

Chapter Highlights

Purpose: This chapter defines “high risk” solicitations and contracts, the requirements for a “high risk” solicitation or contract, and the necessary review process for all “high risk” IT solicitations and contracts.

Key points:

- o All “high risk” IT solicitations and contracts, as defined in [§ 2.2-4303.01\(A\)](#), must be reviewed by both VITA and the Office of the Attorney General (OAG) prior to release of a high risk solicitation and prior to award of a high risk contract.
- o VITA Contract Risk Management will conduct high risk IT solicitation and contract reviews according to [§ 2.2-4303.01\(B\)](#).
- o All high risk solicitations and contracts must include clear and distinct performance measures and enforcement provisions, including remedies in the case of Supplier non-performance
- o eVA will serve as the system of record for reporting data related to performance of high risk contracts

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30.0 Introduction

In 2014 the Joint Legislative Audit and Review Commission (JLARC) directed its staff to review the development and management of state contracts. Interest in this topic was prompted by problems that arose from several high profile contracts. JLARC evaluated whether the state's procurement policies ensure that contracts provide good value to the state while also mitigating the risks to agencies and the public. JLARC found that a majority of public contracts deviated from agency expectations across multiple categories, including cost, schedule, and specifications. The study also found that most public contracts for goods and services did not contain incentives to perform the specifications of the contract, or remedies in the case of continued nonperformance.

As a result of the JLARC study, on July 1, 2019, the General Assembly amended the Virginia Public Procurement Act to define "high risk" solicitations and contracts, and the required review and approval processes for all solicitations and contracts that meet the definition of "high risk."

This chapter defines and explains high risk contracting, the *Code* mandated review process for high risk solicitations and contracts, and how agencies can ensure their "high risk" solicitation or contract fulfills the requirements set forth in the VPPA.

30.1 High Risk Contracts, Defined

[§ 2.2-4303.01](#) of the Code of Virginia defines a "high risk" solicitation or contract as any public contract with a state public body for the procurement of goods and services which:

- o Costs over \$10 million dollars over the course of the initial term, OR,
- o Costs over \$5 million dollars over the initial term and meets at least one of the following criteria;
 - The goods, services, insurance, or construction that is the subject of the contract is being procured by two or more state public bodies;
 - The anticipated term of the initial contract, excluding renewals, is greater than five years; or,
 - The state public body procuring the goods, services, insurance, or construction has not procured similar goods, services, insurance, or construction within the last five years

According to the statute, all "high risk" solicitations and contracts must be evaluated to ensure that they comply with applicable state law and policy and contain the following:

- o Appropriate terms and conditions,
- o Distinct and measurable performance metrics, including clear enforcement provisions,
- o Remedies in the case that performance measures are not met

VITA, along with the Office of the Attorney General (OAG), is required to review all "high risk" solicitations and contracts to ensure that the requirements outlined in [§ 2.2-4303.01\(B\)](#) are met prior to the release of a "high risk" solicitation, or the award of a "high risk" contract.

30.1.1 IT Contracts that meet the definition of "High Risk" Awarded Prior to July 1, 2019

Any existing IT contract that: (i) meets the definition of a high risk contracts and, (ii) has 2 or more remaining renewal provisions shall be reviewed in accordance with the provisions of [§ 2.2-4303.0\(B\)](#) prior to any renewal.

30.1.2 Determining "Cost" VS. "Spend"

[§ 2.2-4303.01\(A\)](#) specifies that the dollar threshold for determining whether a solicitation or

contract meets the definition of “high risk” is based on the projected total cost of the procurement. A solicitation or contract is considered “high risk” if it has an *anticipated cost* of over \$10 million dollars, or over \$5 million dollars and meets one of the criteria outlined in [§ 2.2-4303.01\(A\)](#).

Pre-solicitation market research and input from industry subject matter experts can help estimate possible “cost.” This should be the total cost of ownership. Total cost should be calculated to include the total value of the acquisition. This includes the purchase price, installation, maintenance for all of the expected years of the contract, and so on. High risk review requirements will be triggered if the “cost” exceeds the high risk dollar threshold. IT solicitations and contracts that meet the definition of “high risk” will need to be reviewed by VITA and the OAG.

30.1.3 Major IT Projects - definition of “High Risk” and approval by CIO

[§ 2.2-2006](#) of the *Code of Virginia* defines a “major IT project” as any Commonwealth information technology project that has a total estimated cost of more than \$1 million or that has been designated a major information technology project by the CIO.

