

Public Contracts

Virginia Association Of School
Business Officials
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⌘ “An agreement between two or more persons which creates an obligation to do or not do a particular thing.” Black’s Law Dictionary

⌘ “A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.” Restatement, Second, Contracts

What is a contract?

⌘ Generally, the law recognizes as essential components of a contract: competent parties, subject matter, a legal consideration, mutuality of agreement, and mutuality of obligation.

Essential Components

⌘ “Public Contract” means an agreement between a public body and a nongovernmental source that is enforceable in a court of law. Virginia Public Procurement Act, Virginia Code § 2.2-4301.

Public Contracts

⌘ Purposes: “The purpose of this chapter is to enunciate the public policies pertaining to governmental procurement from nongovernmental sources, to include governmental procurement that may or may not result in monetary consideration for either party. This chapter shall apply whether the consideration is monetary or nonmonetary and regardless of whether the public body, the contractor, or some third party is providing the consideration.” Virginia Code § 2.2-4300(B)

Virginia Public Procurement

⌘ Purposes: “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 . . .

Virginia Public Procurement

⌘ “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 exchange information concerning what is sought to be procured and what is offered.” Virginia Code § 2.2-4300(C)

Virginia Public Procurement

⌘ “Every . . . school board is declared a body corporate and, in its corporate capacity, is vested with all the powers and charged with all the duties, obligations and responsibilities imposed upon school boards by law and may sue, be sued, *CONTRACT, BE CONTRACTED WITH*, and in accordance with the provisions of this title, purchase, take, hold, lease and convey school property, both real and personal. School board members appointed or elected by district or otherwise, shall have no organization or duties except such as may be assigned to them by the school board as a whole.” Virginia Code § 22.1-71

Virginia School Boards

⌘ “No school board shall expend or *CONTRACT* to expend, in any fiscal year, any sum of money in excess of the funds available for school purposes for that fiscal year without the consent of the governing body or bodies appropriating funds to the school board. Any member of a school board or any division superintendent or other school officer violating, causing to be violated or voting to violate any provision of this section shall be guilty of malfeasance in office.” (Emphasis added)
Virginia Code § 22.1-91

Limitations on Contracting

⌘ A local school board, as with other bodies corporate, can act only through its duly authorized agents and, of necessity, must delegate responsibility for the day to day operation of schools to its agents and employees. Pleasants v. Commonwealth, 214 Va. 646 (1974)(Student discipline case)

Virginia School Boards

- ⌘ Who has authority in your school division to assent to contracts?
 - ⌘ Chairman?
 - ⌘ Division Superintendent?
 - ⌘ Board Clerk?
 - ⌘ Assistant Superintendent or Director of Finance?
 - ⌘ Others?

Virginia School Boards

⌘ “Those that deal with public officials must, at their peril, take cognizance of their power and its limits.” County of York v. King’s Villa, Inc., 226 Va. 447 (1983); Deal v. Commonwealth, 224 Va. 618 (1983).

Public Officials

⌘ To hold otherwise and thereby permit “one official to supplant the collective wisdom of the elected governing body whom the people have chosen to wield the power here in dispute,” would “rend the fabric of government,” which is “designed to restrain public officials from unfettered, unchecked control over governmental affairs.” County of York, at 450-51.

Public Officials

⌘ “The treasurer or comparable officer of each county, city or part thereof constituting a school division or town, if the town constitutes the school division, shall be charged with the responsibility for the receipt, custody and disbursement of funds of the school board and shall keep such funds in an account or accounts separate and distinct from all other funds.”
Virginia Code § 22.1-116

Fiscal Agents

⌘ With some limited exceptions, “a school board shall examine all claims against it and, when approved, shall order or authorize the payment thereof. A record of such approval and order or authorization shall be made in the minutes of the school board. Payment of each claim shall be ordered or authorized by a warrant drawn on the treasurer or other officer charged by law with the responsibility for the receipt, custody and disbursement of the funds of the school board. The warrant shall be signed by the chairman or vice-chairman of the school board, countersigned by the clerk or deputy clerk thereof, made payable to the person or persons, firm or corporation entitled to receive such payments . . . ” Virginia Code § 22.1-122(A)

