake piping as required by the Invitation to

The Virginia Supreme Court has held that Va. Code § 2.2-4364(A) is limited to decisions that exclude the *bidder* from the process, not to decisions that exclude a particular *bid*. Thus, Va. Code § 2.2-4364(A) does not provide a bidder with a remedy independent of the one created by §§ 2.2-4360 and 2.2-4364(C) to challenge a public body's finding that a bid was non-responsive. *Sabre Constr. Corp. v. Cnty. of Fairfax*, 256 Va. 68, 501 S.E.2d 144 (1998).

There is no requirement to notify a non-responsive bidder of the reason why the bid is non-responsive before awarding the bid to the next lowest responsive and responsible bidder, as there is when the lowest responsive and responsible bidder is non-responsive (see section [25-3.02\(b\)](#)).

25-3.02(b) Responsible Bidder

The low bidder must also be "responsible." A "responsible" bidder or offeror is a person who has the capability, in all respects, to perform fully the contract requirements and the moral and business integrity and reliability that will assure good faith performance. Va. Code § 2.2-4301. This arises most often with, for example, a contractor who has just begun business and has no track record; even though he is the low bidder, he may not be deemed to be "responsible." The Invitation to Bid may include criteria that the public body may use in determining whether a bidder is a "responsible" bidder. Va. Code § 2.2-4302.1

Prior to a written determination of non-responsibility, the public body must notify in writing the apparent low-bidder of the factual basis for the determination of non-responsibility. The apparent low bidder may request to inspect documents within five days of receipt of notice of the determination and submit rebuttal information within ten days after receipt of notice. The public body shall issue a written determination of non-responsibility within five days of receipt of rebuttal information. The bidder has ten days to appeal administratively (if available) or judicially. This provision does not apply to procurements involving the prequalification of bidders and the rights of any potential bidders under such prequalification to appeal a decision that the bidder is not responsible. Va. Code § 2.2-4359.

If upon administrative or judicial appeal it is determined that the locality's finding of non-responsibility was not an honest exercise of discretion but was arbitrary or capricious or not in accordance with state law or the terms of the Invitation to Bid, and the contract has not been awarded, then the relief shall be a finding that the bidder is responsible or a directed award pursuant to § 2.2-4364(A), or both. Va. Code § 2.2-4359. If the contract has been awarded and performance has not begun, then performance may be enjoined. Va. Code § 2.2-4360(B). If performance has begun, arguably the court may not void the contract award absent the locality's agreement. See Va. Code § 2.2-4360(B). But see *MFS Network Technologies v. Commonwealth*, 33 Va. Cir. 406 (City of Richmond 1994), discussed at section [25-13.03](#).

See *Caperton v. VDOT*, No. 3:15cv36, 2016 U.S. Dist. LEXIS 122787 (W.D. Va. Sept. 12, 2016), *aff'd*, 684 Fed. Appx. 322 (4th Cir. 2017), in which the federal district court, assuming that a finding of non-responsibility could be stigmatizing, held that the plaintiffs failed to allege that this caused it to be "virtually impossible" to obtain employment in their chosen field; thus their § 1983 due process claim was dismissed.

25-3.02(c) Preference for Energy-Efficient and Water-Efficient Goods

If a locality receives two or more bids for products that are Energy Star certified, meet the efficiency requirements of the Federal Energy Management Program (FEMP), appear

Bid could not be waived by the city, and therefore the low bidder could not be awarded the contract) with *English Constr. Co., Inc. v. Stafford Cnty.*, No. CL09-769 (Stafford Cnty. Cir. Ct. 2009) (county could waive items not included in bid documents as an informality).

on FEMP's Low Standby Power Product List, or are WaterSense certified, the locality must select among those bids, unless it provides a written statement that the cost of the products is unreasonable. Va. Code § 2.2-4328.1.

25-3.03 Alternate Bids

In *San Jose Construction Group v. Loudoun County School Board*, 47 Va. Cir. 487 (Loudoun Cnty. 1998), the court held that even though there was no evidence of actual impropriety, an Invitation to Bid that provided for a base bid and multiple alternatives violated the VPPA when the alternates were chosen after the bids were opened. *See also W.M. Schlosser Co., Inc. v. City of Suffolk Sch. Bd.*, No. C.L. 05-165 (City of Suffolk Cir. Ct. Aug. 25, 2005) (appearance of impropriety in choosing alternate bids, but court chose not to void contract).

25-3.04 Rejection of Bids or Offers

While Va. Code § 2.2-4319(A) allows an Invitation to Bid (ITB) or Request for Proposal (RFP) to be canceled or rejected, the public body may not do so solely to avoid awarding a contract to a particular responsive and responsible bidder. The reasons for cancellation or rejections must be made part of the contract file. While there is no case that specifically states this, a locality should be able to reject bids or proposals if they feel they can get more competition by re-bidding. *See Gen. Excavation, Inc. v. City of Harrisonburg*, 80 Va. Cir. 273 (Rockingham Cnty. 2010) (court does not have remedial jurisdiction over a violation of § 2.2-4319(A)).

25-3.05 Withdrawal of Bid

A public body may establish procedures for the withdrawal of bids in any contract. However, the Act sets forth one of two procedures that must be used to allow the withdrawal of a bid for a construction contract. For construction contracts, bids can be withdrawn only because of a clear clerical mistake evidenced in the original papers and based on an unintentional arithmetic error or omission of a quantity of labor or material that causes the bid to be substantially lower than other bids. Va. Code § 2.2-4330.

If, upon appeal, it is determined that the decision refusing withdrawal of the bid was not an honest exercise of discretion, but rather was arbitrary or capricious or not in accordance with state law, or the terms or conditions of the Invitation to Bid, the sole relief shall be withdrawal of the bid. Va. Code § 2.2-4358.

25-3.06 Announcement of Award or Intent to Award

With either an Invitation to Bid or a Request for Proposal, the public body has the choice of providing a notice of award or a notice of intent to award. Va. Code § 2.2-4360. The advantage of issuing a notice of intent to award is that starts the ten day time period for filing a protest. If a notice of intent to award is issued, a notice of award also has to be made, but bidders or offerors do not get another ten day protest period. Public notice of the award or the intent to award shall be given by the public body "in the manner prescribed in the terms or conditions of the Invitation to Bid or Request for Proposal." Va. Code § 2.2-4360. If the public body states that the notice will be made by posting on the public body's website of either the notice of award or intent to award, the ten-day protest period begins with the posting, not the actual receipt of notice by the bidder or offeror.

25-4 COMPETITIVE NEGOTIATION

25-4.01 Application

Competitive negotiation is defined in Va. Code § 2.2-4302.2 and is normally used for service contracts where price is not the most important consideration. A public body no longer has to make a determination that it was not practicable or fiscally advantageous to use an Invitation to Bid before using a Request for Proposal for goods or services. Public bodies can simply choose whether to use an Invitation to Bid or Request for Proposal for goods and services (other than professional services and construction which have their own rules). If

the public body documents in advance and in writing that competitive sealed bidding is not practicable or fiscally advantageous, insurance may be obtained through a broker, who is chosen through a competitive negotiation process. Va. Code § 2.2-4303(C).

Generally, competitive negotiation is not used for construction contracts. Competitive negotiation, however, may be used by any public body for the construction of highways and any draining, dredging, excavation, grading, or similar work upon real property if the public body documents in advance and in writing that competitive sealed bidding is not practicable or fiscally advantageous. Va. Code § 2.2-4303(D).⁷ With similar documentation, competitive negotiation can also be used in certain circumstances with design-build and construction management projects. See section 25-6.01.

25-4.02 Process

Competitive negotiation is initiated by the issuance of a Request for Proposal. If a numerical scoring system will be used to evaluate the proposals, an explanation of the point values must be included in the RFP or posted. As opposed to Invitations to Bid, localities may publish notice of an RFP *either* on the Department of General Services' central electronic procurement website *or* other appropriate websites ten days prior to receipt of proposals. Va. Code § 2.2-4302(A)(2). All localities are encouraged to use [eVA](#), the state procurement system, for notice of requests for proposals. *Id.* Localities *may* also publish notice in a newspaper of general circulation in the area in which the contract is to be performed. *Id.* Following the receipt of proposals, the public body must choose at least two offerors to negotiate with, unless only one is fully qualified or one is clearly more qualified than the others. Va. Code § 2.2-4302.2(A)(3). The offeror must state in writing at the beginning of negotiations any exceptions to any liability provisions of the RFP.⁸ Negotiations may be conducted with the firms selected to be interviewed, but procurement officials must be careful not to let offerors know about other offerors' prices. The contract is awarded to the offeror who makes the best proposal. However, when terms and conditions for multiple awards are provided in the RFP, awards may be made to more than one offeror. *Id.* See 1985-86 Op. Va. Att'y Gen. 252 for a discussion of the difference between competitive sealed bids and competitive negotiation.

The Request for Proposal must include the criteria on which the decision will be made. There is no requirement in the Act that requires public bodies to assign points or percentages to the criteria on which the award will be based prior to making a decision as to which offerors to interview or, following the interviews, which offeror to award the contract. This is up to the individual public body. Some public bodies use points or percentages to determine which offerors to interview, but not in determining which offeror should be awarded the contract after the interviews. One of the problems with percentages is that one low score can change the outcome. Except regarding contracts for architectural, professional engineering, or transportation construction services, the public body may consider, among other criteria, the offeror's employment of persons with disabilities to perform the proposed work. Va. Code § 2.2-4302.2(A)(1).

25-5 PROFESSIONAL SERVICES

Professional services (defined as "work performed by an independent contractor within the scope of the practice of accounting, actuarial services, architecture, land surveying, landscape architecture, law, medicine, dentistry, optometry, pharmacy, or professional

⁷ Requests for Proposals for construction services cannot require a specified experience modification factor, which is a value assigned to a contractor by a rate service organization. Va. Code § 2.2-4302.2(1).

⁸ In the case of an RFP for information technology, the public body may not require an offeror to state exceptions to liability provisions in their proposals. In those cases, however, any exceptions must be stated during negotiations or arguably they are waived.

engineering”) can be procured only by competitive negotiation.⁹ Va. Code § 2.2-4303(B). This was the one area of contention when the VPPA was originally adopted, since architects and engineers felt that price should not be considered in providing these services, and the Committee felt that they should be treated as any other competitive negotiation.

