VIRGINIA PROCUREMENT LAW STUDY

FINAL REPORT

November 1, 1980

Office of the Secretary of Administration and Finance
Ninth Street Office Building
Richmond, Virginia 23219

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COMMONWEALTH of VIRGINIA

Office of the Governor

Richmond 23219

Charles B. Walker
Secretary of Administration and Finance

October 31, 1980

The Honorable Stanley C. Walker, Chairman
General Laws Committee of the Senate
Post Office Box 11266
Norfolk, Virginia 23517

The Honorable Thomas W. Moss, Jr., Chairman
General Laws Committee of the House of Delegates
1505 First Virginia Bank Tower
Norfolk, Virginia 23510

Gentlemen:

Pursuant to Senate Joint Resolution 148 agreed to by the General Assembly in its 1979 session, I transmit the final report of the Study of Virginia Procurement Law. The Advisory Committee or Task Force established in 1979 was chaired by the Director of the Department of General Services and comprised of members representing the private sector, as well as Federal, State, and local governments. The study was under the direction of Robert P. Kyle, former Assistant Attorney General and Acting Director of the Division of Purchases and Supply during 1979.

The Advisory Committee has carefully reviewed our existing statutes and evaluated these with respect to requirements for the handling of Federal grants, the statutes of other states, the provisions and recommendations of the Model Procurement Code as approved by the American Bar Association, and certain charter provisions applicable to local governments in Virginia. The proposed legislation contained in this report would repeal certain existing State law and put in place general law applicable to procurement by the State, as well as its political subdivisions. The proposed legislation is sufficiently specific to require proper procurement procedures but also reasonably flexible to afford local governments the opportunity to structure their detailed procurement procedures to meet their specific needs.

I commend this study for your serious consideration in enacting the proposed legislation to modernize and broaden the

procurement laws of this Commonwealth consistent with the requirements of present day procurement for governmental entities.

Very truly yours,

Charles B. Walker

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cc: The Honorable John N. Dalton

SENATE JOINT RESOLUTION NO. 148

Providing for a study of the State procurement laws under the direction of the Chairmen of the Committees on General Laws of the Senate and House of Delegates.

Agreed to by the Senate, February 21, 1979

Agreed to by the House of Delegates, February 19, 1979

WHEREAS, substantial funds are expended each year by the Commonwealth and her political subdivisions on the acquisition of construction, services, printing and supplies; and

WHEREAS, efficient procurement of these items results in significant savings to the people of this Commonwealth; and

WHEREAS, public confidence in the efficient, impartial, and professional procurement of these items is essential; and

WHEREAS, no comprehensive study of the procurement laws of this Commonwealth, which are scattered throughout the Code of Virginia, has ever been undertaken to ensure that these objectives are attained to their fullest extent under Virginia law; now, therefore, be it

RESOLVED by the Senate of Virginia, the House of Delegates concurring, That the Secretary of Administration and Finance is requested to form a Task Force composed of appropriate public officials and employees to undertake a study of the public procurement laws of Virginia.

The Secretary shall coordinate the development of the study with the Chairmen of the Committees on General Laws of the Senate and House of Delegates and shall consider and report to the Committees on General Laws of the Senate and House of Delegates on the desirability or feasibility of public contract legislation applying uniformly to the State and cities, counties, and other political subdivisions. It shall evaluate current and proposed procurement legislation in light of requirements for the handling of federal grants. It may compare the Virginia law with legislation adopted in other States and with the Model Procurement Code approved by the American Bar Association. The Secretary shall also coordinate his studies with and cooperate with the Joint Subcommittee to study the selection process for architects and engineers for capital projects for the State and its political subdivisions to avoid any duplication of effort and to insure a full and complete inquiry into the selection process.

All State agencies and political subdivisions shall cooperate with the Task Force in its study.

The Task Force shall make an interim report to the Committees on General Laws of the Senate and House of Delegates, not later than December one, nineteen hundred seventy-nine, and a final report no later than November one, nineteen hundred eighty, whereupon the Task Force's existence shall terminate.

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INTRODUCTION

Introduction

A study of the laws on public procurement in Virginia was authorized by Senate Joint Resolution 148, adopted at the 1979 Session of the General Assembly. That resolution directed the Secretary of Administration and Finance to establish a Task Force which would consider and report to the Committees on General Laws of the Senate and House of Delegates on the desirability or feasibility of public contract legislation applying uniformly to the State and cities, counties, and other political subdivisions. It would evaluate current and proposed procurement legislation in light of requirements for the handling of federal grants. It would compare the Virginia law with legislation adopted in other states and with the Model Procurement Code approved by the American Bar Association. The resolution required an Interim Report by December 1, 1979[1], and a Final Report by November 1, 1980.

Across the nation, much attention has been devoted during the last decade to the adequacy of the statutory structures within which public procurement activities are conducted. In the early 1970's, for example, the federal Commission on Government Procurement published a report which led to the establishment of the Office of Federal Procurement Policy. In 1975, the Council of State Governments published a lengthy study of State and local government procurement. Shortly thereafter, the American Bar Association, with funding from the Law Enforcement Assistance Administration, undertook the development of a Model Procurement Code, a model state statute encompassing both State and local government procurement. The American Bar Association's House of Delegates approved the Model Procurement Code early in 1979. The federal government has also announced that the procurement systems of recipients of federal grants would have to meet certain standards. The final version of these standards was published in August, 1979, as Attachment O to OMB Circular A-102.

Thus, in embarking on this study, Virginia is participating in a national development, rather than reacting to allegations of deficiencies in public contracting in the Division of Purchases and Supply, the Department of Highways and Transportation, or local governments. This study is more comprehensive, for it involves not a review of the procedures and policies of individual agencies, but an examination of the statutes under which all public agencies purchase materials, services, and construction.

Throughout this report, "procurement" means buying, purchasing, renting, leasing, or otherwise acquiring any supplies, services, insurance or construction from private sources. It also includes all functions that pertain to the obtaining of any supply, service, or construction, including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration.

The Interim Report summarized how Virginia's procurement laws compared with statutes in Georgia, North Carolina, Pennsylvania, Tennessee and Texas, as well as with the Model Procurement Code published by the American Bar Association and Attachment O to OMB Circular A-102, which contains the procurement requirements for any expenditure involving federal contract or grant funds. This led to the identification of a number of areas in which the present Virginia statutes are deficient.

Virginia procurement statutes are scattered throughout the Code, frequently intertwining organizational details with operational policies. This makes it difficult to locate the applicable laws. There is no uniform, coherent statement of the public policies pertaining to procurement activities. This has led to conflicting interpretations. For example, there are Opinions of the Attorney General holding that localities are not required to utilize competitive bidding on construction projects[2], but there are also Opinions reaching the opposite conclusion[3]. Some provisions are confusing. For example, Section 11-17 applies to contracts "for the construction, improvement or repair" of structures, yet excepts various contracts which seem to have no connection with the construction, improvement or repair of structures, such as contracts for the purchase of hay or grain. Many provisions on the same topic are inconsistent. For example, payment and performance bonds are required on local government construction contracts exceeding $25,000 (if awarded by competitive bidding),[4] but are required on State construction contracts over $10,000,[5] except highway construction contracts where the applicable statute requires a performance bond regardless of the amount of the contract, but makes no mention of a payment bond.[6]

There are serious omissions in Virginia's procurement laws. The purchase of goods by the State and by counties is covered in the Code, and by the charters for most cities, but there is no statute covering the purchasing of either goods or construction by school divisions. Where State funds are not involved, contracts for construction may apparently be awarded by school boards without competitive bidding or any other form of competitive procurement.[7] The procurement of both insurance and most services is not covered by statute at all for any governmental bodies. Virginia statutes invariably mention only one method of procurement, competitive bidding, offer differing incomplete definitions of that,[8] and furnish no guidance on any

[1] Senate Document 18 (1980)

[2] See Reports of Attorney General, 1950-51 at p. 35; 1951-52 at p. 142.

[3] See Report of Attorney General 1975-76 at p. 72; Opinion to the Honorable Vincent F. Callahan, Jr., dated March 25, 1980.

[4] Section 11-23 of the Code.

[5] Section 11-20 of the Code.

[6] Section 33.1-187 of the Code.

[7] See Report of the Attorney General, 1977-78 at p. 90. Many school divisions do utilize competitive bidding as a matter of policy, even in the absence of a statutory mandate.

[8] For example, Section 11-17 requires advertising for ten days. Section 33.1-185 requires advertising for fourteen days. Section 15.1-108 requires advertising for five days, but Section 2.1-442 does not require advertising at all.

method to be used if competitive bidding is not practicable.

The Advisory Committee concluded that Virginia's procurement laws should be overhauled, and that the final product should be a comprehensive statement applicable to all levels and agencies of government, articulating broad fundamental operating policies, the foremost of which is competition. The statutory scheme should be flexible to accommodate the variety of agencies and political subdivisions. It should be, and must be perceived to be, fair to vendors and to the public bodies.

The recommended legislation is attached. It includes commentary following many of the sections to explain the purpose, intent, or background of the particular provision. The Advisory Committee urges that if the General Assembly sees fit to adopt this bill, this commentary be included in the annotated Code as was done for the Uniform Commercial Code, the Administrative Process Act, and Title 8.01.

The balance of this report is a discussion of major topics considered by the Advisory Committee. In addition to the recommended legislation, a table of existing statutes and their disposition, a comparison of the recommended legislation with what the federal General Accounting Office considers proper features of public procurement, and summaries of Virginia cases and Opinions of the Attorney General dealing with public contracting are also attached.

Coverage

As noted previously, present Virginia procurement law is a patchwork of inconsistent provisions. The legislation developed this way because procurement policy was frequently an afterthought to an organizational decision. For example, a centralized purchasing agency existed for the State for over fifty years before the statute directed the use of competitive bidding in the purchase of goods.[9] Where there was no convenient organizational entity, such as a centralized purchasing agency or a purchasing agent, there simply was no coverage. This explains the omission of any mention of the procurement of most services. Where there were several public agencies involved, this led to separate procurement provisions which, either from the beginning or as the result of amendments over the years, became inconsistent.

The Advisory Committee approached from another angle, by attempting to identify what are or should be Virginia's fundamental public procurement policies, regardless of the organizational structure involved. Once these policies were articulated, they could prevail regardless of the level of government, organizational structure, or source of funds involved.

The Unique Nature of Public Procurement

Public bodies, like private organizations, are rarely self-sufficient. Both acquire goods, services, and construction by entering the marketplace. There are, however, some fundamental differences between the public customer and the private customer, and these differences both shape and must be accommodated in a public procurement system.

Of course, the government enters the marketplace within a prescribed framework of laws. This dependence upon affirmative legal authority inevitably makes public purchasing somewhat less flexible than private purchasing. In the private sector, the assumption is that a firm may develop and follow the practices it chooses unless prohibited by law. Innovations can be applied immediately, without waiting for the legislative process to produce an amendment to the statute. The result has been the development of buying practices in the private sector which in general are less objective, more personal, and more flexible than those in the public sector.[10] In the public sector, the statute prescribes the mode by which the power to contract must be exercised; the mode is the measure of the power.[11] The necessity for statutory authority also affords a convenient vehicle for attaching additional legislative restrictions and limitations. In the recommended legislation, the Advisory Committee suggests that a public body entering the marketplace should, insofar as possible, have the same abilities and obligations as a private organization of comparable size. Differences should be, but have not always been, supported by sound public policy reasons.

The lack of secrecy in public contracting is a fundamental difference.[12] Prices paid and sources of supply are seldom revealed in the private sector, and neither the media nor a citizen can compel involuntary disclosure. The fact that all procurement transactions in the public sector are matters of public record means that the public contracting official is accountable to a much larger constituency. If one source of supply appears to receive inordinate public business, his competitors may suggest or insinuate improprieties, and the public is quick to accept these allegations as fact. In the private sector, a vendor who impugned the honesty of a purchasing official in this way could not expect future orders from that official. In the public sector, unfounded insinuations must be expected and disregarded.

The combination of the lack of secrecy and public funds creates pressure for what is sometimes called "equitable distribution" of public contracts. One device intended to achieve this is competitive bidding. The extent of reliance upon competitive bidding in public procurement is the most obvious distinction between public and private procurement.

It should be acknowledged that competitive bidding is not the most efficient procurement method. That honor might go to unilateral selection of vendors, which would avoid the time and effort required to prepare unbiased specifications, publish an invitation, await responses, and compare bids. It should also be acknowledged that

[9] Ch. 508, (1979) Acts of Assembly.

[10] Reck, Dickson, *Government Purchasing and Competition* (Univ. of California Press, 1954) at p. 86.

[11] Aljian, George W., Ed., *Purchasing Handbook*, 3rd Ed. (McGraw-Hill, 1973) at p. 20-14.

[12] Aljian, op cit. p. 20-14.

competitive bidding does not necessarily ensure the lowest cost. The process itself is expensive for the procuring body. It may also be more expensive for the vendors who must prepare bids, and this expense is ultimately reflected in the purchase price. But in the public sector, despite the objective of economy, more importance is ultimately attached to the ways and means of obtaining prices than to the prices themselves.[13]

Despite disadvantages, public procurement is characterized by competitive bidding because the public perceives that this method ensures equal access to public business, provides controls over contracting officials to minimize favoritism and corruption, and implies cost savings. The Advisory Committee suggests, however, that the true hallmark of public procurement must be competition.

Competition affords every qualified vendor a fair opportunity to obtain public business. It avoids favoritism. It ensures that the public body is informed of the alternatives available, and provides the best chance that the expenditure of public funds will be made wisely.

All too frequently, however, competition is seen as a shorthand expression for competitive bidding. This confusion is abetted by Virginia's statutes, which occasionally mention competitive bidding, but never mention any other method of competitive procurement. It is necessary to understand at the outset that competition means access to consideration by a public body, and comparison of the salient features of the offer by the public body. Competitive bidding is one form of competitive procurement, but not the only one.

The legislation describes two methods of procurement featuring competition. The first, competitive sealed bidding, is a traditional form, characterized by detailed specifications and a bid expressed in dollars. The choice among qualified bidders can then be made on the basis of the lowest bid. The legislation lists the elements of competitive sealed bidding.

The other competitive method is competitive negotiation. Nowhere is the Advisory Committee's emphasis on flexibility more apparent than in the definition of this method. This method allows the public body is consider whatever factors it deems important. It does not mandate award to the low offer. In fact, it does not even mandate that cost be considered. It requires only that the availability of the business be made public, and that the public body identify the factors it will be considering in its evaluation. Both design-build and construction management contracts are awarded by competitive negotiation, but the technique can be used for goods and services as well as construction.

The legislation lists three major exceptions to the use of competitive sealed bids or competitive negotiation. First, if the goods, services, insurance, or construction are available only from one source, there is no need to stage a charade of competitive procurement. Second, in an emergency, formal procedures are not required.

Council of State Governments, *State and Local Government Purchasing* (1975) at p. 6.2.

COMMENT

The recommendation set forth in the following three paragraphs is as recommended by the majority of the Advisory Committee. We cannot support that recommendation, as we feel it creates the illusion that all purchases under $10,000 are exempt from the competitive process. We do not oppose such exemption for capital outlay purchases or purchases for major maintenance and repairs where time is of the essence. For any such purchases exempted from the normal competitive process, documented competitive quotations should be obtained wherever practicable.

Charles B. Walker
Secretary of Administration
and Finance

The third major exception to the use of competitive sealed bids or competitive negotiation, however, is the exception for small purchases, which the Advisory Committee suggests be defined as expenditures of less than $10,000. Transactions below that figure need not utilize the statutory procedures for competitive sealed bids or competitive negotiation. The public body would be free to develop any procedures it wishes, the legislation requiring only that competition be obtained where practicable.

The Advisory Committee recognizes that an expenditure of $10,000 is a significant expenditure. This figure was chosen for several reasons. First, in recent years the General Assembly has raised the level at which advertising and competitive bidding on State construction contracts are required to $10,000.[14] Similar adjustments have been required in the level at which competitive bids are required for the purchase of goods by counties. The figure has been raised from $1,000 to $2,500 to $5,000.[15] At least one city (Roanoke) already has the figure of $10,000 in its charter,[16] and Attachment O, prescribing procurement procedures where federal funds are involved, uses the figure of $10,000 as a threshold.[17]

It should be emphasized, however, that the legislation clearly encourages competition below $10,000, but just does not mandate a statutory form. Thus, a public body might require more formal procedures for the procurement of goods costing $9,000 than for construction in the same amount. Competition is still required wherever practicable. A public body is free to use competitive sealed bids or competitive negotiation if it chooses, regardless of the amount of the transaction.

The statute recognizes several relatively limited exceptions, too. These include purchases from operations

[14] Ch. 403, 1980 Acts of Assembly.

[15] Ch. 217, 1977 Acts of Assembly; Ch. 16, 1980 Acts of Assembly. See also House Document 7 (1980) (1979 Annual Report of the Local Government Advisory Council) at p. 4.

[16] Ch. 207, 1970 Acts of Assembly.

[17] Para. 11a, Attachment O to OMB Circular A-102, 44 Federal Register 47874, August 15, 1979.

of the Commission for the Visually Handicapped and from nonprofit sheltered workshops for the handicapped. In addition, legal services and expert witnesses associated with litigation or regulatory proceedings need not be competitively procured since that might involve premature disclosures of tactical plans or confidential work product. A term contract may be extended to permit completion of a pending assignment.

Having described two basic forms of competitive procurement, it was necessary to provide some guidance in selecting between the two. Because most procurement transactions lend themselves to competitive bidding, and because it is the traditional method, the legislation specifies that method, but provides two paths to the alternative of competitive negotiations. The first is that a public body may use competitive negotiations whenever it determines in writing that competitive sealed bidding is either not practicable or not advantageous. This determination is obviously not a forbidding obstacle, but rather only the manifestation of a conscious decision to forego competitive sealed bids.

For professional services, however, even that written determination is not required. The Advisory Committee recognized that most public bodies would determine that competitively bidding professional services is not advantageous, and this provision facilitates the use of competitive negotiations.[18]

Socioeconomic Considerations

The fundamental purpose of public procurement is to acquire the goods, services, insurance and construction needed for the operation of government. The objective is to acquire these items fairly at the lowest ultimate cost to the taxpayers.[19] In any procurement statute, many of the provisions are directed to this end. It is inevitable, however, that other governmental policies influence the procurement function. Frequently, the government's considerable purchasing power, like the federal government's dispensation of largesse, is brought to bear on socioeconomic problems.