Payment of Claims

- ⌘ A school board may, in its discretion by resolution, appoint an agent, and a deputy agent to act for the agent in his absence or inability to perform this duty, to examine and approve such claims and, when approved by him or his deputy, to order or authorize the payment thereof.
- ⌘ When the agent appointed by the school board is the division superintendent and the division superintendent and clerk is one and the same person, all such warrants shall be countersigned by the chairman or the vice-chairman. Virginia Code § 22.1-122(B)

Payment of Claims

- ⌘ Competitive Sealed Bidding – Virginia Code §2.2-4302.1: generally for all public contracts with nongovernmental contractors for the purchase or lease of goods, or for the purchase of services, insurance or construction.
- ⌘ Competitive Negotiation – Virginia Code § 2.2-4302.2: for professional services, and goods in certain circumstances.
- ⌘ Sole Source – Virginia Code § 2.2-4303(E)
- ⌘ Emergency – Virginia Code § 2.2-4303(F)
- ⌘ Small purchases – Virginia Code § 2.2-4303(G)

Public Procurement

⌘ Within the limitations established in Virginia Code § 2.2-4303.1, available for multiple construction projects, and generally limited to one-year terms, with up to four additional one-year terms.

Architectural and Professional Engineering Term Contracts

- ⌘ School boards may participate in, sponsor, conduct or administer a joint procurement agreement with one or more public bodies for goods, services, or construction (with limits), or may purchase from another public body's contract if the RFP or IFB specified that it was a cooperative procurement. Virginia Code § 2.2-4304.
- ⌘ Beware vendor/contractor representations with regard to eligibility for cooperative procurement.

Joint and Cooperative Procurement

⌘ A public contract may include provisions for modification of the contract during its performance, but no fixed-price contract may be increased by more than 25% of the amount of the contract or \$50,000, whichever is greater, without the advance written approval of the governing body. Virginia Code § 2.2-4309

Modification of a Contract

& Nondiscrimination: In the solicitation or awarding of contracts, no public body shall discriminate against a bidder or offeror because of race, religion, color, sex, national origin, age, disability, status as a service disabled veteran, or any other basis prohibited by state law relating to discrimination in employment. Virginia Code § 2.2-4310.

Required Terms

⌘ In contracts of more than \$10,000, public bodies must include the statements in Virginia Code § 2.2-4311, requiring the contractor to agree that it shall not discriminate against employees or applicants for employment on the bases prohibited by law, and that it shall include nondiscrimination/equal employment statements in its solicitations and advertisements, and in all of its subcontracts of more than \$10,000.

Required Terms

& Unauthorized Aliens: All public bodies shall provide in every written contract that the contractor does not, and shall not during the performance of the contract for goods and services, knowingly employ an unauthorized alien as defined in the federal Immigration Reform and Control Act of 1986. Virginia Code § 2.2-4311.1

Required Terms

- ⌘ Faith-Based Organizations: Public bodies, in procuring goods or services,, shall not (i) discriminate against a faith-based organization on the basis of the organization's religious character or (ii) impose conditions that (a) restrict the religious character of the faith-based organization (with limited exceptions), or (b) impair, diminish, or discourage the exercise of religious freedom by the recipients of such goods, services, or disbursements.
- ⌘ Public bodies shall ensure that all invitations to bid, requests for proposals, contracts, and purchase orders prominently display a nondiscrimination statement indicating that the public body does not discriminate against faith-based organizations.
Virginia Code § 4343.1(C)(D)

Required Terms

⌘ Drug-Free Workplace: In every contract over \$10,000, public bodies shall include a provision that the Contractor agrees to provide a drug-free workplace for its employees, make certain postings related thereto, state in all advertisements and solicitations for employees that it maintains a drug-free workplace, and include such provisions in every subcontract for \$10,000 or more. Virginia Code § 2.2-4312

Required Terms

⌘ Corporate Status: Pursuant to Section 2.2-4311.2 of the Code of Virginia, if Contractor/Bidder is authorized as a stock or non-stock corporation, limited liability company, business trust, or limited partnership or registered as a registered limited liability partnership, Contractor/Bidder shall be authorized to transact business in the Commonwealth as a domestic or foreign business entity if so required by Title 13.1 or Title 50 of the Code of Virginia or as otherwise required by law.