As a compromise, the following process was devised: when a Request for Proposal is issued for professional services, the price of services cannot be requested with the proposals, and the RFP should state that. The determination as to which firms will be interviewed is based solely on qualifications. At the interview or discussion stage, the public body may request “nonbinding” estimates of cost from the firms being interviewed, and may take those estimates into consideration, along with the other information presented, to determine which firm of those interviewed to rank first, second and so on. Only after an architectural or engineering firm is ranked for negotiations may the public body require the offeror to list exceptions to any proposed contractual terms and conditions that are not required by law or regulation. The public body may negotiate with only the firm ranked first until a contract is negotiated at a fair and reasonable price that is pursuant to contractual terms and conditions acceptable to the public body and then award the contract to that firm. If a contract cannot be negotiated with the firm ranked first, the public body must notify that firm that it is no longer under consideration and then move to the firm ranked second and so on until a contract is negotiated. Va. Code § 2.2-4302.2(A)(4).

Localities and school boards may award contracts for architectural and engineering services for multiple construction projects even though the projects have not yet been identified with a single RFP, with certain specified conditions and limitations. The projects must require similar experience and expertise, and the nature of the projects must clearly be identified. The General Assembly amended Va. Code § 2.2-4303.1 in 2022 to have only two limits for localities: \$10 million for all projects per term, and \$2.5 million for any single project per term. A term is one year or when the total project fees reach \$10 million, whichever comes first, and there can be three renewals. The revised limits apply to new contracts for which the solicitation was issued after July 1, 2022, so existing contracts with renewals can use the old term limits and renewal terms, at the option of the locality. An award may be made to multiple firms, as long as the public body has established procedures for determining which firm will be selected for each individual project. Va. Code § 2.2-4303.1.

Multiphase professional services contracts satisfactory and advantageous to the completion of large, phased, or long-term projects may be negotiated and awarded based on qualifications at a fair and reasonable price for the first phase only, when completion of the earlier phase is necessary to provide information critical to the negotiation of a fair and reasonable price for succeeding phases. Prior to the procurement of any such contract, the local public body shall state the anticipated intended total scope of the project and determine in writing that the nature of the work is such that the best interests of the public body require awarding the contract. Va. Code § 2.2-4302.2(B). Public bodies may use their small purchase procedure for professional services contracts where the aggregate or the sum of all phases is not expected to exceed \$80,000. Va. Code § 2.2-4303(G).

⁹ However, legal services may be determined to be exempt altogether under Va. Code § 2.2-4344(A)(2).

25-6 CONSTRUCTION

25-6.01 Design-Build and Construction Management

Design-Build and Construction Management contracting is governed by Chapter 43.1 of Title 2.2, which is expressly designated as supplemental to the Procurement Act and controlling with regard to conflicts with the Act. Va. Code § 2.2-4378(D).

Design-build contracting self-evidently includes a contract that provides for all design and construction. A construction management contract is for the coordination and administration of contracts for construction services, but can include the provision of services by the construction manager. See Va. Code § 2.2-4379.

Prior to deciding to use either such contract type for a specific project, the public body must have:

1. employed or have under contract an architect or engineer competent to advise the public body regarding the use of design-build or construction management on the specific project and assist with the preparation and evaluation of the RFP;
2. adopted, by ordinance or resolution, written procedures, consistent with the procedures adopted by the Secretary of Administration for design-build or construction management contracts; and
3. documented in writing that for the specific construction project (a) a design-build or construction management contract is more advantageous than a competitive sealed bid construction contract; (b) there is a benefit to the public body by using a design-build or construction management contract; and (c) competitive sealed bidding is not practicable or fiscally advantageous.

Va. Code § 2.2-4382(A)-(C).

For design-build contracts, the locality must also include a two-step competitive negotiation process consistent with the standards established by the Division of Engineering and Buildings of the Department of General Services for state agencies. Va. Code § 2.2-4382(E).

Construction management contracts may be used for projects whose cost is expected to be less than the project cost threshold established in the procedures adopted by the Secretary of Administration governing such contracts, which is currently \$26 million, if the project is complex as defined in Va. Code § 2.2-4379 and the local governing body approves in writing of the use of construction management. Va. Code § 2.2-4382(D). Projects above \$26 million are presumed to be complex, so that requirement does not need to be met.

For all construction management projects, public notice of the Request for Qualifications must be posted on the Department of General Services procurement website ([eVA](#)) at least thirty days before qualifications are due; there must be a two-step competitive negotiation process; and the contract must be entered into no later than the completion of the schematic design phase (unless prohibited by authorization of funding restrictions). *Id.*

No more than 10 percent of the construction work, as measured against total cost, can be performed by the construction manager's own forces. The remaining work must be performed by the construction manager's subcontractors who were procured through competitive sealed bidding to the maximum extent possible. *Id.* These provisions do not

apply to construction management contracts involving infrastructure projects. Va. Code § 2.2-4382(D)(5).

Experience with prior construction management or design-build may be considered in awarding the contract but is not required. Price is a critical basis for the award of the contract. *Id.*

The public body must report to the Department of General Services annually by November 1 all completed capital projects in excess of \$2 million, specifying the procurement method used, the projected and actual budget, the projected and actual timeline, and any post-project issues. Va. Code § 2.2-4383.

Other than the two-step competitive process mentioned earlier, the above rules do not apply to design-build contracts that localities enter into (as opposed to construction management). See Va. Code § 2.2-4382(E).

A locality may establish a requirement to select no more than five offerors deemed most suitable for the project with whom it may then negotiate and award a design-build contract. 2012 Op. Va. Att’y Gen. 12.

25-6.02 Job Order Contracting

Localities may contract for construction projects using job order contracting, a method of procuring construction by establishing a book of unit prices and then obtaining a contractor to perform work as needed using the prices, quantities, and specifications in the book as the basis of its pricing. The contractor may be selected through either competitive sealed bidding or competitive negotiation depending on the needs of the public body procuring the construction services. A minimum amount of work may be specified in the contract. The contract term and the project amount cannot exceed the limitations specified in Va. Code § 2.2-4303.2. Va. Code § 2.2-4301.

A single project contract cannot exceed \$500,000. A job order contract may be used for multiple projects as long as the jobs require similar experience and expertise, the nature of the jobs is clearly identified in the solicitation, and the contract is limited to a term of one year or when the cumulative total project fees reach the maximum threshold amount of \$6 million, whichever occurs first. Va. Code § 2.2-4303.2(A). Job order contracts may be renewable for two additional one-year terms at the option of the public body. Va. Code § 2.2-4303.2(B). Order splitting with the intent of keeping a job order under the maximum dollar amounts prescribed is prohibited. Va. Code § 2.2-4303.2(D).

Professional architectural or engineering services may be included in a job order contract only where such professional services (i) are incidental and directly related to the job, (ii) do not exceed \$25,000 per job order, and (iii) do not exceed \$75,000 per contract term. Va. Code § 2.2-4303.2(E).

Job order contracting cannot be used for construction, maintenance, or asset management services for a highway, bridge, tunnel, or overpass. However, job order contracting may be used for safety improvements or traffic calming measures for individual job orders up to \$250,000, subject to the \$6 million maximum annual threshold amount. Va. Code § 2.2-4303.2(F).

25-6.03 Public Private Education Infrastructure Act of 2002 - PPEA

The Public-Private Education Facilities and Infrastructure Act (PPEA) was enacted by the 2002 General Assembly. Va. Code § 56-575.1 et seq. The PPEA authorizes a responsible public entity to enter into a comprehensive agreement with a private entity to develop or

operate a qualifying project. The project may be either solicited by the responsible public entity or proposed unsolicited. If the responsible public entity rejects a proposal initiated by a private entity that purports to develop "specific cost savings," the public entity must specify the basis for the rejection. Va. Code § 56-575.3(D).

25-6.03(a) Responsible Public Entity

"Responsible public entity" means the Commonwealth and any agency or authority thereof, any county, city or town and any other political subdivision of the Commonwealth, any public body politic and corporate, or any regional entity that serves a public purpose. Va. Code § 56-575.1.

25-6.03(b) Guidelines

The responsible public entity must have adopted and made publicly available guidelines that are sufficient for it to comply with the PPEA before it can request or consider a qualifying project. Va. Code §§ 56-575.3:1 and 56-575.16(4). The Department of General Services has published [Model Guidelines](#). By statute, the guidelines for a local responsible public entity must contain a mechanism for the appropriating body to review the proposed interim or comprehensive agreement prior to execution. It must also contain a requirement that it engage the services of qualified professionals, which may include an architect, professional engineer, or certified public accountant, not otherwise employed by the responsible public entity, to provide independent analysis regarding the specifics, advantages, disadvantages, and long- and short-term costs of any request by a private entity for approval of a qualifying project unless the governing body of the responsible public entity determines that such analysis of a request by a private entity for approval of a qualifying project shall be performed by employees of the responsible public entity. Va. Code § 56-575.3:1(C). There is also a laundry list of guideline proposals that are mandatory for state public entities but optional for those at the local level. Va. Code § 56-575.3:1(B).

25-6.03(c) Qualifying Project

A "qualifying project" includes educational facilities and property, buildings, or facilities that meet a public purpose and are developed or operated by or for any responsible public entity, any improvement or equipment necessary to enhance the public safety or security of a building used principally by a responsible public entity, utility or telecommunications infrastructure, recreational facilities, technology infrastructure and services, wireless broadband infrastructure, any improvements necessary or desirable to any unimproved state or locally owned real estate, or solid waste facilities that generate electricity. Va. Code § 56-575.1. In essence, most capital projects are covered by this broad definition. The responsible public entity must find that there is a public need for, or benefit from, the project; that the estimated cost of the project is reasonable in relation to similar facilities, and that the private entity's plans will result in the timely development of the qualifying project. Va. Code § 56-575.4(C).

25-6.03(d) Develop or Operate

Under the Act, the responsible public entity may contract with the private entity to develop or operate a qualifying project. Va. Code § 56-575.3. "Develop" is defined as to plan, design, develop, finance, lease, acquire, install, construct, or expand. "Operate" is defined as to finance, maintain, improve, equip, modify, repair, or operate. Va. Code § 56-575.1.

25-6.03(e) Procurement

Qualifying projects developed under the PPEA are not generally subject to Virginia's public procurement laws, except that the construction performance bond must comply with Va. Code § 2.2-4337 and, once a comprehensive agreement has been entered into and the process of bargaining of all phases or aspects of the comprehensive agreement is complete, a responsible public entity must make available, upon request, procurement records in accordance with § 2.2-4342. Va. Code §§ 56-575.9(A)(1) and 56-575.17(D). However, the Act itself has some procurement restrictions. The procurement of the contract with the

private entity should be either consistent with (1) the competitive sealed bidding requirements of the Procurement Act (see section 25-3), or (2) if the responsible public entity states the qualifying reasons why it is advantageous to do so, the Procurement Act's competitive negotiation requirements (see section 25-4). Va. Code § 56-575.16.