Several observations concerning this phenomenon are appropriate. First, although there is a tendency to think first of programs such as set-asides for minorities or women when the topic arises, many other socioeconomic considerations are reflected in purchasing statutes. For example, in-state preference laws and sections allowing noncompetitive procurement from sheltered workshops use the purchasing power of government to favor particular vendors.

Second, each of these social or economic programs makes public procurement more costly and time consuming. It is a legitimate question how much of the extra costs and other burdens of the socioeconomic objective should be absorbed in the procurement process, and how much should be supported by more explicit means such as tax benefits or direct grants. Because the costs are hidden in the procurement process, all too often there is insufficient consideration of the real cost involved when public procurement is mobilized for some ancillary purpose.[20]

It is, of course, proper and appropriate for government's purchasing clout to be exercised in support of important governmental objectives. In drafting the recommended legislation, the Advisory Committee sought to incorporate the socioeconomic considerations reflected in existing law, making them uniformly applicable throughout public procurement in Virginia.

Present Virginia law contains two in-state preferences provisions. The first, in effect a provision preferring a Virginia firm in the event of a tie, applied to the Division of Purchases and Supply.[21] The other, permitting a reciprocal percentage differential against bidders from states which assess a percentage differential against Virginia firms, applied only to construction contracts.[22] The recommended legislation makes both the tie breaker and reciprocity provisions applicable to all procurement transactions.

In adopting this approach, the Advisory Committee declined to suggest that Virginia impose a price differential against all out of state bidders for several reasons. First, such a device is anticompetitive. It increases costs and decreases the potential sources of supply.[23] Second, it invites retribution by neighboring states against Virginia based vendors.[24] While it may be legally permissible,[25] such preferences are generally condemned.[26]

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[18]See Report of the Commission on Government Procurement, Vol. 1, p. 98:

"The procurement of professional services should be accomplished, so far as practicable, by using competitive proposal and negotiation procedures which take into account the technical competence of the proposers, the proposed concept of the end product, and the estimated cost of the project, including fee. The primary factors in the selection process should be the professional competence of those who will do the work, and the relative merits of proposals for the end product, including cost, sought by the Government. The fee to be charged should not be the dominant factor in contracting for professional services."

[19]In its Second Interim Report, the Special Grand Jury of the Circuit Court of the City of Richmond amplified this point:

"Government purchasing procedures must be designed and implemented to achieve several basic goals. First, they must ensure that the government purchases the highest quality goods at the lowest possible price. Second, they must ensure that the government orders what is needed and gets what it pays for. Third, the procedures must allow every interested business to have a fair chance of getting a government contract. Lastly, government procedures must protect government's legitimate interest." Id. at 1.

[20]The federal Commission on Government Procurement recommended "means to make the costs of implementing social or economic goals through the procurement process more visible." Report of the Commission on Government Procurement, Vol. 1, p. 122.

[21]Section 2.1-448 of the Code.

[22]Section 11-20.1 of the Code.

[23]As competition is reduced, prices tend to rise. One study suggests the rise is roughly the same as the percentage allowed in the preference statute. Council of State Government, "In State Preferences in Public Purchasing" (1965).

[24]*See* "In State Preferences in Public Contracting," 49 Colo. L.R. 205 (1978) at p. 212.

[25]*See* American Yearbook Co. v. Askew, 339 F. Supp. 719 (ND Fla. 1972), affd. 409 US 904 (1972); Cf. Reeves, Inc. v. Stake, __US__ (1980).

[26]*See* Council of State Governments, *Report on State and Local Purchasing*, (1975) at p. 9.4; National Association of Attorneys

On the other hand, where competition is free, and equal bids are received, there must be some basis for selecting one bid over another. Under these circumstances, a Virginia firm can be preferred. Likewise, if Virginia firms are disadvantaged when competing in another state because of that state's procurement law, reciprocal treatment in this State is appropriate.

The General Assembly enacted legislation in 1980 prohibiting discrimination because of race, religion, color, sex, or national origin in the awarding of contracts.[27] The recommended legislation applies this prohibition to all public bodies.

The General Assembly has favored two private sources by excepting them from competing for State business. These are activities under the supervision of the Virginia Commission for the Visually Handicapped[28] and nonprofit sheltered workshops serving the handicapped.[29] The recommended legislation extends this exception on a voluntary basis to all public bodies, but preserves the existing mandates for the Division of Purchases and Supply.

All of the above provisions direct the behavior of the public body. The Virginia Fair Employment Contracting Act,[30] which is transferred without change to the recommended legislation, directs the behavior of those who would undertake contracts with a public body.

As noted repeatedly throughout this report, the principle of full and open competition should be the touchstone of public procurement. Participation of small and minority businesses in this process should be facilitated, but not by relegating such businesses to second class status by establishing artificial set-asides or "sheltered markets." Those devices only weaken the ability of the businesses to compete in the open market, and make them increasingly dependent upon favored treatment in the public sector. In addition, such devices are administratively cumbersome[31] and susceptible to abuse.[32]

There are, however, a host of ways in which participation in public business can be facilitated without sacrificing competition. Special efforts to identify small or minority businesses, and to encourage them to seek public business, are appropriate. These efforts might include advertisement of opportunities in publications of less than general circulation, such as trade journals or minority audience newspapers. They might include coordination with the State Office of Minority Business Enterprise, special training or introductory seminars for firms without previous public contracting experience, or the division of requirements into multiple contracts within the ability of smaller firms. The Advisory Committee concluded that legislation in this area must be broad enough to authorize such programs without circumscribing innovation and flexibility.[33] The recommended legislation authorizes any programs consistent with the Act. That does not include deviation from the fundamental principle of competition.

The Advisory Committee recognized, however, that federal funding is occasionally conditioned upon the recipient expending the funds in ways inconsistent with full and open competition. In light of the United States Supreme Court's decision in *Fullilove* v. *Klutznick,* 48 USLW 4979 (July 2, 1980), such conditions are apt to increase. Many State agencies and localities are heavily dependent upon federal funds, and cannot afford to forego that revenue.[34] Rather than automatically acceding to federal conditions (as the Model Procurement Code does), the Advisory Committee recommends that a conscious decision be made in each instance by a public body that acceptance of federal funds under conditions at variance with the State legislation is in the public interest.

Procurement of Architectural and Engineering Services

No issue generated more comment during the course of the study than the procurement of architectural and engineering services. In recent years, increased attention has been given to such substantial expenditures. For example, in 1972, the Report of the Commission on Government Procurement recommended that the federal government

> "base procurement of architect-engineer services, so far as practicable, on competitive negotiation, taking into account the technical competence of the proposers, the proposed concept of the end product, and the estimated cost of the project, including fee . . . The practice of initially selecting one firm for negotiations should be discouraged, except in those rare instances where a single firm is uniquely qualified to fill an unusual need for professional services."[35]

In 1978, the United States Supreme Court decided *National Society of Professional Engineers* v. *United States,* 435 US 679 (1978), holding that a provision in the National Society of Professional Engineers' Code of Ethics which prohibited members from engaging in

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General, *Government Purchasing and the Antitrust Laws* (1977) at p. 28. The Special Grand Jury minced no words:

> "The idea that the Commonwealth ought to deal with local vendors because they will provide the best service is nonsense. The State should deal with anyone who provides the best product and service at the lowest possible price." Third Interim Report at p. 19.

[27] Ch. 422, 1980 Acts of Assembly, Section 2.1-376.1 of the Code.

[28] Section 2.1-450 of the Code.

[29] Section 2.1-450.1 of the Code.

[30] Section 2.1-374 *et seq* of the Code.

[31] "Currently, the SBA has different definitions of small for different programs. Some businesses qualify for preference in government contracting but can't get an SBA loan. The definitions also use a jumble of different criteria, including the number of employees, sales, net income and assets, that even the SBA says is confusing." "SBA Wants to Redefine Small Business To Stop Aid for Thousands of Companies," *Wall Street Journal,* March 12, 1980, p. 13.

[32] *See, e.g.,* "No Accused Firms Have Lost Minority Aid." Washington *Post,* February 27, 1980, p. D-9.

[33] These efforts are similar to those described in the Model Procurement Code, which does not contain provisions for minority or small business preferences or set-asides.

[34] *See* House Document No. 16 (1980), "Interim Report of the Joint Legislative Audit and Review Commission on Federal Funds in Virginia."

[35] Report of the Commission on Government Procurement, Vol. III, p. 115 (1972).

competitive pricing violated federal antitrust laws.[36] According to one observer, since that decision, "The professional associations have intensified their pressures on State and local govenments to enact legislation that would restrict the use of competitive price proposals for the procurement of architect/engineer services."[37]

In Virginia, the Joint Legislative Audit and Review Commission published a report in 1978 entitled, "The Capital Outlay Process in Virginia," which criticized the lack of competition in the selection of architects and engineers for State capital outlay projects. In 1980, another JLARC report criticized "an excessive reliance on non-competitive selection" in the procurement of consultants, including services provided by architectural and engineering firms, where those services were not part of a specific capital outlay project.[38]

In examining this topic, the Advisory Committee was materially assisted by House Document 36, the report of the Joint Subcommittee created by House Joint Resolution Number 275, adopted at the 1979 Session, and the legislation which it recommended that now appears in Section 2.1-548.1 of the Code.[39] That legislation mandates competition for the procurement of architectural and engineering services for State capital projects, but does not address similar services procured by the Department of Highways and Transportation or any political subdivision, or such services not associated with capital projects.

Much of the discussion concerning the procurement of architectural and engineering services is the result of the confusion of three distinct concepts: the desirability of competition, the role of price in the selection decision, and the method of determination of the price. The legislation recommended by the Advisory Committee embodies only one of these concepts, the desirability of competition, leaving the other two to the good judgment of each public body. The three concepts are discussed separately in this report to illustrate why the Advisory Committee felt that fixed rules for the latter two in the statute were inappropriate.

The central thrust of the proposed legislation is that competition should be a feature of all government procurement, wherever practicable. This includes architectural and engineering services. There are two obvious situations where competition is impracticable. First, there may be only one available source for the required services. While this may not be particularly likely in the case of architectural or engineering services, since Virginia is blessed with a number of highly qualified firms, if such an occasion did arise, a public body could procure architectural or engineering services from the sole source. The second exception is procurement under emergency services. The legislation reflects the common-sense realization that there are occasions when immediate action is required, and a public body must have the flexibility to respond to those circumstances. A recent example of such an occasion was the collapse of the Benjamin Harrison Bridge.

The legislation describes two methods which utilize competition for the procurement of any goods, services, or construction. The first is competitive sealed bidding, which is characterized by detailed specifications and a selection among qualified vendors on the basis of price. The other procurement method described in the legislation is competitive negotiation. Under this method, a public body may consider factors other than or in addition to price. The legislation makes no effort to mandate the role of price in the selection decision when a public body uses competitive negotiation. That is left to each public body. The legislation simply mandates competition.

It must be remembered that the use of competitive negotiation is not limited to the procurement of architectural or engineering services. This method is appropriate wherever the public body wishes to consider factors other than or in addition to price when choosing among qualified vendors. The term "competitive negotiation," however, is familiar in the context of architectural and engineering services.[40] The report of the Joint Subcommittee which recommended HB601 last Session described competitive negotiation as the traditional method of securing architectural and engineering services.[41]

The Advisory Committee was vigorously urged to prohibit public bodies in Virginia from even considering cost in the procurement of architectural and engineering services. Since the Supreme Court's voiding of the ban against competitive bidding, both the public and private sectors have had the ability to consider cost. The argument is now presented that if public bodies may consider cost, they would choose low cost, unprofessional design services, and that this would inevitably lead to a decline in the quality of services furnished. This highly paternalistic argument does not explain why public clients in Virginia are considered to be less able to perceive their own best interests when presented with full information than private sector clients. Nor does it explain why a person inclined to render unprofessional services will resist the temptation if chosen by a process omitting consideration of price, when it is perhaps more likely that such a person would still cut corners to maximize the profit.

Moreover, there is no unanimity on the question of whether cost should be a consideration in the selection process. Less than half of the states have adopted

[36]The Justice Department recently brought suit to force the American Consulting Engineers Council to cancel portions of its ethics code, including prohibitions against design competition. "Justice Agency Sues Engineers Council Over Parts of Code," *Wall Street Journal*, August 18, 1980, p. 3.

[37]Slawsky, Norman J. and De Marco, John J., "Is the Price Right? State and Local Government Architect and Engineer Selection," Public Administration Review, Vol. 40, No. 3, May/June 1980 at p. 269.

[38]"Management and Use of Consultants by State Agencies," Joint Legislative and Audit Review Commission, May 12, 1980.

[39]House Bill 601, Ch. 376, 1980 Acts of Assembly.

[40]*See*, for example, *A Guide to the Procurement of Architectural and Engineering Services*, published by the American Consulting Engineers Council, and "Management and Use of Consultants by State Agencies," JLARC Operational Review, May 12, 1980 at pp. 13-15.

[41]House Document No 36 (1980) at p. 4.

statutes which attempt to minimize the consideration of price in the selection of architects and engineers for contracts to which the state is a party. The commentary to the Model Procurement Code includes language for an alternative provision explicitly allowing "the price for which the services are to be rendered" to be considered.[42] And as noted earlier, the Commission on Government Procurement recommended that the federal government consider price, although this recommendation has not been accepted by Congress. The procurement of architectural and engineering services by the federal government is prescribed in the "Brooks bill."[43] Located elsewhere in the United States Code, however, is a limitation of the fee which can be paid for such services to 6 percent of the project cost.[44] The selection of firms is thus restricted at the outset to those willing to provide services within that 6 percent limit. Better qualified firms able to command a higher fee may simply abstain from federal work. As the American Consulting Engineers Council has noted, "cost is a major consideration in any procurement process."[45] Under the federal procedure, however, the fee is a major consideration not for the client but only for the provider of the services.[46]

No state statute goes further than Maryland's,[47] which, while exciting the vehement objection of various professional associations, has not, in the opinion of the responsible state official, led to a deterioration of the quality of professional services rendered. It has, however, resulted in a significant reduction in the total of fees paid.[48] This is offset, to some degree at least, by the time, expense, and personnel involved in a procurement system which resembles competitive bidding professional services. It is important to note, however, that the professional associations in that state do not claim that the process has led to unprofessional or low-quality services, only that the monetary savings are illusory when considered in light of the additional time and manpower involved in the selection.[49]

It was precisely because there are a variety of techniques for securing architectural and engineering services being utilized by public bodies across the country that the Advisory Committee concluded it was inappropriate to mandate for all public bodies in Virginia a particular mode.[50] The Advisory Committee concluded that within the broad principle of competition, a public body should be free to identify and consider those factors which the public body feels are relevant to the particular transaction. In taking this position, the Advisory Committee is not endorsing the consideration of price in the selection process for architectural and engineering services, but rather declining the position that all public bodies must be precluded from access to information or techniques available to other customers for such services. This leaves to the public body the decision concerning what weight, if any, to give to price, as well as the point at which price enters into the selection process.

The last concept is the calculation of the fee to be paid for architectural or engineering services. As noted in House Document 36, there are a variety of ways to determine the compensation. These include lump sum, salary costs times a multiplier, cost plus fixed fee, percentage of construction cost, cost per unit, and per diem. The State has used a fee schedule for architectural and engineering services on capital outlay projects for many years. Recent changes fix this fee as a percentage of an independent estimate of the cost of construction at the preliminary plans stage.[51] The Department of Highways and Transportation, on the other hand, usually negotiates each fee based upon the anticipated man hours required. Each of the methods may have some advantages, and the Advisory Committee declined to limit public bodies in their choice.[52]

The Advisory Committee concluded that within the broad principle of competition, public bodies should be free to structure different procedures for selection of architects and engineers, and different methods of determining their fees. This might be done in statutes such as Section 2.1-548.1 *et seq,* which applies to State capital projects. It might also be done in regulations, directives or ordinances. Because the Advisory Committee recognized that negotiation would frequently be the appropriate method of procurement for such professional services, the legislation does not require a public body to consider competitive sealed bidding for professional services, thereby facilitating the use of competitive negotiations.

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[42] Model Procurement Code, Commentary following Article 5-501.

[43] 40 USC Section 541 *et seq.*

[44] 41 USC Section 254 (b).

[45] *A Guide to the Procurement of Architectural and Engineering Services*, p. 5.

[46] The same result obtains on State capital outlay projects, where the fee is prescribed in advance as a percentage of the estimated construction cost. See Section 50.05, Capital Outlay Manual (1980).

[47] Md. Ann. Code Art. 41 Section 231 N to EE.

[48] According to a letter from Mr. Jerome W. Klasmeier, Deputy Secretary, Maryland Department of General Services, to Mr. Lonnie Robbins, dated October 16, 1979, fees for design contracts for 57 "new construction" projects totalling $183 million averaged 3.92% of the Total Estimated Construction Cost. The *lowest* architectural fee permitted under Virginia Capital Outlay Manual is 5% (estimated construction cost exceeding $5 million), and architectural fees range up to 8.85% for projects with an estimated construction cost of less than $25,000. Incidentally, at the time of Mr. Klasmeier's letter, the most successful architectural firm under the Maryland procedure, in terms of dollar volume of contracts, was a Virginia firm, the VVKR Partnership.

[49] Letter from Mr. Emil Kordish, Consulting Engineers Council of Maryland, to the Honorable Victor L. Crawford, dated November 1, 1978.

[50] The Brooks bill has been criticized, for example, as inhibiting the search for innovative techniques and money saving solutions. "The only competition permitted by the bill is the ranking of firms for one-at-a-time negotiation, not the ranking of proposals for comparative evaluation. This means that the blue ribbon professional firms, those that are larger and longer established, always get first crack at the Government business." Remarks of Representative Chet Holifield, quoted in "A-E: Competitive Price Negotiation," Government Executive, Vol. 12, No. 8, August, 1980.

[51] Section 50.01, Capital Outlay Manual.

[52] It should be noted, however, that if federal funds are involved, the fee for such services cannot be established as a percentage of the construction cost. See paragraph 12, Attachment O to OMB Circular A-102, 44 Federal Register 47874, August 15, 1979.

Insurance

In 1980, a bill was introduced (SB 278) which would require competitive bidding in the procurement of insurance. Since the procurement of insurance falls within the scope of this study, the Advisory Committee examined this area. It concluded that competition, but not necessarily competitive bidding, must be present in the procurement of insurance by public bodies.