Required Terms

& Prompt Payment, as established in Virginia
Code § 2.2-4354

Required Terms

⌘ No Crimes Against Children: Virginia Code § 22.1-296.1 requires each Contractor performing services involving direct contact of Contractor's employees with students to certify that Contractor, its employees or persons providing services under the Contract on school property, during regular school hours or during school-sponsored activities have not been convicted of a felony or any offense involving the sexual molestation or physical or sexual abuse or rape of a child.

Required Terms

⌘ No Collusion: A certification that Contractor's response to the solicitation was prepared without certain prior understandings or agreements, free of collusion, and in full compliance with applicable law, including the Virginia Conflicts of Interest Act

Recommended Provisions

- ⌘ Choice of Law Provision: “This Contract shall be governed in all respects whether as to validity, construction, performance, or otherwise by the laws of the Commonwealth of Virginia.”
- ⌘ Jurisdiction & Venue: “The parties hereby submit to the personal jurisdiction of, and venue in, the General District or Circuit Court of _____ County, Virginia for resolution of any and all claims, causes of action or disputes between Contractor and the School Board.”

Recommended Provisions

⌘ Availability of Funds: “It is understood and agreed between the parties herein that the School Board shall be bound hereunder only to the extent of the funds available and duly appropriated or which may hereafter become available and duly appropriated for the purpose of fulfilling the School Board’s obligations with respect to the Contract.”

Recommended Provisions

⌘ Indemnification: seek to obtain as fullsome and comprehensive an indemnification/hold harmless clause in favor of the School Board, its officers, employees and agents as possible: “The Contractor agrees to indemnify, defend and hold harmless the School Board and its officers, agents, ad employees from any claims, damages and actions of any kind or nature, whether at law or in equity, arising from or caused by (i) the use of any materials, goods, or equipment of any kind o nature furnished by the Contractor, (ii) any services of any kind or nature provided by the Contractor, or (iii) Contractor’s performance of its Obligations, provided that such liability is not attributable to the sole negligence on the part of the Board.”

Recommended Provisions

⌘ Indemnification: generally, decline to agree to an indemnification clause from the School Board in favor of the Contractor, as in contravention of public policy and a potential waiver of certain defenses available to the School Board.

Recommended Provisions

⌘ Insurance and Bonds: confer with the School Board's liability insurance carrier for appropriate amounts and specific requirements for the respective projects. Often, the School Board will expect to be named as an "additional insured" by the Contractor's policy, and will request copies of relevant insurance certificates prior to commencement of work under the contract. Bonds are required for certain contracts, such as construction contracts: verify and confirm required amounts.

Recommended Provisions

⌘ Compliance with Laws: “All work performed shall be in accordance with all local, state and federal codes, laws and regulations, including but not limited to: Virginia Conflicts of Interest Act, Virginia Fair Employment Contracting Act, Virginia Freedom of Information Act, Virginia Prompt Payment Act, the Virginia Public Procurement Act, and Board policies.” School boards may want to add Virginia Workers’ Compensation Act and other federal and state laws, such as environmental laws, applicable to certain contracts.

Recommended Provisions

- ⌘ Tax Exempt Statement for School Board
- ⌘ Termination and Cancellation; Contractual Claims Procedures
- ⌘ Warranties by Contractor Suitable for the Project
- ⌘ Audit by School Board of Contractor's records for the Project
- ⌘ Intellectual Property Rights for Project Documents vest with the School Board

Recommended Provisions

- ⌘ Consider developing Standard Terms and Conditions to include in all solicitations for goods and services.
- ⌘ Modify as necessary for each solicitation – consult with legal counsel.
- ⌘ Vendor Contract – Beware
 - ⌘ Governing law
 - ⌘ Indemnification provisions in favor of vendor
 - ⌘ Limitation of liability clauses
 - ⌘ Cooperative procurement representations

Standard Terms and Conditions

⌘ A whole different seminar!

Construction Contracts

Questions?

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