High risk solicitations and contracts are also considered major IT projects, and therefore, must be approved by the CIO prior to the issuance of the high risk solicitation or award of the high risk contract. In order for VITA SCM to recommend approval to CIO, an agency seeking to conduct a high risk procurement must fully meet all requirements laid out in [§ 2.2-4303.01](#).

30.2 What should be Included in High Risk Solicitations and Contracts?

30.2.1 What a High Risk IT Solicitation Must Contain

An IT high risk solicitation must contain the following in order to be approved for release:

- Distinct and measurable performance metrics, as well as clear enforcement provisions that are incorporated as part of the contractual obligations upon award
- Include performance measures and enforcement provisions in the high risk solicitation which provide a service provision baseline from which to negotiate with Suppliers to the benefit of your agency
- An Attached IT contract template, provided by VITA, contains the appropriate terms and conditions that comply with applicable state law and policy

30.2.2 What a High Risk IT Contract Must Contain

A high risk contract must contain the following in order to be approved for award:

- Appropriate contractual terms that comply with applicable Virginia law and policy
 - Terms cannot be duplicative or conflicting within the body of the contract
 - When using VITA’s IT contract templates, it is important to remove all references to VITA and all other general language reserved for VITA’s statewide contracts
 - Distinct and measurable performance metrics and clear enforcement provisions, including remedies or incentives to be used in the event that contract performance metrics or other provisions are not met.

It is important that your agency send the most current, redlined version of the high risk contract in order for VITA and the OAG to determine the appropriateness and legality of the Supplier’s and Agency’s redlines to the original document(s).

30.3 Compliance with High Risk Requirements

30.3.1 Performance Measures

Performance measures are quantifiable metrics of expected service provision, and are the backbone of a successful contract.

Strong performance measures are:

- o Clear – The standards by which the Supplier are contractually bound are explicit and leave no room for ambiguity;
- o Distinct - Capture inputs/outputs, outcomes, quality, and timeliness in relation to identified performance measures
- o Calculable – Metrics are quantifiable, and are tied to a methodology which can accurately measure performance against the contract;

Performance measures should be tailored to provide accurate and reliable data on the Supplier's performance against agreed upon service provisions. The metrics chosen should be able to correctly identify how well, and to what extent, the Supplier regularly meets the expected levels of service outlined in the original agreement.

Performance measures should be tailored to render the maximum value of the contract. When crafting performance measures, some important questions to ask are:

- o *Which aspects of service delivery are **most** important to procurement success?*
- o *What aspects of performance will indicate that the project is effectively fulfilling its intended purpose?*
- o *What aspects of performance indicate the intended value-add of the project for the Commonwealth? and,*
- o *What things are measurable that would indicate contract failure?*

Common examples of performance measure areas are: webpage uptime, incident response time/mean time to repair (MTTP), customer service/satisfaction, and prompt delivery of all hardware/software necessary to begin services.

30.3.2 Enforcement Provisions and Remedies

Each performance measure should be tied to a corresponding enforcement provision. Enforcement provisions incentivize the Supplier to consistently meet the performance measures set out in the contract.

Strong enforcement provisions:

- o Appropriately incentivize the Supplier to hit performance measure targets regularly using monetary or contractual provisions;
- o Reduce the risk of service level or project failure by holding the Supplier materially accountable for failure to meet performance measures;
- o Include remedies in the case of non-performance

Contractual remedies provide a tangible way to ensure the Supplier is informed and addressed appropriately for missing key performance measures. This can be in the form of monetary penalties, or exercising contractual options such as termination or seeking neglected services from another Supplier.

When crafting enforcement provisions, some of the most important questions to ask are:

- o *How are you making sure the expected deliverables are being met?*
- o *How are you holding the Supplier accountable for poor or nonperformance of the contract requirements?*
- o *In what ways is the Supplier properly incentivized to consistently meet performance targets?*

Common examples of enforcement provisions include liquidated damages, credits applied to monthly invoices, termination for breach of contract, and milestone payment withholds, to be paid after the last milestone in completed, reflected on the final invoice.

30.4 Additional Resources

Below are other procurement tools to manage risk and comply with high risk requirements.

30.4.1 Service Level Agreements

Service level agreements, or SLAs, define the level of service expected by a customer from a Supplier, laying out the metrics by which that service is measured, and the remedies, if any, should the agreed-on service levels not be achieved.

SLAs provide a modular, easy-to-use methodology for measuring and evaluating performance under the contract. A strong SLA serves as a vehicle for routine monitoring and reporting on outlined performance measures, and provides performance data which can be leveraged to collect remedies or enact enforcement provisions should the Supplier fail to meet the SLAs.

