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Hot Issues in
State and Local Bid Protests

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Hot Issues in State and Local Bid Protests

- Organizational Conflicts of Interest
- Lobbying
- Sole Source Awards
- "Frivolous" Protests
- False Claims Act Actions by Protester
- Post-Protest Tort Claims Against Protester
Goals of a Bid Protest System

- Enhances accountability of procurement officials/government agencies.
- Protects integrity of procurement system.
- Provides transparency.
- Discourages improper conduct.
- Clarifies/shapes procurement law.
- Identifies gaps or needed reforms in procurement law.
- Provides mechanism for unsuccessful offerors to air grievances.
Critical Elements of an Effective System

- Independent decision maker
- Effective remedies
- Availability of critical agency documents to protester or their outside counsel
- Readily available rules with a clearly defined protest process
Lack of Uniformity

- Some states/localities have a developed/robust system with precedent while others have limited procedures/case law in place as a guide.

- The degree of meaningful relief varies among the jurisdictions.

- Some state/local protest processes are not provided in the solicitation or are hard to find/decipher.

- Within a state, sometimes a protest process does not apply to certain acquisitions (like universities).
Organizational Conflicts of Interest ("OCIs")

1. Unequal access to information
   - Contractor has access to nonpublic information in the performance of a government contract not available to other competitors that may give it an unfair competitive advantage in a later competition.

2. Biased ground rules
   - Contractor has ability to set the ground rules for another government procurement in which the contractor will compete.

3. Impaired objectivity
   - A contractor performing work under one government contract is required to:
     - Evaluate work it performed under another contract;
     - Evaluate work performed by a separate entity in which it possesses a financial interest; or
     - Evaluate work performed by a competitor.
Types of Work that Trigger OCIs

- Systems Engineering and Technical Direction
- Preparing specifications or statements of work
- Providing evaluation services
- Having access to non-public government or third-party proprietary information
Do P3 Procurements And Other Innovative Techniques Increase the Likelihood of OCIs?

- Public Private Partnerships
- Design-Build
- Likelihood of large teams that include designers, environmental consultant and other firms that may have performed work for the owner
Will the Emerging Standard for OCIs at the Federal Level Impact the States?

- Inferences based on "suspicion and innuendo" not enough to establish OCI.
- "Hard facts" to show an actual conflict not required.
- "Hard facts" to show a potential conflict may be sufficient.
- Turner Constr. involved unequal access to information.
Contractors Need Procedures for

- Identifying actual or potential OCIs before proposals get started;
- Mitigating identified OCIs;
- Complying with applicable regulations and contractual OCI-related terms and conditions; and
- Protecting certain competition-sensitive information when teams within the business unit or other business units are competing for the same procurement.
Mitigation Techniques

- Communications restrictions
- Physical security for printed and electronic documents
- Restriction on use of program and/or systems sensitive information
- Workspace separation and access controls (sometimes referred to as firewalls)
- Protection of third-party proprietary information (such as through Non-Disclosure Agreements)
- Employee awareness
- Periodic compliance reviews
- Restriction on employee job assignments
- Restriction on financial incentives
- Subcontractor work assignment monitoring
- Employee training
Unequal Access
OCI Mitigation Strategies

- Contractor has access to nonpublic information in the performance of a government contract not available to other competitors that may give it an unfair competitive advantage in a later competition.
- Firewalls and NDAs will usually be effective if done early and enforced.
- Difficult to mitigate after the fact.
- Release of information to competitors is often not practical.
- Information obtained through performance as an incumbent is **not** an unfair advantage in most cases.
Biased Ground Rules
Mitigation Strategies

- Contractor has ability to set the ground rules for another government procurement in which the contractor will compete.

- Examples:
  - Contractor writes the specifications or SOW for a procurement; or
  - Procurement for a system that contractor provided under a Systems Engineering Technical Assistance (SETA) contract.

- Difficult to mitigate.

- Releasing conflicted contractor's work product will usually not sufficiently mitigate.

