

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 Appendix A. 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

- 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.

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
Section 22.1-296.1(C): Certification of Crimes Against Children

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 created using the templates maintained by the purchasing agent and approved by the county attorney or otherwise in a form approved by the county attorney. (See Appendix A; contact purchasing agent for current in-use templates) All contracts shall contain the terms and conditions required by this chapter and by law. In no event shall a contract contain clauses requiring mandatory arbitration, indemnification of the vendor by the County, vendor ownership or security interest in property of the County, or broad powers of decision granted to the vendor.

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.

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.
- Identification of the parties: The County shall be identified as the "County of Albemarle, Virginia." The school division shall be identified as the "School Board of Albemarle County, Virginia." The vendor shall be identified by its legal name.
- Legal status of the parties: The County shall be identified as being "a political subdivision of the Commonwealth of Virginia." The School Board shall be identified as "a body corporate under the laws 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 County's or School Board's properly authorized representative's signature. Terms of contracts, including renewals, in excess of five years are generally disfavored but may be approved by the purchasing agent if circumstances warrant.
- 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) (contracts exceeding \$10,000 in value)
- 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) (contracts exceeding \$10,000 in value)
- Statement that the County or the School Board, as applicable, does not discriminate against faith-based organizations (*Virginia Code* § 2.2-4343.1)
- Payments to subcontractors (*Virginia Code* § 2.2-4354)

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.

The following provisions are required by this purchasing manual to be included in all public contracts:

- Non-appropriation: The continuation of contract past the end of any fiscal year is subject to appropriations by the Board of Supervisors or School Board, as applicable.

- Albemarle County business license requirement.
- Contract interpretation under the laws of the Commonwealth of Virginia.
- Venue in Albemarle County, Virginia.
- Payment and performance bonds (if construction project is \$100,000 or more).
- Compliance with local, state, and federal laws.
- Termination with cause.

The following provisions are recommended by this purchasing manual to be included in all public contracts:

- Non-assignment of contract by either party.
- Termination without cause.
- Hold harmless, indemnification (vendor indemnification of the County, NOT the County indemnifying the vendor).
- Independent contractor.
- Submission and disposition of contract claims.
- Payments to subcontractors.
- Insurance.
- Cooperative procurement, if applicable and approved by the purchasing agent.

The following provisions are PROHIBITED by law and this purchasing manual:

- Dispute resolution by arbitration.
- Indemnification of vendor by the County.
- Payment of vendor's attorney's fees.

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 Board named as an additional insured: The County or the School Board, 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 "School Board of Albemarle County, Virginia."
- Form of the certificate: The certificate shall be on a form approved by the County risk manager, such as the standard Acord 25 form.
- Original certificate: The vendor shall provide a duplicate original certificate of insurance. An original certificate shall be provided upon request of the purchasing agent.
- Signature of insurance agent: The certificate of insurance shall be signed by an insurance agent licensed to do business in Virginia

and registered with the Virginia State Corporation Commission Bureau of Insurance.

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 ensure that they comply with the requirements for 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 the signatory’s 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 vendor 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	Employees specifically designated by their Department Head or Tier III signatory and who have completed mandatory training
II	\$25,000	County Department and School Division Heads, School Principals*
III	\$100,000	County Executive,** School Superintendent** and Chief Operating Officer
IV	N/A	Purchasing Agent, Chief of Financial Management, Chief Financial Officer and Director of Finance

*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.

**The deputy county executive and deputy superintendent are authorized in the absence or unavailability of the county executive and superintendent, respectively.

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 twenty calendar days after the date of the occurrence of the event on which the claim is based, or within twenty calendar days after the date of the beginning of the work upon which the claim is based, as the case may be. However, if damage is deemed certain in the opinion of the vendor to result from its acting on an order from the County, it shall immediately take written exception to the order.
- Time to submit claim: A contractual claim, whether for money or other relief, shall be received in the purchasing office no later than sixty calendar days after final payment. An untimely notice will be insufficient to satisfy the requirements here, and no claim shall be recognized.
- 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. An oral notice or statement will be insufficient to satisfy the requirements herein, and no claim shall be recognized.
- 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 percent of the amount of the contract, or \$50,000, whichever is greater. If

resolution of the claim requires that the County pay an amount exceeding twenty-five percent of the amount of the contract, or \$50,000, whichever is greater, the purchasing agent shall present the proposed settlement to the Board of Supervisors or the Board's designee as defined in Section 26-4 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 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 to the fullest extent provided by law. 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 calendar days after 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, deputy county executive, or assistant county executive shall act as the designee of the Board of Supervisors for purposes of this review and approval. Approval shall be documented in writing on a form prepared by the purchasing agent or by other verifiable means. Proposed change orders shall receive this review whenever the cumulative total of proposed changes first exceeds twenty-five percent of the amount of the contract or any multiple of twenty-five percent 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.

26-5 Contract Administration and Record Retention

Unless otherwise determined by the purchasing agent, the using department shall be responsible for the administration of all of the contracts for which it is responsible. Administration begins at the creation of a solicitation and continues

from the time of the award of a contract through the completed performance of the work under the contract and acceptance by the County of the work. Administration also includes resolution of disputes through final payment.

Each County department shall designate a person or persons who shall be responsible for contract administration. Designated persons are strongly encouraged to attend any contract administration training provided by the purchasing agent.

Documentation regarding the negotiation, execution, performance, and resolution of a contract should be uniformly and securely maintained in conformity with the Library of Virginia retention schedules. Timely destruction of these records should be made only pursuant to the applicable retention schedules and in the manner proscribed. Documentation of records destruction shall also be appropriately maintained.

Any and all records regarding a procurement shall be delivered to the purchasing agent upon request.