More information on how to create SLAs can be found at the following link: [Service Level Agreement \(SLA\) Tool](#).

See [Chapter 21](#) for more information on SLAs and performance based contracting.

30.4.2 Market Research

Preliminary market research will help determine the viability of existing solutions to meet your agency's IT business needs, and establishes a baseline for what to expect of Suppliers' proposed solutions.

Conducting market research also provides your agency with an estimate of the total projected cost of the procurement, allowing your agency to more easily determine whether or not the procurement is considered high risk.

In-depth market research can also forecast potential risks that could occur during the lifecycle of a particular procurement. Understanding the ways industry leaders provide service for the particular solution your agency is procuring helps better understand what your agency should expect of a selected Supplier and the level of service they should be able to provide.

The different phases of market research include:

- o Surveillance – involves a high level scan of the industry environment (routine review of journal articles, webinars, etc.)
- o Investigation – using the data gathered during market surveillance to identify potential solutions and monitor industry leaders
- o Identification – applies knowledge obtained during market surveillance and investigation to scope the procurement to meet your agency's specific IT business needs. Agencies may release a Request for Information (RFI) in order to determine the types of products that are available which will satisfy its requirements. See [Chapter 18](#) for more information on Requests for Information (RFIs)

Market research can also provide your agency with a baseline for establishing performance measures and enforcement provisions. By carefully evaluating what performance targets and remedies have been applied to procurements of a similar size and scope, your agency can leverage the knowledge from the industry during contract negotiations, and hold the Supplier to appropriate standards of performance.

30.4.3 Milestone and Corrective Action Planning

For large scale IT procurements, a granular milestone plan, including scheduled deliverables, may help ensure timely delivery of all services the Supplier is contractually obligated to provide. If each milestone is tied to formal acceptance and payment, this incentivizes the Supplier to complete milestones on a timely basis and at the expected level of service. VITA Contract Risk Management recommends that each milestone payment include at least a 20% payment withhold, to be paid once all milestones have been completed and accepted by your agency, reflected on the final invoice to the Supplier.

One method of holding the Supplier materially accountable to performing its contractual obligations is to

require that the Supplier submit a Corrective Action Plan (CAP) for any missed deliverables, milestones, or contractual obligations. Requiring the Supplier to submit, in writing, a detailed plan to correct the deficiencies that caused a variance in performance from what is specified in the contract, will incentivize the Supplier to ensure that all deliverables and/or milestones are met according to initial expectations.

30.4.4 Use of VITA's IT Procurement Tools

VITA has a number of tools available for agencies to use when conducting an IT procurement to ensure that the procurement remains in compliance with high risk requirements, applicable Virginia law, and VITA's policies, standards, and guidelines.

Our minimum requirements matrix has been revised to include requirements for high risk IT procurement. The matrix contains the contractual language and requirements for IT procurement VITA will be looking for when conducting a high risk review of a particular solicitation or contract. The revised matrix can be found here: [Minimum Contractual Requirements Matrix for Major IT Projects, High Risk Procurement, and Delegated Procurements](#).

In order to accurately judge the appropriateness and legality of the high risk solicitation or contract's terms and conditions, it is important for your agency to use VITA SCM's most current solicitation and contract templates. VITA SCM's RFP, contract and evaluation templates are all designed to result in the strongest IT contract possible. When you are preparing to conduct a high risk procurement, contact scminfo@vita.virginia.gov and you will be provided with the appropriate solicitation or contract templates, as well as any necessary training on how to properly modify VITA SCM's templates.

30.5 How to Begin the High Risk IT Procurement Review Process

30.5.1 Additional VITA Review Processes

High risk IT solicitations and contracts also fall under the purview of other groups within VITA, and are still subject to additional VITA oversight per the Code. It is up to your agency to ensure that the high risk solicitation or contract has met all additional VITA governance and oversight requirements.

30.5.2 High Risk IT Procurement in Relation to your Agency's Strategic Plan

Before your agency begins a high risk IT solicitation, it is important to confirm with your AITR that the procurement has been included in your agency's strategic plan. If the procurement was not initially included in your agency's strategic plan, you must ensure that it is retroactively included via a Procurement Business Alignment (PBA). VITA's High Risk Contract Group will not review a high risk solicitation if the procurement is not included in your agency's strategic plan.

Contact your AITR for more information on your agency's strategic plan, or to begin the PBA process.

30.5.3 Submitting a Procurement Governance Request

For any IT procurement \$250,000 and above, your agency must submit a Procurement Governance Request (PGR). High risk IT solicitations and contracts require a PGR and approval from VITA's Project Management Division (PMD). It will be up to your agency to ensure that all reviews and corresponding documents are submitted to PMD so that VITA can recommend approval for release of the solicitation or award of the contract to the CIO.