25-6.03(f) Comprehensive Agreement

The primary means of implementing the PPEA is the comprehensive agreement. Virginia Code § 56-575.9 sets forth an extensive list of what must be in the agreement and provides that other terms that serve the public purpose of the PPEA may be included. The comprehensive agreement may provide for the development or operation of phases or segments of the qualifying project. If the responsible public entity is an agency or institution of the Commonwealth, prior to entering into the negotiation of an interim or comprehensive agreement, the responsible public entity must submit copies of detailed proposals to the Public-Private Partnership Advisory Commission. Va. Code § 56-575.4(I). Negotiation of an interim or comprehensive agreement may not occur until the Public-Private Partnership Advisory Commission has submitted its recommendations or declined to accept the detailed proposals for review. Va. Code § 30-280(E). Submission and approval are not required, however, if the proposed qualifying project (1) has a total cost of less than \$3 million, or (2) is more than \$3 million but less than \$50 million for which funds have been specifically appropriated as a public-private partnership in the general appropriation act or capital construction projects that have been authorized in the appropriation act, provided such project does not increase in size by more than 5 percent beyond the plans and justifications that were the basis of the appropriation. Va. Code § 30-280(B). A local responsible public entity is not required to obtain the approval of the Public-Private Partnership Advisory Commission, although approval by the governing body is required if the responsible public entity is a school board or locality. Va. Code § 56-575.16(5). A local responsible public entity must submit a copy of any comprehensive agreement to the Auditor of Public Accounts, and any responsible public entity which enters into a comprehensive agreement also must make procurement records, not including trade secrets and confidential financial records, available for public inspection upon request. Va. Code § 56-575.17(D).

25-6.03(g) Interim Agreement

Prior to or in connection with the negotiation of the comprehensive agreement, the responsible public entity may enter into an interim agreement to provide for partial planning and development activities while other aspects of a qualifying project are being negotiated and analyzed. Va. Code § 56-575.9:1. Like comprehensive agreements, approval by the Public-Private Partnership Advisory Commission may be required if the responsible public entity is an agency or institution of the Commonwealth; and approval by the governing body is required if the responsible public entity is a school board or locality. Va. Code § 56-575.16(5). Once a responsible public entity enters into an interim agreement, the PPEA requires that all procurement records, not including trade secrets and confidential records, be made available for public inspection, upon request. Va. Code § 56-575.17(D).

25-6.03(h) Financing

Part of the purpose of the Act is to provide flexibility in financing capital projects. The Act provides that the amount and terms of any financing of a qualifying facility may be determined by the parties to the interim or comprehensive agreement. The private entity and the responsible public entity may use any funding resources available to them and may, to the fullest extent permitted by applicable law, issue debt, equity, or other securities or obligations, enter into leases, access any designated trust funds, borrow or accept grants from any state infrastructure bank, and secure any financing with a pledge of, security interest in, or lien on, any or all of its property, including all of its property interests in the qualifying facility. Va. Code § 56-575.10(A). The private entity may issue debt, equity, other securities or obligations, engage in sale/leaseback transactions, or secure financing with a security interest in the property. Va. Code § 56-575.8(C). Funding sources may also include government appropriations, donated property, grants and loans, user fees, and lease and

service payments. Va. Code § 56-575.9(B) and (C). The Act does not authorize any new debt instrument that would impact localities' debt capacities.

One of the purposes of enacting the PPEA was to take advantage of the federal Economic Growth and Tax Relief Reconciliation Act of 2001, PL 107-16, which provides that public primary or secondary education facilities owned by a private, for-profit corporation pursuant to a public-private partnership agreement may be financed through tax-exempt private activity bonds. See Chapter 12, Financing Virginia's Local Governments, section [12-4.01\(d\)](#).

25-6.03(i) Defaults and Remedies

A "material default" means any default by the private entity in the performance of its duties that jeopardizes adequate service to the public from a qualifying project. Va. Code § 56-575.1. Virginia Code § 56-575.11 sets forth the remedies. If there is a material default by the private entity, the responsible public entity may assume the responsibilities and duties of the private entity, and in such case, it shall succeed to all of the rights, title and interest in such qualifying project, subject to any liens on revenue previously granted. If the responsible public entity does take over the project, it may continue to develop the project as if it were the private entity. Before any payments to secured parties, the responsible public entity may use revenue to pay current operation and maintenance costs of the qualifying project, including compensation to the responsible public entity for its services in operating and maintaining the project. The full faith and credit of the responsible public entity shall not be pledged to secure any financing of the private entity by the election to take over the qualifying project. Assumption of operation of the qualifying project shall not obligate the responsible public entity to pay any obligation of the private entity from sources other than revenue.

A responsible public entity with the power of condemnation may also exercise such power to acquire the qualifying project in the case of a material default. The responsible public entity may terminate, with cause, the comprehensive or interim agreement and exercise any other rights and remedies that may be available to it at law or in equity. The responsible public entity may make any appropriate claims under the maintenance, performance, or payment bonds or lines of credit required under the Act.

25-6.03(j) High Performance Buildings

State agencies or localities entering the design phase for the construction of a new building greater than 5,000 gross square feet in size or the renovation of a building where the cost of the renovation exceeds 50 percent of the value of the building must ensure that such building has sufficient electric vehicle charging infrastructure and has features that permit the agency or institution to track the building's energy efficiency and carbon emissions. Va. Code §§ 2.2-1183 and 15.2-1804.1. Localities are allowed to grant an exemption from the standards if granted by resolution of the governing body made in writing and explaining the basis for the exemption. Va. Code § 15.2-1804.1(D).

25-7 WHEN NEITHER AN ITB NOR RFP IS REQUIRED**25-7.01 Cooperative Procurement**

Any public body may "participate in, sponsor, conduct, or administer a joint procurement agreement on behalf of or in conjunction with one or more other public bodies, or public agencies or institutions or localities of the several states, of the United States or its territories, the District of Columbia, the U.S. General Services Administration, or the Metropolitan Washington Council of Governments, for the purpose of combining requirements to increase efficiency or reduce administrative expenses in any acquisition of goods, services, or construction." Va. Code § 2.2-4304. In addition, a public body may purchase from another public body's contract even if it did not participate in the request for proposal or invitation to bid, if the request for proposal or invitation to bid specified that the

procurement was a cooperative procurement being conducted on behalf of other public bodies. Thus, if one locality puts such a statement in the RFP or ITB, other localities can purchase off that contract even if they are not specifically named, in a manner similar to the long-standing practice of purchasing off of a state contract. However, unnamed public bodies may not engage in cooperative procurement for architectural or engineering services or construction.¹⁰ *Id.*

A local government may purchase from another governmental agency services listed on the state's "commercial activities list." If the cost of such services is over \$25,000, the locality must post notice on its public government website where all public notices for procurement opportunities are located or on the Department of General Services' central electronic procurement system (eVA) and provide opportunity for comment or the provision of information, unless the contract is exempt under Va. Code § 2.2-4343. Va. Code § 2.2-614.4.

Consistent with federal regulations, any county, city, town, or school board may also purchase goods and nonprofessional services from a U.S. General Services Administration contract or a contract awarded by any other agency of the U.S. government. Va. Code § 2.2-4304(D)(3).

The General Assembly also adopted legislation stating that any locality may participate in programs offered by the National Association of Counties (presumably without competitive procurement, although it does not specifically state that). 2007 Va. Acts ch. 330.

25-7.02 Sole Source

Upon written determination that there is only one source practicably available, a contract may be awarded without competitive sealed bidding or competitive negotiation. Va. Code § 2.2-4303(E). The test is whether a particular product is "practicably" available, not whether it can be found anywhere. See 1983-84 Op. Va. Att'y Gen. 291. A notice must be issued which states that the contract is being awarded to a sole source, what is being procured, the contractor selected, and the date on which the contract was or will be awarded. This can be either posted on a website or published in a newspaper. Local governments are encouraged to post the notice on the Department of General Services' central electronic procurement website, eVA. Under Va. Code § 2.2-4360(A), a protest must be filed within ten days after posting or publication or there can be no protest. In *Advanced Transportation & Logistics, Inc. v. Botetourt County*, 77 Va. Cir. 164 (Botetourt Cnty. 2008), the court held that when the county tried to extend a seven-year contract for two-and-a-half more years without issuing an RFP it was in effect awarding a sole source contract, and another firm that provided the same service was a "potential bidder or offeror" that could file a protest to the sole source procurement. The court noted that the county had not followed the procedure for sole source procurement, leading to the question of whether the court would have reached a different result if it had done so. The court subsequently held that the county had violated the VPPA. 79 Va. Cir. 359 (Botetourt Cnty. 2009).

25-7.03 Emergencies

Similar rules apply to emergency basis contracts under Va. Code § 2.2-4303(F).¹¹ A contract may be awarded in an emergency without competitive sealed bidding or competitive negotiation, provided such competition as is practicable under the circumstances is attempted. Emergency is not defined. Again, a protest must be filed within ten days of

¹⁰ Artificial turf and track surfaces, playground equipment, stream restoration, and stormwater management practices are excepted from this prohibition.

¹¹ This authority is separate from the emergency contracting powers afforded to a local director of emergency management under Va. Code §§ 44-146.19 and 44-146.21.

posting or publication. See *H.S. Martin Constr. Corp. v. Lee Cnty. Sch. Bd.*, No. 2:16cv10 (W.D. Va. Dec. 21, 2016) (failure to follow requirements of Va. Code § 2.2-4303(F) renders contract to perform emergency repairs ultra vires and void, despite performance of work).

25-7.04 Small Purchase Procedure

Under Va. Code § 2.2-4303(G), a public body may establish written procedures not requiring competitive sealed bids or competitive negotiation for single or term contracts for goods, non-professional services, non-transportation-related construction not expected to exceed \$200,000, and transportation-related construction not expected to exceed \$25,000. The procedures vary from locality to locality, but normally require at least three telephone quotes for smaller purchases and at least three written quotations for larger purchasers. A locality may establish purchase procedures, if adopted in writing, not requiring competitive negotiation for single or term contracts for professional services if the aggregate or the sum of all phases is not expected to exceed \$80,000. Local public bodies are “encouraged” to post small purchase notices on the DGS website, [eVA](#). Va. Code § 2.2-4302(A)(2).

25-7.05 Reverse Auction

The General Assembly authorized the purchase of goods or nonprofessional services (except for construction or professional services, and “bulk purchases of commodities used in road and highway construction and maintenance, and aggregates”) by reverse auctioning. Va. Code § 2.2-4303(I). In reverse auctioning, bidders are invited to bid on specified goods or nonprofessional services through real-time electronic bidding, with the award being made to the lowest responsive and responsible bidder. During the bidding process, bidders’ prices are revealed, and bidders have the opportunity to modify their bid prices for the duration of the time period established for bid opening. Va. Code § 2.2-4301.