Public bodies across the country have developed various methods of insurance procurement. In some areas, the public body will choose a broker or agent and then purchase the desired insurance. Under such an arrangement, the amount of coverages and the coverages actually purchased are based on the recommendations of the broker or agent. This is often done because the public officials lack sufficient expertise to evaluate their insurance needs and then buy appropriate insurance. This procedure has three disadvantages. First, the selection of the agent may be arbitrary or improper, or may appear to be so. Second, as the special grand jury observed and documented, there are inherent dangers in allowing a vendor to control the definition of the goods or services being provided.[53] Third, even assuming good faith in the description of needs, there is no incentive to offer lower rates, since the public body will have no basis for comparison.

As a result of these disadvantages, some public bodies instituted advisory boards made up of insurance agents to assist in the procurement process. Virginia had a State Insurance Board,[54] although it had a less direct role than similar boards at the local level. One of the first of such boards was the Insurance Advisory Committee of the City of Richmond. While such boards are certainly an improvement over the arbitrary selection of an insurance carrier, they may present both legal and philosophical problems.

In Rhode Island, such a board was found to be allocating the insurance contracts, and sharing the commissions. This constituted horizontal market allocation and an agreement not to compete in violation of the antitrust laws.[55] In a letter of assurance to the State Attorney General dated May 14, 1980, the agents agreed to desist.[56] A similar practice is being terminated in Maine.

Even more disturbing, however, is the apparently common practice of sharing commissions among insurance agencies that furnish no insurance or services. This began at the time insurance boards were created, apparently to placate the agents who would not be assured of a continuing source of revenue from sales of their insurance.

Investigations in New York and New Jersey have established that shared commissions in those States found their way back to officials or political parties.[57] Recent and continuing disclosures in Virginia suggest that the public procurement process in this State is no more immune from impropriety. While it was beyond the charge of this study to determine whether illegal practices are actually occurring in Virginia, the possibility is manifest.

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[53]"Second Interim Report, Special Grand Jury of the Circuit Court of the City of Richmond, Division I (1979).

[54]Section 2.1-525 of the Code was repealed in 1980, and replaced by Section 2.1-526.4, establishing a State Insurance Advisory Board.

[55]The application submitted by agents wishing to share in commissions on insurance for the City of Richmond contains the following:

"In applying for approval to participate in the commissions written for the City of Richmond, I (we) agree to refrain from direct solicitation of insurance and surety business from the City."

"The Richmond, Virginia Insurance Plan," p. 9.

[56]Letter to The Honorable Dennis J. Roberts, II, Attorney General of the State of Rhode Island, from Independent Insurance Agents of Woonsocket, dated May 14, 1980.

[57]The New Jersey Commission of Investigation found:

"Certain closed-door transactions by some officials and brokers—commission payments for which no services were required, cronyism, political kickbacks and other violations of the public trust—were so gross as to suggest outright corruption."

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"Instead of adopting obviously essential business-like procedures, many localities were adhering to entrenched systems of insurance purchase and management that promoted political and private interests rather than the public welfare."

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"(These are) symbolized by the long-entrenched, improper utilization of what is known in the insurance industry as 'commission sharing.' This term refers to the custom of splitting with other insurance brokers portions of commissions received by a primary broker as compensation for the insurance program he sells. Such sharing of commissions became over the years a devious patronage device utilized by controlling political regimes. The S.C.I. inquiry revealed that primary brokers were required to funnel portions of their commissions to the governing authorities who had contracted for insurance programs. These split fees were allocated to politically influential or subservient sub-brokers who returned the favor in the form of political contributions. Such sharing brokers generally provided no professional services for their commission shares. As a result of the misuse of the commission sharing process to buy political rather than professional services, self-serving resistance developed within the political 'establishment' to any proposals for reforming the system. This largely behind-the-scenes opposition to changing the status quo remains virulent." Report and Recommendations of the State of New Jersey Commission of Investigation on the Purchase and Administration of Public Insurance Programs (April, 1980), pp. 1-2.

The New York Commission of Investigation stated:

"The SIC has concluded that a substantial number of local governments have not set adequate guidelines for insurance coverage nor have they adequately explored the possibility of doing business at a sharply reduced cost. Further, numerous instances exist of governmental bodies not weighing available options. All too frequently, the insurance programs have been adopted with glaring disregard for the prudent expenditure of taxpayers' money. The wastefulness disclosed has not always been based upon personal gain for public or political officials, although such instances have certainly been found; it often is based on a willingness to allow the status quo to continue unchecked and unreviewed, . . ."

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"Local officials will have to decide whether it is more important to conserve the tax dollars of their constituents or to preserve political patronage."

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"Waste has been the central issue in the investigations. The payment of commissions to non-working insurance brokers is in our view unacceptable, particularly in these days of economic stringency. In each of the three inquiries conducted by the SIC, the primary broker testified that most of the brokers performed no necessary services on the policies for which they received commissions." "Insurance Commissions and Party Politics, Part III." State of New York Commission of Investigation (1979), pp. 34-36.

Even if the practice of commission sharing in Virginia is not yet tainted by criminality, it clearly affords a disincentive to competition. If an agent is assured of a share of the commission, even if he does not work or furnishes no service or insurance coverage, he may be satisfied not to compete. In addition, it is questionable public policy to expend public funds in this manner.[58] This practice was criticized in an editorial which appeared in the Danville *Bee* on March 13, 1979:

> Under the current system, an insurance advisory committee comprised of local agents handles and places all the city's insurance. Commissions from premiums are tossed into a single pool and doled out to local agents, based on numerous criteria, whether or not they write one line of municipal insurance.
>
> Dubbed the "Richmond Plan," the aforementioned system long has been a sore point with us. It bothers us to no end that some insurance agents get a share of these substantial goodies in return for doing nothing apart from being a breathing insurance agent . . .
>
> The Richmond plan was adopted at a time when the city's insurance business was concentrated in the hands of two or three large local firms. The idea was to give all local agents a piece of the action, a course of action that has worked primarily to the benefit of the agents.
>
> In this day of seemingly endless increasing costs—in insurance and everything else the city must buy with tax dollars—the city's primary concern should be the best possible coverage at the best price wherever it can be obtained . . .

It must be recognized that insurance boards themselves are not the problem, for they may have a beneficial role in a competitive procurement process. The structure of the process itself, and the way in which the insurance advisory board is integrated into the process, are critical. Care must be taken to avoid the legal flaws or other inefficiencies.

In addition to avoiding the completely arbitrary selection of an insurance agency, the use of insurance advisory boards does provide public bodies with information and advice concerning available and desirable coverages. In recent years, perhaps out of a desire to avoid reliance upon what might be perceived as hardly disinterested advice, many public bodies have retained independent consultants to analyze their insurance needs and assist in the procurement process. Others have employed professional risk managers to provide this function. Under either method, as with proper use of an insurance advisory board, competition can be obtained, either through competitive negotiation or competitive sealed bids.

The experience of Virginia localities proves that by introducing competition into the procurement of insurance, substantial money can be saved. For example, in 1977 the Chesapeake City Schools, following analysis of their needs and preparation of specifications by a consultant, used a competitive program, to purchase more coverage than the previous year for over $100,000 less. The premium for insurance for Prince William County was reduced by over $30,000 following a competitive program.[59] Henrico County realized savings of 25% on the same lines of insurance by using competitive bidding.

One encounters a number of arguments against an open and competitive process for procurement of insurance. Perhaps the most misleading is the statement that competition will have no effect upon price, or "since insurance rates are very closely controlled in Virginia by the State Corporation Commission, a large number of identical bids would be received with no savings whatever."[60] In fact, Virginia law requires prior approval of premium rates by the State Corporation Commission for only four lines of insurance: workman's compensation, motor vehicle assigned risks, basic property coverage and uninsured motorists coverage as well as excess rates for a specific risk.[61] In addition, legislation permits the Commission to require the prior filing of rates or supplementary rate information if the Commission finds that competition is not an effective regulator,[62] but this has been done only for physician, surgeon and other medical malpractice liability coverage.[63] For all other lines of insurance within its jurisdiction, insurance companies file rates for average commercial or personal risks. Most commercial rating plans filed provide for variances from the otherwise applicable premium based upon actual and/or contemplated experience or other factors. Thus, for the overwhelming amount of insurance purchased by public bodies, including property damage liability, fire, miscellaneous property, burglary and theft, personal injury liability, fidelity and surety and motor vehicle insurance, price competition is not precluded.

It is sometimes claimed that insurers will refuse to participate in a competitive process. Experience throughout Virginia disproves that, for many public bodies have successfully instituted competitive procurement of insurance. A recent national survey of municipalities disclosed that during the years 1975-1977, over 60% of the municipalities utilized competitive bidding programs for general liability and automobile liability coverage.[64]

Some objections to competition result from the chronic tendency to equate competition with com-

[58] In 1979, the City of Richmond paid insurance commissions of over $175,000. Of this total, 25%, or less than $44,000 was actually retained as compensation by the agents of record for the various policies. The Insurance Advisory Committee received 75% of the total, amounting to $131,680. Of this amount, 25%, or almost $33,000 was expended for administrative expenses, including compensation for the members and Executive Secretary of the Insurance Advisory Committee, as well as other persons who actually rendered services. The balance of approximately $99,000 was distributed to members of the so-called "Insurance Pool" according to a formula which does not require that any insurance or service be furnished by the recipient. In fact, many members of the "Insurance Pool" do not do so.

[59] Data provided with the consent of these jurisdictions by Messrs. R. L. Fisher and Samuel Rosenthal of Industrial Insurance Management Corp., the consultant retained by those jurisdictions.

[60] The Richmond, Virginia Insurance Plan, p. 2.

[61] Sections 38.1-220 and 38.1-279.47 of the Code.

[62] Sections 38.1-279.33 and 38.1-279.40 of the Code.

[63] Order of State Corporation Commission, Case No. INS800055 (1980).

[64] Municipal Liability Insurance, Survey of Municipalities and Insurance Companies, All Industry Research Advisory Council (May, 1980), p. 40.

petitive bidding. There may be reasons why a public body might choose the more flexible method of competitive negotiation in lieu of competitive sealed bids. These include the desire for coverage suggestions from carriers, the recognition that the low bid may not be the best bargain, and the difficulty of drawing uniform specifications acceptable to all potential carriers. These are not, however, reasons for foregoing competition.

Competition does not dictate that insurance needs be either consolidated or fragmented. That is up to the public body. Nor does competition require annual contracts, with the potential for frequent adjustment to a new carrier. The majority of municipalities seeking competitive bids conduct such programs only once every three years.

The Advisory Committee concluded that competition should be the public policy in Virginia for the procurement of insurance as it should be for all other procurement. Accordingly the legislation does not exempt it.

Bonds

The use of bonds for various purposes is a feature of public procurement, especially construction. In recommending consistent legislation, the Advisory Committee felt that the fundamental purpose of each bond must be controlling.

A bid bond is submitted with the bid. It is a device to ensure that the bidder, if offered the contract, will accept and execute the contract in accordance with the bid. The bond promises that the bidder and his surety are jointly and severally liable for the amount of the bond, usually about five percent of the amount of the bid, if the bidder refuses to honor the bid upon being tendered the contract. The bid bond contributes to the sanctity of the system for bidding on public contracts and leads to the certainty and reliability of bids.[65]

There are a number of problems in the present statutes relating to bid bonds. First, the statutes do not conform to existing practices, for they require a certified check, and then allow a bid bond to be submitted to lieu of the certified check. In practice, a bid accompanied by a certified check is the exception. In the recommended legislation, the bond is required, and the certified check is a permissible alternative. Both are still acceptable, but the legislation is in terms of the more usual bid bond.

The present statutes are not consistent. Bid bonds for highway construction bids must be for an amount twenty percent more than the amount required if a certified check is submitted.[66] For other State construction contracts, the face amount of the bond need only be the same as the amount required if a certified check is submitted.[67] And no statute requires bid bonds on local government construction contracts, although they are invariably used.

The recommended legislation requires bid bonds for bids over $25,000. This figure was chosen for several reasons. First, the General Assembly in 1980 raised the threshold for payment and performance bonds on local government construction to $25,000,[68] and the Advisory Committee felt that uniformity at that level for all bonds would minimize confusion.

Second, bid bonds for lesser projects would not amount to a significant forfeiture, and would thus not further the purpose of emphasizing the binding character of the bid. Third, a level of $25,000 would allow an area of limited risk where small and unproven contractors could compete for public work without securing a surety.

The legislation requires bid bonds in an amount set by the public body. Any other form of security, such as a certified check, would be in the same amount.

The legislation also provides that the forfeiture shall not exceed the face of the bond or the difference between the bid and the next low bid, whichever is less. This will fully protect the public body without providing the opportunity for a windfall.

The performance bond, which is always written with a payment bond, is clearly for the protection of public funds. By that bond, the contractor and surety promise to pay the sum of the bond unless there is satisfactory performance of the contract. The legislation conforms with the existing practice of requiring this bond in the face amount of the contract.

Unlike the bid bond and the performance bond, the payment bond is not primarily for the benefit of the public body. It is a feature of public contract law because it is impossible to place a lien upon public property in Virginia.[69] In the private sector, a subcontractor, materialman or supplier can recover the cost of work or goods in a project even if the prime contractor goes bankrupt or refuses to pay. He does this by placing a lien upon the owner's property which benefitted by his goods or labor.[70] Without the payment bond, in which the contractor and surety agree to pay for material and labor supplied in the performance of the work, subcontractors, materialmen and suppliers would bear an inordinate risk in undertaking work on public projects.

Present provisions concerning payment and performance bonds need revision. An example of the inconsistencies was cited in the introduction to this report. The recommended legislation standardizes the level at which such bonds are required at $25,000, the figure adopted by the General Assembly in 1980 for local government construction contracts.[71]

In recent years, bonding requirements have been cited as an impediment to small businesses' participation in public work.[72] The request has been to raise the level at which bonds are required. While some adjustment from the 1977 level of $2,500 was in order, the Advisory

[65] Newport News v. Doyle and Russell, 211 Va. 603 (1971).

[66] Section 33.1-186 of the Code.

[67] Section 11-19 of the Code.

[68] Ch. 403, 1980 Acts of Assembly.

[69] Phillips v. Univ. of Virginia, 97 Va. 472 (1899); Bowers v. Town of Martinsville, 156 Va. 497 (1931).

[70] Section 43-1 *et seq* of the Code.

[71] Ch. 403, 1980 Acts of Assembly.

[72] *See* House Document 18 (1979), "Report on Bonding to Small Businesses and Disadvantaged Businesses."

Committee fears that this approach is too narrow and overlooks the fact that the purpose of the payment bond is to protect firms providing labor and material on public projects who cannot obtain liens on the public property. It is not the public body which assumes the major share of additional risk on an unbonded project; it is those subcontractors and suppliers.

Moreover, the purpose of the bond can be achieved simultaneously with increased access for firms without bonding capacity and without additional expense. Present law requires payment and performance bonds from the general or prime contractor, but also provides that the prime contractor must require payment bonds from his subcontractors.[73] The bond that the State has used for capital outlay projects for several years,[74] however, and the bond published by the American Institute of Architects[75] which is widely used in the construction industry, provide protection to the sub-subcontractors, materialmen and suppliers. The double bonding requirement results in additional expense unnecessarily. It also denies firms without bonding capacity eligibility to work as subcontractors on public work. The public purpose is fully served just by the general contractor's bond. Accordingly, the recommended legislation deletes the double bonding requirement.

As noted previously, the recommended legislation speaks in terms of the most prevalent form of contract security, the bond. It does provide for alternative forms, such as a certified check or cash. It also mentions the letter of credit, which is emerging as a very useful tool in public contracting. The letter can be used as a substitute form of guaranty in public contracts. It has even been labeled a guaranty letter of credit.[76] This guaranty letter is designed to ensure that one or more parties to a contract will perform their duties under it. In the traditional situation, the owner of the structure requires that the contractor give him payment and performance bonds providing for the payment of certain sums of money if the structure is not completed in accordance with the contract. Under the recommended legislation, in order to fulfill this requirement, the contractor can procure a letter of credit stating that upon the contractor's failure to perform in accordance with the agreement, the bank will pay a draft drawn on the letter. The bank in return receives a promise from the contractor that he will reimburse it for any expenditure made under the letter of credit. The owner/beneficiary of the letter can only draw on the draft if it is accompanied by some certification of noncompliance. The required documents are a matter of contract and must be specifically stated in the letter. The owner must strictly comply with these requirements when attempting to collect on the draft. This certification is frequently accomplished by reducing the performance sought to statements that can be certified by a qualified third party such as an architect. This architect's certificate of noncompliance would trigger collection under the letter.[77]

In Virginia, localities frequently use letters of credit as a security device in erosion control agreements with subdivision contractors. The letter is also now used as a security device by a developer under Section 15.1-466 of the Code. The use of the letter of credit as a security device has become so prevalent that a recent glossary of construction terms defined the letter as:

> "An alternate to the furnishing of a performance bond by a surety where a bank issues a letter of credit to the owner as security for the performance of the contract." Meyer, *A Glossary of Construction Terms*, 14 *Forum* 924, 923 (1979).

In addition to these named devices, however, the legislation permits any other mechanism which will afford protections equivalent to the bonds. The thrust of these sections is to emphasize the substance of the purpose of contract security rather than the form of how that purpose is achieved. This will allow flexibility in developing innovative techniques without sacrificing the public interest.

Remedies

Any procurement transaction offers opportunity for conflicts or disputes between the parties. The public procurement system must identify the major potential conflicts, and afford some mechanism for resolving them. This is particularly important in the public sector, where vendors occasionally assert inherent "rights" merely because public funds are involved. An excellent example of this attitude is eligibility to sell to the public body. It may come as some surprise that the United States Supreme Court has stated:

> "Like private individuals and businesses, *the government enjoys the unrestricted power* to produce its own supplies, *to determine those with whom it will deal*, and to fix the terms and conditions upon which it will make needed purchases . . . It (the federal procurement statute) was not intended to be a bestowal of litigable rights upon those desirous of selling to the government." Perkins v. Lukens Steel Co., 310 US 113 at 125 (1940). (emphasis added)

Notwithstanding this flat statement, reasons of public policy have eroded this attitude, and the Advisory Committee concluded that no vendor should be blacklisted arbitrarily or capriciously. Accordingly, the legislation requires that any vendor determined ineligible to receive a public contract, whether by disqualification (removal from bid list, suspension, debarrment), or by refusal of prequalification (if such a procedure exists), should receive written notice of the reasons. The intent is not to encourage second-guessing the decision of the public body, but to ensure that the decision is not arbitrary or capricious. Since review of the decision is afforded by the legislation, no hearing need precede the decision,[78] although a public body

[73] Sections 11-20 and 11-23 of the Code.