30.5.4 Enterprise Cloud and Oversight Services (ECOS)

If your high risk IT procurement will be leveraging Cloud services as part the solution, your agency must follow all required Enterprise Cloud and Oversight Service (ECOS) processes. High risk solicitations for Cloud services must include an ECOS Assessment form, which Cloud solution providers must complete and submit as part of their proposal.

Additionally, all high risk solicitations for Cloud computing services must include an Exhibit of Additional Cloud Services Contractual Terms and Conditions. These are to be negotiated after proposals have been evaluated, and select Suppliers have been invited to contract negotiations. An SCM Cloud Sourcing Specialist and Enterprise Services expert, if necessary, must be present during contract negotiations. For additional guidance, refer to the ECOS Procedure Checklist, located at the following link: [ECOS Procedure Checklist for Cloud Solicitations and Contracts](#).

Once your agency has determined which Supplier(s) will move forward to contract negotiations, your agency must submit a request for an ECOS Assessment of the remaining Supplier(s). This assessment must be complete prior to the conclusion of contract negotiations.

A high risk IT contract for Cloud services cannot be awarded until the Supplier has passed the ECOS Assessment, prior to VITA CSRM written approval of any Security Exceptions, or prior to final negotiations to the Exhibit of Cloud Services Additional Contractual Terms and Conditions.

Contact scminfo@vita.virginia.gov for the most current version of the Exhibit of Additional Cloud Terms and Conditions.

30.6 Review by VITA Contract Risk Management

After all additional IT procurement requirements have been met, your agency will need to begin the high risk review process with VITA Contract Risk Management. The information below will help your agency navigate the high risk review process.

30.6.1 Submitting the High Risk Solicitation or Contract

If the total "cost" of the procurement will exceed \$5 or \$10 million dollars, and meet the definition of "high risk" outlined in [§ 2.2-4303.01\(A\)](#), PMD will forward the high risk IT solicitation or contract to VITA Contract Risk Management so that the high risk review can begin.

All high risk IT solicitations must be reviewed by VITA Contract Risk Management and the OAG prior to the solicitation being publicly posted, and all high risk contracts must be reviewed prior to award. High Risk IT Contracts should be negotiated with top Supplier(s) before submission to SCM for review. All redlines submitted by the Supplier and approved by all parties should be included in the submitted documentation to aid Contract Risk Management in reviewing the contract's inclusion of appropriate terms and conditions and compliance with applicable state law and policy.

Both the OAG and VITA Contract Risk Management have, according to the statute, thirty (30) business days to review a high risk solicitation or contract. In order to maximize the review period, your agency should submit the high risk solicitation or contract to both VITA and the OAG at the same time.

Agencies must submit a completed Minimum Requirements Matrix to VITA Contract Risk Management along with their high risk solicitation or contract. The Matrix can be found at the following website: [Minimum Contractual Requirements Matrix for Major IT Projects, High Risk Procurements, and Delegated Procurements](#).

30.6.2 VITA Contract Risk Management Review Process

VITA Contract Risk Management will review the submitted high risk IT solicitation or contract. Remember, the CIO has to approve all procurements for release if they exceed \$1 million. It's the same for contracts. Contract Risk Management is one of the groups that recommends approval to the CIO.

In order to assist agencies with this process, VITA has established the Contract Risk Management team, a group dedicated to reviewing high risk IT solicitations and contracts and consulting agencies before, during, and after the review process has been completed.

High risk contract analysts are trained to identify whether or not the terms and conditions of high risk IT solicitations and contracts are appropriate, comply with Virginia state law and policy, and that the high risk solicitations or contracts include strong performance metrics and enforcement provisions.

In order to determine if a high risk solicitation or contract complies with the requirements set out in [§ 2.2-4303.01\(B\)](#), and can be recommended to the CIO for approval, VITA Contract Risk Management will review the submitted document(s) and provide feedback via redlines. All redlines indicating non-compliance with [§ 2.2-4303.01\(B\)](#) and other applicable Virginia law and policy will mandate revisions on behalf of your agency.

Agencies must re-submit all high risk solicitations and contracts that were returned with redlines so that they can be re-reviewed by VITA Contract Risk Management.

VITA Contract Risk Management also has a trained High Risk Contracting Consultant who is a designated resource for agencies to contact for training on how to use VITA's IT contracting tools. The High Risk Contracting Consultant also serves in an advisory role after the high risk solicitation or contract review has been completed, walking your agency through the comments from VITA Contract Risk Management.