25-7.06 Energy and Operating Efficiency Performance-Based Contracting

The General Assembly adopted the Energy and Operating Efficiency Performance-Based Contracting Act at Va. Code § 11-34.1 et seq. in 2001. It allows public bodies to enter into contracts to install energy saving equipment such as new lighting, air conditioning, heating, and windows, with a provision that some or all of the cost of the equipment will be paid for by the reduction in energy costs from the new equipment. In the event the energy savings are not as much as agreed to in the contract, the contractor must pay the public body the difference. The Act allows such projects to be financed over a period of up to twenty years. While this provision is used mainly for school buildings, it can be used for any kind of public buildings. A public body is also authorized to use forward pricing mechanisms for energy purchases. Forward pricing mechanisms are contracts or financial instruments that obligate the public body to buy or sell a specified quantity of energy at a future date at a set price. Va. Code § 2.2-4329.1.

25-7.07 Road Improvements

A governing body may negotiate and award a contract without competition to an entity that is constructing road improvements pursuant to a proffered zoning condition in order to expand the scope of the road improvements by utilizing cash proffers of others or other available locally generated funds. Va. Code § 15.2-2303.2(C).

25-7.08 Miscellaneous

Article 3 of the VPPA lists numerous exemptions and limitations from the application of the Act. Some of these are as follows:

1. Under Va. Code § 2.2-4346(B), school boards may use competitive negotiation rather than competitive sealed bids when attempting to contract with companies to provide caps and gowns, photographs, class rings, yearbooks, and graduation announcements.

2. Va. Code § 2.2-4303(I) allows purchases from auctions, including online public auctions, when it is determined to be in the best interests of the locality. However, "bulk purchases of commodities used in road and highway construction and maintenance, and aggregates" may not be made by online public auctions.
3. Va. Code § 2.2-4344 provides additional exceptions to the VPPA requirements. Of interest is the General Assembly's exemption, with certain limitations, of contracts entered into by community development authorities, and the exemption of industrial or regional industrial facilities with respect to "authority facilities." See *also* Va. Code §§ 15.2-5152 (regarding creation of community development authorities) and 15.2-4902 (defining "authority facilities").
4. A school board that makes purchases through its public school foundation or purchases educational technology through its educational technology corporation (see Va. Code § 22.1-212.2:2) is exempt from the provisions of the VPPA except for the anti-discriminatory and ethics provisions. Va. Code § 2.2-4343(A)(12).
5. Purchases of electric utility services by a public body are exempt from the VPPA if purchased through an association of which the public body is a member. Va. Code § 2.2-4345(A)(13).
6. Purchases from small, women-owned, and minority-owned businesses are exempt from the VPPA if made pursuant to an enhancement or remedial plan established pursuant to Va. Code § 15.2-965.1. Va. Code § 2.2-4343(A)(19). See section [25-12.01](#).
7. The purchase of Virginia-grown food products for use by a public body where the annual cost of the product is not expected to exceed \$100,000 (written informal solicitation required). Va. Code § 2.2-4343(A)(22).
8. A contract with approved private or nonprofit organizations for the provision of on-line courses or virtual school programs. Va. Code § 22.1-212.24(C).

25-8 CONTRACTUAL PROVISIONS

25-8.01 Price

Public contracts may be awarded on a fixed-price or cost-reimbursement basis, or on any other basis that is not prohibited. Except in an emergency, cost-plus contracts are prohibited. Va. Code § 2.2-4331. See 1982-83 Op. Va. Att'y Gen. 739 for definition of cost-plus contract. Also allowed is the award of a public contract on the basis of cost plus a percentage of the private investment made by a private entity in cases of the procurement of commercial or financial consulting services related to a qualifying transportation facility under the Public-Private Transportation Act or a qualifying project under the Public-Private Education Facilities and Infrastructure Act. Va. Code § 2.2-4331(C).

A fixed-price contract cannot be increased by more than 25 percent of the contract or \$50,000, whichever is greater, without the approval of the governing body. Va. Code § 2.2-4309. This is to ensure against a contractor entering into an agreement with a purchasing official to get the low bid and then increasing it through change orders. In *Carnell Construction Corp. v. Danville Redevelopment & Housing Authority*, 745 F.3d 703 (4th Cir. 2014), the Fourth Circuit deflected several attempts to avoid the repercussions of this statute. First, it rejected an argument that the cap only applies to situations in which a contractor has increased the contract price excessively without providing

additional work. It then rejected an argument that some conditional language allowing modifications to the final contract price transformed a fixed-price contract into a unit-price contract. And third, it held that the statute did not effect an unconstitutional taking of property, finding no fundamental property right in the constitutional sense to a particular remedy in contract.

In reaction to *Carnell*, the General Assembly amended Va. Code § 2.2-4309 to provide that the statute does not limit the amount a party to a public contract may claim or recover against a public body pursuant to Va. Code § 2.2-4363, concerning contractual disputes, or any other applicable statute or regulation. Modifications made by a political subdivision that fail to comply with Va. Code § 2.2-4309 are voidable at the discretion of the governing body, and the unauthorized approval of a modification cannot be the basis of a § 2.2-4363 contractual claim. See section [25-8.08](#).

25-8.02 Prevailing Wage and Living Wage

Localities may require that the contractor or subcontractor awarded a public contract for public works with a value of more than \$250,000 pay its workers “wages, salaries, benefits, and other remuneration . . . at the prevailing wage rate.” Va. Code § 2.2-4321.3. “Public works” means the operation, erection, construction, alteration, improvement, maintenance, or repair of any public facility or immovable property owned, used, or leased by a state agency or locality.” *Id.* The prevailing wage rate is determined by the Commissioner of Labor and Industry and the U.S. Secretary of Labor. *Id.* If a locality has adopted an ordinance to that effect, any contractor or subcontractor who employs laborers to perform work under a public works contract for that locality at a rate less than the prevailing wage is liable to those laborers for the payment of all wages due plus 8 percent interest. Va. Code § 2.2-4321.3(D). Moreover, the contractor or subcontractor will be disqualified from bidding on public contracts until restitution is paid. *Id.* A willful violation of the prevailing wage law is a Class 1 misdemeanor. *Id.* Any interested party, including a bidder, offeror, or contractor, will have standing to challenge any public works contract that violates the prevailing wage requirement, and may be awarded injunctive relief and reasonable attorney’s fees and costs. Va. Code § 2.2-4321.3(E). Employers subject to the prevailing wage requirement must keep records of wages paid and hours worked for each employee, and preserve the records for six years. Va. Code § 2.2-4321.3(H).

The Attorney General has opined that a public body may include in a solicitation the requirement that a successful bidder or offeror pay its employees or contract workers a minimum wage or a living wage, other than the wage levels required by federal or state law, even without specific statutory language authorizing such a requirement. 2020 Op. Va. Att’y Gen. 83.

25-8.03 Labor Agreements

Localities may require bidders, contractors, or subcontractors to adhere to project labor agreements with labor organizations. Va. Code § 2.2-4321.2. A project labor agreement is defined as “a pre-hire collective bargaining agreement with one or more labor organizations that establishes the terms and conditions of employment for a specific public works project.” Va. Code § 2.2-4321.2(A). Previously, localities were prohibited from requiring such a condition, and any interested party, including a bidder, contractor, or subcontractor, could seek injunctive relief against a locality violating the statute.

25-8.04 Retainage

A public body can retain no more than 5 percent of a construction contract. A similar provision applies to subcontracts. Va. Code § 2.2-4333. In certain contracts relative to street work and public works projects, the contractor must be given the option of having the retainage placed in an interest-bearing escrow account. Va. Code § 2.2-4334. This

provision cannot be waived and is incorporated by law into any relevant contract. *S. End Constr. Inc. v. Tom Brunton Masonry Inc.*, No. 7:12cv390 (W.D. Va. Feb. 25, 2013).

25-8.05 Delay Damages

A public contract cannot provide for any waiver of damages by a contractor for delay when the unreasonable delay was caused by the public body or its employees or agents. Va. Code § 2.2-4335.

That section allows a public body to have a contractual provision allowing the locality to recover for delays caused by the contractor that requires notice of any delay by the party claiming delay, that provides for liquidated damages, and that provides for arbitration or any other procedure designed to settle contract disputes. This provision requires contractors to pay a percentage of the costs incurred by the public body in “investigating, analyzing, negotiating, litigating and arbitrating the claim, which percentage shall be equal to the percentage of the contractor’s total delay claim that is determined through litigation or arbitration to be false or to have no basis in law or fact.” See *Upper Occoquan Sewage Auth. v. Blake Constr. Co.*, 266 Va. 582, 587 S.E.2d 721 (2003). Conversely, a public body is similarly obligated to pay a percentage of the contractor’s costs if the contractor contests a denial of a delay claim.

The Virginia Supreme Court construed real teeth into Va. Code § 2.2-4335 in *Blake Construction Co. v. Upper Occoquan Sewage Authority*, 266 Va. 564, 587 S.E.2d 711 (2003). The Court held the parties could not contractually limit the definition of “unreasonable delay” to acts of bad faith, maliciousness, gross negligence, or abandonment of the contract. Only the limitations expressed in the statute—that the delay was within the owner’s control and was unreasonable—can be considered. Unreasonableness is to be determined by the court based on the facts and circumstances of each case. The Court noted that notice restrictions, because they are expressly allowed by Va. Code § 2.2-4335(B)(2), may also act as a condition precedent.

In *Martin Brothers Contractors, Inc. v. Virginia Military Institute*, 277 Va. 586, 675 S.E.2d 183 (2009), the Virginia Supreme Court held that a clause in a construction contract limiting the contractor’s right to claim additional amounts for owner-caused delay was void as against public policy.

25-8.06 Bid, Performance, and Payment Bonds

Bid bonds, performance bonds, and payment bonds are required in any construction contract exceeding \$500,000 or transportation projects exceeding \$350,000 that are partly or wholly funded by the Commonwealth. Va. Code § 2.2-4336(A). In lieu of a bid bond, performance bond, or payment bond, a bidder may furnish a certified check, cashier’s check, or cash escrow, and if approved by the attorney for the locality, a personal bond, property bond, or bank or saving and loan association’s letter of credit. Va. Code § 2.2-4338. Any waiver of the right to sue on the payment bond is void unless it is in writing, signed by the person whose right is waived, and executed after such person has performed labor or furnished material in accordance with the contract documents. Va. Code § 2.2-4341(D). The General Assembly adopted legislation in 2023 that allows a public body to adopt an ordinance to allow these limits to apply to individual task orders for indefinite delivery or quantity construction contracts. Va. Code § 2.2-4337(G).

Disputes arising under payment bonds issued in accordance with the VPPA are subject to the limitations period contained in the VPPA (Va. Code § 2.2-4341(C)) unless the parties specifically contract for a different time limitation. *APAC-Atlantic, Inc. v. Gen. Ins. Co.*, 273 Va. 682, 643 S.E.2d 483 (2007).

