

Chapter 26. The Contract

Summary

This chapter identifies, in general terms, the required elements of a contract entered into for the procurement of goods or services. The specific elements of a contract are set forth in model contracts in the Appendix. This chapter also identifies the procedure for resolving contractual claims. Finally, this chapter establishes the procedure for reviewing and executing contracts.

| Essential Information in this Chapter |
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| <ul style="list-style-type: none">• After a contract is awarded, a contract shall be prepared and circulated for review and signature by the vendor and county officers.• Before forwarding a contract to the county attorney for review, the contract preparer shall confirm that all contract documents are included and that the certificate of insurance and all bonds or other forms of surety are provided and satisfy the requirements of the invitation for bids or request for proposals.• The contract shall be in a form approved by the county attorney.• Although a vendor's standard contract may be used if provided for in the invitation for bids or request for proposals, such a contract should be avoided. |
| Key References to the Code of Virginia Applicable to this Chapter |
| Section 2.2-4309: Modification of the contract Section 2.2-4311: Employment discrimination by contractor prohibited Section 2.2-4311.1: Compliance with federal, state, and local laws and federal immigration law; required contract provisions Section 2.2-4311.2: Compliance with state law; foreign and domestic businesses authorized to transact business in the Commonwealth Section 2.2-4312: Contractor required to maintain a drug-free workplace Section 2.2-4331: Contract pricing arrangements Section 2.2-4332: Workers' compensation for construction contractors and subcontractors Section 2.2-4333: Retainage on construction contracts Section 2.2-4334: Deposit of certain retained funds Section 2.2-4335: Construction contract provisions barring damages for unreasonable delays void Section 2.2-4350(B): Separate payment dates Section 2.2-4354: Payment clauses Section 2.2-4363: Contractual disputes Section 18.2-498.1: Certificate of no collusion |

26-1 General

After a contract is awarded, a contract shall be prepared and circulated for review and signature by the vendor and county officers. The contract shall be in a form approved by the county attorney, and shall contain the terms and conditions required by this chapter and by law.

The contract may be a short form contract. This contract specifies the procurement number, the date of execution, the parties to the contract, the contract term, the contract amount and payment terms. The contract documents, incorporated by reference, include the original invitation for bids or request for proposals, with all addenda, and the vendor's proposal.

Although a vendor's standard contract may be used if provided for in the invitation for bids or request for proposals, such a contract should be avoided. These contracts will likely contain clauses favoring the vendor. If such a contract is used, beware of clauses that govern mandatory arbitration, indemnification of the vendor by the County, the vendor's ownership of materials produced pursuant to the contract and delivered to the County, and the granting of broad powers of decision to the vendor.

26-2 Review of Contract and Contract Documents by County Attorney

Before forwarding a contract to the county attorney for review, the contract preparer shall confirm that all contract documents are included and that the certificate of insurance and all bonds or other forms of surety are provided and satisfy the requirements of the invitation for bids or request for proposals.

The county attorney shall review a contract for the following matters, and any other matters identified during review:

26-2.1 The Contract

The contract shall be reviewed by the county attorney for the following:

- Form and substance: The contract shall be in a form approved by the county attorney, except when the invitation for bids provides that the contract may be provided by the vendor, in which case the county attorney shall review the substance and the form of the contract.
- Identification of the parties: The County shall be identified as the "County of Albemarle, Virginia." The school division shall be identified as the "County School Board of Albemarle County, Virginia." The vendor shall be identified by its legal name.
- Legal status of the parties: The County and the school division each shall be identified as being "a political subdivision of the Commonwealth of Virginia." The legal status of the vendor shall be also stated (e.g., "a Virginia corporation").
- Term of the agreement: The term of the contract shall not commence prior to the date of the vendor's signature.

- Included documents: All of the documents listed in the “contract documents” section of the contract shall be included in the contract package.

26-2.2 Required Provisions

State law requires the inclusion of certain provisions in public contracts. Those required provisions currently include:

- Employment discrimination by contractor prohibited (Virginia Code § 2.2-4311)
- Compliance with federal, state, and local laws and federal immigration law (Virginia Code § 2.2-4311.1)
- Compliance with state law; foreign and domestic businesses authorized to transact business in the Commonwealth (Virginia Code § 2.2-4311.2)
- Drug-free workplace to be maintained by contractor (Virginia Code § 2.2-4312)

All County and School Board contracts shall include all provisions required by and in the *Virginia Code*, and shall be subject to, and follow the required form of, subsequent amendment(s) to state law:

26-2.3 Certificate of Insurance

If the invitation for bids or the request for proposals requires that the vendor have insurance during its performance of the contract, the certificate of insurance shall be reviewed for the following:

- Correct type of coverage: The certificate shall identify all of the types of insurance coverage (e.g., general liability, property damage, automobile liability, workers’ compensation) required by the invitation for bids or the request for proposals.
- Correct amount of coverage: The certificate shall identify the amount of each type of insurance coverage, which must meet or exceed the amount for that type required by the invitation for bids or the request for proposals. The amount of coverage may be satisfied by combining the amount of insurance for the particular type of coverage with the amount of excess liability or umbrella insurance identified on the certificate of insurance, but only if the insurer provides a written statement that the coverage and the eligibility requirements for the excess liability or umbrella insurance is the same as the primary insurance.
- Term of coverage: The term of the insurance coverage shall begin on or prior to the date of the term of the contract, and shall continue during the full term of the contract. A certificate of insurance that

indicates that an insurance policy will expire prior to the end of the contract term may be approved, but the vendor must provide a new certificate of insurance prior to the expiration of that policy.