[74] G.S. Form E & B, CO—10.1 (Rev. 2-79).

[75] AIA Document A-311.

[76] *See* Verkuil, "Bank Solvency and Guaranty Letters of Credit," 25 Stan. L. Rev. 716 (1973).

[77] *See* Joseph, "Letters of Credit—The Developing Concept and Financing Functions," 94 Banking L. J. 816 (1977); Comment, "Letters of Credit in Nonsale of Goods Transactions," 30 Bus. Law 1103 (1975).

[78] *See* Goldberg v. Kelly, 397 US 254 (1970), esp. footnote 9 at p. 263; Trap Rock Ind. v. Kohl, 284 A2d 161 (NJ. 1971)

could choose to provide one. The legislation does not attempt to list or limit acceptable reasons for disqualification.

A similar situation is presented when a bidder eligible to receive public contracts is determined not to be a responsible bidder for a particular contract. The conflict arises only if the bidder is the apparent low bidder. Accordingly, if an apparent low bidder is determined not to be a responsible contractor for the particular contract, the legislation requires that the bidder must be provided a written statement of the reasons for that determination. The public body is not required, however, to furnish reasons why a proposal submitted during competitive negotiations is not considered the most advantageous.

Another major conflict can occur where a bidder claims an error in the bids and seeks to be relieved of the obligation of entering the contract. In 1971, the Virginia Supreme Court considered such a situation where the forfeiture of a bid bond was at stake. After recognizing that an "obvious" error permitted withdrawal in most states, the Court adopted instead the minority view:

> "While it might seem harsh to hold against a bidder who has actually made a clerical mistake in the preparation of its bid for its refusal to enter into the contract awarded to it and to give a performance bond, Doyle and Russell must be held bound by the express provisions of its contract stating that it will not rely on a plea of mistake for cancellation of its bid. To hold otherwise would be to ignore the terms of the official bid form, the provisions of the bid bond, and the purpose of requiring a bond to accompany a bid. It would also seriously jeopardize the sanctity of the system for bidding on public contracts and lead to the uncertainty and unreliability of bids. The system followed here for awarding such contracts saves the public harmless, as well as the bidders themselves, from favoritism or fraud in its varied forms." Newport News v. Doyle and Russell, 211 Va. 603 (1971) at 608.

The following year, the General Assembly adopted alternative statutory procedures allowing withdrawal of bids on construction contracts under defined conditions when a mistake is claimed.[79] The Advisory Committee suggests only relatively minor changes. Since only one of the two procedures has been in common use, the proposed legislation omits the other procedure. It also permits a public body to establish a similar procedure for bids for other than construction contracts.

The Advisory Committee recognized that any procedure affords the opportunity for improper withdrawal. Under the retained procedure, a bidder could gather with other bidders after submission of bids, compare bids, doctor the working papers, and still submit them prior to the formal opening of bids. A claim for withdrawal under such circumstances would be difficult to detect. On the other hand, the procedure has been invoked only rarely on the State construction contracts to which it applies.

One of the most common conflicts in public contracting is an argument over the award of a contract. As noted above, the traditional position is that even statutes requiring competitive bidding confer no rights upon the bidders. As the West Virginia Supreme Court noted:

> "Statutes and ordinances of this type are enacted for the benefit of the public, to protect public coffers, and confer no rights upon individual contractors." Pioneer Co. v. Hutchinson, 220 SE 2d 894 (W. Va. 1975).

And it is essential that the public official be free to exercise judgment and discretion in procurement decisions. But if such decisions are not subject to some sort of review, allegations of capricious or criminal conduct are inevitable and both vendor confidence and public confidence in the fairness of the decision will suffer. Thus, the legislation codifies and makes applicable to all public bodies the holding of Taylor v. County Board, 189 Va. 472 (1949):

> "When the decision of the authorities is based upon a fair and honest exercise of their discretion, it will not be interferred with by the courts, even if erroneous. Courts do not in such cases substitute their judgment for the judgment of the body to which the decision is confided. Interference by the court is limited to cases in which the public body has proceeded illegally or acted arbitrarily or fraudulently."

The last major category of conflicts are disputes which arise during performance of a contract. Unlike the other conflicts, this has an obvious counterpart in the private sector, where disputing parties may negotiate a resolution, agree to the assistance of a disinterested party, or litigate in a court of law.

To define the dispute, a public body must take a position on a claim, and communicate that position to the contractor. The legislation does not specify this internal procedure, which could be as simple as an exchange of letters, or if the public body felt it necessary, more detailed. Thus, the Advisory Committee left in place existing legislation for highway construction claims[80] but is not mandating such a procedure for other public bodies.

The emphasis in the legislation is upon prompt identification and disposition of contractual claims. For that reason, the legislation requires submission of claims no later than 60 days after final payment. Acceptance of the final payment will not waive claims. The legislation does provide that pendency of claims shall not delay payments of amounts agreed due in the final payment.

For all of the above conflicts, one recourse is always available: filing suit. In addition, the legislation authorizes (but does not mandate) any public body to establish an administrative appeals process. To prevent the administrative appeal process from becomng, or being perceived as unfair or burdensome to contractors, no contractor is required to exhaust the procedure before filing suit (although if the administrative appeal process is invoked by a contractor, it must be completed before a suit is filed unless the public body agrees otherwise). The factual findings are conclusive, thus ensuring that the process does not merely become a rehearsal for a trial. In order for the factual findings to be conclusive, however, the administrative appeal

[79] Section 11-20.2 of the Code.

[80] Section 33.1-386 *et seq.*

process adopted by the public body must provide for a hearing before a disinterested person or panel, the opportunity to present pertinent information, and a written decision. Either party to the contract can initiate judicial review of the decision, which is confined to the issues of law.

The legislation also specifies the relief available if it is determined that the public body acted improperly. Again, it must be remembered that legislation requiring competition is intended primarily to benefit the public, not the bidders. Thus, monetary damages have generally not been awarded in disputes over eligiblity of bidders or awards of contracts. As stated by one court:

> "Such a statutory provision enacted as a protection to the (municipal) corporation cannot be used to make a disobedience of its provisions by the municipal officers a double source of punishment to the municipality. If the plaintiff is right in its contention then a disobedience of the provisions of the statute will make the municipality pay the difference between the lowest bid and the bid for which the contract is made, and also the profit that the lowest responsible bidder would have made if the statute had not been violated. But such is not the purpose of the charter provision . . . the statue was not enacted for the benefit of the plaintiff, and he cannot recover by reason of its provision. (citation omitted), *Molloy v. City of New Rochelle*," 198 N.Y. 402, 92 NE 94 (1910).

This proposed legislation, however, makes a major exception in two instances. If a public body determines that a bidder is not a responsible bidder, and awards the contract to another bidder, and it is subsequently detemined that the determination of non-responsibility was arbitrary and capricious, the bidder is entitled to the cost of preparation of the bid, but not projected or anticipated profits or the costs of appeal. Similar relief is available if an award is made to another bidder, and it is subsequently determined that the award was arbitrary and capricious and should have been made to the protesting bidder.

This course was selected for several reasons. First, where the contract has been awarded and accepted in good faith,[81] and another contractor has begun performance, it would be manifestly unfair to declare that contract void. On the other hand, the vigilance of vendors is the best mechanism for policing a public procurement system, and some effort to make them whole without encouraging frivolous appeals from disgruntled vendors is appropriate.

COMMENT

Although the Advisory Committee's recommendation does not statutorily address the creation of an appeal board or panel for State government in a mandatory sense, such a panel will be created for the Department of General Services with respect to all procurement executed by that Department. Such a board or panel wil be comprised of persons within the private and public sectors having demonstrated capabilities and expertise in procurement, public contracts, and public contract law. We recommend such a requirement for the Department of General Services be mandated statutorily. In accordance with the recommendation of the Advisory Committee, this leaves the creation of such a panel or board to the discretion of the local governing body for the political subdivisions.

Charles B. Walker
Secretary of Administration
and Finance

The legislation does not include several features urged upon the Advisory Committee. Some persons suggested that this legislation should create a special panel to hear all public contract disputes, similar to the Boards of Contract Appeals used by the federal government. In support of this feature, it was argued that this would be an efficient way to dispose of public contract disputes, and that it would result in a panel whose members had considerable expertise in public contract law.[82]

The Advisory Committee declined this suggestion for several reasons. First, except insofar as the legislature specifies differences, public contracts are controlled by the same body of law applicable to other contracts.[83] There are insufficient differences to warrant establishing a special tribunal. Moreover, the existence of a special tribunal might even tend to unnecessarily increase the differences between public and private contracts. Second, the Advisory Committee concluded that there was an insufficient volume of public contract disputes to warrant the expense of creating and operating such an agency. Third, the Advisory Committee had no indication that the Circuit Courts were incompetent or unable to handle public contract cases, and was loathe to recommend something which could be interpreted as a lack of faith in their performance.

The Advisory Committee was also urged, in lieu of recommending establishing a special tribunal, to specify several Circuit Courts around the State in which all public contract disputes would be litigated. The Advisory Committee concluded that this was more a question of venue than of procurement policy, and that the General Assembly had addressed this to its satisfaction in the revision of Title 8.01 in 1977.

Differences With The Model Procurement Code

In developing the proposed legislation, the Advisory Committee relied heavily upon the Model Procurement Code published by the American Bar Association. The Model Procurement Code is described by its authors as a "model" rather than a "uniform" statute, which means that jurisdictions are encouraged to adapt its provisions, rather than adopt them verbatim. Many features of the proposed legislation are clearly derived from the Model Procurement Code. For example, the description of various procurement methods and many of the ethics provisions are based on MPC sections. Since the Advisory Committee did not conclude that

[81] Note that "arbitrary and capricious" is not a synonym for bad faith. Cf. First Savings and Trust Co. v. Milwaukee County, 148 NW 22 (Wis. 1922); Univ. of Miami v. Militana, 184 So 2d 701 (Fla. App. 1966).

[82] The Model Procurement Code contains optional provisions creating such a Procurement Appeals Board, made up of at least three lawyers. It is described as a full-time body. See Section 9-501 *et seq.*

[83] In fact, some major contract cases in Virginia arose in the public sector, but that was not a factor in the decisions. See, for example, VMI v. King, 217 Va. 751 (1977) (obligations of architect to owner, statute of limitations); Valley Landscape Co. v. Rolland, 218 Va. 257 (1977) (relationship of architect to contractor); Ranger Const. Co. v. Prince William County School Board, 605 F2d 1298 (1979) (claims for attorney's fees in construction litigation).

Virginia should adopt the MPC verbatim, however, it would be appropriate to identify some of the major differences.

Article 2 of the Model Procurement Code prescribes a procurement organization. It provides that the Chief Procurement Officer shall "procure or supervise the procurement of all supplies, services, and construction needed by the State."[84] Even where the legislature exempts procurement through the Chief Procurement Officer, the transaction still must be in accordance with regulations promulgated by the Procurement Policy Office.[85] The proposed legislation contains no analogous provisions.

At the State level in Virginia, there are three major procurement agencies. The Division of Purchases and Supply of the Department of General Services is the centralized purchasing agency for goods, and also promulgates the rules and regulations for the purchase of goods not requisitioned through it. The Division of Engineering and Buildings of the Department of General Services assists in the administration of capital outlay construction, and promulgates rules and regulations for the procurement of architects and engineers for capital projects. The agency or institution to which the funds are appropriated is the party to these contracts. The Department of Highways and Transportation procures highway construction and related materials and equipment. In addition to these three agencies, the Department of Alcoholic Beverage Control purchases alcoholic beverages.

The Advisory Committee concluded that this division of responsibility was logical and appropriate, and that there was no reason to consolidate the procurement of these disparate items. Capital outlay construction is not "centralized." The process itself was the subject of a recent JLARC study, which, while recommending improvements in administration, refrained from suggesting that a central agency act as the owner in all capital outlay construction.[86] For several reasons, not the least of which would be the cost and manpower requirements with minimal offsetting benefits, the Advisory Committee shares that view.

With the exception of architectural and engineering services for capital projects, no statute provides central control over the procurement of services. Considering the variety of such services, which range from janitorial or gardening work through elevator or boiler maintenance to auditing or other professional services, the Advisory Committee rejects the notion that a single agency could or should be charged with procuring such services for other agencies.[87] Where uniform implementing policies are required, they can be effectively supplied through Administration and Finance Directives.[88]

[84] MPC Section 2-204.

[85] MPC Section 2-303.

[86] "Operational Review: The Capital Outlay Process in Virginia," Joint Legislative Audit and Review Commission (1978).

[87] The Joint Legislative Audit and Review Commission has apparently reached a similar conclusion. "Management and Use of Consultants By State Agencies" (1980), p. 17.

[88] *See, e.g.*, Administration and Finance Directives 2-80 and 4-80.

The proposed legislation concentrates on "how" not "who." Centralized procurement remains the rule wherever the General Assembly has mandated it, as it has for the purchase of materials, equipment, supplies and printing for State agencies[89] and for goods for counties.[90]

Central to Article 2 of the MPC is a separation of policy making and operational functions. Accordingly, the MPC creates a Procurement Policy Office which adopts the regulations that the Office of the Chief Procurement Officer must follow. The Advisory Committee rejected this departure from the traditional notion of administrative law in which an agency, within standards contained in the legislation, adopts implementing regulations and then enforces and abides by those regulations. This notion is embodied in the Administrative Process Act, Section 9-6.14:1 *et seq* of the Code. It ensures that the public officials are fully accountable, and are wholeheartedly committed to the letter and spirit of the regulations. This is as important in procurement as in any other area. A separate board does not necessarily insulate the procurement process from improper influences. In fact, an argument can be made that it could facilitate improper influence.

Finally, the Advisory Committee is satisfied that a mechanism exists for any necessary coordination of State procurement policy. The Governor, his cabinet, and the responsible agency heads appointed by him can certainly formulate policy as effectively as a new "superboard."

For some political subdivisions of the State, the MPC suggested organization appears unnecessarily ornate. The Advisory Committee felt that to mandate a procurement organization for localities would generate resentment, and would deflect attention from the more important policies articulated in the legislation. It was also mindful that a focus on organization at the expense of the procurement policies resulted in many of the deficiencies in the present law.

The Model Procurement Code describes one method of source selection as "competitive sealed proposals." It separately describes two similar procedures, one for most professional services and the other for architectural and engineering services.[91] The legislation recommended by the Advisory Committee consolidates all three methods into one, and describes it as "competitive negotiation."

The term "competitive sealed proposals" was rejected because it seemed likely to be confused with competitive sealed bidding.[92] "Competitive negotiation" was selected because it emphasizes the role of competition while connoting the flexibility inherent in a negotiating process. It is also a term readily understood in both the purchasing and construction communities.[93]

[89] Section 2.1-440 of the Code.

[90] Section 15.1-107 of the Code.

[91] MPC Sections 3-203, 3-207, 5-501.

[92] Ironically, early drafts of the Model Procurement Code used the term "competitive negotiation." *See* Preliminary Working Papers Nos. 1 and 2.

[93] *See* Council of State Governments, *State and Local Government Purchasing* (1975), at p. 6.6; American Consulting Engineers Council.

Throughout the recommended legislation, the Advisory Committee sought flexibility. It felt that the MPC approach, which mandated slightly different forms of competitive negotiation depending upon what was being procured, unnecessarily limited public bodies in developing innovative and responsive procurement methods. The fundamental guideline of competition, rather than the details of the procedure, should be the touchstone.

The Model Procurement Code was heavily influenced by the federal procurement system. Some features of that system, however, are less desirable at the State and local level. The volume of federal procurement, both in dollars and numbers of transactions, may warrant a quasi-judicial process for resolving disputes. The MPC suggests such a process, featuring a Procurement Appeals Board. There is no indication that there is anywhere near the necessary volume of public contract cases or disputes in Virginia to justify the expense of establishing such a body in Virginia. A number of other entities included in the MPC were omitted for similar reasons. These include a Procurement Advisory Council, Procurement Institute, and Ethics Commission.

Ethics

The Advisory Committee approached the matter of ethics in public procurement with a candid recognition of the limitations of such legislation. Whenever greed is more powerful than honor, there will be those who will violate a statute, and even the most draconian penalty is a surmountable deterrent. Nevertheless, statutes should define unacceptable conduct, both of public employees and those who accept public funds as vendors and contractors.

The Advisory Committee adopted two positions at the outset. First, because of the extraordinary trust and responsibility exercised by public officials conducting procurement transactions, and because of the legitimate expectation by the public that this trust and responsibility be exercised properly, the statute should describe a higher standard of conduct for procurement officials than for public employees generally. Procurement officials, like Caesar's wife, must avoid even the appearance of impropriety.

Second, the Advisory Committee decided that rather than attempt to consolidate all provisions with application in a procurement context, it would recommend legislation to fill the voids or deficiencies under existing legislation. In other words, the recommended legislation is an overlay; it supplements but does not supersede existing legislation which is located other places in the Code.

Two such statutes deserve special mention. Both were enacted in 1980. The Virginia Governmental Frauds Act (Section 18.2-498.1 *et seq*) and a statute outlawing combinations to rig bids submitted to public bodies (Section 59.1-68.6 *et seq*) filled huge gaps in the procurement laws of this State.

The Virginia Conflict of Interest Act applies to all public officials and employees. Some conduct which is not forbidden under that Act is clearly unacceptable for purchasing officials. For example, aggregate annual income of less than $5,000 from a firm or business is not deemed to be a "material financial interest."[94] A purchasing official could select a firm from which he would receive up to $5,000, and could be successfully prosecuted only if it could be proved that this sum was "for services performed within the scope of his official duties"[95] or was a gift "that might reasonably tend to influence him in the discharge of his duties."[96] The words are high sounding, but easily evaded.

The recommended legislation differs in several important respects from the approach of the Conflict of Interest Act. First, it uses the term "pecuniary interest" which is more encompassing than "material financial interest." Second, unlike the Conflict of Interest Act, the recommended legislation does not prohibit certain contracts. It prohibits knowing participation in a procurement transaction on behalf of the public body by a public employee having a pecuniary interest in a contract. Thus, if an employee or official with a pecuniary interest in a firm seeking public business abstains or disqualifies himself, the public body is free to contract with that firm (unless the Conflict of Interest Act prohibits the contract, of course).

Nothing shakes confidence in public procurement as quickly as the disclosure that vendors or contractors provide gifts or special privileges to procurement officials.[97] The general prohibitions, which require proof of intent or tendency to influence an official act, are simply too lax for public procurement. The recommended legislation prohibits solicitation or acceptance of gifts of more than nominal or minimal value. Each public body could, in its internal rules, amplify this provision. The Advisory Committee felt that each public body should have the opportunity to define the precise threshold.

