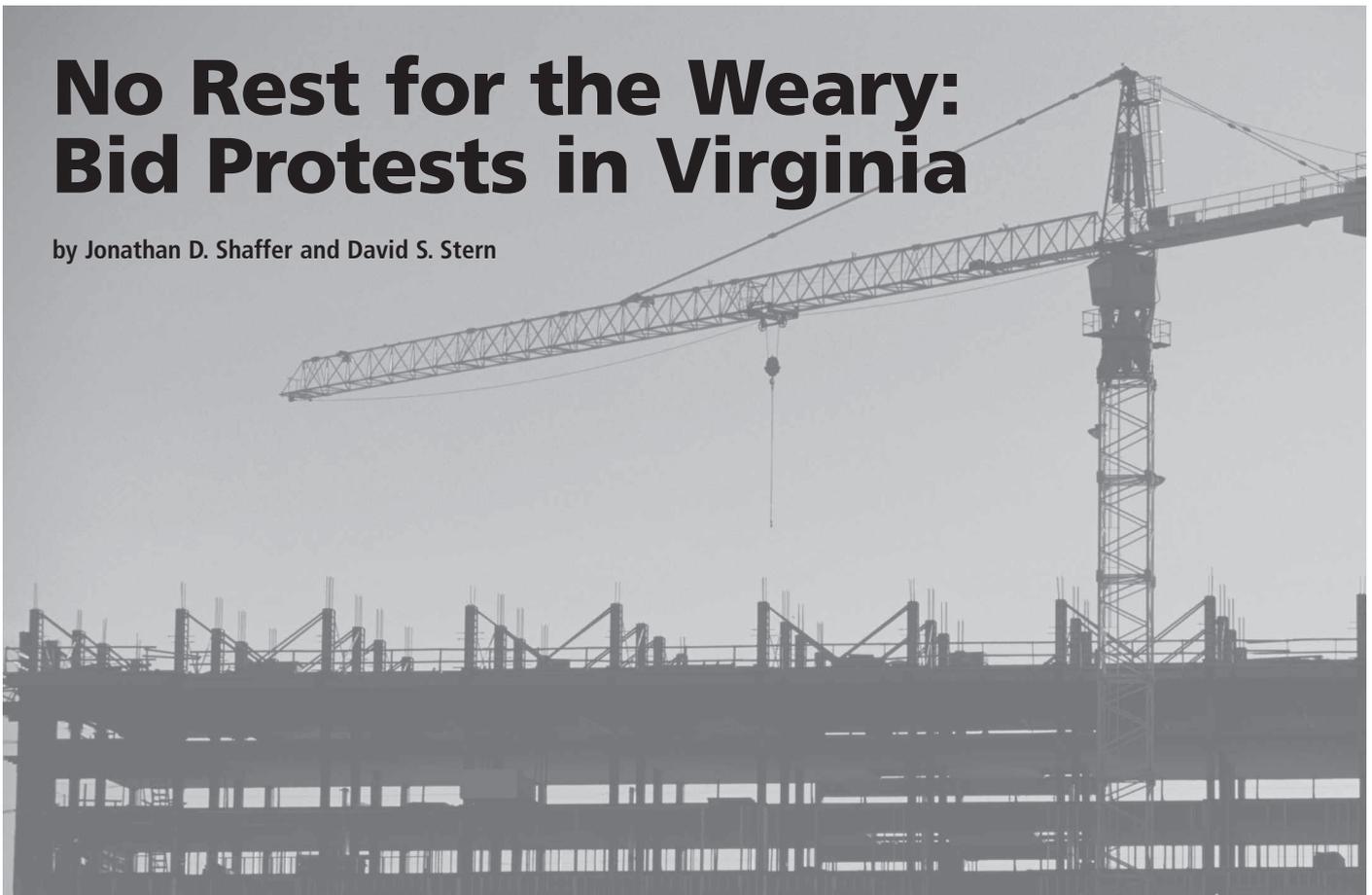


No Rest for the Weary: Bid Protests in Virginia

by Jonathan D. Shaffer and David S. Stern



Competing for business from Commonwealth of Virginia agencies can be a time-consuming and challenging process. Potential contractors must closely follow lengthy solicitations to ensure strict compliance while working feverishly to develop the lowest possible competitive price. Given the need to get the best quotes from subcontractors, the contractor often works until the last possible moment to finalize its price. Once the bid or offer is submitted, however, the work is not done. If the competition is a negotiated procurement, there may be further negotiations or discussions with agency personnel and the submission of a best and final offer.