While subcontractors are third-party beneficiaries to the payment bond mandated by Va. Code § 2.2-4337, that statute does not operate to automatically make them third-

party beneficiaries to the underlying contract. *Env't. Staffing Acquisition Corp. v. B & R Constr. Mgmt.*, 283 Va. 787, 725 S.E.2d 550 (2012). A circuit court has held that the written notice required to be given to the contractor before a third-party beneficiary may bring an action on a contractor's payment bond must be received by the contractor within ninety days, not just mailed within ninety days. *R.T. Atkison Bldg. Corp. v. Archer Western Constr., L.L.C.*, 90 Va. Cir. 240 (City of Norfolk 2015) (construing Va. Code § 2.2-4341(B)).

25-8.07 Hold Harmless Provisions for Design Contracts

Any provision in a contract between an architect or professional engineer and a public body relating to the planning or design of a building or other construction project that purports to indemnify or hold harmless the public body against liability is void and unenforceable except to the extent it indemnifies the public body against liability for damage arising out of negligent acts, errors or omissions, recklessness, or intentionally wrongful conduct of the architect or engineer. Va. Code § 11-4.4.

25-8.08 Contractual Claims

Contractual claims, whether for money or other relief, shall be submitted in writing no later than sixty days after final payment under Va. Code § 2.2-4363(A). Nothing in Va. Code § 2.2-4363 or any other section of the Act requires a public body to give notice that a payment is final before the sixty-day limitations period begins to run. *Jean Moreau & Assocs. v. Health Ctr. Comm'n*, 283 Va. 128, 720 S.E.2d 105 (2012). While the Court did not prescribe exactly what a writing must contain to be considered a "claim," it did find that mere notice of intent to file a claim is not a claim itself. *Id.* Notice is not required, however, when a contractor seeks to judicially enforce an administrative decision regarding a contractual claim. *Costello Constr. Co. v. City of Charlottesville*, 97 F. Supp. 3d 819 (W.D. Va. 2015) (federal suit claimed city erroneously calculated damages based on vendor appeal board decision).

When appealing a county's disallowance of a claim arising out of a contract covered by the Procurement Act, the claimant must serve written notice of its appeal on the clerk of the county's governing body and execute a bond to the county, both within thirty days from the date of either the decision or service of written notice of the denial, in accordance with Va. Code § 15.2-1246. The claimant must institute legal action in the appropriate circuit court within six months of the date of the decision denying the claim, in accordance with Va. Code §§ 2.2-4363(E) and 2.2-4364(E). *Viking Enter. v. Cnty. of Chesterfield*, 277 Va. 104, 670 S.E.2d 741 (2009); *see also Cnty. of Albemarle v. Camirand*, 285 Va. 420, 738 S.E.2d 904 (2013) (service of a single document entitled "Appeal Bond" did not comply with the statutory written notice requirement); *Specialty Constr. Mgmt. v. Cnty. Bd. of Arlington*, Rec. No. 111210 (Va., May 25, 2012) (unpubl.).

Written notice of intent to file a claim must be submitted at the time of the occurrence or beginning of the work upon which the claim is based. Va. Code § 2.2-4363(A).¹² The notice of intent need not be separate and distinct from the claim itself. *Jean Moreau & Assocs. v. Health Ctr. Comm'n*, 283 Va. 128, 720 S.E.2d 105 (2012); *Costello Constr. Co. v. City of Charlottesville*, 97 F. Supp. 3d 819 (W.D. Va. 2015). In *Commonwealth v. AMEC Civil, LLC*, 280 Va. 396, 699 S.E.2d 499 (2010) (VDOT case), the Court emphasized the importance of a nearly identical state statutory notice requirement. Timely submission of the claim in accordance with the statute is a condition precedent to bringing an action and thus a mandatory prerequisite to filing suit. It is not merely a

¹² Because of a procedural failure by the contractor, the Supreme Court would not consider the merits of an argument that the triggering occurrence in a contract notice provision worded similarly to the statute was the subsequent contract price change order, not the initial work order reducing the scope of the project. *Blake Constr. Co. v. Upper Occoquan Sewage Auth.*, 266 Va. 564, 587 S.E.2d 711 (2003).

procedural requirement, but a part of the newly created substantive cause of action and accordingly an element of the contractor's prima facie case. Actual notice cannot substitute for written notice or make later written notice timely. The Court held that a written record of the minutes of meetings cannot constitute notice; a written document must clearly give notice of the contractor's intent to file its claim for damages and must be given to the governmental entity by letter or equivalent communication directed to the entity in a timely manner. The Fourth Circuit, interpreting Virginia state law, held that the notice requirements of the contract were mandatory procedural requirements barring all claims for additional compensation for which notice was not properly given. *Carnell Constr. Corp. v. Danville Redev. & Hous. Auth.*, 745 F.3d 703 (4th Cir. 2014).

What constitutes the "time of occurrence" or "beginning of work" depends on the specific circumstances that arise during construction. In *AMEC, supra*, the Court found that the time of the denial of a request for additional compensation was the "time of the occurrence." The Court also found that the when the parties developed a "legitimate dispute" over delay costs constituted the "time of occurrence."

Submission of invoices more than six months after the occurrence upon which the claim was based did not comply with the statutory requirement. *Flory Small Business Dev. Ctr. v. Commonwealth*, 261 Va. 230, 541 S.E.2d 915 (2001); *see also Upper Occoquan Sewage Auth. v. Blake Constr. Co.*, 266 Va. 582, 587 S.E.2d 721 (2003) (upholding jury's special verdict determinations that notices were timely given and claims timely filed as not plainly wrong); *Welding, Inc. v. Bland Cnty. Serv. Auth.*, 261 Va. 218, 541 S.E.2d 909 (2001) (allegation that timely notice was provided as evidenced through minutes of progress meetings was sufficient to meet pleading requirements); *MCI Constructors v. Spotsylvania Cnty.*, 60 Va. Cir. 290 (Spotsylvania Cnty. 2002) (the triggering "occurrence" took place when proposed change orders were denied, disallowed, or disapproved, in whole or in part); *R.J. Crowley Inc. v. Fairfax Cnty. Sch. Bd.*, 41 Va. Cir. 55 (Fairfax Cnty. 1996) (written updates of status of project not notice of intent to file claim). *Cf. F.T. Evans, Inc. v. Sci. Museum of Va.*, 61 Va. Cir. 317 (City of Richmond 2003) (when dispute over payment does not arise until the work is completed, notice is the claim itself).

The contract must include procedures for consideration of claims. The procedures, which must include a time limit for a decision, may be specified in the contract or incorporated by reference. A contract provision that the public entity had thirty days to decide on a claim before the contractor could file suit did not mean that a default denial occurred if the public entity failed to render a decision within thirty days and thus the statute of limitations had not run. *Type, Inc. v. George Mason Univ.*, 59 Va. Cir. 282 (Fairfax Cnty. 2002). *But see Mid-Atlantic Bus. Commc'ns, Inc. v. Va. Dep't of Motor Vehicles*, 269 Va. 51, 606 S.E.2d 835 (2005) (public body's failure to respond to letter within thirty days did not thwart plaintiff's ability to file suit and thus tolling provisions did not apply).

If the locality has failed to include procedures for consideration of claims, Va. Code § 2.2-4363(C) provides default procedures. 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. Contractual claims, whether for money or other relief, must be submitted in writing no later than sixty days after receipt of final payment. To be considered a final denial of a claim, the written decision must be signed by the public body's chief administrative officer or his designee. The contractor may not institute legal action prior to receipt of the final written decision on the claim unless the public body fails to render a decision within ninety days of submission of the claim. The sole remedy for the public body's failure to render a decision within ninety days is the contractor's right to institute immediate legal action.

If the public body has established administrative procedures pursuant to Va. Code § 2.2-4365, such procedures must be in the contract or incorporated by reference. Va. Code § 2.2-4363(B). The decision of the public body is final unless the contractor appeals within six months of the date of the final decision on the claim by the public body by invoking administrative procedures meeting the standards of § 2.2-4365, if available, or by instituting legal action as provided in § 2.2-4364. Va. Code § 2.2-4363(E); *see Mid-Atlantic Bus. Commc'ns, Inc., supra* (claim denied when letter so stating received from DMV manager of project, not by letter from Comptroller sent pursuant to different statutory procedure). The tolling provision of Va. Code § 8.01-229(E)(1) applies to Va. Code § 2.2-4363. *Welding, Inc. v. Bland Cnty. Serv. Auth.*, 261 Va. 218, 541 S.E.2d 909 (2001); *see also Mid-Atlantic Bus. Commc'ns, Inc., supra* (tolling provisions of Va. Code § 8.01-229 apply to Procurement Act claims). The contractor may not seek administrative or judicial relief prior to the public body's decision unless the public body does not act within the time specified in the contract, or, if no time is specified, then within the time provided by the default provisions discussed above. A failure of the public body to render a final decision within the time provided in the default provisions is deemed a final decision denying the claim by the public body. Va. Code § 2.2-4363(D).

While exhaustion of any administrative claims is required before an action can be maintained, all claims need not be administratively exhausted before the submission of an exhausted claim. Va. Code § 2.2-4364(F); *W.M. Schlosser Co. v. Fairfax Cnty. Redev. & Hous. Auth.*, 975 F.2d 1075 (4th Cir. 1992); *Costello Constr. Co. v. City of Charlottesville*, 97 F. Supp. 3d 819 (W.D. Va. 2015) (cumulative impact claims not so inextricably intertwined with administrative claims that they cannot be pursued in court).

25-8.09 Payment

25-8.09(a) Prompt Payment

Localities are required to pay for completed goods and services by the "required payment date." Va. Code § 2.2-4352. The "required payment date" is either the date on which payment is due under the terms of the contract or not more than forty-five days after the goods or services are received or after the invoice is rendered, whichever is later. If payment is not made by that date, the locality must pay the amount assessed by the contractor but not in excess of 1 percent per month. If the contractor does not indicate that a late fee is due, then the locality arguably does not owe a penalty. A locality can also avoid a late fee by notifying the vendor of any defect or impropriety within twenty days of receipt. Local government agencies must include in contracts a payment clause obligating the contractor to either pay his subcontractors within seven days after receiving payment from the locality or to notify them of his intention to withhold all or part of the amount due with the reason why. Va. Code § 2.2-4354. Contractors must also provide their Social Security numbers or federal employer identification numbers. If the contractor is late in paying a subcontractor, he must pay interest to the subcontractor. *See Upper Occoquan Sewage Authority v. Blake Construction Co.*, 275 Va. 41, 655 S.E.2d 10 (2008) for a discussion of pre- and post-judgment interest under the Prompt Payment Act provisions.

25-8.09(b) Payment of Subcontractors by Contractor

Effective January 1, 2023, any construction contract awarded by a locality must include a payment clause that obligates a contractor to be liable for the entire amount owed to any subcontractor with which it contracts. Va. Code § 2.2-4354(1).