The special grand jury recommended that legislation restrict the employment of former purchasing officials.[98] The Model Procurement Code contains such restrictions.[99] The Advisory Committee concluded, however, that such restrictions unnecessarily curtailed the employment opportunities of a class of public employees, while the same purpose could be achieved by disclosure.

The recommended legislation also explicitly prohibits kickbacks and other improper payments involving public contracts.

A Guide to the Procurement of Architectural and Engineering Services. It is also the term used in Attachment O to OMB Circular A-102.

[94] Section 2.1-348(f)(2) of the Code.

[95] Section 2.1-349(a)(4) of the Code.

[96] Section 2.1-351(c) of the Code.

[97] "In the private sector, this kind of vendor conduct would amount to nothing more than good salesmanship. However, this same conduct cannot be viewed so benignly in the public sector, where the governmental market is supposed to be open to all businessmen on equal terms," Fourth Interim Report, Special Grand Jury, p. 12.

[98] Fourth Interim Report, Special Grand Jury, p. 5.

[99] MPC Section 12-208.

Conclusion

The legislation recommended by the Advisory Committee will not make public procurement immune from wrongdoing. No dictate yet, including the Ten Commandments, has accomplished that. The integrity of public purchasing depends not upon laws but upon people, both the public officials and those who seek to provide goods, services, insurance and construction to government. The most that legislation can do is articulate the policies and standards which the collective representatives of the citizenry believe should be implemented, and to specify certain safeguards.

This legislation is admittedly broad. The variety of public bodies in Virginia, the range of goods, services, insurance, and construction needed by those bodies, and the desire to provide those bodies the ability to develop responsive techniques made that necessary. The legislation does, however, provide a comprehensive uniform framework for public procurement at every level, and clearly establishes competition as the hallmark of public procurement in Virginia.

COMMENTS OF INDIVIDUAL MEMBERS
OF THE
ADVISORY COMMITTEE

2426 McRae Road
Bon Air, Virginia 23235
September 15, 1980

Mr. H. Douglas Hamner, Jr.
Commonwealth of Virginia
Department of General Services
209 North Ninth Street
Richmond, Virginia 23219

Dear Doug:

In accordance with your memorandum, I am attaching a Minority Report on certain problems in the procurement study.

It will be appreciated if you would include these comments as a part of the final report.

It has been a pleasure working with you on this study and it is believed that the General Assembly will adopt a version that will benefit the overall purchasing program in the State.

Sincerely yours,

T. Ashby Newby

MINORITY REPORT ON CERTAIN RECOMMENDATIONS CONTAINED IN THE VIRGINIA PROCUREMENT LAW STUDY

At the conclusion of the introduction to this report is a statement reading "this legislation is admittedly broad", therefore, I wish to object to three recommendations that are not in the best interest of public procurement and if adopted, can only result in huge unnecessary expenditures of public funds.

S11-37 (e) Award to the lowest responsive and responsible bidder. When so provided in the invitation to Bid, awards may be made to more than one bidder. In my opinion, there is no place in a competitive program for multiple awards. The user preference simply means that the user can choose the highest priced item of the multiple bidders, if desired.

Presumably, this type of award is patterned after the Federal procurement program and a recent report involving the GSA purchasing scandal cited that the multiple award program was one of the two most abused areas. Such an abuse is readily perceptible and leads to higher cost.

S11-41 (b) Upon a determination in writing that competitive sealed bidding is either not practicable or not advantageous to the public, goods, services, insurance or construction may be procured by competitive negotiation.
Senate Bill 278 introduced in the 1980 General Assembly would have required competitive bidding in the procurement of insurance. I wholeheartedly concur with this concept. That mandatory purchase of insurance by competitive bidding would save the tax payers of the Commonwealth thousands of dollars annually.

Several examples of savings through the competitive bidding of insurance were cited in this report. Also, the Department of Highways and Transportation has purchased its insurance requirements on a competitive sealed bid basis for more than 30 years. The award is made to the firm submitting the lowest bid meeting all requirements of the specifications. A review of the Highway Department's records on insurance purchases will substantiate that thousands of dollars are saved each year by a competitive bidding insurance program.

Therefore, I could not concur to any other method for a public body to purchase its insurance needs.

S11-41 (e) If adopted in writing, a public body may establish purchase procedures not requiring competitive sealed bids or competitive negotiation for single or term contracts not expected to exceed $10,000, provided, however, that such small purchase procedures will provide for competition wherever practicable.
I do not consider an amount under $10,000 to be a "small" purchase. $9,999 will buy a lot of pencils and will also purchase a car or truck. Such a purchase with public funds on a non-competitive basis, in my opinion, is a violation of the public trust.

Excluding purchases under $10,000 would cost the tax payers of the Commonwealth millions of dollars each year and can only lead to favoritism and collusion.

The Department of Highways and Transportation is the largest dollar volume purchaser of all State agencies. Their purchases exceed $135,000,000 annually for equipment, material and supplies for its own agency and for other State agencies. Highway Commission policy requires that all purchases exceeding $500 must be made on a competitive sealed bid basis. This program has literally saved the Department and the other agencies for whom they purchase, thousands of dollars annually. Further, the Highway Department has a firm policy for purchases up to the $500 required for sealed bids.

Consequently, I cannot support an exclusion from competitive bidding a sum that would exceed $1,000 and preferably it should be $500. To do so is an unwise and costly expenditure of our tax dollars for which there is no justification.

T. Ashby Newby
Committee Member

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September 15, 1980

FILE NO.:

Mr. Doug Hamner
618 9th Street
Office Building
Richmond, Virginia 23219

Re: Procurement Law Study

Dear Mr. Hamner:

I am responding to your letter of September 8, 1980, in which you indicate minority reports must be submitted by September 19, 1980.

Before getting to my suggestions, I would first like to compliment Bob Kyle on the outstanding job he did as the leader of our group. I doubt he will ever get the recognition he deserves for his efforts on this project.

My suggestions for changes are in the area of dispute resolution. Section 11-70(e) as now written provides, "A contractor may bring an action involving a contract dispute with a public body in the appropriate Circuit Court."

I see two problems with the above-quoted provision. First, with regard to the venue of dispute litigation, I believe it would be fair and equitable for the Department of Highways and Transportation to be treated the same as the rest of the state's contracting agencies. By virtue of §33.1-387 of the Virginia Code, the Department of Highways and Transportation is the only contracting agency in Virginia that requires a contractor to litigate its claim in the Circuit Court of the City of Richmond by trial without a jury.

At best, this distinction between the Department of Highways and the other state agencies is uncalled for. At worst, this distinction may result in a denial of due process. It is feasible that the cost of litigating a claim in Richmond could be so prohibitive that a contractor would give up a valid claim.

The legislature very aptly stated the intent of the venue chapter in §8.01-256 of the Virginia Code. There, the legislature indicated that convenience of the parties and witnesses and the administration of justice without delay and prejudice were the factors considered in drafting the venue chapter. In highway claims, even the primary highway department witnesses reside near the site of the work and not in Richmond.

As I understand it, the Department argues that claims against it are quite complicated and for that reason they should be litigated in only one circuit court and decided by a judge and not a jury. I concur in the Department's view that construction claims are complex. In fact, I think the state will eventually discover that major building construction claims are far more complex than highway construction claims. However, I feel complexity of the claims should have little bearing on an appropriate venue to try the case.

Based on the foregoing, I hope that the Secretary of Administration will recommend that §33.1-387 be repealed.

As you know, my second concern is over litigation of claims by and against the state or local government before "hometown" juries. This is a potential problem for two reasons. In many instances the potential jurors may have a monetary interest in the outcome of the litigation. If the local governmental body loses, public money must be used to pay the claim. Thus, there is a chance of the jurors being biased against the contractor. I have found that city, county and town attorneys use the threat of a "local" jury trial to their great advantage in dealing with contractors. On the other side, when a state agency is forced to litigate in a contractor's backyard, the potential influence of the contractor on the local jury could potentially affect the outcome of the case.

Second, a potential problem exists because construction contract claims can be so complex that a jury gets confused and pays little attention to the evidence. An article in the September 22, 1980 issue of "Business Week" outlines the problem. I believe it is in the government's and the contractor's best interest to have qualified people decide the facts in these cases.

I have given considerable thought on the best way to eliminate the potential problems of prejudice and confusion. As you know, at one time I felt that a board of contract appeals would be the best approach. This is the method the federal government uses. Almost all of the state and local government members of our group opposed the board approach because of its cost to the state.

After the objections were raised by the other members, I gave this matter more thought. I have concluded that when a party requests a jury, a fair approach would be to contractually require that it shall be a "Blue Ribbon" jury as provided for in §8.01-359(D) of the Virginia Code. Such juries are usually composed of experts in the field and are called upon to decide the complex factual questions which arise. These expert juries reduce the time necessary to try the case and they are more likely to reach the correct conclusions.

In conclusion, I feel the advisory group did an excellent job under the leadership of Bob Kyle. I hope the Secretary of Administration will consider the two suggestions I have outlined above.

Very truly yours,

ROCOVICH, DECHOW, PARVIN & WILSON, P.C.

Cordell M. Parvin

CMP/lp

LEGISLATION

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Title 11 a chapter numbered 7, consisting of sections numbered 11-35 through 11-80, as follows:

Chapter 7 of Title 11

ARTICLE I - General Provisions

S11-35 Title, Purpose. (a) This chapter may be cited as the Virginia Public Procurement Act.
(b) The purpose of this Act is to enunciate within this chapter the public policies pertaining to governmental procurement from nongovernmental sources. This chapter shall repeal and supersede all charter provisions, local ordinances, and regulations inconsistent with this chapter.
(c) The provisions of this chapter shall not apply to those contracts entered into prior to July 1, 1981, which shall continue to be governed by the laws in effect at the time those contracts were executed.

S11-36 Implementation. This chapter may be implemented by ordinances or regulations consistent with this act promulgated by any public body empowered by law to undertake the activities described in this chapter. Any such public body may act by and through its duly designated or authorized officers or employees.

> The goal of this chapter is to articulate fundamental policies, not details. Substantial implementation will be required in order for each public body to apply these policies to its unique situations. This will, however, permit necessary flexibility.

S11-37 Definitions. The words defined in this section shall have the meanings set forth below throughout this chapter.
(1.) Competitive Sealed Bidding is a method of contractor selection including the following elements:
(a) Issuance of a written Invitation to Bid containing or incorporating by reference the specifications and contractual terms and conditions applicable to the procurement. When it is impractical to initially prepare a purchase description to support an award based on price, an Invitation to Bid may be issued requesting the submission of unpriced offers to be followed by an Invitation to Bid limited to those bidders whose offers have been qualified under the criteria set forth in the first solicitation.

> The second sentence recognizes two-step bidding, which is a useful variation on the traditional method of competitive bidding.

(b) Public notice of the Invitation to Bid at least ten days prior to the date set for receipt of bids by posting in a designated public area or publication in a newspaper of general circulation or both. In addition, bids may be solicited directly from potential contractors.
(c) Public opening and announcement of all bids received.
(d) Evaluation of bids based upon the requirements set forth in the Invitation, which may include special qualifications of potential contractors, life cycle costing, value analysis, and other criteria to de-

termine acceptability such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose.

It may be necessary to define the qualifications of potential contractors, e.g. by requiring experience in work similar to that being bid (See Report of the Attorney General (1972-1973) at p.107), the ability to provide service promptly, or other unique capabilities. The emphasis is upon identifying such factors at the outset, in the Invitation to Bid. Evaluation of bids should not be a rote exercise. It should include value analysis or life cycle costing, which allows the public body to consider not just the initial outlay but the total cost.

(e) Award to the lowest responsive and responsible bidder. When so provided in the Invitation to Bid, awards may be made to more than one bidder.

The second sentence authorizes a multiple award after a competitive program. This might include awards on a regional basis, the division of total requirements among several firms, or an effort to allow user preference or vendor service to be considered during the term of a contract.

2.) Competitive Negotiation is a method of contractor selection including the following elements:

(a) Issuance of a written Request for Proposal indicating in general terms that which is sought to be procured, specifying the evaluation factors to be used, and containing or incorporating by reference the other applicable contractual terms and conditions.

(b) Public notice of the Request for Proposal at least ten days prior to the date set for receipt of proposals by posting in a designated public area or publication in a newspaper of general circulation, or both. In addition, proposals may be solicited directly from potential contractors.

(c) Optional discussion or negotiation with each responsible offeror determined to have submitted a proposal reasonably susceptible of being selected for award. A public body may also use a contractor selection process involving multiple rounds of competition.

(d) Award to the offeror whose proposal is determined in writing to be the most advantageous, taking into consideration the evaluation factors set forth in the Request for Proposal.

The essence of competitive negotiation is comparison of proposals from several offerors. It differs from competitive bidding in several important respects. First, while price may be a factor, it is not necessarily the determinative factor, since quality, service, experience, time of performance or other factors

may be sufficient justification for entering a contract for more than the lowest proposal. These factors are identified in the Request for Proposal. Second, the specifications are not as detailed, since the purpose is to solicit a variety of approaches or alternatives. Third, this method envisions face-to-face discussions and negotiation, unlike competitive bidding where there is no opportunity for such interaction.

This definition allows the public body to determine the weight to be given to all factors in the selection process. It is a flexible procedure, since cost may be designated as a major or minor factor. One major objective of this procedure would be to ensure access to consideration for public work upon known criteria.

There are many ways under this procedure to place cost in the proper perspective if the public body wishes to minimize the role of price in the selection process. For example, prices could be received in a separate envelope which would not be opened until selection of the best qualified offeror had occurred, and the award made to the best qualified offeror if the price submitted was reasonable. A Request for Proposal might state that the award would depend upon negotiation of a reasonable fee with the offeror making the proposal most advantageous to the public body. A public body might establish a fee schedule or contract sum in advance, which would remove price as a factor in selecting among those persons or firms submitting proposals.

Construction under fixed price design-build and construction management contracts are forms of competitive negotiation. The procedure for selection of architects, engineers and land surveyors for State capital projects as set forth in Section 2.1-548.1 et seq is also a form of competitive negotiation.

Unlike the Model Procurement Code, this chapter consolidates all competitive negotiation into one provision, rather than prescribing slightly different procedures for architects and engineers, for other professional services, and for any other applications. Because this definition specifies fundamentals rather than details, public bodies may adopt different procedures for various procurements as long as they are consistent with these fundamentals.

(3.) Public Body shall mean any legislative, executive or judicial body, agency, office, department, authority, post, commission, committee, institution, board or political subdivision created by law to exercise some sovereign power or to perform some governmental duty, and empowered by law to undertake the activities described in this Chapter.

This Chapter, in and of itself, does not authorize a public body to enter into contracts. That power would be conferred in enabling legislation. If a public body has the power to enter into contracts, the power must be exercised in accordance with this Chapter.

(4.) Goods includes all material, equipment, supplies, printing, and automated data processing hardware and software.

This is based on the former language in the State purchasing statutes, plus a reference to ADP hardware and software.

(5.) Construction includes building, altering, repairing, improving, or demolishing any structure, building or highway, and any draining, dredging, excavation, grading, or similar work upon real property.

This is a combination of the Model Procurement Code definition and former Section 11-17 of the Code.

(6.) Services includes any work performed by an independent contractor wherein the service rendered does not consist primarily of acquisition of equipment or materials or the rental of equipment, materials and supplies.

This is derived from the North Carolina definition. The definition of "contractual services" in former Section 15.1-106 of the Code was too limited. It referred to utility services available in most instances from only one source, frequently at prescribed rates. Since this definition includes only work performed by an independent contractor, other employment agreements are not within the purview of this Chapter.

(7.) Professional services includes work performed by an independent contractor within the scope of the practice of accounting, architecture, land surveying, law, medicine, optometry, or professional engineering.

(8.) Responsive Bidder means a person who has submitted a bid which conforms in all material respects to the Invitation to Bid.

(9.) Responsible Bidder or offeror means a person who has the capability in all respects to perform fully the contract

requirements, and the integrity and reliability which will assure good faith performance, and who has been prequalified, if required.

This definition allows the public body to consider integrity and reliability as well as capability. It is derived from the MPC definition, but recognizes that prequalification, if required by the public body, is essential to a determination that the bidder is responsible.

(10.) Informality means a minor defect or variation of a bid or proposal from the exact requirements of the Invitation to Bid or Request for Proposal which does not affect the price, quality, quantity, or delivery schedule for the goods, services or construction being procured.

This definition was suggested by the Attorney General's Office and is consistent with three opinions of the Attorney General. See Reports of the Attorney General (1969-1970) at p. 67; (1969-1970) at p. 215; and (1978-1979) at p. 58.

S11-38 [Reserved.]

S11-39 Compliance with conditions on federal grants or contracts. Where a procurement transaction involves the expenditure of federal assistance or contract funds, the receipt of which is conditioned upon compliance with mandatory requirements in federal laws or regulations not in conformance with the provisions of this chapter, a public body may comply with such federal requirements notwithstanding the provisions of this chapter only upon the written determination of the Governor, in the case of State agencies, or the governing body, in the case of political subdivisions, that acceptance of the grant or contract funds under the applicable conditions is in the public interest. Such determination shall state the specific provision of this chapter in conflict with the conditions of the grant or contract.

This provision does not address the situation where the Supremacy Clause in the United States Constitution allows a federal law to supplant a contrary State law. Rather, it addresses the situation where the federal government conditions its largess upon compliance with certain requirements, and the State or locality is presented with the choice of complying or foregoing the federal funds or contract. Examples of instances where federal statutory or regulatory conditions might conflict with State law include small business set asides, waiving of bonding requirements, or limitation of bidders to those from "labor surplus areas." This provision does not purport to allow compliance with federal grant or contract conditions which are violative of the Virginia Constitution.

S11-40 Cooperative Procurement. Any public body may participate in, sponsor, conduct or administer a cooperative procurement agreement with one or more other public bodies or agencies of the United States for the purpose of combining requirements to increase efficiency or reduce administrative expenses.

S11-41 Methods of Procurement. All public contracts with nongovernmental contractors for the purchase or lease of goods, or for the purchase of services, insurance or construction shall be awarded after competitive sealed bidding, or competitive negotiation as provided in this section, unless otherwise authorized by law.

The application of this section is limited to the purchase or leasing of goods, or the purchase of services, insurance and construction from private sources. This section has no application to the purchase or leasing of real property. Former law did not address the leasing of goods, or the purchases of insurance or most services.