- Firewalls and NDAs will usually be effective if done early and enforced.
Impaired Objectivity OCIs
Mitigation Strategies

- A contractor performing work under one government contract is required to:
  - Evaluate work it performed under another contract;
  - Evaluate work performed by a separate entity in which it possesses a financial interest; or
  - Evaluate work performed by a competitor.

- Primary concern is contractor will not be able to evaluate work objectively because of economic interests.

- Best mitigation is complete elimination of all financial ties.

- Renounce all current and future interest.
Impaired Objectivity
Mitigation Strategies

 Pertains to organizations, not individual employees.
 Firewalls within organization are not effective.
 "Firewalled subcontractor" – Mitigation may be possible by separating the work that results in the conflict and subcontracting to another, unaffiliated contractor.
  o Under this solution, subcontractors more closely resemble prime contractors because government must increase oversight of subcontractors.
  o Solution is only appropriate when scope of work is large and can be carved-out and minor portion of the work would result in OCI.
Recent GAO Decisions Have Confirmed Limits on Mitigation

- **Nortel Gov't Solutions, Inc., B- 299522.5, B- 299522.6, 2009 CPD ¶ 10** (mitigation plan was not sufficiently detailed; agency should evaluate impact on offeror’s technical approach to the extent plan relies on having review performed/augmented by government personnel/contractors).

- **Cognosante, LLC, B-405868, 2012 CPD ¶ 87** (firewall would not adequately mitigate impaired objectivity OCI).

- **TriCenturion, Inc., B-406032, et seq., 2012 CPD ¶ 52** (divestiture plan provided specific details and milestones adequate to mitigate potential OCI).

- **The Analysis Grp., LLC, B-401726.3, 2011 CPD ¶ 166** (after CO determined that there was a remote possibility of OCI that could not be mitigated, CO properly executed a waiver of the residual OCI).
False Claims Act Actions By Protester

- In addition to or as alternate to a protest, disappointed offeror may seek relief under False Claims Act.
- For example,
Protests and Lobbying Restrictions

- State registration requirements
- State limitations on contingent fees
- Code of silence rules
Sole Source Awards

- Avoiding competition
- "Crony" Capitalism
- Overstatement of a company's allegedly "unique" capabilities
- May not offer government the best pricing or best value
- May overlook others who can offer the same goods/services
- Ad hoc awards
"Frivolous" Protests

- Limitations on Protests
- Protest Bonds
- Protest Filing Fees
Post-Protest Tort Claims

- Awardee may pursue tort claims against protester where protest has been denied.

- Theories could include intentional interference with contract, economic loss, negligence, statutory tort (liability imposed by statute).

The Procurement Lawyer will continue to publish items of state and local legislative and regulatory interest, as well as case notes, in the “News from the Regions” column. If you have any information of note you wish to be considered for publication, please submit it to George Mackey. George can be reached at 516/794-7500 or by e-mail at gfnj3@aol.com.

VIRGINIA
John S. Pachter and Jonathan D. Shaffer

Communications During Agency-Level Bid Protests Are Not Subject to Absolute Privilege

In a significant decision for companies pursuing agency-level bid protests, the Supreme Court of Virginia has ruled that contractors do not have an absolute privilege for statements made during agency-level bid protests. This decision should ring alarm bells for contractors considering bid protests at the federal or state agency level to fully investigate the factual basis for their allegations before filing. Protestors could be faced with an increased burden given the short time limits applicable to protests.

In November 1994 the Virginia Department of Social Services (DSS) issued a Request for Proposals to privatize two child support enforcement offices pursuant to the Virginia Public Procurement Act, Va. Code §§ 11-35 through 80. Maximus, Inc., and Lockheed Information Management Systems Company, Inc., were the only two offerors to submit proposals. DSS created an evaluation panel of five state employees. The panel evaluated proposals and issued a Notice of Intent to Award the contract to Maximus on April 13, 1995.