25-8.10 Drug-Free Workplace

All public bodies shall include in contracts over \$10,000 the drug-free workplace language set forth in Va. Code § 2.2-4312.

25-8.11 Change Orders

A public contract may include provisions for modification of the contract during performance, but no fixed-price contract may be increased by more than 25 percent or \$50,000, whichever is greater, without the advance written approval of the governing body. Va. Code § 2.2-4309. The intent of this provision is to prevent a purchasing official and a contractor from conspiring to low bid a contract and then have large change orders without anyone reviewing it. Thus, once a fixed-price contract (as opposed to a requirements contract) exceeds the greater of 25 percent or \$50,000, the governing body should approve that change order and any subsequent change order when that level is exceeded again. See discussion of *Carnell Construction Corp. v. Danville Redevelopment & Housing Authority*, 745 F.3d 703 (4th Cir. 2014) (following statute and limiting change orders increase to 25 percent of fixed price) in section [25-8.01](#).

Any public body may extend the term of an existing contract for services to allow completion of any work undertaken but not completed during the original term of the contract. Va. Code § 2.2-4309. In *Advanced Transportation & Logistics Inc. v. Botetourt County*, No. CL08-199 (Botetourt Cnty. Cir. Ct. Oct. 6, 2008), the court held that this language prevented the county from extending a seven-year contract for waste hauling services for an additional two-and-a-half years without soliciting proposals.

25-8.12 Employment of Unauthorized Aliens

All public bodies must include in every written contract that the contractor does not, and will not during the performance of the contract for goods and services in the Commonwealth, knowingly employ an unauthorized alien as defined in the federal Immigration Reform and Control Act of 1986. Va. Code § 2.2-4311.1.

25-8.13 Licensed to Contract in Virginia

All written contracts must contain a provision that the contracting foreign or domestic business entity is authorized to transact business in Virginia. Bidders or offerors must include in any bid or offer their State Corporation Commission identification number or an explanation as to why they are not required to be authorized to transact business in Virginia. A contract entered into by a business in violation of these requirements is voidable at the option of the public body. Va. Code § 2.2-4311.2.

25-9 FAITH-BASED ORGANIZATIONS

Public bodies may enter into contracts with faith-based organizations to provide goods or services for programs funded by the block grant provided pursuant to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P.L. 104-193, on the same basis as any other nongovernmental source. Va. Code § 2.2-4343.1. The faith-based organization may not use any funds provided for expenditure for sectarian worship, instruction, or proselytizing. Faith-based organizations cannot discriminate against any recipient of goods, services, or disbursements made pursuant to a contract. Subsection D of the statute requires that all invitations to bid, requests for proposals, contracts, and purchase orders prominently display a statement indicating that the public body does not discriminate against faith-based organizations. An argument can be made that this requirement applies only to contracts to be awarded under the Personal Responsibility and Work Opportunity Reconciliation Act, and not to every contract, bid, or proposal.

The public body may not discriminate against faith-based organizations nor may it impose conditions that restrict its religious character. The public body shall provide to each individual who applies for or receives goods, services, or disbursements provided pursuant to a contract between a public body and a faith-based organization a notice that such provision is not an endorsement of the provider's religion.

If an individual who applies for or receives goods, services, or disbursements provided pursuant to a contract between a public body and a faith-based organization objects to the religious character of the provider faith-based organization, the public body shall offer the individual, within a reasonable period of time after the date of his objection, access to equivalent goods, services, or disbursements from an alternative provider.

25-10 RECORDS AND THE FREEDOM OF INFORMATION ACT

Meetings may be closed to discuss the award of a public contract involving the expenditure of public funds, including interviews of bidders or offerors, and discussion of the terms or scope of such contract, where discussion in an open session would adversely affect the bargaining position or negotiating strategy of the public body. Va. Code § 2.2-3711(A)(29).

The Freedom of Information Act (FOIA) provides in Va. Code § 2.2-3705.1(12) that records relating to the negotiation and award of a specific contract, where competition or bargaining is involved and where the release of such records would adversely affect the bargaining position or negotiating strategy of the public body, are exempt until the public body has made a decision to award or not to award the contract. That provision further provides that if a transaction is one governed by the Public Procurement Act, records disclosure is controlled by the Procurement Act. The Procurement Act provides in Va. Code § 2.2-4342 that the FOIA provisions apply except for the exceptions in that section. Reading the provisions together, most procurement records are disclosable only after the contract is awarded. Exceptions are that offerors and bidders may inspect proposals or bid records prior to the award of a contract unless the public body decides not to accept any offers or bids and reopens the contract. Also, trade and proprietary secrets may not be revealed if the submitter designates the information as such prior to or at the time of submission and states the reasons why protection is necessary.

25-11 BEST VALUE

The General Assembly added language in Va. Code §§ 2.2-4300 and 2.2-4301 referencing the concept of “best value.” It is defined as “the overall combination of quality, price, and various elements of required services that in total are optimal relative to a public body’s needs.” While this sounds like a good concept, it is difficult to administer in practice, as is shown by the analysis of the Virginia Supreme Court in *Professional Building Maintenance Corp. v. School Board of County of Spotsylvania*, 283 Va. 747, 725 S.E.2d 543 (2012), where the Court reversed an award of a contract adopted using the best value concept, finding that “best value” provision does not negate the necessity of awarding the contract to the lowest responsive bidder. “Best value” is similar to “competitive negotiation” where the public body is awarding the contract to the offeror who made the “best” proposal, and using competitive negotiation may be a better approach.

25-12 NON-DISCRIMINATION

25-12.01 By the Locality

In the solicitation or awarding of contracts, no public body shall discriminate against a bidder or offeror because of race, religion, color, sex, sexual orientation,¹³ gender identity,¹⁴ national origin, age, disability, or any other basis prohibited by state law relating to discrimination in employment. Va. Code § 2.2-4310. Whenever solicitations are made, each public body shall include businesses selected from a list made available by the Department

¹³ “Sexual orientation” is defined as “a person’s actual or perceived heterosexuality, bisexuality, or homosexuality.” Va. Code § 2.2-3901(C).

¹⁴ “Gender identity” means “the gender-related identity, appearance, or other gender-related characteristics of the individual, with or without regard to the individual’s designated sex at birth.” Va. Code § 2.2-3901(B).

of Small Business and Supplier Diversity (successor to the Department of Minority Business Enterprise). Va. Code § 2.2-4310.

All public bodies must have a program that facilitates the participation in procurement of small, women-owned, minority-owned, and service-disabled veteran-owned businesses, as well as organizations that provide employment for the disabled. The program must be in writing and comply with the enhancement or remedial measures authorized by the chief executive of a locality pursuant to Va. Code § 15.2-965.1 (discussed in the following paragraph). Va. Code § 2.2-4310(B). A locality may enact an ordinance establishing measures to enhance participation by “micro-businesses” in local government procurement practices, where a micro-business is any women-owned or minority-owned business with no more than twenty-five employees. Va. Code § 15.2-965.2.

Any locality may enact an ordinance providing that whenever there exists (i) a rational basis for small business enhancement or (ii) a persuasive analysis that documents a statistically significant disparity between the availability and utilization of women- and minority-owned businesses, the chief executive of the local governing entity can implement appropriate enhancement and remedial measures consistent with prevailing law. Va. Code § 15.2-965.1. The Governor may require state agencies to establish a similar remedial plan. Va. Code § 2.2-4310(C). The purchase of goods and services by a locality under such a remedial plan are exempt from the requirements of the procurement provisions. Va. Code § 2.2-4343(A)(19). See *H.B. Rowe Co., Inc. v. Tippet*, 615 F.3d 233 (4th Cir. 2010), for an extensive discussion of a North Carolina statute requiring preferences for road construction bids with women- and minority-owned subcontractors and in which the court upheld the preferences for African-American subcontractors, but not women.

25-12.02 By the Contractor

All localities must include in every contract of over \$10,000 provisions that the contractor will not discriminate against any employee or applicant for employment because of race, religion, color, sex, national origin, age, disability, or any other basis prohibited by state law relating to discrimination in employment, except where there is a bona fide occupational qualification reasonably necessary to the normal operation of the contractor. Va. Code § 2.2-4311. Additionally, the contractor must include such a provision in every subcontract or purchase order of over \$10,000, so that the provisions will be binding upon each subcontractor or vendor. *Id.* If a contract over \$10,000 has been awarded to a small, women-owned, minority-owned, or service-disabled veteran-owned business, the contract must require such business to have a plan for subcontracting, if subcontracting is intended, to small, women-owned, minority-owned, and service-disabled veteran-owned businesses. Va. Code § 2.2-4310(D). The contract must also include language stating that if the contractor employs more than five employees, it must provide annual training on the contractor’s sexual harassment policy to all employees providing services in Virginia. In addition, the contractor must post the company’s sexual harassment policy in a conspicuous place in any building that it owns or leases in Virginia, and include it in the contractor’s employee handbook. *Id.*

25-13 PROTESTS

25-13.01 Who May File

The VPPA protest procedure is set forth in Va. Code §§ 2.2-4357 through 2.2-4366. The majority of protests are filed under Va. Code § 2.2-4360. Protests may only be filed by persons who actually submitted bids or offers (except in the case of emergency or sole source contracts). In *Concerned Taxpayers v. County of Brunswick*, 249 Va. 320, 455 S.E.2d 712 (1995), the Supreme Court held that a citizens group could not legally challenge the county’s decision to award a landfill contract, either under the VPPA or under common law.

In *Charlottesville Area Fitness Club Operators Ass'n v. Albemarle County Board of Supervisors*, 285 Va. 87, 737 S.E.2d 1 (2013) (LGA filed an amicus brief), the court held that third parties do not have a mechanism under the Act to protest an award of a public contract and they have no remedy independent of the Act.

25-13.02 Procedure

The protest must be initially filed with the public body, or a person designated by the public body, no later than ten days after public notice of the award or the decision to award, whichever occurs first. The public notice of the award or the decision to award must be given in the manner specified in the ITB or RFP. For example, if the ITB states the notice of the award will be posted, the ten-day period begins at the date of posting, regardless of actual knowledge. Such protest must be in writing, state the basis for the protest, and state the relief requested. A bidder may not challenge the terms and conditions of the ITB or the RFP. There is language in Va. Code § 2.2-4360 to the effect that if the protest is based on information contained in public records, then the time to file a protest shall expire ten days after the records are available for inspection or at such later time as provided in Va. Code § 2.2-4360. The question is when the documents were available for inspection, not when they were actually inspected. In *Saunders Oil Co. v. Pethtel*, 13 Va. Cir. 337 (City of Richmond 1988), the court held that the ten days was the outside time, and that even if documents were not made available, the time to file a protest could not exceed the ten days. In any event, it is important that it be made clear to bidders that all documents are made available at the time the bids are opened and, with RFPs, at the time negotiations are completed so that the ten-day period is not arguably extended. No protest may be filed on the basis that the winning bidder or offeror is non-responsible. See 1985-86 Op. Va. Att'y Gen. 44.