Once the agency announces award, there is a short limitation period in which to take action. For the unsuccessful offerors—unlike in the commercial marketplace—there is an opportunity to file a bid protest to challenge the agency procurement action. By this time, the contractor's bid

personnel are tired of the old procurement and working intensively on new business opportunities. Yet there is no rest for the weary. If the award appears arbitrary or otherwise in violation of law, the contractor must act quickly to preserve its rights.

A bid protest is a challenge to a public agency's procurement action and is unique to public procurements. The law of commercial contracts does not provide a basis for a seller to challenge a private buyer's decision to choose another supplier.¹ In contrast, Virginia state agencies are subject to the Virginia Public Procurement Act (VPPA).² There is a strong public interest in ensuring confidence in the integrity of the procurement process.³ Accordingly, Virginia grants administrative and judicial bid protest remedies to prospective contractors.⁴

Time Is Running

If a contractor believes the award of a Virginia public contract is arbitrary or oth-

erwise in violation of law, the contractor must submit its protest to the contracting agency within ten days of the award or an announcement of a decision to award—whichever occurs first.⁵ There is an exception when documents are produced by the agency for public review. Generally, the ten days will run from the date of production of public records.⁶ However, the need to file before award to obtain a stay must also be considered and may shrink the ten-day window.

All public records relating to the procurement are available for inspection by the contractor in accordance with the Virginia Freedom of Information Act (FOIA), subject to limited exceptions.⁷ A competitive negotiation offeror, upon request, shall be afforded the opportunity to inspect proposal records within a reasonable time—after the evaluation and negotiations of proposals are completed but prior to award—except in the event that the contracting agency decides not to accept any

of the proposals and to reopen competition. A competitive sealed-bid bidder has the same rights after the opening of all bids but before award. The general public is entitled to inspect the same documents only after award of the contract.⁸

The Virginia FOIA limits disclosure. Cost estimates relating to a proposed procurement prepared by or for a contracting agency shall not be open to inspection.⁹ Also, trade secrets and proprietary information are protected so long as the entity submitting such information declares protection before its submission.¹⁰

Contractors must be vigilant. The starting point for the protest period depends in part on information available under Virginia's FOIA. The ten-day clock begins from the moment the records are available for inspection. If the documents that give rise to a protest are produced well before award, the contractor may not be able to wait until ten days after award to file its protest.

What Went Wrong:

Typical Substantive Protest Issues

Typical substantive protest grounds include failure to follow the solicitation evaluation criteria, failure to document the source selection decision and other critical determinations, improper cost/technical trade-offs, improper exclusion from the competitive range, lack of meaningful discussions, errors in the cost evaluation; improper disclosure of competitive information and unmitigated conflicts of interest.¹¹

For sealed bid procurements, a frequent protest issue is bid responsiveness. The Virginia Code defines "responsive bidder" as "a person who submitted a bid that conforms in all material respects to the invitation to bid."¹² A bid may be responsive notwithstanding a minor informality. A minor informality is "a minor defect or variation of a bid or proposal from the exact requirements of the Invitation to Bid or the Request for Proposal, which does not affect the price, quality or delivery schedule for the goods, services or construction being procured."¹³

Responsiveness is sometimes confused with responsibility. A responsible bidder or offeror is defined as 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, and, where required, has been prequalified.¹⁴

Under the VPPA, a protester may not protest another offeror's responsibility.¹⁵ This is in sharp contrast to the federal procurement system which permits protests regarding an offeror's responsibility to the Court of Federal Claims or Government Accountability Office, under limited circumstances.¹⁶

The VPPA provides a separate procedure for an offeror to challenge any adverse finding as to its own responsibility.¹⁷ As with other areas of protest, an offeror must challenge a finding of nonresponsibility within ten days of notice.¹⁸

Is There a Remedy?:

Avoiding a Pyrrhic Victory

In the event of a timely protest or the filing of a timely legal action before award, no further action to award the contract shall be taken unless there is a written determination that proceeding without delay is necessary to protect the public interest.