- County or school division named as an additional insured: The County or the school division, as the case may be, must be identified on the certificate of insurance as an additional insured for all types of insurance coverage except for workers' compensation and professional liability. The County shall be identified as the "County of Albemarle, Virginia." The school division shall be identified as the "County School Board of Albemarle County, Virginia."
- Form of the certificate: The certificate shall be on a form substantially similar to the sample certificate in the Appendix.
- Original certificate: The vendor shall provide an original certificate of insurance. A photocopy or facsimile of the certificate may be accepted when prompt review and approval of the contract is necessary and the vendor assures the County that the original certificate is forthcoming.
- Signature of insurance agent: The certificate of insurance shall be signed by an insurance agent licensed to do business in Virginia.

26-2.4 Bonds and Other Forms of Security

Security such as performance bonds, payment bonds, or other forms of security shall be reviewed to assure that they comply with the requirements for such security as set forth in sections 24-3.2, 24-4.2 and 24-5.

26-2.5 Signature of Vendor

The signature of the vendor shall be reviewed for the following:

- Signatory must be authorized to bind the vendor: The contract shall be signed on behalf of the vendor only by a person who is authorized to contractually bind the vendor. The vendor may be required to provide proof of such authority prior to approving the contract.
- Title or office of signatory must be identified: The title or office of the signatory shall be identified on a line immediately below his or her signature.

- Signature must be notarized: The signature of the signatory shall be notarized by a notary public in the state in which the contract is executed by the signatory.

26-2.6 Authorized County/School Board Signatories

The following officers are authorized to sign contracts on behalf of the County and/or School Board:

| Tier | Maximum Amount | Authorized Signatories |
|-------------|-----------------------|--|
| I | \$5,000 | Tier III & IV signatories, School Principals* |
| II | \$25,000 | Tier III & IV signatories, School Principals* |
| III | \$50,000 | Tier IV signatories, School Superintendent and Chief Operating Officer |
| IV | N/A | Purchasing Agent, Chief of Financial Management |

*School Principals are authorized to sign only form contracts prepared and approved by the County Attorney. Any modification of standard contract terms requires the separate review of the County Attorney and signature by a Tier III or IV signatory, depending on the amount.

26-3 Contractual Claims and Dispute Resolution

A contractual claim shall be made pursuant to the following procedure:

- Time to submit notice of intention to file a claim: The vendor shall submit to the purchasing agent written notice of its intention to file a claim within fifteen (15) calendar days after the date of the occurrence of the event on which the claim is based, or within fifteen (15) calendar days after the date of the beginning of the work upon which the claim is based, as the case may be.
- Time to submit claim: A contractual claim, whether for money or other relief, shall be received in the purchasing office no later than sixty (60) calendar days after final payment.
- Form and substance of claim: A claim shall be in writing, shall identify the date of the occurrence or the date of the beginning of the work upon which the claim is based, shall state the basis for the claim, and shall identify the relief sought.
- Investigation of claim: Upon receipt of a claim, the purchasing agent shall conduct an investigation and evaluation of the claim. As part of his investigation, the purchasing agent may request that the vendor submit additional information to support his claim, and may request the vendor, or a representative thereof, to appear before the purchasing agent to provide additional information. The purchasing agent also may consult the using department and the county attorney.

- Resolution of claim: The purchasing agent, with the advice and consent of the county attorney, may settle and resolve a claim by mutual agreement of the vendor and the County. If resolution of the claim requires that the County pay additional money to the vendor, the purchasing agent's authority to settle a claim is limited to an amount not exceeding twenty-five (25) percent of the amount of the contract, or fifty thousand dollars (\$50,000), whichever is greater. If resolution of the claim requires that the County pay an amount exceeding twenty-five (25) percent of the amount of the contract, or fifty thousand dollars (\$50,000), whichever is greater, the purchasing agent shall present the proposed settlement to the board of supervisors for its determination.
- Written decision by purchasing agent if claim not resolved: If a claim is not resolved by mutual agreement of the vendor and the County within thirty (30) calendar days of receipt of the claim, the purchasing agent shall notify the vendor in writing of his decision, which shall set forth the reasons for the action taken. The decision of the purchasing agent shall be final and conclusive unless the vendor timely appeals the decision as provided by law. Denial of a vendor's claim under a construction contract based on the vendor's alleged unreasonable delay requires the County to pay a penalty that is a percentage of the vendor's costs to investigate, analyze, negotiate, litigate and arbitrate the claim. A vendor may not institute legal action on the claim prior to receipt of the purchasing agent's written decision, unless the purchasing agent fails to render his decision within thirty (30) calendar days of receipt of the claim.
- Payment during pendency of claim: The pendency of a claim shall not delay payment of amounts agreed due in the final payment, provided that the goods or services contracted for have been provided and accepted. The acceptance of the final payment by the vendor shall not constitute a waiver of the vendor's right to timely submit a claim.

The purchasing agent may consult the using department and the county attorney during any stage of the claim process.

26-4 Change Orders

Virginia Code § 2.2-4309(A) provides in part: “[N]o fixed-price contract may be increased by more than twenty-five percent of the amount of the contract or \$50,000, whichever is greater, without the advance written approval of . . . the governing body, in the case of political subdivisions.” The County Executive’s Office shall act as the designee of the Board of Supervisors for purposes of this review and approval. Proposed change orders shall receive this review whenever the cumulative total of proposed changes first exceeds 25% of the amount of the contract or any multiple of 25% thereafter (such as 50%, 75%, etc.). Modifications that fail to comply with this section are voidable at the discretion of the Board of Supervisors or its designee, and the unauthorized approval of a modification cannot be the basis of a contractual claim.