

Managing Your Vendor

2021 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



Vendor Selection

- ▶ Specifications
 - ▶ Vendor must meet mandated qualification requirements to be selected
- ▶ Examples:
 - ▶ Licenses (Contractor, reseller, dealer, professional)
 - ▶ Certifications
 - ▶ Years of Experience/Projects Completed



LICENSED

Vendor Selection

- ▶ 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-1-1.

- ▶ 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 § 5-22-1



Vendor Selection

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

**Debarred
Vendor**



Vendor Selection

secure | www.state.wv.us/admin/purchase/debar.html

Bills Signed WestlawNext Signon CLEAR Newspapers Bill Status - West Virg Purchasing WV SOS - Business & NASPO.org Associat

Debarred Vendor List

[WV.gov](#) | [Administration](#) | [Purchasing](#) | Debarred Vendor List A ++ | A | A-- TRANSLATE
bing

Pursuant to **West Virginia Code** §5A-3-33c and 33d, the State of West Virginia and its political subdivisions may not solicit offers from, award contracts to, or consent to subcontract with a debarred vendor during the debarment period.

Below is a list of vendors who are currently debarred from doing business with the State of West Virginia.

Vendor Name:	Gerry E. Barton
Vendor Address:	Route 1, Box 185 Valls creek, WV 24815
Debarment Date:	February 23, 2011
Debarment Period:	Permanent
Debarment Scope:	All Commodities and Services

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)



Remedies for Breach

- ▶ 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

Remedies for Breach

- ▶ 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



Remedies for Breach

- ▶ 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



Remedies for Breach

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

CANCELLED



Remedies for Breach

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

Remedies for Breach

- ▶ 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**

Remedies for Breach

- ▶ 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



Remedies for Breach

- ▶ Debarment Grounds (W. Va. Code 5A-3-33d)
 1. 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;

Remedies for Breach

▶ Debarment Grounds (W. Va. Code 5A-3-33d)

- (6) The vendor is not in good standing with a licensing board;
- (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.

Remedies for Breach

- ▶ Debarment (W. Va. Code 5A-3-33d)

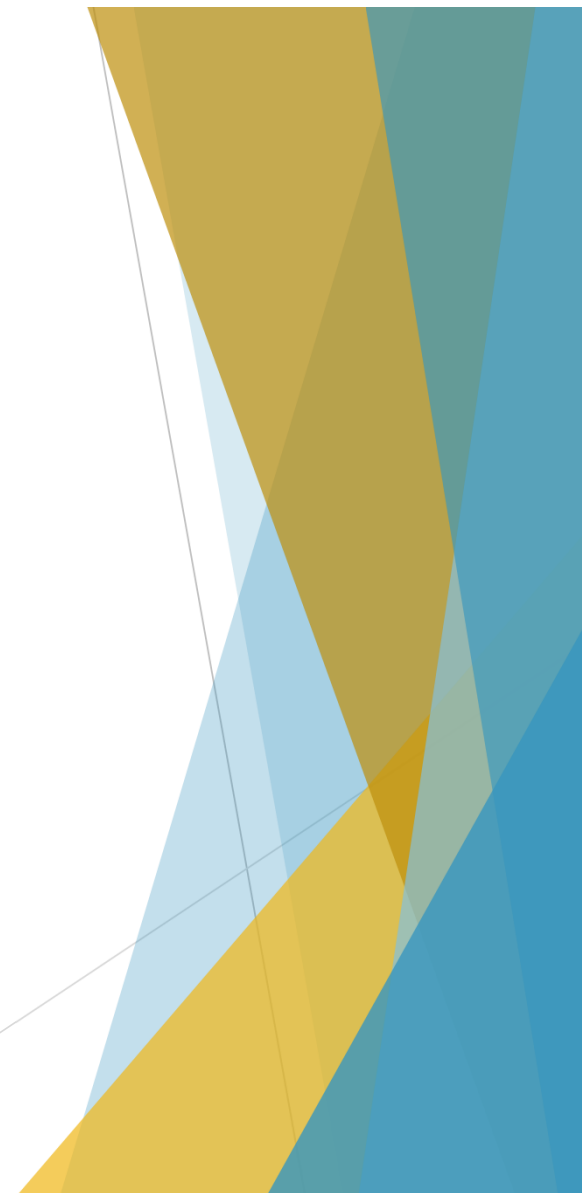
- ▶ Examples:

- ▶ Bayliss & Ramey

- ▶ REAP Bag Provider

- ▶ Threatened

- ▶ Adorama



QUESTIONS?

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