If a timely protest or legal action is made, further action on the contract cannot be taken unless the bid will expire or a written determination is made that proceeding without delay is necessary. Va. Code § 2.2-4362. If a protest is filed and the locality determines that a mistake was made, the locality has the option under Va. Code § 2.2-4319 to cancel or reject the bids or proposals and start over. The reasons for rejection or cancellation need to be put in the file in writing. See *Central Va. Physicians v. City of Richmond*, No. HH-23-4 (City of Richmond Cir. Ct. Feb. 13, 1996) (public body may cancel an award if it receives an untimely protest it considers to be meritorious).

The protest proceeding is not the type of administrative proceeding with safeguards inherent in a judicial proceeding; thus, false, misleading, or defamatory statements made therein are not privileged. *Lockheed Information Management Sys. v. Maximus, Inc.*, 259 Va. 92, 524 S.E.2d 420 (2000).

In *Corrections Products Company v. City of Alexandria*, 74 Va. Cir. 557 (City of Alexandria 2006), the court held that because the plaintiff failed to submit a bid that complied with all the requirements of the ITB, the plaintiff cannot be considered a "bidder" and does not have standing.

25-13.03 Appeal of Denial of Protest

Assuming that the locality determines to deny the protest at the administrative level, the bidder or offeror has ten days to file an appeal either to an administrative panel or officer, if available, or to go to court, at the bidder or offeror's option. While the locality has the option of setting up an administrative review, the locality cannot force the bidder or offeror to use that procedure as opposed to going straight to court. *W.M. Schlosser Co. v. Fairfax Cnty. Redev. & Hous. Auth.*, 975 F.2d 1075 (4th Cir. 1992). Some localities choose to allow the protesting bidder or offeror the right to an administrative review, and some do not. If an administrative review is provided, it may be either a panel or one person. However, the reviewer must be disinterested and cannot be an employee of the locality. In the event the protesting bidder or offeror chooses an administrative hearing and loses, he has thirty days

to file an appeal in circuit court. A decision by the administrative reviewer cannot be removed to federal court. *Fairfax Cnty. Redev. & Hous. Auth. v. W.M. Schlosser Co.*, 64 F.3d 155 (4th Cir. 1995).

Because Va. Code § 2.2-4360 provides that that a bidder may “appeal” a public body’s denial of its protest, a bidder may not seek judicial relief until the public body has issued its written decision within ten days of the protest. In *Sabre Construction Corp. v. County of Fairfax*, 256 Va. 68, 501 S.E.2d 144 (1998), the bidder sought judicial relief one day before the locality issued its denial. *Accord John T. Moore & Assocs. v. Va. Commonwealth Univ.*, 69 Va. Cir. 200 (City of Richmond 2005).

The appeal procedure under Va. Code § 2.2-4360 is to be strictly construed, thus a letter to an administrative appeal board discussing jurisdiction of the board to hear an appeal does not constitute a written appeal of the denial of the protest. *NBS Imaging Sys., Inc. v. Va. Dep’t of Motor Vehicles*, 46 Va. Cir. 165 (City of Richmond 1998).

There is no provision for monetary damages in the VPPA.¹⁵ While there are provisions for staying the award of the contract once an appeal is filed, the Supreme Court held in *Concerned Taxpayers v. County of Brunswick*, 249 Va. 320, 455 S.E.2d 712 (1995) that a violation of the VPPA does not render void the contract between the governing body and the contractor who was selected. The VPPA provides that if an award of a contract is found to have been arbitrary or capricious, the performance of the contract *may* be enjoined (if performance has not begun) or the public body *may* declare the contract void upon a finding that this action is in the best interest of the public (if performance has begun). In *MFS Network Technologies v. Commonwealth*, 33 Va. Cir. 406 (City of Richmond 1994), the circuit court held that the prohibition in Va. Code § 2.2-4360 against an injunction after performance has begun does not apply to a circuit court’s exercise of its equitable powers upon appeal of the protest decision. In *Fortran Corp. v. Commonwealth*, 43 Va. Cir. 111 (City of Richmond Cir. Ct. 1997), a circuit court reversed the award of a contract to a bidder it found did not meet the minimum mandatory requirements of the RFP, but it refused to award the contract to the protestor.

The standard under Va. Code § 2.2-4360 is whether the decision of the locality was arbitrary or capricious. The Virginia Supreme Court stated in *Taylor v. County Board of Arlington Cnty.*, 189 Va. 472, 53 S.E.2d 34 (1949) that:

[w]hen the decision of the authorities is based upon a fair and honest exercise of their discretion, it will not be interfered with by the courts, even if erroneous. Courts do not in such cases substitute their judgment for the judgment of the body to which the decision is confided. Interference by the courts is limited to cases in which the public body has proceeded illegally or acted arbitrarily or fraudulently.

While this case precedes the VPPA, the legislative history contained in the [Virginia Procurement Law Study Final Report](#) states that this standard is being incorporated into the VPPA.

¹⁵ In *John C. Holland Enterprises v. J.P. Mascaro & Sons*, 653 F. Supp. 1242 (E.D. Va.), *aff’d*, 829 F.2d 1120 (4th Cir. 1987), the court held that a disappointed bidder could not maintain an unjust enrichment action against a successful bidder. See also *Huger-Davidson Sale Co. v. Rockbridge County School Board*, No. CH96000016-00 (Rockbridge Cnty. Cir. Ct. Apr. 10, 1996), in which the court held that the VPPA did not allow damages, attorney’s fees, or costs, and the only remedy for a violation was to reverse the award (but not to make the award to the protestor).

A contractor is bound by the forum selection clause included in a prequalification procedure and, presumably, in an RFP, ITB, or contract. *Fru-Con Constr. Corp. v. Cnty. of Arlington*, No. 106cv1 (E.D. Va. Jan. 30, 2006).

25-14 ETHICS

25-14.01 History

The Ethics in Public Contracting provisions of the Virginia Public Procurement Act are found in Va. Code §§ 2.2-4367 through 2.2-4377. They were part of the original VPPA that was effective January 1, 1982. The legislative history on the ethics portion of the VPPA is also in the *Virginia Procurement Law Study Final Report*. While it would probably have been better to use a Virginian as an example, the ethics portion of the Report summarizes its intent by stating that “Procurement officials, like Caesar’s wife, must avoid even the appearance of impropriety.” This language was echoed in the general purposes section of the VPPA (Va. Code § 2.2-4300(C)), which states that all procurement procedures are to be conducted in a fair and impartial manner with avoidance of any impropriety or *appearance of impropriety*.

25-14.02 Interaction With Other Statutes

The ethics section of the VPPA is not intended to be the only ethical statute with applicability to procurement. It is intended to supplement other statutes, not supersede them. In particular, the ethical standards in these statutes also apply in the procurement context:

- a. The State and Local Government Conflict of Interests Act (Va. Code § 2.2-3100 et seq.). See [Chapter 27, The Conflict of Interests Act](#).
- b. The Virginia Governmental Frauds Act (Va. Code § 18.2-498.1 et seq.).
- c. The Virginia statutes relating to bribery (Va. Code §§ 18.2-438 et seq. and 18.2-446 et seq.).

An action may be a violation of the ethics provisions of the VPPA even though it may not be a violation of the Conflict of Interests Act.

25-14.03 What Happens if a Public Employee Violates the Act?

A willful violation of any provision of the ethics article constitutes a Class 1 misdemeanor. Va. Code § 2.2-4377. Upon conviction, any public employee must forfeit his employment in addition to any other fine or penalty. The determination of whether the violation was “willful” in a particular case will generally depend upon the character of the act involved and the attending circumstances. The customary meaning of “willful” is that the act must have been done “purposely, intentionally, or designedly.” *Hunter v. Commonwealth*, 15 Va. App. 717, 427 S.E.2d 197 (1993).

This is a rare, if not the only, instance in which the General Assembly has prescribed that a person will lose his or her job, with evidently no discretion available to the locality or to the judge.¹⁶ However, many unanswered questions remain about the statute’s application. Does the person have any due process rights following a conviction? If the locality wishes, can it simply hire the person back the next day? Does a member of a governing body automatically lose his seat if there is a violation; i.e., does that role constitute “employment?” Moreover, it is unclear whether violations occurring more than one year ago are still violations for which one could lose his job. Since the statute of

¹⁶ By contrast, for a knowing violation of the Conflict of Interests Act, a judge *may* order the forfeiture of the office or employment. Va. Code § 2.2-3122.

limitations on misdemeanors is one year, does that mean that after a year a public employee cannot be prosecuted for ethical violations under the VPPA?¹⁷

25-14.04 Disqualification

Unlike the Conflict of Interests Act, the VPPA does not prohibit contracts in violation of the Act. Rather, Va. Code § 2.2-4369 states that a “public employee having official responsibility for a procurement transaction” shall not participate on behalf of the public body in a procurement transaction when the employee falls within certain categories. Exceptions are provided for in Va. Code § 2.2-4369 when the transaction affects the public generally or when the public employee is a member of a business, profession, occupation, or group the members of which are affected by the transaction, and appropriate declarations are made.

25-14.04(a) Official Responsibility for Transaction

Who is a “public employee having official responsibility for a procurement transaction?” Interestingly, this category is fairly broad. For example, the definitions in Va. Code § 2.2-4368 specifically include “elected officials or appointed members of governing bodies.” In addition, the definition of “official responsibility” includes those persons who have “administrative or operating authority, whether intermediate or final, to initiate, approve, disapprove or otherwise affect a procurement transaction, or any claim resulting therefrom.” The definition of “procurement transaction” includes “all functions that pertain to the obtaining of any goods, services or construction, including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration.”

Thus, the Act does not simply apply to people in the purchasing office. It also applies to those employees in the using agencies who need the goods, services or construction and start the whole process. In addition, it includes local governing bodies, to the extent that they actually approve or disapprove the solicitation in the first instance or the award of the contract.

25-14.04(b) Situations Requiring Disqualification

Disqualification must occur in the following instances:

1. When the employee knows that he or she is contemporaneously employed by a bidder, offeror, or contractor involved in the procurement transaction.
2. When the employee knows that the employee, the employee’s partner, or any member of the employee’s immediate family holds a position with a bidder, offeror, or contractor such as an officer, director, trustee, partner or the like, or is employed in a capacity involving personal and substantial participation in the procurement transaction, or owns or controls an interest of more than 5 percent.