This section requires competitive sealed bids with two broad exceptions. First, a separate statute may specify another method for a particular agency or commodity. For example, Section 11-45 of this Article lists several exceptions, and the purchase of alcoholic beverages for resale by the Alcoholic Beverage Commission is similarly excepted in Section 4-7 of the Code. Second, the section itself lists certain instances when competitive sealed bids are not required, including instances where competitive negotiations may be appropriate. If one of these subsections applies, the requirement for competitive bidding is removed, and it is not necessary to consider the other methods. In other words, if an emergency exists, competitive sealed bids are not required and no consideration needs to be given to competitive negotiation. Likewise, if an emergency exists where competitive negotiation normally would prevail, the public body may proceed under the emergency provision. If the commodity or service is a sole source item, the public body need not consider either competitive sealed bids or competitive negotiation, but may proceed under the sole source provision.

(a) Professional services may be procured by competitive negotiation.

The intent of this exception is to allow the procurement of professional services by competitive negotiation without a determination in writing that competitive sealed bidding is either not practicable or not advantageous to the public. Under the definition of competitive negotiation, the public body determines what weight, if any, to give to cost. Thus, this section does not require professionals to bid prices against each other nor does it require that public bodies consider price. On the other hand, the language is permissive, and should the public body wish to consider cost, or even to use competitive sealed bidding, it would not be prohibited. Again, professional services may be procured as sole source items or under the emergency or small purchase provisions.

(b) Upon a determination in writing that competitive sealed bidding is either not practicable or not advantageous to the public, goods, services, insurance or construction may be procured by competitive negotiation.

This provision is intended to give the public body a great deal of flexibility. "Practicable" and "advantageous" should be given ordinary dictionary meanings. The result is that a public body has an accessible alternative to competitive sealed bids. The public body need only to state in writing that competitive sealed bidding is either not practicable or not advantageous. This determination could be made for a specific procurement transaction, or for a particular service or commodity. This determination is intended to be almost conclusive, since the Virginia Supreme Court has stated in describing a decision at another stage of the procurement process:

> "When the decision of the authorities is based upon a fair and honest exercise of their discretion, it will not be interfered with by the courts even if erroneous. Courts do not in such cases substitute their judgment for the judgment of the body to which the decision is confided. Interference by the courts is limited to cases in which the public body has proceeded illegally or acted arbitrarily or fraudulently." Taylor v. County Board, 189 Va 472 (1949) at 483.

(c) Upon a determination in writing that there is only one source for that which is to be procured, a contract may be negotiated and awarded to that source without competitive sealed bidding or competitive negotiation.

Even construction may be a sole source item. See Report of the Attorney General (1946-47) at p. 110.

(d) In case of emergency, a contract may be awarded without competitive sealed bidding, provided, however, that such procurement shall be made with such competition as is practicable under the circumstances. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file.

(e) If adopted in writing, a public body may establish purchase procedures not requiring competitive sealed bids or competitive negotiation for single or term contracts not expected to exceed $10,000, provided, however, that such small purchase procedures will provide for competition wherever practicable.

Clearly, the competitive sealed bid procedures are not cost effective for small purchases. The figure of $10,000 was selected for several reasons. At least one locality had that figure in its charter

although most charters, and Section 15.1-108, as amended at the 1980 Session, use $5,000. Former Section 11-17, as amended at the 1980 Session, used $10,000 for State construction contracts. Attachment O, which states the requirements for procurement with federal grant funds, uses that figure. Former Section 33.1-185 used the figure of $25,000 for State highway construction contracts, but the lower figure prescribed by Attachment O had to be used whenever federal funds were involved. Rather than perpetuate this inconsistency, this provision establishes a uniform figure for all public contracts. Other portions of the highway construction statutes, such as construction by force account, are not affected.

It must be emphasized that a public body may elect to use competitive sealed bids below $10,000, or may adopt procedures for less formal competitive bidding. For example, a public body might determine that more formality is required for the purchase of $9,000 worth of goods or services than for construction of the same amount. The proposal allows the public body to determine the procedures, but states that competition should be obtained wherever practicable, and that the small purchase procedures must be established in writing.

11-42 Cancellation, rejection of bids; waiver of informalities. (a) An Invitation to Bid, a Request for Proposal, or any other solicitation, or all bids or proposals, may be cancelled or rejected. The reasons for cancellation or rejection shall be made part of the contract file.

The right to reject all bids is inherent in the power to contract, but bidders occasionally feel that a commitment to enter a contract is made when bids are solicited. For this reason, statutory recognition of the inherent right is common. For example, see former Section 11-21 of the Code. Nevertheless, this right ought not to be exercised arbitrarily or without explanation, for it leads to suspicion aggravated by the fact that a bidder expends time and money in preparing a bid.

(b) A public body may waive informalities in bids.

A definition of "informality" suggested by the Attorney General's Office, appears in Section 11-37 (10).

11-43 Contract pricing arrangements. (a) Except as prohibited herein, public contracts may be awarded on a fixed price or cost reimbursement basis.
(b) Except in case of emergency no public contract shall be awarded on the basis of cost-plus a percentage of cost.

A cost-plus-a-percentage-of-cost contract provides a negative cost incentive for the contractor. Federal law

prohibits this arrangement on federal contracts, and Attachment O prohibits states and localities from using this arrangement where federal funds are involved. Nevertheless, it may be necessary to use this arrangement where neither the owner nor the contractor knows the difficulties of performance in an emergency situation.

At present, most contracts are fixed price, and it is not anticipated that cost reimbursement contracts will supplant fixed price contracts. Cost reimbursement is appropriate where it is difficult to estimate with reasonable certainty the cost of performance, under some emergency conditions, and on construction management contracts.

S11-44 Discrimination prohibited. In the solicitation or awarding of contracts, no public body shall discriminate because of the race, religion, color, sex, or national origin of the bidder or offeror.

This is a slightly expanded version of House Bill 600, enacted at the 1980 Session. This language would be applicable to all public bodies, and specifically includes solicitation as well as awarding.

S11-45 Exceptions to requirement for competitive procurement. (a) Any public body may enter into contracts without competition for the purchase of goods or services

(1) which are performed or produced by persons or in schools or workshops under the supervision of the Virginia Commission for the Visually Handicapped; or

(2) which are performed or produced by nonprofit sheltered workshops serving the handicapped.

Subsection a. recognizes the two statutory exemptions from competitive bidding presently found at Sections 2.1-450 and -450.1. This section extends the exemptions to any public body desiring to use them. Since this chapter applies only to contracts with nongovernmental contractors, it is unnecessary to list purchases from the Department of Corrections as an exception.

(b) Any public body may enter into contracts for legal services, expert witnesses, and other services associated with litigation or regulatory proceedings without competitive sealed bidding or competitive negotiation, provided, however, that the pertinent provisions of Chapter 11 of Title 2.1 of the Code remain applicable.

This subsection dispenses with competitive procedures in securing services for litigation or regulatory proceedings, such as rate hearings before the State Corporation Commission. The rationale is that such proceedings require confidentiality during preparation which would be compromised by open procurement procedures. Retention of legal counsel for

other purposes would be subject to the procedures. Chapter 11 of Title 2.1 contains provisions addressing the employment of special counsel by State agencies. In most cases, such employment must be approved by the Attorney General.

(c) Any public body may extend the term of an existing contract for services to allow completion of any work undertaken but not completed during the original term of the contract.

(d) An industrial development authority may enter into contracts without competition for the acquisition of "authority facilities" or "facilities" as defined in Section 15.1-1374 (d) of the Code.

Industrial development authorities often purchase "facilities" prescribed by the enterprise being assisted. Under these circumstances, the preference of the enterprise is controlling.

(e) The Department of Alcoholic Beverage Control may procure alcoholic beverages without competitive sealed bidding or competitive negotiation.

S11-46 Prequalification. Prospective contractors may be prequalified for particular types of supplies, services, insurance or construction, and consideration of bids or proposals limited to prequalified contractors. Any prequalification procedure must be established in writing and sufficiently in advance of its implementation to allow potential contractors a fair opportunity to complete the process.

Prequalification frequently contributes to the efficiency of the source selection process by identifying responsible contractors or vendors with specialized expertise, such as highway or electrical contractors. This provision would include the maintenance of vendor lists by purchasing offices. The second sentence emphasizes that prequalification must be a bona fide process, and not a ruse to exclude bidders arbitrarily. A remedy is provided elsewhere for a firm denied prequalification.

S11-47 Preference for Virginia products and firms. (a) Public bodies shall without sacrifice of price, quality or other criteria identified in the Invitation to Bid or Request for Proposal give preference as far as may be reasonable and practicable to goods, services and construction produced in Virginia or provided by Virginia persons, firms or corporations.

(b) Whenever any bidder is a resident of any other state and such state under its laws allows a resident contractor of that state a preference measured by a percentage of the difference between the bid submitted by such contractor and the bid submitted by a contractor who is a resident of another state, a like preference may be allowed to the lowest responsible bidder who is a resident of Virginia.

The first paragraph embodies former Section 2.1-448, which when read with 2.1-442, applied an in-state preference in instances where price was not sacrificed. The second paragraph is taken from former Section 11-20.1, and is intended to prevent a bidder from a state with a percentage price preference law from taking advantage of the fact that Virginia does not have such a parochial provision. Of Virginia's immediate neighbors, only West Virginia has a percentage of price preference statute.

S11-48 Participation of small and minority businesses. All public bodies may establish programs consistent with all provisions of this chapter to facilitate the participation of small or minority businesses in procurement transactions. Such programs shall be in writing, and may include cooperation with the State Office of Minority Business Enterprise, the United States Small Business Administration, and other public or private agencies.

In recent years, a wide variety of programs directed at small or minority businesses have been proposed. Rather than mandate identical programs for every public body, this provision would encourage experimentation and innovation. Such programs might include identification of small and minority firms, division of requirements to facilitate participation, special efforts to solicit bids from small or minority businesses, or special publications or training programs. This provision does not authorize disregarding other provisions in this Chapter.

S11-49 Use of brand names. Unless otherwise provided in the Invitation to Bid, the name of a certain brand, make or manufacturer does not restrict bidders to the specific brand, make or manufacturer named; it conveys the general style, type, character and quality of article desired, and any article which the public body determines to be the equal of that specified, considering quality, workmanship, economy of operation and suitability for the purpose intended, shall be accepted.

This provision is a condensed version of former Section 11-23.1. It would, however, be applicable to all public contracts, and not just construction of public buildings. Occasionally, it is necessary to obtain a proprietary product which is not a sole source item, such as a replacement part available from several distributors or an item to match existing products. This would be permissible if acknowledged in the Invitation. It is an exception to the public policy requiring acceptance of equals. Identification of a proprietary item in the Invitation may avoid a later dispute over whether another product is "equal" to that specified.

S11-50 Comments concerning specifications. Every public body awarding public contracts shall establish procedures whereby comments concerning specifications or other provisions in Invitations to Bid or Requests for Proposal can be received and considered prior to the time set for receipt of bids or proposals or award of the contract.

It is impossible to guarantee by statute or good intentions that every specification will be free from error or ambiguity. This section merely requires that a procedure for receiving and considering timely comments be established. It does not require a formal response or any appellate proceedings. Clear specifications are in the public body's interest, and remedial action, where appropriate, is apt to be taken voluntarily. A more elaborate procedure at this juncture of a procurement transaction could present the opportunity for harassment and delay.

S11-51 Employment Discrimination by contractor prohibited. All public bodies shall include in every contract of over ten thousand dollars the provisions in subsections (a) and (b):

(a) During the performance of this contract, the contractor agrees as follows:

1. The contractor will not discriminate against any employee or applicant for employment because of race, religion, color, sex or national origin, except where religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of the contractor. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this nondiscrimination clause, including the names of all contracting agencies with which the contractor has contracts of over ten thousand dollars.

2. The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that such contractor is an equal opportunity employer; provided, however, that notices, advertisements and solicitations placed in accordance with federal law, rule or regulation shall be deemed sufficient for the purpose of meeting the requirements of this section.

(b) The contractor will include the provisions of the foregoing paragraphs 1 and 2 in every subcontract or purchase order of over ten thousand dollars, so that such provisions will be binding upon each subcontractor or vendor.

(c) Nothing contained in this section shall be deemed to empower any public body to require any contractor to grant preferential treatment to, or discriminate against any individual or any group because of race, color, religion, sex or national origin on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex or national origin employed by such contractor in comparison with the total number or percentage of persons of such race, color, religion, sex or national origin in any community or in the State.

This section is the former Virginia Fair Employment Contracting Act, former Section 2.1-374 of the Code. That act only applied to State contracts, and this provision extends the expressed public policy of that law to all public bodies.

S11-52 Public inspection of procurement records. Except as provided herein, all proceedings, records, contracts and other public records relating to procurement transactions shall be open to the inspection of any citizen, or any interested person, firm or corporation, in accordance with the Virginia Freedom of Information Act.

(a) Cost estimates relating to a proposed procurement transaction prepared by or for a public body shall be open to public inspection only after award of the contract.

(b) Bid and proposal records shall be open to public inspection only after the award of the contract, provided, however, that any bidder or offeror shall upon request be afforded the opportunity to inspect such records prior to award, subject to reasonable restrictions to ensure the security and integrity of the records.

(c) Trade secrets or proprietary information submitted by a bidder, offeror or contractor in connection with a procurement transaction shall not be subject to public disclosure under the Virginia Freedom of Information Act, provided, however, that the bidder, offeror or contractor must invoke the protections of this section prior to or upon submission of the data, and must identify the data to be protected and state the reasons why protection is necessary.

The first exception prevents the public body's estimate from providing a floor below which bids are unlikely to be received.

The second exception is consistent with former Sections 2.1-442 and 15.1-109, as well as an Opinion of the Attorney General. See Report of the Attorney General (1975-76) at p.71. A change provides, however, for access by an interested bidder or offeror prior to award.

Under present law, trade secrets or other proprietary information are not excluded from the Virginia Freedom of Information Act. If provided, a competitor can request disclosure. This discourages participation in public procurement, and may limit proper evaluation of competing products. This provision would protect such information, but includes safeguards to ensure compliance with the general public policy expressed in the Freedom of Information Act.

S11-53 Negotiation with lowest responsible bidder. Unless cancelled or rejected, a responsive bid from the lowest responsible bidder must be accepted as submitted, except that if the bid from the lowest responsible bidder exceeds available funds, the public body may negotiate with the apparent low bidder to obtain a contract price within available funds, provided, however, that such negotiation may be undertaken only under conditions and procedures described in writing and approved by the public body prior to issuance of the Invitation to Bid and summarized therein.

Former Section 11-21 of the Code was amended in 1979 to authorize negotiation on State construction contracts

(other than highway construction) under carefully defined circumstances. This section would empower any public body wishing to exercise this authority to do so if it describes the conditions and procedures in advance. It is intended to avoid the time and expense of a second solicitation of bids, yet is more limited than the former statutory authority of the Division of Purchases and Supply, which may negotiate "whenever the Division has reason to believe that the low bid is not the best price." See former Section 2.1-442 of the Code.

S11-54 Withdrawal of bid due to error. (a) A bidder for a public construction contract may withdraw his bid from consideration if the price bid was substantially lower than the other bids due solely to a mistake therein, provided the bid was submitted in good faith, and the mistake was a clerical mistake as opposed to a judgment mistake, and was actually due to an unintentional arithmetic error or an unintentional omission of a quantity of work, labor, or material made directly in the compilation of a bid, which unintentional arithmetic error or unintentional omission can be clearly shown by objective evidence drawn from inspection of original work papers, documents and materials used in the preparation of the bid sought to be withdrawn. The bidder must submit to the public body or designated official his original work papers, documents, and materials used in the preparation of the bid within one day after the date fixed for submission of bids. Such work papers shall be delivered by the bidder in person or by registered mail at or prior to the time fixed for the opening of bids. The bids shall be opened one day following the time fixed by the public body for the submission of bids. Thereafter, the bidder shall have two hours after the opening of bids within which to claim in writing any mistake as defined herein and withdraw his bid. The contract shall not be awarded by the public body until such two-hour period has elapsed. Such mistake shall be proved only from the original work papers, documents and materials delivered as required herein.
(b) A public body may establish procedures for the withdrawal of bids for other than construction contracts.
(c) No bid may be withdrawn under this section when the result would be the awarding of the contract on another bid of the same bidder.
(d) If a bid is withdrawn under authority of this section the next higher bidder shall be deemed to be the low bidder.
(e) No bidder who is permitted to withdraw a bid shall for compensation supply any material or labor to or perform any subcontract or other work agreement for the person or firm to whom the contract is awarded or otherwise benefit, directly or indirectly, from the performance of the project for which the withdrawn bid was submitted.
(f) If the public body denies the withdrawal of a bid under the provisions of this section, it shall notify the bidder in writing stating the reasons for its decision.

This section is derived from former Section 11-20.2. It is extended to all public construction contracts, and includes the withdrawal procedure most commonly specified

under the former statute. Former Section 11-20.2 and this provision alter the rule stated in Newport News v. Doyle and Russell, 211 Va. 603 (1971). Public bodies are authorized to adopt similar provisions for other than construction contracts. A remedy is provided elsewhere if there is disagreement on the right to withdraw a bid.

S11-55 Modification of the contract. (a) A public contract may include provisions for modification of the contract during performance, but no fixed-price contract may be increased by more than twenty-five percent of the amount of the contract or ten thousand dollars, whichever is greater, without the advance written approval of the Governor or his designee, in the case of State agencies, or the governing body, in the case of political subdivisions;
(b) Nothing in this section shall prevent any public body from placing greater restrictions on contract modifications.

This section both authorizes and restricts changes to a contract during performance. The intention is to require exceptional action when the total of change orders significantly increases the amount of the contract.

Subparagraph (b) recognizes that some public bodies may wish to impose greater restrictions.

S11-56 Retainage on construction contracts. (a) In any public contract for construction which provides for progress payments in installments based upon an estimated percentage of completion, the contractor shall be paid at least 90 percent of the earned sum when payment is due, with not more than 10 percent being retained to assure faithful performance of the contract. After 50 percent completion, no further retainage shall be withheld unless there is a written determination that satisfactory progress is not being made in the work. All amounts withheld may be included in the final payment.
(b) Any subcontract for a public project which provides for similar progress payments shall be subject to the same limitations.

