MANAGING YOUR VENDOR

2019 AGENCY PURCHASING CONFERENCE

REASONS FOR CONTRACT CONFLICT

- Different interpretations
- Unforeseen circumstances
- Vendor in over its head (can't fulfill obligations)
- Mistake made in bidding
- Malicious acts fraud/greed

MEETING OF THE MINDS – ESTABLISHING EXPECTATIONS

- Reduce Conflict Before It Happens
 - Well understood need
 - Industry research
 - Good specs (sufficiently detailed, clear, and unambiguous)

Examples:

- Cloud v. non-cloud solutions
- Delivery locations and timing
- Elevator restarts
- Clearly defined payment amounts and process
- Software solution not satisfactory
- Cell phones as item scanners

Specifications

- Vendor must meet mandated qualification requirements to be selected

Examples:

- Licenses (Contractor, reseller, dealer, professional)
- Certifications
- Years of Experience/Projects Completed



Lowest "Responsible" Bidder

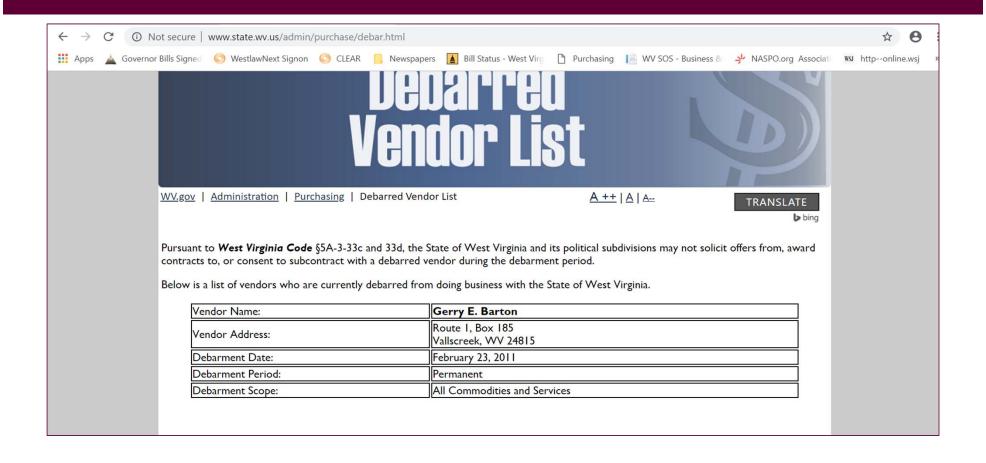
- "Responsible" in this context means "a vendor who has the capability to fully perform the contract requirements, and the integrity and reliability which will assure good-faith performance." W.Va. Code § 5A-I-I.

Lowest "Qualified Responsible" Bidder

- "Is ready, able, and willing to timely furnish the labor and materials required to complete the contract; is in compliance with all applicable laws of the State of West Virginia; and has supplied a valid bid bond or other surety authorized or approved by the contracting public entity." W.Va. Code § 5-22-I

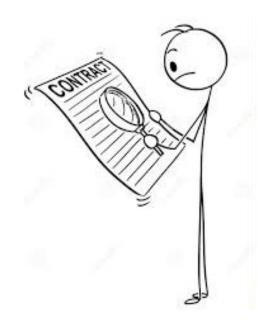
- Vendor must not be debarred
 - Federal Debarment automatically checked by wvOASIS
 - State Debarment must check manually www.state.wv.us/admin/purchase/debar.html





CONTRACT ADMINISTRATION / OVERSIGHT

- Monitor the Vendor
 - READ YOUR CONTRACT!!!
 - Ensure contract milestones met
 - Confirm hours worked
 - Review all invoices against contract for accuracy
 - Review work product
 - Perform proper receiving procedures for commodities
 - Hire an expert when needed (architect or consultant)



CONTRACT ADMINISTRATION / OVERSIGHT

- Expert Managers
 - Consultants
 - Architects
- Will not absolve State of responsibility
 - Must now administer/oversee two contracts



CONTRACT ADMINISTRATION/OVERSIGHT

- Retainage, Progress Payments, Liquidated Damages
 - What are the differences?
 - Advantages vs. disadvantages?
 - Only useful if built into solicitation/contract
- Examples:
 - wvOASIS
 - Construction



CONTRACT ADMINISTRATION/OVERSIGHT

- Don't Be Afraid to Challenge the Vendor
 - Remember you represent the State
 - Vendor can't be paid until you are satisfied
 - Both of these give you negotiating leverage



BREACH OF CONTRACT

- When it's clear, resolution can be easy
 - Negotiation isn't "did breach occur," but will it be cured and how much is owed.