In a bid protest proceeding under the VPPA, the court may set aside agency pro-

urement action that is arbitrary or capricious, or in violation of state law or the terms of the solicitation.¹⁹ Virginia law gives the circuit court the power to award injunctive relief in a bid protest case.²⁰

If the agency determines before award that the decision to award is arbitrary, then the sole relief shall be a finding to that effect and the cancelling of the proposed award.²¹ If the agency determination is made after award but before performance, then the contract may be enjoined by the agency.²² Finally, if the award is made and performance begins, the contracting agency may declare the contract void upon a finding that this action is in the best interest of the public.²³ The prohibition against injunction after performance has begun does not apply to a circuit court's exercise of equitable powers on appeal of a protest decision.²⁴

The great fear for a protester is that the protest expense will result in a Pyrrhic victory if the pending award is not stayed. If the contract or award is not stayed, the agency may obtain the equipment or services from the awardee and may then later argue that, even if the protest is sustained, the protester should not obtain equitable relief since the contract has been substantially performed. Because the bid protest procedures do not permit a protester to recover lost profits caused by an improper award, the protester's only effective remedy is often award of the contract. However, if the equipment or services are purchased by the agency in the meantime, this remedy may be unavailable.²⁵

The problem is heightened when the goods or services procured are not easily reversed. For example, if the procurement is for computer equipment, once the equipment is installed, no court is likely to order the agency to buy computers from another bidder. Similarly, for a construction project, once the awardee has mobilized and started work, a court may be reluctant to act. On the other hand, if the contract is long term with options, or the contract is a service contract where it is relatively easy to transition from one con-

Contractors must be vigilant. The starting point for the protest period depends in part on information available under Virginia's FOIA.

tractor to another, the absence of a stay may not be dispositive.

Even where a stay is not mandatory, some agencies will voluntarily agree to stay performance of the contract during the protest litigation—particularly if the court will agree to expedite proceedings. Many bid protests can be resolved quickly on cross motions for judgment on the administrative record on an accelerated basis. The key is apprising the court as early as possible of the specific basis for a request for expedited relief. Courts may consider a bid protest on an accelerated schedule, particularly where the parties reach agreement on maintaining the stay pending review, and there is an immediate upcoming event that requires action. For example, in a construction project, a procurement for one part of the project may have a ripple impact on other parts of the project, and a delay due to a bid protest that is not resolved quickly can impact numerous other procurements or even the entire project.

Where to File

The protest must be filed initially with the procuring agency. After filing a protest, the contracting agency has ten days to issue a written decision stating the reasons for its actions. The protester has ten days from receipt of the written decision to challenge the protest decision.²⁶

If the protester is not satisfied with an agency's decision, it has two options for appeal: administrative appeal or judicial review. The administrative appeal option is only available when an agency establishes a procedure for hearing protest appeals.²⁷

Appeal Procedure

An administrative appeal provides a contractor the opportunity to present pertinent information to a disinterested person or panel.²⁸ The disinterested person or panel cannot be an employee of the agency.²⁹

The appeal authority must issue a written decision containing findings of fact. These

Filing a protest is time-consuming, disruptive and expensive.

findings can only be set aside by a court when they are fraudulent, arbitrary or capricious, or so grossly erroneous as to imply bad faith.³⁰ Unlike findings of fact, any determination on an issue of law is reviewable de novo by the appropriate appellate court.³¹

Both the protester and the agency are entitled to judicial review of the appeal decision. Such action must be brought within thirty days of receipt of the written decision.³²

