

Chapter 3. General Requirements and Policies Applicable to All Procurements: Nondiscrimination, Drug-free Workplace, Public Records, Ethics and Conflicts of Interest

Summary

This section sets forth certain requirements and policies that apply to all procurements: the prohibition of discrimination; a vendor’s agreement to maintain a drug-free workplace; the encouragement of small businesses and businesses owned by women and minorities; the public nature of certain procurement records, ethics, and conflicts of interest.

Essential Information in this Chapter
<ul style="list-style-type: none"> • In the procurement of goods and services, the County shall not discriminate against a vendor because of race, religion, color, sex, national origin, age, disability or other basis prohibited by state law relating to discrimination in employment. • The County welcomes and encourages the participation of small businesses and businesses owned by women and minorities in procurement transactions. • With limited exceptions, all proceedings, records, contracts and other public records relating to procurement transactions are open for inspection by the public. • All County officers and employees who have official responsibility for the procurement of goods, services, insurance or construction must comply with ethics requirements of the Virginia Public Procurement Act and the State and Local Government Conflict of Interests Act.
Key References to the Code of Virginia Applicable to this Chapter
<p>Section 2.2-3101: Definitions used in the State and Local Government Conflict of Interests Act Section 2.2-3105 <u>et seq.</u>: Prohibited conduct regarding contracts Section 2.2-4343.1: Discrimination against faith-based organizations prohibited Section 2.2-4310(A): Discrimination prohibited in procurement process Section 2.2-4310(B): Participation in procurement process by small businesses and businesses owned by women and minorities Section 2.2-4311: Employment discrimination by vendor prohibited Section 2.2-4312: Vendor required to maintain drug-free workplace Section 2.2-4342: Public inspection of certain procurement records Section 2.2-4367 <u>et seq.</u>: Ethics in public contracting</p>

3-1 Discrimination Prohibited

In the procurement of goods and services, the County shall not discriminate against a vendor because of race, religion, color, sex, national origin, age,

disability, or other basis prohibited by state law relating to discrimination in employment. Each invitation for bids and request for proposals must contain a statement of nondiscrimination consistent with the declaration above. The statement shall be in a form approved by the county attorney. In addition, each contract over \$10,000 must include a provision in which the vendor agrees not to discriminate during the performance of the contract.

In the procurement of goods and services for programs funded by a block grant provided under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, the County shall not: (1) discriminate against faith-based organizations on the basis of their religious character; (2) impose conditions that restrict the religious character of the faith-based organizations; or (3) impair, diminish, or discourage the exercise of religious freedom by the recipients of the goods, services or disbursements. Each invitation for bids, request for proposals, contract and purchase order shall prominently display a nondiscrimination statement indicating that the County does not discriminate against faith-based organizations.

Whenever the County makes a solicitation to specific potential vendors, the purchasing agent shall include businesses selected from a list provided by the State Department of Minority Business Enterprise.

3-2 Maintaining a Drug-free Workplace

Each contract over \$10,000 must include a provision in which the vendor agrees to maintain a drug-free workplace during the performance of the contract.

3-3 Participation of Small Businesses and Businesses Owned by Women or Minorities

The County welcomes and encourages the participation of small businesses and businesses owned by women or minorities in procurement transactions.

The purchasing agent shall use and maintain the list of businesses owned by minorities or women available for solicitation provided by the State Department of Minority Business Enterprise.

The purchasing agent must register small businesses and businesses owned by minorities or women and shall maintain such list in the purchasing office.

3-4 Public Inspection of Certain Records

Subject to the exceptions set forth in section 3-4.1, all proceedings, records, contracts and other public records relating to procurement transactions shall be open to inspection by any citizen, or any interested person, firm or corporation, in accordance with the Virginia Freedom of Information Act (Virginia Code § 2.2-3700 et seq.). The purchasing agent shall not make available as public

information any materials properly designated as a trade secret or as proprietary information.

3-4.1 Procurement Records not Available for Public Inspection

There are two classes of procurement records exempt from public inspection:

- Cost estimates: Cost estimates relating to a proposed procurement transaction prepared by or for the County are not subject to inspection.
- Trade secrets or proprietary information: Trade secrets or proprietary information submitted by a bidder, offeror, or contractor in connection with a procurement transaction are not subject to inspection, subject to the procedures in section 3-4.2.