This section is consistent with the American Institute of Architects General Conditions and the Virginia Construction Industry Guidelines published by the Virginia organizations of the AIA, Associated General Contractors, Consulting Engineers Council and Virginia Society of Professional Engineers. In addition, it requires that the determination that progress is not satisfactory be in writing if any additional amounts are to be withheld after 50 percent completion. It results in the same total being retained as former Section 11-23.5.

S11-57 Bid Bonds. (a) Except in cases of emergency, all bids or proposals for construction contracts in excess of twenty-five

thousand dollars shall be accompanied by a bid bond from a surety company selected by the bidder which is legally authorized to do business in Virginia, as a guarantee that if the contract is awarded to such bidder, that bidder will enter into the contract for the work mentioned in the bid. The amount of the bid bond shall not exceed five percent of the amount bid. (b) No forfeiture under a bid bond shall exceed the lesser of (1) the difference between the bid for which the bond was written and the next low bid, or (2) the face amount of the bid bond.

The dollar threshold for a bid bond was raised to $25,000 to keep it in tandem with payment and performance bonds. The threshold for those bonds was raised to $25,000 on local government construction contracts in 1980. The use of a certified check is covered in Section 11-61.

Subsection (b) places a limit on the amount of the forfeiture which fully protects the public body but precludes a windfall.

S11-58 Performance and payment bonds. (a) Upon the award of any public construction contract exceeding twenty-five thousand dollars awarded to any prime contractor, such contractor shall furnish to the public body the following bonds:

(1) A performance bond in the sum of the contract amount conditioned upon the faithful performance of the contract in strict conformity with the plans, specifications and conditions of the contract.

(2) A payment bond in the sum of the contract amount. Such bond shall be for the protection of claimants who have and fulfill contracts to supply labor or materials to the prime contractor to whom the contract was awarded, or to any of his subcontractors, in the prosecution of the work provided for in such contract, and shall be conditioned upon the prompt payment for all such material furnished or labor supplied or performed in the prosecution of the work. "Labor or materials" shall include public utility services and reasonable rentals of equipment, but only for periods when the equipment rented is actually used at the site.

(b) Each of such bonds shall be executed by one or more surety companies selected by the contractor which are legally authorized to do business in Virginia.

(c) If the public body is the Commonwealth of Virginia, or any agency or institution thereof, such bonds shall be payable to the Commonwealth of Virginia. Bonds required for the contracts of other public bodies shall be payable to such public body.

(d) Each of the bonds shall be filed with the public body which awarded the contract, or a designated office or official thereof.

(e) Nothing in this section shall preclude a public body from requiring payment or performance bonds for construction contracts below twenty-five thousand dollars.

Legislation enacted in 1980 raised the dollar threshold to $25,000 on local government contracts. This section applies that figure to all other public construction contracts.

Former law requires these bonds "in a sum not less than one-half the estimated cost of the work." The almost universal practice is to require bonds in the full amount, and this is also the suggestion of the Model Procurement Code.

Note that while a bid bond is not required if there is an emergency, no similar exemption appears for the payment and performance bonds. The payment bond, particularly, affords protection to subcontractors, materialmen, and suppliers, and there is no reason to shift the risk to these parties because the prime contract was awarded under emergency circumstances.

This section does not require that subcontractors furnish bonds. The bond forms published by the AIA, as well as the payment bonds now being used by the State and some localities on capital projects, afford protection to sub-subcontractors and the subcontractor's materialmen and suppliers. The additional cost of bonds from subcontractors is passed on to the public body. While this provision does not prevent a prime contractor from requiring bonds from subcontractors, it does remove a statutory impediment to the participation as subcontractors in public work of firms which have been unable to obtain bonding, a major concern in recent years. See, for example, House Document 18, 1979 Session.

S11-59 Action on performance bond. No action against the surety on a performance bond shall be brought unless within five years after (1) completion of the contract, including the expiration of all warranties and guarantees, or (2) discovery of the defect or breach of warranty, if the action be for such.

This section is derived from the former Sections 11-20, 11-23, and 33.1-192.1. The venue language in the present statutes is omitted because Section 8.01-261 (6) covers venue in State court, and Virginia statutes cannot prescribe federal venue, as that is a matter of federal law.

S11-60 Actions on payment bonds. (a) Subject to the provisions of subsection (b) hereof, any claimant who has performed labor or furnished material in accordance with the contract documents in the prosecution of the work provided for in any contract for which a payment bond has been given, and who has not been paid in full therefor before the expiration of ninety days after the day on which such claimant performed the last of such labor or furnished the last of such materials for which he claims payment, may bring an action on such payment bond to recover any amount due him for such labor or material, and may prosecute such action to final judgment and have execution on the judgment. The obligee named in the bond need not be named a party to such action.

(b) Any claimant who has a direct contractual relationship with any subcontractor of the prime contractor who gave such payment bond but has no contractual relationship, express or implied, with such prime contractor may bring an action on the payment bond only if he has given written notice to such contractor within ninety days from the date on which the claimant performed the last of the labor or furnished the last of the materials for which he claims payment, stating with substantial accuracy the amount claimed and the name of the person for whom the work was performed or to whom the material was furnished. Notice shall be served by registered or certified mail, postage prepaid, in an envelope addressed to such contractor at any place where his office is regularly maintained for the transaction of business.
(c) Any action on a payment bond must be brought within one year after the day on which the person bringing such action last performed labor or last furnished or supplied materials.

This section sets forth the procedure for enforcing a payment bond. It is similar to the federal procedure and the laws in other states.

11-61 Alternative Forms of Security. (a) In lieu of a bid, payment, or performance bond, a bidder, offeror or contractor may furnish a certified check or cash escrow in the face amount required for the bond.
(b) If approved by the Attorney General in the case of State agencies, or the attorney for the political subdivision in the case of political subdivisions, a bidder, offeror or contractor may furnish a personal bond, property bond, or bank or saving and loan association's letter of credit on certain designated funds in the face amount required for the bid, payment or performance bond. Approval shall be granted only upon a determination that the alternative form of security proffered affords protection to the public body, subcontractors, materialmen and suppliers equivalent to a corporate surety's bond.

This provision authorizes alternatives to the bonds from corporate sureties authorized to do business in Virginia. Present law allows a certified check in lieu of a bid bond. A cash escrow would provide equivalent protection to the public body. It is unlikely that either of these alternatives would be used in lieu of payment or performance bonds.

Subparagraph (b) allows other alternatives, but requires a legal determination that equivalent protection will be afforded. The use of a letter of credit under the Uniform Commercial Code is a developing area. For example, it may now be used as a performance guarantee by a subdivider or developer under Section 15.1-466 of the Code.

This section does not abrogate the requirement for the protection traditionally afforded by bonds, but seeks to allow other devices to secure equivalent protection.

1-62 Bonds on other than construction contracts. A public body may require bid, payment or performance bonds for contracts for goods or services if provided in the Invitation to Bid or Request for Proposal.

ARTICLE III - Remedies

S11-63 Ineligibility. (a) Any bidder, offeror or contractor refused permission to or disqualified from participation in public contracts shall be notified in writing. Such notice shall state the reasons for the action taken. This decision shall be final unless the bidder, offeror or contractor appeals within 30 days of receipt by invoking administrative procedures meeting the standards of Section 11-71, if available, or in the alternative by instituting legal action as provided in Section 11-70.

(b) If upon appeal it is determined that the action taken was arbitrary and capricious and not in accordance with the Constitution, statutes or regulations, the sole relief shall be restoration of eligibility.

S11-64 Appeal of denial of withdrawal of bid. (a) A decision denying withdrawal of a bid under the provisions of Section 11-54 shall be final and conclusive unless the bidder appeals the decision within ten days after receipt of the decision by invoking administrative procedures meeting the standards of Section 11-71, if available; or in the alternative by instituting legal action as provided in Section 11-70.

(b) If no bid bond was posted, a bidder refused withdrawal of a bid under the provisions of Section 11-54 must, prior to appealing, deliver to the public body a certified check or cash bond in the amount of the difference between the bid sought to be withdrawn and the next low bid. Such security shall be released only upon a final determination that the bidder was entitled to withdraw the bid.

(c) If upon appeal it is determined that the decision refusing withdrawal of the bid was arbitrary and capricious, the sole relief shall be withdrawal of the bid.

Former Section 11-20.2 required the bidder to pay the costs of a hearing before the agency which already contests the right to withdraw. This section does not impose that burden, and uses the mechanisms established for other disputes.

S11-65 Determination of nonresponsibility. (a) Any bidder who, despite being the apparent low bidder, is determined not to be a responsible bidder for a particular contract shall be notified in writing. Such notice shall state the basis for the determination, which shall be final unless the bidder appeals the decision within ten days by invoking administrative procedures meeting the standards of Section 11-71, if available, or in the alternative, by instituting legal action as provided in Section 11-70.

(b) If upon appeal it is determined that the decision of the public body was arbitrary and capricious, and the award of the contract in question has not been made, the sole relief shall be a finding that the bidder is a responsible bidder for the contract in question. If it is determined that the decision of the public body was arbitrary and capricious, but the award of the contract in question has been made, the sole relief shall be a finding to that effect plus the cost of preparation of the bid, but not anticipated profits or expenses of the appeal.

(c) A bidder contesting a determination that he is not a responsible bidder for a particular contract shall proceed under this section, and may not protest the award or proposed award under Section 11-66.
(d) Nothing contained in this section shall be construed to require a public body, when procuring by competitive negotiation, to furnish a statement of the reasons why a particular proposal was not deemed to be the most advantageous.

This remedy is available to any firm removed or suspended from a vendor's list, or refused prequalification.

S11-66 Protest of award or decision to award. (a) Any bidder or offeror may protest the award or decision to award a contract by submitting such protest in writing to the public body or an official designated by the public body no later than ten days after the award or the announcement of the decision to award, whichever occurs first. No protest shall lie for a claim that the selected bidder or offeror is not a responsible bidder or offeror. The written protest shall include the basis for the protest and the relief sought. The public body or designated official shall issue a decision in writing within ten days stating the reasons for the action taken. This decision shall be final unless the bidder or offeror appeals within ten days of the written decision by invoking administrative procedures meeting the standards of Section 11-71, if available; or in the alternative by instituting legal action as provided in Section 11-70.
(b) If prior to award it is determined that the decision to award is arbitrary and capricious, then sole relief shall be a finding to that effect. The public body may cancel the proposed award or revise it to comply with the law. If after an award it is determined that an award of a contract was arbitrary and capricious, then the sole relief shall be a finding to that effect plus the cost of preparation of the bid, but not anticipated profits or expenses of the appeal.

A bidder may protest the decision to award a contract, or the award, for many reasons. These include claims that the evaluation was flawed, that the protestor's bid was improperly rejected as nonresponsive, that a competitor's bid was not responsive, or that the proper procedures were not followed. A bidder may not protest, however, a determination that a competitor is a responsible bidder or offeror, for that is a judgment which is the proper province of the public body. Note that a protest may be lodged prior to either a notice of intent to award or the award, but must be lodged no later than ten days after the first of these occurs.

S11-67 Effect of appeal upon contract. The validity of a contract awarded and accepted in good faith in accordance with this chapter shall not be affected by a protest or appeal.

S11-68 Stay of award during protest. An award need not be delayed for the period allowed a bidder or offeror to protest, but in the event of a timely protest, no further action to award the

contract will be taken unless there is a written determination that proceeding without delay is necessary to protect the public interest or unless the bid or offer would expire.

S11-69 Contractual disputes. (a) Contractual claims, whether for money or other relief, shall be submitted in writing no later than sixty days after final payment, provided, however, that written notice of the contractors intention to file such claim shall have been given at the time of the occurrence or beginning of the work upon which the claim is based. Nothing herein shall preclude a contract from requiring submission of an invoice for final payment within a certain time after completion and acceptance of the work or acceptance of the goods. Pendency of claims shall not delay payment of amounts agreed due in the final payment.
(b) Each public body shall include in its contracts a procedure for consideration of contractual claims. Such procedure, which may be incorporated into the contract by reference, must establish a time limit for a final decision in writing by the public body.
(c) A contractor may not invoke administrative procedures meeting the standards of Section 11-71, if available, or institute legal action as provided in Section 11-70, prior to receipt of the public body's decision on the claim, unless the public body fails to render such decision within the time specified in the contract.
(d) The decision of the public body shall be final and conclusive unless the contractor appeals within six months of the date of the final decision on the claim by the public body by invoking administrative procedures meeting the standards of Section 11-71, if available, or in the alternative by instituting legal action as provided in Section 11-70.

One key to proper disposition of claims on public contracts is prompt identification and monitoring of costs. Most contracts contain a provision on notification of claims. The language in subsection (a) is derived from Section 33.1-386.

Since this chapter is intended to set forth fundamental policies, the details of the procedure used by the public body to evaluate claims are left to the public body. There could be considerable variety, depending upon the complexity of the contract. For example, the present statutory procedure for State highway construction claims may not be an efficient procedure for claims on contracts for good or services. In any event, the public body must identify in its contracts the process for deciding claims. This process must have a time deadline. A final decision by the public body is a prerequisite to either administrative or legal appeal under Sections 11-70 or 11-71.

Delay in resolving claims should be in the interest of neither the public body nor the contractor. If it is necessary to appeal the decision of the public body, this appeal should be prosecuted promptly. The term of six months used in subsection (d) is roughly the same period between the final decision deadline for filing a legal action on State highway construction claims.

§11-70 Legal actions. (a) A bidder or offeror, actual or prospective, who is refused permission or disqualified from participation in bidding or competitive negotiation or who is determined not to be a responsible bidder or offeror for a particular contract may bring an action in the appropriate Circuit Court challenging that decision, which shall be reversed only if the petitioner establishes that the decision was not an honest exercise of discretion but rather was arbitrary and capricious.

(b) A bidder denied withdrawal of a bid under Section 11-64 may bring an action in the appropriate Circuit Court challenging that decision, which shall be reversed only if the bidder establishes that the decision of the public body was clearly erroneous.

(c) A bidder, offeror or contractor may bring an action in the appropriate Circuit Court to determine whether a proposed award or the award of a contract is not an honest exercise of discretion but rather is arbitrary and capricious and not in accordance with the Constitution, statutes, regulations, and the terms and conditions of the Invitation to Bid or Request for Proposal.

(d) If injunctive relief is granted, the court shall, upon request of the public body, require the posting of reasonable security to protect the public body.

(e) A contractor may bring an action involving a contract dispute with a public body in the appropriate Circuit Court.

(f) A bidder, offeror, or contractor need not utilize administrative procedures meeting the standards of Section 11-71, if available, but if those procedures are invoked by the bidder, offeror, or contractor, the procedures must be exhausted prior to instituting legal action concerning the same procurement transaction unless the public body agrees otherwise.

(g) Nothing herein shall be construed to prevent a public body from instituting legal action against a contractor.

The "appropriate Circuit Court" is determined by referring to venue statutes, eq, Sections 8.01-261 and 8.01-262.

§11-71 Administrative Appeals Procedure. (a) A public body may establish an administrative procedure for hearing protests of a decision to award or an award, appeals from refusals to allow withdrawal of bids, appeals from disqualifications and determinations of nonresponsibility, and appeals from decisions on disputes arising during the performance of a contract, or any of these. Such administrative procedure shall provide for a hearing before a disinterested person or panel, the opportunity to present pertinent information and the issuance of a written decision containing findings of fact. The findings of fact shall be final and conclusive and shall not be set aside unless the same are fraudulent or arbitrary or capricious, or so grossly erroneous as to necessarily imply bad faith. No determination on an issue of law shall be final if appropriate legal action is instituted in a timely manner.

(b) Any party to the administrative procedure including the public body, shall be entitled to institute judicial review if such action is brought within 30 days of receipt of the written decision.

The administrative procedure authorized in this section is optional. A public body may forego establishing such a procedure, in which case all appeals would be to the appropriate court. This administrative procedure does not supplant the internal process for evaluating and deciding claims described in Section 11-69 (b).

ARTICLE IV - Ethics in Public Contracting

S11-72 Purpose. The provisions of this article supplement but do not supersede other provisions of law, including but not limited to the Virginia Conflict of Interests Act (Sections 2.1-348 et seq.), the Virginia Governmental Frauds Act (Sections 18.2-498.1 et seq.), and Articles 2 and 3 of Chapter 10, Title 18.2. The provisions of this article apply notwithstanding the fact that the conduct described may not constitute a violation of the Virginia Conflict of Interests Act.

> Confidence in public procurement requires a higher standard of propriety in this area than that required for other government activities. This article enunciates those higher standards without altering the many other provisions of law which have general application.

S11-73 Definitions. As used in this article,

(1) Public employee means any person employed by a public body, including elected officials or appointed members of governing bodies.

(2) Official responsibility means administrative or operating authority, whether intermediate or final, to initiate, approve, disapprove, or otherwise affect a procurement transaction, or any claim resulting therefrom.

(3) Procurement transaction includes all functions that pertain to the obtaining of any goods, services, or construction, including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration.

> This article covers public employees who have official responsibility for procurement transactions. The first three definitions describe that class of people.

(4) Pecuniary interest arising from the procurement means either a material financial interest as defined in the Virginia Conflict of Interests Act, or any financial benefit inuring at any time as a direct result of the procurement transaction, but does not include payments for bona fide pre-existing employment of members of the public employee's immediate family or stock dividends paid to a general class of stockholders.

> The definition of "material financial interest" in the Virginia Conflict of Interests Act is too broad to meet the standards of Attachment O, since the former excludes aggregate annual income below $5,000.

(5) Immediate family means a spouse, children, parents, brothers, and sisters, regardless of residence, and any other person living in the same household as the employee.

This is broader than the comparable provision in the Conflict of Interests Act in order to meet the standards of Attachment O, which does not limit its application to relatives living in the same household. This provision also covers persons other than relatives who may be living with the public employee.

S11-74 Proscribed participation by public employees in procurement transactions. No public employee having official responsibility for a procurement transaction shall participate in that transaction on behalf of the public body when the employee knows that:

a. The employee is contemporaneously employed by a bidder, offeror or contractor involved in the procurement transaction; or

b. The employee, the employee's partner, or any member of the employee's immediate family holds a position with a bidder, offeror or contractor 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; or

c. The employee, the employee's partner, or any member of the employee's immediate family has a pecuniary interest arising from the procurement transaction; or

d. 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 bidder, offeror or contractor.

Two elements of this section are particularly important. First, it does not prohibit contracts as such; it prohibits participation in the transaction by certain employees. Second, the offense is participating with knowledge of the proscribed relationship. A violation cannot be inadvertent.