Examples:

- Adorama intentional failure to deliver, not so fast!
- Fence Vendor Not a dollar more than contracted for!
- OT Hotwire No you can't connect that wire there!
- REAP Bags Your suppliers want more money, we don't care!

BREACH OF CONTRACT

- When it's not clear ...
 - Resolution is much more difficult.
 - If several people in the meeting (on your side) disagree, it's not clear.

Examples:

- Capitol Dome What does "can't touch the dome" mean anyway?
- Archaeological Dig Whose fault is it and what did it cost?
- The Stone is Staining Yeah, but you picked it!
- A Day Late Can we withhold full payment?

PROOF OF BREACH

- Documentation is key!
- Proof is for judge, opposing counsel, newspaper
- Examples:
 - Vendor Performance Report WV-82
 - Emails
 - Letters
 - Contract documents
 - Specifications missed
 - Deadlines missed
 - Vendor confirmation of failure (if possible)



- Demand Letter tell the vendor it breached and demand it be fixed
 - In most cases, this will resolve the issue, or at least begin the dialogue
 - Get support from higher up before sending
 - Utilize attorneys to draft if not comfortable
- Demand Letter Components:
 - Always follow contract requirements for this if any exist (notice procedures).
 - > Address to vendor rep familiar with contract (or higher)
 - > Explain the failure
 - > Point to the law or contract clause that was violated
 - > Allow cure opportunity if appropriate
 - > Threaten action if cure doesn't happen, or state action to be taken
 - Offer further discussion if needed

Performance Bonds

- Don't cancel contract cancellation may eliminate bond
- Breach letter to Surety and vendor
- Surety will either object, hire firm to perform, or pay

If Surety Objects

- Breach of contract suit ensues
- Get AG's Office involved earlier rather than later

- Immediate contract cancellation if one of the following occurred:
 - Vendor agreement
 - Contract obtained by fraud/collusion
 - Breach of Contract
 - Conflict of Interest identified
 - Funds not appropriated
 - Violation of law/rule/ordinance



- 30-day contract cancellation
 - Any reason or no reason
 - Must be reasonable decision though



- Lawsuit for performance or damages
 - AG Office represents in suit should include them up front
 - Circuit Court

- Suspension (W.Va. Code 5A-3-32, 33)
 - One year or less
 - Vendor has violated provisions of the purchasing law/rule/regulation
 - Notified by a certified mail
 - Must including reason for suspension
 - Can appeal to Sec. of Admin

MUST HAVE SOLID DOCUMENTATION

- Debarment (W.Va. Code 5A-3-33d)
 - Nuclear option
 - Can permanently prohibit vendor from government contracting
 - 9 separate grounds
 - Requested by spending unit or Purchasing
 - Formal administrative process
 - Can apply to related parties
- MUST HAVE SOLID DOCUMENTATION



- Debarment Grounds (W.Va. Code 5A-3-33d)
 - (I) Fraud in obtaining or attempting to obtain a public contract or subcontract;
 - (2) Antitrust violation relating to the submission of offers;
 - (3) Crimes of dishonesty relating to contracting (fraud, bribery, forgery, etc.)
 - (4) Lack of business integrity that affects the present responsibility of the vendor;
 - (5) Default on obligations owed to the state;
 - (6) The vendor is not in good standing with a licensing board;

- Debarment Grounds (W.Va. Code 5A-3-33d)
 - (7) Vendor attempts to circumvent bidding laws
 - (8) Violation of the terms of a public contract or subcontract for
 - failure to substantially perform;
 - Performance in violation of standards established by law or the trade or profession;
 - Use of substandard materials on one or more public contracts or
 - A repeated pattern or practice of failure to perform
 - (9) Any other cause of a serious and compelling nature amounting to knowing and willful misconduct of the vendor that demonstrates a wanton indifference to the interests of the public and that caused, or that had a substantial likelihood of causing, serious harm to the public.

- Debarment (W.Va. Code 5A-3-33d)
 - Examples:
 - ➤ Bayliss & Ramey
 - > REAP Bag Provider
 - Threatened
 - ➤ Adorama

DON'T FORGET TO SIGN THE ATTENDANCE SHEET

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CONTACT US