3-4.2 Procedure to Protect Disclosure of Trade Secrets or Proprietary Information

In order for trade secrets or proprietary information to be protected from disclosure, the vendor must comply with the following procedure:

- Protection must be timely invoked: The vendor must invoke the protections of this section prior to or upon submission of the data or other materials to the County, and must designate the data or other materials to be protected and state the reasons why protection is necessary.
- Designation must be valid: If a vendor identifies all materials as a trade secret or as proprietary information, the purchasing agent may contact the vendor and request that the vendor further explain in writing why all of the materials are, in fact, trade secrets or proprietary information. Otherwise, the purchasing agent may not evaluate the merits of the designation of information as a trade secret or as proprietary information.

3-4.3 Timing of Public Inspection

The timing of the public inspection of procurement records is as follows:

- Competitive sealed bidding bidders: Upon request, a bidder may inspect bid records within a reasonable time after the opening of all bids but prior to award, except in the event that the County decides to reject all bids and to reopen the procurement process.
- Competitive negotiation offerors: Upon request, an offeror may inspect proposal records within a reasonable time after the evaluation and negotiation of proposals are completed, but prior to

award, except in the event that the County decides to reject all proposals and to reopen the procurement process.

- All persons: Procurement transaction records are available for public inspection, including inspection by competitive sealed bidding bidders and competitive negotiation offerors, after the award of the contract.

3-4.4 Ensuring the Security and Integrity of Procurement Records

An inspection of procurement records is subject to reasonable restrictions imposed by the purchasing agent to ensure the security and integrity of the records.

3-5 Ethics in Public Contracting

Each County officer or employee (collectively “employee”) who has official responsibility for the procurement of goods, services, insurance or construction must be familiar with Virginia Code §§ 2.2-4367 through 2.2-4377 (Ethics in Public Contracting). Following is a general summary of those sections. Certain key terms used in this section are defined in section 1-5.

A willful violation of any provision listed below is a Class 1 misdemeanor, and, upon conviction, an employee must forfeit his employment, in addition to any other fine or penalty provided by law. The purchasing agent may require employees having official responsibility for procurement transactions in which they participated to annually submit for these transactions a written certification that they complied with Virginia Code § 2.2-4367 et seq. A knowingly false statement in a certification is punishable as described above.

3-5.1 Prohibited Participation by Employees in Procurement Transactions (Virginia Code § 2.2-4369)

Except as otherwise may be allowed by law, no employee having official responsibility for a procurement transaction shall participate in that transaction on behalf of the County when the employee knows one or more of the following conditions exist:

- Contemporaneous employment: The employee is contemporaneously employed by a vendor involved in the procurement transaction.
- Holding of position: The employee, the employee’s partner, or any member of the employee’s immediate family holds a position with a vendor 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 five (5) percent.

- Pecuniary interest in the procurement transaction: The employee, the employee's partner, or any member of the employee's immediate family has a pecuniary interest arising from the procurement transaction.
- Prospective employment: 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 vendor.

3-5.2 Solicitation or Acceptance of Gifts Prohibited (Virginia Code § 2.2-4371)

No employee having official responsibility for a procurement transaction shall solicit, demand, accept, or agree to accept from a vendor 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. The County may recover the value of anything conveyed in violation of this section.

3-5.3 Subsequent Employment with Vendor Prohibited (Virginia Code § 2.2-4370)

No public employee or former employee having official responsibility for procurement transactions shall accept any employment with any vendor with whom the employee dealt in an official capacity concerning procurement transactions for a period of one year from the cessation of employment with the County unless the employee provides written notification to the County, or a public official if designated by the County, or both, prior to commencement of employment by that vendor.

3-5.4. Gifts by Vendors (Virginia Code § 2.2-4371)

No vendor, including a subcontractor, shall confer upon any employee having official responsibility for a procurement transaction any payment, loan, subscription, advance, deposit of money, services or anything of more than nominal value, present or promised, unless consideration of substantially equal or greater value is exchanged.

3-5.5. Kickbacks (Virginia Code § 2.2-4372)

Kickbacks are prohibited as follows:

- No contractor or subcontractor shall demand or receive from any of his suppliers or his subcontractors, as an inducement for the award of a subcontract or order, any payment, loan, subscription,

advance, deposit of money, services or anything, present or promised, unless consideration of substantially equal or greater value is exchanged.