Circuit Court Proceeding

The protester's second option for appealing an adverse protest decision is filing in the applicable circuit court.³³ While a contractor is not required to avail itself of the administrative appeal procedure before filing in court, a protester that does utilize these procedures is required to let the administrative appeal run its course. Also, despite any contrary contract language, a contractor is entitled to proceed directly to court without utilizing the contracting agency's appeal procedures.³⁴

Risks of a Protest: No Absolute Privilege

The Supreme Court of Virginia has ruled that contractors do not have an absolute privilege for statements made during agency-level bid protests.³⁵ In that case, the awardee had sued the protester alleging conspiracy and tortious interference arising from actions during the agency protest process. The awardee ultimately received substantial monetary damages. This decision should ring alarm bells for

contractors considering bid protests to fully investigate the factual basis for their allegations before filing.³⁶ Protesters could be faced with an increased burden given the short time limits applicable to protests. The Court held that the absolute privilege for statements made during a judicial proceeding does not apply to an agency-level bid protest because bid protest proceedings do not provide safeguards similar to those inherent in a judicial proceeding. Those safeguards include the power to issue subpoenas, liability for perjury, and the applicability of the rules of evidence.

Is There a Better Way?: Avoiding Bid Protests

Filing a protest is time-consuming, disruptive and expensive. If a contractor pursues a protest unsuccessfully, the agency may be less inclined to do business with the contractor in the future. Even if the protest is sustained, the protester will likely antagonize the agency and may not ultimately receive award of the contract. Accordingly, any contractor should exercise due care to avoid the need for protests by ensuring that its proposal or bids are submitted timely are responsive to the solicitation, and do not contain material ambiguities.

On the other hand, if the contractor discovers that the agency has not dealt fairly with the contractor, a protest may be the only reasonable alternative. In some cases, the agency may not be aware of the procurement defect giving rise to the protest, or senior agency officials may not agree with decisions made by agency evaluators or other procurement personnel. These protests could be resolved through alternative dispute resolution, and result in a contract award that would otherwise have been lost.³⁷ Many agency personnel respect a protest brought in good faith.

In other cases, pursuing the protest may be the only means to remedy a significant procurement error or violation of law. Preparing a proposal for a negotiated procurement often involves substantial expenditure of time and money by a contractor. In light of that significant investment, a protest may be the only

reasonable means of protecting the contractor's interests.

The protest process is also time consuming and disruptive to the agency. If a protest is sustained, the agency may be prevented from timely project completion. Accordingly, the agency must exercise due care to avoid successful protests by ensuring that procurements are conducted in accordance with legal requirements.³⁸ The agency must make sure that personnel conducting the procurement follow the solicitation evaluation criteria and award provisions strictly. Protests are often sustained where personnel do not follow the published rules. While "men must turn square corners when they deal with the government," "it is no less good morals and good law that the government should turn square corners in dealing with the people" ³⁹ ¶

Endnotes:

- 1 See *Washington-Dulles Transportation Ltd. v. Metropolitan Washington Airports Authority*, 263 F.3d 371 (2001), n.1 (referring to Virginia Court rulings; finding Federal District Court has jurisdiction over a claim that the airport authority violated the terms of its lease from the federal government). The Authority, although otherwise subject to Virginia law, is not an agency of the Commonwealth and is specifically exempt from the VPPA. The Fairfax County Circuit Court held there is no cause of action at Virginia common law for a disappointed bidder. The Virginia Supreme Court subsequently refused a petition for appeal, finding there was no reversible error in the Circuit Court's judgment.
- 2 Va. Code § 2.2-4300.
- 3 Va. Code § 2.2-4300(C). See, e.g., *MFS Network Technologies Inc. v. Commonwealth of Virginia*, 33 Va. Cir. 406, 410 (City of Richmond 1994) (stating that it is in the public interest to know that procurement laws are administered properly).
- 4 Va. Code §§ 2.2-4360; 2.2-4364.
- 5 Va. Code § 2.2-4360.
- 6 Va. Code §§ 2.2-4360(A); 2.2-4342.
- 7 Virginia Freedom of Information Act § 2.2-3700 et seq.
- 8 Va. Code § 2.2-4342(D).
- 9 Va. Code § 2.2-4342(B).
- 10 Va. Code § 2.2-4342(F).
- 11 See, e.g., Va. Code Ann. §§ 2.2-4300(A), 2.2-4300(C); *Public Assembly Facility Guide: A Guide for Managers of Arenas, Auditoriums, Convention Centers, Performing Arts Centers, Race Tracks and Stadiums*, Chapter 3, Bid Protests (1st ed. 1998); *First Health Services Corp. v. Commonwealth of Virginia*, 35 Va. Cir. 184 (City of Richmond 1994); *MFS Network Technologies, Inc. v. Commonwealth of Virginia*, 33 Va. Cir. 406 (City of Richmond 1994); *Cubic Toll Systems, Inc. v. Virginia Department of*