On April 25, 1995, Lockheed filed a formal protest of the DSS decision to award the contract to Maximus in accordance with the Virginia Public Procurement Act, Va. Code § 11-66. Virginia Code § 11-66(a) allows an unsuccessful bidder to file a bid protest with the public body or its designated agent. The Virginia procedures are similar to the agency-level bid protest procedures under Federal Acquisition Regulation 33.103.

In its protest, Lockheed alleged that two members of the evaluation panel had undisclosed conflicts of interest, which interfered with their objectivity and compromised the integrity of the evaluation process. Lockheed asserted that in the seven months preceding the posting of the Notice of Intent to Award, one of the evaluators was an “active candidate for employment” with Lockheed but was not hired. Lockheed stated a second evaluator had been employed by Maximus while on leave from DSS and had been offered employment with Maximus in Tennessee. Lockheed also alleged that Maximus asked her to submit a resume as a prospective employee on the bid at issue, and she complied.

Before filing its protest, a Lockheed vice president (and former head of DSS) told a DSS official that if DSS awarded the contract to Maximus things “could get bloody.” Following receipt of the protest, DSS canceled the Notice of Intent to Award and sent out a new request for proposals.

Maximus filed suit in the Circuit Court for the City of Richmond, Virginia, alleging Lockheed had tortiously interfered with its contract expectancy and that Lockheed and others engaged in a conspiracy to injure Maximus’s business reputation. Maximus alleged that Lockheed knew, or had reason to know, that the allegations in its formal protest were false, that the false allegations were intentionally and selectively presented to create an appearance of impropriety, and that the protest was calculated to wrongfully interfere with Maximus’s contractual relationship with DSS.

At trial, the first evaluator testified that he had never applied for employment with Lockheed and had not been an active candidate for employment within seven months preceding the request for proposals. The second employee testified that in 1992 she had served as a consultant to Lockheed for one month while on annual leave from DSS. This arrangement was known and approved by DSS. The employee also testified that she sent out resumes anticipating that she might be required to look for a new job because her husband was about to be transferred. In addition, the DSS division head testified he recommended the Notice of Intent to Award be cancelled for “expediency” because Lockheed was going to “tie us up” in proceedings and for “fear of a public spectacle” resulting from the strong protest allegations.

The trial court granted Lockheed’s motion to strike at the close of Maximus’s evidence and entered judgment in favor of defendants. The court held Lockheed had a “qualified privilege,” and Maximus was required to show malice or “that the improper conduct is so egregious as to override the qualified privilege.”

Maximus appealed to the Supreme Court of Virginia, which reversed the trial court’s decision, holding that evidence of malice or other egregious conduct was not required as an element of a claim for tortious interference with a contract expectancy action against a protesting bidder. Instead, the court concluded that in an action for intentional interference, a defendant seeking to raise the affirmative defense of justification has the burden to prove that its methods were not “wrongful.”

On remand, the jury found for Maximus in the amount of $1.5 million for the tortious interference claim and $3 million for conspiracy. The court denied Lockheed’s motion to strike the evidence and set aside the verdict, but reduced the amount of the verdict. The court concluded that the damages claimed under the two counts were identical and limited Maximus to a single damage recovery.

4 The Procurement Lawyer Summer 2000
Next, it was Lockheed’s turn to appeal to the Virginia Supreme Court. Lockheed argued that it had an absolute privilege or, in the alternative, a qualified privilege based on legitimate business competition and protection of the public interest. In a January 14, 2000, decision, the Virginia Supreme 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. Specifically, the court noted that under Virginia protest procedures, “neither notice nor hearing is afforded any other party or bidder, including the successful bidder.” The court also noted that none of the other safeguards necessary for application of the absolute privilege defense applied.

Lockheed also argued that even if it did not have an absolute privilege, it was entitled to an affirmative defense similar to a qualified privilege defense on the basis of “legitimate business competition” and the “protection of the public interest.” The Supreme Court agreed that an affirmative defense of justification or privilege applies in a claim of intentional interference in a business contract. However, the court held that Lockheed had the burden of proof to establish that its conduct was “legitimate business competition,” and the jury had determined that Lockheed had not met its burden.