This adds a new element, because it applies to both the employee and “any member of the employee’s immediate family.” The definition of “immediate family” in Va. Code § 2.2-4368 includes a “spouse, children, parents, brothers and sisters, and any other person living in the same household as the employee.” This is broader than the definition of “immediate family” in the Conflict of Interests Act, which includes just a spouse and any other person residing in the same household who is a dependent. “Immediate family” for VPPA purposes includes brothers, sisters, parents, and children, *regardless* of where they live. See 1996 Op. Va. Att’y Gen. 42. Thus, if a member of a board of supervisors is

¹⁷ In contrast, the Conflict of Interests Act has a specific criminal statute of limitations period of five years from the violation, or one year from the date the Commonwealth’s Attorney learns of the violation, whichever occurs first. Va. Code § 2.2-3125.

voting on a contract with a company of which his brother is an officer, even though the brother lives in Seattle, he still must disqualify himself from the vote or be in violation of the Act.

3. When the employee knows that the employee, the employee's partner, or any member of the employee's immediate family has a pecuniary interest arising from the procurement transaction.

This is even broader, because it picks up the definition of "personal interest in a contract" from the Conflict of Interests Act. A "personal interest" under the Conflict of Interests Act exists by reason of (i) ownership in a business if the business interest exceeds 3 percent of the total equity of the business; (ii) annual income that exceeds, or may reasonably be expected to exceed, \$5,000 from ownership in real or personal property or a business; (iii) salary, other compensation, fringe benefits, or benefits from the use of property, or any combination thereof, paid or provided by a business that exceeds, or may reasonably be expected to exceed, \$5,000 annually; (iv) ownership of real or personal property if the interest exceeds \$5,000 in value and excluding ownership in a business, income, or salary, other compensation, fringe benefits or benefits from the use of property; (v) personal liability incurred or assumed on behalf of a business if the liability exceeds 3 percent of the asset value of the business; or (vi) an option for ownership of a business or real or personal property if the ownership interest will consist of clause (i) or (iv).

The most common of these may occur under (iii), annual salary over \$5,000. For example, if a purchasing official or a governing body member has a brother who makes more than \$5,000 with IBM, it is arguable that the official must disqualify himself whenever his locality wants to buy computers through a solicitation on which IBM may bid.

4. When the employee knows that the employee, the employee's partner, or any member of the employee's immediate family is negotiating, or has an arrangement concerning, prospective employment with a bidder, offeror or contractor.

The Act has another exception that would allow a public employee to avoid disqualification (and the criminal penalties if he chose not to disqualify himself). Va. Code § 2.2-4369. If the participation is "specifically allowed" by the Conflict of Interests Act, then there is no requirement of disqualification. See 1987-88 Op. Va. Att'y Gen. 15. However, Va. Code § 2.2-3110, which lists several exceptions to the applicability of the Conflict of Interests Act, states in subsection (A)(4) that a contract does not violate the Act if the sole personal interest in a contract is due to the officer, employee, or member of his immediate family (i.e., using the Conflict of Interests Act definition) making more than \$5,000 in salary from a company, provided that the officer, employee, or immediate family member does not have authority to participate in the procurement on behalf of the contracting firm, and the officer or employee either does not have authority to participate in the procurement or letting of the contract or he disqualifies himself as a matter of public record and does not participate in negotiating or approving the contract on behalf of the government. Thus, the employee or officer still has to disqualify himself from the procurement process to make the contract lawful under the exception in Va. Code § 2.2-3110(A)(4).

25-14.04(c) How to Disqualify

What is required for disqualification? The VPPA does not say what the official has to do in order to disqualify himself. It simply says that the person should "not participate" in the transaction. It would probably be better to put the reason for disqualification in writing at the beginning of the procurement, so there will be no question in the future.

25-14.05 Solicitation or Acceptance of Gifts

A public employee having official responsibility for a procurement transaction (again, this can include elected officials if they vote on the contract) shall not solicit, demand, accept, or agree to accept from a bidder, offeror, contractor, or subcontractor any payment, loan, subscription, advance, deposit of money, services, or anything of more than nominal or minimal value, present or promised, unless consideration of substantially equal or greater value is exchanged. Va. Code § 2.2-4371(A). The Virginia Court of Appeals has held that this section is neither unconstitutionally vague nor overbroad. *Vincent v. Commonwealth*, No. 0416-95-1 (Va. Ct. App. Jan. 30, 1996) (unpubl.).

What is “nominal or minimal value?” Although several terms are defined in Va. Code § 2.2-4368, these are not. Unfortunately, this leaves significant discretion to the employees. The easiest rule, particularly given the penalty for a violation, is not to accept anything with more than a five dollar value. This also applies to below-market rate loans and free services, not simply hard goods.

It is a violation of the Act for bidders, offerors, contractors, or subcontractors to confer upon any public employee having official responsibility for a procurement transaction any payment, loan, subscription, advance, deposit of money, services, or anything of more than nominal value (for some reason they left out “minimal”), present or promised, unless consideration of substantially equal or greater value is exchanged. Va. Code § 2.2-4371(B). It is important that purchasing officers know that this section exists, so they can tell bidders or contractors who offer them free tickets that if they accepted the offer, both of them would be guilty of a Class 1 misdemeanor.

There is one Attorney General’s opinion that discusses gifts, 1982-83 Op. Va. Att’y Gen. 90. The issue is whether a basketball coach at a state college can accept money or merchandise by a shoe manufacturer in return for the team wearing the shoes of that company. While the opinion does not absolutely hold that such an arrangement violates any statutes, it states that if the coach has official responsibility for procuring the basketball shoes and receives money or anything of more than nominal or minimal value, there may be a violation of Va. Code § 2.2-4371(A).

The Act prohibits any officer or employee of local government from accepting any gifts that reasonably tend to influence him in the performance of his official duties. Va. Code § 2.2-3103.¹⁸ The term “gift” is defined to include services as well as lodging and meals. The difference between the Conflict of Interests Act § 2.2-3103 prohibition and the VPPA prohibition is that in the former it must be determined that the gift would reasonably tend to influence the performance of the person’s official duties, while under the VPPA it is a violation if the gift is of more than nominal or minimal value, regardless of whether it tends to influence the person.

25-14.06 Disclosure of Subsequent Employment

Virginia Code § 2.2-4370 deals with the “revolving door.” While it does not prohibit a public employee from going to work for a bidder or contractor immediately after leaving his position in the public sector, it requires the employee to provide written notice to the public body (or a public official designated by the public body) prior to starting work for the bidder, offeror, or contractor. See Va. Att’y Gen. COI Adv. Op. No. 10-A03 (2010) (notice required if employee had official responsibility for procurement transactions). If the employee does

¹⁸ Additionally, no person required to fill out a long form financial disclosure may accept a gift valued over \$100 from a lobbyist or person seeking to contract with the public entity of which the recipient is an officer or employee. Va. Code § 2.2-3103.1. See Chapter 27, Conflict of Interests Act, section [27-4.04](#).

not provide such notice prior to going to work for the bidder or contractor, he cannot accept employment with the bidder or contractor for one year after he leaves his public sector job.

This only applies to persons who have official responsibility for procurement transactions taking jobs with private sector employers with whom they dealt in an official capacity concerning procurement transactions. Thus, it does not apply to all jobs a purchasing official would take. Given the breadth and vagueness of the phrase "with whom they dealt in an official capacity concerning procurement transactions," however, it still may apply in more situations than one would think. For example, if a county administrator were involved in a contract with a landfill operator, and then left the county to work with that landfill operator, without giving notice, the statute would preclude him from taking the position for one year. The prohibitions are vague as to timing. For example, if employment was without giving notice, does the employee avoid ethical implications by giving up his job in the private sector, or is he already guilty of violating the ethics provisions? If a county attorney hires outside bond counsel or litigation counsel, and then wants to go work for that law firm, does he have to give written notice prior to accepting the position? The statute puts no limit on how long ago a public employee may have actually dealt with a private employer in a procurement transaction before the prohibition kicks in. What if the procurement transaction occurred five years ago? Does the prohibition still apply? There are no clear answers to these questions.

25-14.07 Kickbacks

Virginia Code § 2.2-4372 has nothing to do with public employees, but prohibits contractors or subcontractors from demanding or receiving anything from suppliers or subcontractors as an inducement for the award of the subcontract or order. It is also illegal for the subcontractor or supplier to make or offer to make such kickbacks. Also, no person shall demand or receive any payment of any kind in return for an agreement not to compete on a public contract.

If it is discovered that a kickback or payment not to compete did occur, it is presumed that the payment was included in the price of the subcontract or order and was paid by the public body. The public body can then recover from either offending party. The Act states that "recovery from one offending party shall not preclude recovery from other offending parties." Does that mean that the public body can get double recovery?

25-14.08 Inability of Paid Consultant to Submit Bid or Proposal

No person who for compensation prepares an invitation to bid or request for proposal on behalf of a public body shall submit a bid for any of that procurement or disclose information to any bidder not available to the public. However, a public body may permit such person to submit a bid or proposal for that procurement or any portion thereof if the public body determines that the exclusion of such person would limit the number of potential qualified bidders or offerors in a manner contrary to the best interests of the public body. Va. Code § 2.2-4373.

25-14.09 Purchase of Building Materials from Architect or Engineer

The Act prohibits (except in an emergency) the purchase of building materials, supplies, or equipment from an architect or engineer who is employed to design the building such supplies would be used for and the purchase of such materials or supplies from any company in which the architect or engineer has an interest. Va. Code § 2.2-4374. This provision was evidently included in the Act to keep architects and engineers from steering building purchases to firms that they controlled, thereby increasing their profits.

25-14.10 Misrepresentations

Virginia Code § 2.2-4376 was adopted by the General Assembly in 1992, in response to a specific complaint by a business. It states that no public employee having official

responsibility for a procurement transaction shall knowingly falsify, conceal, or misrepresent a material fact; knowingly make any false, fictitious, or fraudulent statements or representations; or make or use any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry.

While there certainly is no problem with requiring that purchasing officials should not lie or use forged documents, the language stating that it is a violation to “knowingly conceal or misrepresent a material fact” is troubling due to its breadth of interpretation. What is “misrepresentation?” What is a “material fact?” Any bidder or contractor who feels that the purchasing officer is not telling him everything may consider that to be a misrepresentation.

As this is a criminal statute resulting in the automatic loss of a job, it could be a very important provision. It is also important to remember that members of Boards of Supervisors and City Councils are “public officials” having official responsibility for procurement transactions” when they vote on the award of the contract.

The Act allows public bodies to require public employees having official responsibility for procurement transactions to annually certify in writing that they have complied with the provisions of the ethics section for those transactions they were involved in. Va. Code § 2.2-4375. Any employee who knowingly makes a false statement in such certification is subject to the Class 1 misdemeanor and forfeiture of employment sanctions.