- No subcontractor or supplier shall make, or offer to make, kickbacks as described in this section.
- No person shall demand or receive any payment, loan, subscription, advance, deposit of money, services or anything of value in return for an agreement not to compete on a public contract.
- If a subcontractor or supplier makes a kickback or other prohibited payment as described herein, the amount thereof shall be conclusively presumed to have been included in the price of the subcontract or order and ultimately borne by the County and will be recoverable from both the maker and recipient. Recovery from one offending party shall not preclude recovery from other offending parties.

3-5.6 Submittal of Bid or Proposal, Disclosure of Non-Public Information to Vendor, Prohibited (Virginia Code § 2.2-4373)

No person who, for compensation prepares an invitation for bids or request for proposals for or on behalf of the County shall: (1) submit a bid or proposal for that procurement or any portion thereof; or (2) disclose to any vendor information concerning the procurement which is not available to the public. However, the purchasing agent, with concurrence of the county attorney, may permit the person to submit a bid or proposal for that procurement or any part thereof, if it is determined that exclusion of the person would limit the number of potential vendors in a manner contrary to the best interests of the County.

3-5.7. Purchase of Materials from Architect or Engineer Prohibited (Virginia Code § 2.2-4374)

No building materials, supplies or equipment for any building or structure constructed by or for the County shall be sold by or purchased from any person employed as an independent contractor by the County to furnish architectural or engineering services, but not construction, for such building or structure or from any partnership, association or corporation in which the architect or engineer has a persona interest as defined in section 1-5.

No building materials, supplies or equipment for any building or structure constructed by or for the County shall be sold by or purchased from any person which has provided or is currently providing design services specifying a sole source for such materials, supplies or equipment to be

used in such building or structure to the independent contractor, employed by the County to furnish architectural or engineering services in which such person has a personal interest as defined in section 1-5.

3-5.8 Misrepresentations Prohibited (Virginia Code § 2.2-4376)

No 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.

3-6 Conflicts of Interest

Following is a general summary of the laws pertaining to conflicts of interest in public contracting. These laws generally prohibit officers or employees from having personal interests in the contracts.

3-6.1 Members of the Board of Supervisors (Virginia Code § 2.2-3107)

This section applies only to members of the Board of Supervisors.

No Board member shall have a personal interest in: (1) any contract with the Board; (2) any contract with any County agency which is a component part of the County and which is subject to the ultimate control of the Board; or (3) any contract other than a contract of employment with any other County agency if the Board appoints a majority of the members of the Board of the second agency.

This section does not apply to:

- **Employment:** A Board member's personal interest in a contract of employment; provided: (1) the officer or employee was employed by the County prior to July 1, 1983, in accordance with the provisions of the Conflict of Interests Act, as it existed on June 30, 1983; or (2) the employment first began prior to the member becoming a member of the Board.
- **Uniform prices:** Contracts for the sale by a County agency of services or goods at uniform prices available to the public.
- **Competitive sealed bidding:** A contract awarded to a Board member as a result of competitive sealed bidding where the Board has established a need for the same or substantially similar goods through purchases prior to the member's election or appointment to the Board. However, the member shall have no involvement in the preparation of the specifications for the contract, and the remaining members of the Board, by written resolution, must state that it is in the public interest for the member to bid on the contract.

3-6.2 Members of the School Board (Virginia Code § 2.2-3108)

This section applies only to members of the School Board.

No School Board member shall have a personal interest in: (1) any contract with the School Board; or (2) any contract with any County agency which is subject to the ultimate control of the School Board.

This section does not apply to:

- Employment: A School Board member's personal interest in a contract of employment; provided the employment began prior to the member becoming a member of the School Board.
- Uniform prices: Contracts for the sale by a County agency of services or goods at uniform prices available to the public.
- Competitive sealed bidding: A contract awarded to a School Board member as a result of competitive sealed bidding where the School Board has established a need for the same or substantially similar goods through purchases prior to the member's election to the School Board. However, the member shall have no involvement in the preparation of the specifications for the contract, and the remaining members of the School Board, by written resolution, must state that it is in the public interest for the member to bid on the contract.