30.7 What to Expect from a VITA High Risk Review

30.7.1 High Risk Review Timeline

According to the statute, both VITA and the OAG have thirty (30) business days to review the high risk solicitation or contract. So, for example, if Agency X submits their high risk solicitation or contract to VITA and the OAG on September 1, the review will be completed no later than October 12.

VITA Contract Risk Management aims to review and return a submitted high risk solicitation or contract to the submitting agency well within the 30 day business day limit. However, the statute intentionally allows for 30 business days for review of high risk solicitations or contracts in order for VITA Contract Risk Management and the OAG to fulfill their responsibilities, outlined in [§ 2.2-4303.01\(B\)](#).

30.7.2 VITA Contract Risk Management's Post-Review Response

After VITA Contract Risk Management's review of your agency's high risk solicitation or contract has been completed, you should expect to receive one of the following responses:

- **Approval for release/award:** if all of the Code requirements are met, VITA Contract Risk Management will inform your agency that it is recommended that the high risk solicitation or contract is approved for release or award by the CIO, pending all other required approvals.
- **Resubmitted to the agency for corrections:** if VITA Contract Risk Management cannot recommend the high risk solicitation or contract to the CIO due to conflicts with the Code requirements, the High Risk Contracting Consultant will reach out to your agency to discuss how the solicitation or contract can become compliant with [§ 2.2-4303.01\(B\)](#).

VITA Contract Risk Management does not recommend approval for release or award until full compliance

with [§ 2.2-4303.01\(B\)](#) has been achieved. If there are outstanding comments from VITA Contract Risk Management that preclude SCM recommending the release/award of the high risk solicitation/contract to the CIO, your agency must resubmit the solicitation or contract to VITA Contract Risk Management with the comments addressed.

30.7.3 Post-Review Consultation for High Risk IT Procurements

If your agency's high risk solicitation or contract contains outstanding comments from VITA Contract Risk Management, your agency will need to resubmit the document(s) with the comments addressed in order for approval for release or award to be recommended. VITA Contract Risk Management seeks to amend the current high risk solicitation or contract, as opposed to rejecting the high risk solicitation or contract outright.

The High Risk Contracting Consultant will serve as the liaison between your agency and VITA Contract Risk Management. The Consultant will contact your agency, walk through the outstanding comments, and explain how the solicitation or contract can be amended to satisfactorily meet the requirements in [§ 2.2-4303.01\(B\)](#).

The post-review consultation process gives agencies the opportunity to revise the high risk solicitation or contract per the guidance of the high risk reviewers and the High Risk Consultant and resubmit their high risk solicitation or contract. Keep in mind, once the revised high risk solicitation or contract is submitted, VITA Contract Risk Management may take up to an additional thirty (30) business days to review the resubmitted document(s).

It is important to remain conscious of the length of time each high risk review may take when creating your procurement timeline., VITA Contract Risk Management always recommends that that suppliers agree to a proposal validity period of at least 180 days to account for both the VITA Contract Risk Management and OAG 30 business day high risk solicitation and contract review periods (and an ECOS review if the solution is a Cloud solution), in addition to the other necessary review processes.

30.7.4 OAG High Risk Review Process

While the OAG will also make suggestions in the form of redlines, they do not formally approve a high risk solicitation or contract for release or award. If changes are required, they will advise you to do so, then you must make the changes and resubmit the document for review to the OAG and to VITA Contract Risk Management. Once the high risk solicitation or contract has been re-submitted, both VITA Contract Risk Management and the OAG will have an additional 30 day review period to ensure that necessary changes have been made.

When the OAG is satisfied with their review, they will re-send the submitted high risk review request form stating that the proposed solicitation or contract has met the statutory requirements. When you receive the form indicating that the OAG review has been completed, it is important that you inform VITA Contract Risk Management by emailing the group directly at scminfo@vita.virginia.gov so that VITA Contract Risk Management ensures that all review requirements have been met.

See Appendix A for the OAG High Risk Submission form.

Appendix A
Office of the Attorney General
(OAG) High Risk Contract Review
Request Form

This form is available on the OAG's website at the following URL:

<https://www.oag.state.va.us/files/HighRiskContract-Review-Request-Secured.pdf>

Appendix B

VITA's Mandatory Terms and Conditions

VITA's Core IT Contract Terms and Conditions can be found at the following link:

<https://www.vita.virginia.gov/media/vitavirginiagov/supply-chain/pdf/StatutorilyMandatedTsandCs.pdf>