Jonathan D. Shaffer is a partner in the Vienna firm of Smith Pachter McWhorter PLC. Shaffer has represented parties in bid protests before state courts in Virginia, the District of Columbia and other states, administrative agencies in Virginia, Maryland and other states, the United States Court of Federal Claims and the United States Government Accountability Office.



David S. Stern is an associate with Smith Pachter McWhorter PLC. He practices primarily in the area of government contracts.

- 12 Va. Code § 2.2-4301. (emphasis added). See also *Doyle Inc. v. Loudoun County School Board*, 1989 Va. Cir. LEXIS 429 (Loudoun County October 10, 1989) (submission of names of subcontractors to be used on the project is not an issue of responsiveness).
- 13 Va. Code § 2.2-4301; *Peninsula Therapy Center, PLC v. Commonwealth of Virginia*, 2002 VA Cir. LEXIS 271 (Newport News Cir. Ct. August 1, 2002) (delay in submitting a required license under terms of the solicitation was a minor informality not required to demonstrate responsiveness).
- 14 Va. Code § 2.2-4301; *Doyle, supra*.
- 15 Va. Code § 2.2-4360(A).
- 16 4 C.F.R. § 21.5(c).
- 17 Va. Code § 2.2-4359.
- 18 Va. Code § 2.2-4359(2).
- 19 Va. Code § 2.2-4364.
- 20 Va. Code §§ 8.01-620, 628; see also Va. Code § 2.2-4364(D).
- 21 Va. Code § 2.2-4360(B).
- 22 Va. Code § 2.2-4360(B).
- 23 Va. Code § 2.2-4360(B).
- 24 *MFS Network Technologies, Inc. v. Commonwealth of Virginia*, 33 Va. Cir. 406 (City of Richmond 1994).
- 25 *Cubic Toll Systems, Inc. v. Virginia Department of Transportation*, 37 Va. Cir. 522 (Fairfax County 1993); *Aydin Corp.*, B-224908, May 19, 1987, 87-1 CPD ¶ 527; *Quality Transport Servs. Inc. v. United States*, 12 Cl. Ct. 276, 277 (1987).
- 26 Va. Code § 2.2-4360(A).
- 27 Va. Code § 2.2-4365(A).
- 28 Va. Code § 2.2-4365(A).
- 29 Va. Code § 2.2-4365(A).
- 30 Va. Code § 2.2-4365(A).
- 31 Va. Code § 2.2-4365(A).
- 32 Va. Code § 2.2-4365(B).
- 33 Va. Code § 2.2-4364.
- 34 *W.M. Schlosser Co. v. Fairfax County Redevelopment & Housing Auth.*, 975 F.2d 1075 (4th Cir. 1992).
- 35 *Lockheed Information Management Systems Company, Inc. v. Maximus, Inc.*, 259 Va. 92, 524 S.E.2d 420 (2000).
- 36 See also Pachter and Shaffer, "Communications during Agency Level Protests Not Subject to Absolute Privilege," *The Procurement Lawyer*, Volume 35, No. 4 at 4-5, Summer 2000.
- 37 Va. Code § 2.2-4366.
- 38 See also *Public Assembly Facility Guide: A Guide for Managers of Arenas, Auditoriums, Convention Centers, Performing Arts Centers, Race Tracks and Stadiums*, Chapter 3, Bid Protests (1st ed. 1998).
- 39 *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 61, n.13 (1984).