3-6.3 Other County Officers and Employees (Virginia Code § 2.2-3109)

This section pertains to officers and employees other than members of the Board of Supervisors and the School Board.

No other officer or employee of any County agency shall have a personal interest in a contract with the agency of which he is an officer or employee other than his own contract of employment.

In addition, no officer or employee of any County agency shall have a personal interest in a contract with any other County agency unless the contract is: (1) awarded as a result of competitive sealed bidding or competitive negotiation; or (2) is awarded after a finding, in writing, by the county executive or the superintendent of schools, as applicable, that competitive bidding or negotiation is contrary to the best interest of the public.

This section does not apply to:

- Additional contracts of employment: An employee's personal

interest in additional contracts of employment with his own agency which accrue to him because of a member of his immediate family, provided the employee does not exercise any control over the employment or the employment activities of the member of his immediate family and the employee is not in a position to influence those activities.

- Contract of employment with another agency: An officer's or employee's personal interest in a contract of employment with any other County agency.
- Uniform prices: Contracts for the sale by a County agency of services or goods at uniform prices available to the general public.

3-6.4 Exceptions (Virginia Code § 2.2-3110)

In addition to the exceptions set forth in sections 3-6.1 through 3-6.3, the following exceptions also apply:

- Real property: The sale, lease or exchange of real property between an officer or employee and a County agency; provided the officer or employee does not participate in any way as an officer or employee in the sale, lease or exchange, and this fact is set forth as a matter of public record by the Board, the School Board, the county executive or the superintendent of schools, as applicable.
- Official notices: The publication of official notices.
- Sole interest is income: An officer or employee whose sole personal interest in a contract with the County is by reason of income from the vendor or the County in excess of \$10,000 per year; provided the officer or employee or a member of his immediate family does not participate and has no authority to participate in the procurement or letting of the contract on behalf of the vendor and the officer or employee either does not have authority to participate in the procurement or letting of the contract on behalf of the County or he disqualifies himself as a matter of public record and does not participate on behalf of the County in negotiating the contract or in approving the contract.
- Contracts with public service corporations, financial institutions, public utilities: Contracts between the County and a public service corporation, financial institution, or company furnishing public utilities in which the officer or employee has a personal interest, provided the officer or employee disqualifies himself as a matter of public record and does not participate on behalf of the County in negotiating the contract or in approving the contract.

- Small contracts: Contracts for the purchase of goods or services when the contract does not exceed \$500.
- Grants and similar payments: Grants or other payment under any program wherein uniform rates for, or the amounts paid to, all qualified applicants are established solely by the administering governmental agency.
- Personal interest in contract arising from marriage: An officer or employee whose sole personal interest in a contract with the County is by reason of his marriage to his spouse who is also employed by the County, if the spouse was employed by the County for five or more years prior to marrying the officer or employee.
- Employment contracts: Employment contracts or renewals thereof or to any other contracts entered into prior to August 1, 1987, which were in compliance with prior conflict of interest laws (Virginia Code § 2.1-347 et seq. or § 2.1-599 et seq.) at the time of their formation and thereafter. Those contracts shall continue to be governed by the prior laws, except that notwithstanding former Virginia Code § 2.1-348(f)(4) (in effect prior to July 1, 1983), the employment of an officer or employee and spouse or any other relative residing in the same household by the County is not be deemed to create a material financial interest except when one of those persons is employed in a direct supervisory or administrative position, or both, with respect to the spouse or other relative residing in his household and the annual salary of the subordinate is \$22,500 or more.

3-6.5 Consequences of Violation (Virginia Code § 2.2-3123)

A contract made in violation of the foregoing sections (Virginia Code § 2.2-3106 through § 2.2-3109) may be declared void and may be rescinded by the Board of Supervisors within five years of the date of such contract. In cases in which the contract is invalidated, the vendor shall retain or receive only the reasonable value, with no increment for profit or commission, of the property or services furnished prior to the date of receiving notice that the contract has been voided. In cases of rescission of a contract of sale, any refund or restitution shall be made to the County, whether it is contracting or selling.

Any purchase by an officer or employee made in violation of the foregoing sections (Virginia Code § 2.2-3106 through § 2.2-3109) may be rescinded by the Board of Supervisors within five years of the date of purchase.