The significance of the Virginia Supreme Court’s decision is that most federal and state agency-level bid protest procedures do not meet the court’s test for safeguards: availability of a hearing, liability for perjury, applicability of the rules of evidence, or the power to subpoena witnesses.

It is unclear whether the absolute privilege would apply to more formalized bid protest procedures, such as those at the United States General Accounting Office. GAO proceedings include notice to the successful bidder and the possibility of a hearing. Additionally, witnesses testifying before GAO are subject to the False Statements Act, 18 U.S.C. § 1001. On the other hand, GAO proceedings do not apply the Federal Rules of Evidence and do not provide for protestors or awardees to subpoena witnesses. In the meantime, protesters and their counsel should be especially on guard to investigate fully all factual allegations before filing a bid protest.

CALIFORNIA
Paul E. Dauer

Excessive Changes Result in Abandonment and Quantum Meruit Recovery

In a landmark decision, an appellate court in California held that where a public agency orders excessive work modifications and performance of work beyond the scope of the contract as intended by the parties, the contract is legally abandoned and the contractor may recover damages of the reasonable fair market value for the work performed. Both points are radical departures from existing California law. Previously, the abandonment theory had been recognized in a private party context, but never extended to the public agency contract context.

In Amelco, the public agency contracted for a municipal center complex, advertising on the basis of 100 percent completed contract documents. During performance, over 1,000 clarifying sketches, 248 of which affected electrical systems, were issued, and thirty-two change orders resulted in an increase in the contract price of $1 million. The court found that every part of the electrical work had been changed at least once, one room was changed forty times, and often the clarifying sketches were to a different scale and did not identify the specific change being made or the drawing being modified.

The court held that the alterations resulted in substantially different work from the project described in the contract. These changes were so extensive, of such a magnitude, and beyond the contemplation of the parties at the time of contracting that they constituted an abandonment and a breach of the contract by the public agency.

The contractor sought and recovered the reasonable value of the work performed less payments made by the agency and less any costs incurred by the contractor that were not fairly attributable to the agency. This statement of damages is equivalent to quantum meruit recovery, and the court noted the appropriateness of the “total cost” method in the abandonment context. Although the entity sought specific threshold findings of the impracticality of proving actual losses directly, reasonableness of the contractor’s bid and its actual cost, and lack of responsibility for the cost, the court found that the agency had waived those findings. More important, the court noted that even if the agency had requested the findings properly, the court would have denied the request. It noted that “where the owner breaches a construction contract by refusing to pay for extra work or materials, ‘the party performing will be entitled to recover what [the extra work or materials] are reasonably worth.’”

In so holding, the court also rejected the agency’s argument that damages were limited to contract prices. Consequently, the contractor recovered overhead and profit rates in excess of those provided in the contract in addition to certain other costs that had been included in the contract price.

California Supreme Court Limits Recovery on Bidder Damages
Jennifer L. Dauer

The California Supreme Court has severely restricted the availability of damages for a bidder who is improperly denied the award of a public contract. The trial court and the intermediate appellate court had awarded bid preparation and bid protest costs, overhead, and lost profits under a section 90 Restatement, promissory estoppel theory. The awarding authority appealed only the award

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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. In contrast, Virginia state agencies are subject to the Virginia Public Procurement Act (VPPA). There is a strong public interest in ensuring confidence in the integrity of the procurement process. Accordingly, Virginia grants administrative and judicial bid protest remedies to prospective contractors.

Time Is Running
If a contractor believes the award of a Virginia public contract is arbitrary or otherwise 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. 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. 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. 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 challenge an 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 procurement 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-
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 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

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 and 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. 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 . . . .”

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 § 2.2-4500(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).


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; Peninsular Therapy Center, PLC v. Commonwealth of Virginia, 2002 Va. Cir. LEXIS 271 (Newport News Cir. Q. 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.


16 4 C.F.R. § 21.5(c).

17 Va. Code § 2.2-4359.

18 Va. Code § 2.2-4359(C).

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).


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).


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.