S11-75 Solicitation or acceptance of gifts. No public employee having official responsibility for a procurement transaction shall solicit, demand, accept, or agree to accept from a bidder, offeror, contractor 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 public body may recover the value of anything conveyed in violation of this section.

Present law requires proof of intent to influence an official act or proof that the gift was "for services performed within the scope of official duties," to obtain a conviction. Intent is too easily hidden, and public confidence suffers because any gift of more than nominal or minimal value is perceived as improper. Moreover, Attachment O requires the recipient of federal funds to maintain standards of conduct more stringent than present law.

S11-76 Disclosure of subsequent employment. No public employee or former public employee having official responsibility for procurement transactions shall accept employment with any bidder, offeror or contractor with whom the employee or former employee dealt in an official capacity concerning procurement transactions for a period of one year from the cessation of employment by the public body unless the employee or former employee provides written notification to the public body or a public official if designated by the public body, or both, prior to commencement of employment by that bidder, offeror, or contractor.

The federal conflict of interest legislation and the Model Procurement Code contain prohibitions on employment of former public employees. A special grand jury recently suggested Virginia consider similar legislation. This provision, however, relies on disclosure rather than an outright prohibition.

S11-77 Gifts by bidders, offerors, contractors, or subcontractors. No bidder, offeror, contractor, or subcontractor shall confer upon any public 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.

This is the complement to Section 4.

S11-78 Kickbacks. (a) No contractor or subcontractor shall demand or receive from any of their suppliers or their subcontractors as an inducement for the award of a subcontract or order 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.

(b) No subcontractor or supplier shall make, or offer to make, kickbacks as described in this section.

(c) 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.

(d) If a subcontractor or supplier makes a kickback or other prohibited payment as described in this section, the amount thereof shall be conclusively presumed to have been included in the price of the subcontract or order and ultimately borne by the public body and will be recoverable from both the maker and recipient. Recovery from one offending party shall not preclude recovery from other offending parties.

S11-79 Purchase of building materials, etc. from architect or engineer prohibited. Except in cases of emergency, no building materials, supplies or equipment for any building or structure constructed by or for a public body shall be sold by or purchased from any person employed as an independent contractor by the public body to furnish architectural or engineering

services but not construction for such building or structure, or from any partnership, association, or corporation in which such architect or engineer has a pecuniary interest.

This provision is derived from former Sections 2.1-449 and 15.1-287, but was modified to accomodate design-build contracts where both construction and design services are furnished by a single contractor.

S11-80 Penalty for violation. Willful violation of any provision of this article shall constitute a misdemeanor. Upon conviction, any public employee shall, in addition to any other fine or penalty provided by law, forfeit his employment.

Like violations of the Conflict of Interests Act, violations are misdemeanors. Public employees convicted of a violation should be discharged.

2. That the Code of Virginia is amended by adding sections numbered 2.1-454.1 and 2.1-483.1 as follows:

Section 2.1-454.1. Aid and cooperation of Division may be sought by political subdivisions, public telecommunications entities and local officers in making purchases; use of facilities of central warehouse.--Virginia public telecommunications entities, as defined in Section 2.1-563.1 of this Code, who are empowered to purchase material, equipment and supplies of any and all kinds may, in their discretion, purchase through the Division of Purchases and Supply. When any such political subdivision, public telecommunications entity, or duly authorized officer requests the Division to obtain bids for any materials, equipment and supplies, and such bids accordingly have been obtained by the Division of Purchases and Supply, the Division may award the contract to the lowest responsible bidder, and such political subdivision or public telecommunications entity shall be bound by such contract; the Division shall set forth in the purchase order that such materials, equipment and supplies be delivered to, and that the bill therefor be made out to and forwarded to such political subdivision or public telecommunications entity; any such bill shall be valid and enforceable claim against the political subdivision or public telecommunications entity requesting the Division to seek such bids.

The Division may make available to any political subdivision or public telecommunications entity the facilities of the central warehouse maintained by the Division; provided, however, that the furnishing of any such services or supplies shall not limit or impair any services or supplies normally rendered any department, division, institution or agency of the State.

The Virginia Public Telecommunications Board shall furnish to the Division of Purchases and Supply a list of public telecommunications entities in Virginia for the purposes of this section. (Code 1950, Section 2.1-288; 1966, c.677; 1977, c.672; 1978, c.653; 1980, c.620.)

Section 2.1-483.1. Supervision of capital outlay construction. The Division of Engineering and Buildings shall assist in the administration of capital outlay construction projects other than highway construction undertaken by the Department of Highways and Transportation, to include the publication of general conditions, review of plans, and specifications, and acceptance of completed projects.

3. That Section 2.1-410, 2.1-442, 2.1-450, 2.1-450.1, and 2.1-451 of the Code of Virginia are amended and reenacted as follows:

Section 2.1-410. Duties of Department. - The Department shall have the following duties:

1. Development and direction of a comprehensive program of management analysis and systems development for State government.

2. Conduct of major management studies and surveys of the State's organizational structure, management practices, and systems and procedures; and development of recommendations to reduce costs and increase productivity.

3. Formulation of policies and standards for management information systems and review of the use and performance of management information systems.

3a. Coordination of automated data processing planning activities for State government.

4. Design of major management information systems having application to more than one agency.

5. Technical review of data systems and procedures developed by State agencies.

6. Review of all proposed automated data processing contracts, including equipment purchases, use of consultants and service contracts, and submission of recommendations thereon to the Secretary of Administration and Finance, or to the purchasing officials designated by the Secretary. Laboratory measuring equipment which contains microprocessors utilizing interfacing equipment designed to be connected to a laboratory computer and which is acquired and will be employed solely for "real time" research purposes and will not be used in any way for data processing or word processing purposes, is excluded from this review, but not from the State's competitive procurement process.

6.1 Execute contracts for automated data processing equipment or services in its own behalf or upon requisition of other State agencies or institutions, as directed by the Governor or the Secretary of Administration and Finance.

7. [Repealed.]

8. Perform systems development services, including design, application programming and maintenance, for agencies when so directed by the Governor or the Secretary of Administration and Finance.

9. [Repealed.]

The provisions included above are not intended to infringe upon, in any manner, the responsibilities for accounting systems assigned to the Comptroller under Section 2.1-196.1 of the Code.

Section 2.1-442. Purchases to be made in accordance with rules and regulations of Division; exempt purchases; competitive bidding.-All purchases made by any department, division, officer or agency of the State shall be made in accordance with Chapter 7 of Title 11 and such rules and regulations as the Division may prescribe. Such rules and regulations shall include a purchasing plan which shall be on file at the Divisions and shall be available to the public upon request. The Division shall have authority to make, alter,

amend or repeal regulations relating to purchase of materials, supplies, equipment, and printing, and may specifically exempt purchases below a stated amount or particular agencies or specified materials, equipment, supplies and printing. ~~The Division shall use competitive bidding unless impracticable to do so in its purchasing practices, pursuant to such rules and regulations as shall be on file at the Division and shall be available to the public upon request. When purchases are made through competitive bidding, the contract shall be let to the lowest responsible bidder, taking into consideration the quality of the articles proposed to be supplied, their conformity with specifications, the purposes for which required, and the times of delivery, provided, however, that whenever the Division has reason to believe that the low bid is not the best price, it shall have authority to enter into further negotiations with the apparent low bidder to the end that the price paid shall be the best price obtainable. Bids shall be received only in accordance with standards and standard specifications, if any, adopted by the Division. All bids may be rejected. Each bid with the name of the bidder shall be entered of record, and each record, with the successful bid indicated, shall, after the letting of the contract, be open to public inspection.~~

Section 2.1-450. Purchases from Commission for Visually Handicapped; violations. -- Unless excepted by the Division, all articles and commodities as (1) are required for purchase by the Division or by any person authorized to make purchases in behalf of the Commonwealth and their departments, agencies and institutions, (2) are performed or produced by persons or in schools or workshops under the supervision of the Virginia Commission for the Visually Handicapped, (3) are available for sale by it, and (4) conform to the standards established by the Division shall be purchased from the Commission at the fair market price without competitive procurement.

Section 2.1-450.1. Purchases from nonprofit sheltered workshops of Virginia serving the handicapped. -- A. The Division shall publish annually a list of materials, supplies and equipment representing items which the Division has had difficulty procuring, either by reason of limited competition in purchase price, product quality or in the opinion of the Director it would be of benefit to the Commonwealth to negotiate with a sheltered workshop for items produced by it. Such list shall exclude items currently produced by schools or workshops under the supervision of the Virginia Commission for the Visually Handicapped or by inmates confined in State correctional institutions.

B. Any item included on the list required by subsection A shall be purchased from nonprofit sheltered workshops serving the handicapped without competitive procurement if the Division

is satisfied that such items (i) can be purchased at their fair market value, (ii) will be of acceptable quality, and (iii) can be produced in sufficient quantities within the time demands required.

C. Nothing in this section shall prohibit the Division from amending the list required under subsection A by adding additional categories as they may develop after such list has been published.

Section 2.1-451. Cases in which purchasing through Division not mandatory. -- Unless otherwise ordered by the Governor, the purchasing of materials, equipment and supplies through the Division of Purchases and Supply is not mandatory in the following cases:

1. ~~Telephone and telegraph service, and electric light and power service, and~~ Such materials, equipment and supplies as are incident to the performance of a contract for labor or for labor and materials;

2. ~~Technical instruments and suppliers, and technical books and other printed matter on technical subjects, also~~ Manuscripts, maps, audiovisual materials, books, pamphlets and periodicals purchased for the use of the Virginia State Library or any other library in the State supported in whole or in part by State appropriation, ~~but no instrument, supply, equipment or other commodity shall be considered technical unless so classified by the Division of Purchases and Supply~~.

3. Perishable articles, provided that no article except fresh vegetables, fresh fish, eggs and milk shall be considered perishable within the meaning of this clause, unless so classified by the Division of Purchases and Supply;

4. ~~Automobile license number plates;~~

5. Materials, equipment and supplies needed by the State Highway and Transportation Commission; provided, however, that this exception may include office stationery and supplies, office equipment, janitorial equipment and supplies, coal and fuel oil for heating purposes only when authorized in writing by the Division; and

6. Materials, equipment and supplies needed by the Virginia Alcoholic Beverage Control Commission; provided, however, that this exception may include office stationery and supplies, office equipment, janitorial equipment and supplies, coal and fuel oil for heating purposes only when authorized in writing by the Division. (Code 1950, Section 2.1-286; 1966, c.677; 1977, c.672.)

7. Binding and rebinding of the books and other literary materials of libraries operated by the State or under its authority.

8. Printing of the records of the Supreme Court.

4. That Section 4-7 of the Code of Virginia is amended and re-enacted as follows:

Section 4-7. Functions, duties and powers of Commission. - The functions, duties and powers of the Board shall be as follows:

(a) To buy, import and sell alcoholic beverages other than beer, the procurement of which is exempt from Chapter 7 of Title 11 of the Code of Virginia, and to have alcoholic beverages in its possession for sale;

(b) To control the possession, sale, transportation and delivery of alcoholic beverages by the Board;

(c) To determine the localities within which government stores shall be established or operated and the location of such stores;

(d) To make provision for the maintenance of warehouses for alcoholic beverages and to control the delivery of alcoholic beverages to and from such warehouses, and the keeping of the same therein;

(e) To lease, occupy and improve any land or building required for the purposes of this chapter;

(f) With the consent of the Governor, to purchase or otherwise acquire title to any land or building required for the purposes of this chapter and to sell and convey the same by proper deed;

(g) To purchase, lease or acquire the use by any manner whatsoever of any plant or equipment which may be considered necessary or useful in carrying into effect the purposes of this chapter, including rectifying, blending and processing plants; the Board is hereby empowered to purchase, build, lease, and operate distilleries and to manufacture alcoholic beverages if in its opinion the purposes of this chapter can be thereby promoted;

(h) To determine the nature, form and capacity of all packages to be used for containing alcoholic beverages to be kept or sold under this chapter, and to prescribe the form and contents of all labels and seals to be placed thereon;

(i) To appoint every officer, agent and employee required for its operations, with such compensation as may be provided in accordance with law for the purpose; assign them their official positions and titles, define their respective duties and powers, require them or any of them to give bonds payable to the Commonwealth, in such penalty as shall be fixed by the Board, and engage the services of experts and of persons engaged in the practice of a profession; all salaries or remuneration in excess of one thousand dollars per annum shall first be approved by the Governor;

(j) To hold and conduct hearings, to issue subpoenas requiring the attendance of witnesses and the production of records, memoranda, papers and other documents before the Board or any officer or agent thereof, and to administer oaths and to take testimony thereunder; in its discretion to authorize any member, officer or agent of the Board to hold and conduct hearings, issue

subpoenas, and administer oaths and to take testimony thereunder; and make summary decisions, subject to final decision by the Board on application of any party aggrieved;

(k) To make a reasonable charge for preparing and furnishing statistical information and compilations to persons other than (1) officials, including court and police officials, of the State and of its subdivisions, if the information requested is for official use, and (2) persons who have a personal or legal interest in obtaining the information requested, if such information is not to be used for commercial or trade purposes;

(l) Generally to do all such things as may be deemed necessary or advisable by the Board for the purpose of carrying into effect the provisions of this chapter. (1934, p. 104; 1936, p. 418; Michie Code 1942, Section 4675(4); 1974, c. 460.)

5. That Section 15.1-108, 15.1-109, 15.1-127, 15.1-605, 15.1-640, 15.1-712, and 15.1-766, of the Code of Virginia be amended and reenacted as follows:

Section 15.1-108. Procedure for purchases and sales. ~~to be based on competitive bids.~~ a. All purchases of, and contracts for, supplies, materials, equipment and contractual services shall be in accordance with Chapter 7 of Title 11. ~~and all~~

b. All sales of such personal property which has become obsolete and usable shall be based wherever feasible on competitive bids. If the amount of the ~~expenditure or~~ sale is estimated to exceed ~~two~~ five thousand ~~five hundred~~ dollars, sealed bids shall, unless the board of supervisors shall provide otherwise, be solicited by public notice inserted at least once in a newspaper of county-wide circulation and at least five calendar days before the final date of submitting bids. ~~The county purchasing agency shall also solicit sealed bids by sending requests by mail to prospective suppliers and by posting notice on a public bulletin board in his office.~~

~~Bids shall in all cases be based on such standard specification as may be adopted by the county purchasing agent under the supervision of the county board.~~

Section 15.1-109. ~~Award or rejection of bids.~~ Legal review; records. ~~All open market orders or contracts made by the county purchasing agent or by any county department or agency shall be awarded to the lowest and best bidder, taking into consideration the qualities of the articles to be supplied, their conformity with the specifications, their suitability to the requirements of the county government, and the delivery terms. Any or all bids may be rejected. If all bids received on a pending contract are for the same unit price or total amount, the county purchasing agent shall have authority to reject all bids and to purchase the required supplies, materials, equipment or contractual services in the open~~

~~market, provided the price paid in the open market shall not exceed the bid price. Each bid, with the name of the bidder, shall be entered on a record and each record with the successful bid indicated thereon shall, after the award of the order or contract, be open to public inspection.~~

All contracts shall be approved as to form by the county attorney or other qualified attorney and a copy of each long-term contract shall be filed with the treasurer or other chief financial officer of the county.

Section 15.1-127. Centralized competitive purchasing by executive secretary. -- The governing body of any county having an executive secretary is authorized to provide for the centralized competitive purchasing of all supplies, equipment, materials and commodities for all departments, officers and employees of the county, including the county school board and the board of public welfare or social services (all of which are in Section 15.1-129 and 15.1-130 referred to as departments). Such purchasing shall be done by the executive secretary under the supervision of the governing body of the county and shall be accomplished in accordance with Chapter 7 of Title 11.

Section 15.1-605. Department of finance. - (a) Director; general duties. - The director of finance shall be the head of the department of finance and as such have charge of the administration of the financial affairs of the county, including the budget; the assessment of property for taxation; the collection of taxes, license fees and other revenues; the custody of all public funds belonging to or handled by the county; supervision of the expenditures of the county and its subdivisions; the disbursement of county funds; the purchase, storage and distribution of all supplies, materials, equipment and contractual services needed by any department, office or other using agency of the county unless some other officer or employee is designated for this purpose; the keeping and supervision of all accounts; and such other duties as the board of county supervisors may by ordinance or resolution require.

(b) Expenditures and accounts. - No money shall be drawn from the treasury of the county, nor shall any obligation for the expenditure of money be incurred, except in pursuance of appropriation resolutions. Accounts shall be kept for each item of appropriation made by the board of county supervisors. Each such account shall show in detail the appropriations made thereto, the amount drawn thereon, the unpaid obligation charged against it, and the unencumbered balance in the appropriation account, properly chargeable, sufficient to meet the obligation entailed by contract, agreement or order.

(c) Powers of commissioners of revenue. - The director of finance shall exercise all the powers conferred and perform all the duties imposed by general law upon commissioners of the revenue, not inconsistent herewith, and shall be subject to the obligations and penalties imposed by general law.

(d) Real estate reassessments. - Every general reassessment of real estate in the county, unless some other person be designated for this purpose by the board of county supervisors in accordance with Section 15.1-598 or unless the board shall create a separate department of assessments in accordance with Section 15.1-604 shall be made by the director of finance; he shall collect and keep in his office data and devise methods and procedure to be followed in each such general reassessment that will make for uniformity in assessments throughout the county.

(e) Powers of county treasurer; deposit of moneys. - The director of finance shall also exercise all the powers conferred and perform all the duties imposed by general law upon county treasurers, and shall be subject to all the obligations and penalties imposed by general law. All moneys received by any officer or employee of the county for or in connection with the business of the county shall be paid promptly into the hands of the director of finance; all such money shall be promptly deposited by the director of finance to the credit of the county in such banks or trust companies as shall be selected by the board of county supervisors. No money shall be disbursed or paid out by the county except upon checks signed by the chairman of the board of county supervisors, or such other person as may be designated by the board, and countersigned by the director of the department of finance.

The board may designate one or more banks or trust companies as a receiving or collecting agency or agencies under the direction of the department of finance. All funds so collected or received shall be deposited to the credit of the county in such banks or trust companies as shall be selected by the board.

Every bank or trust company serving as a depository or as a receiving or collecting agency for county funds shall be required by the board of county supervisors to give adequate security therefor and to meet such requirements as to interest thereon as the board may by ordinance or resolution establish. All interest on money so deposited shall accrue to the benefit of the county.

(f) Claims against counties; accounts. - The director of finance shall audit all claims against the county for goods or services; it shall also be his duty to ascertain that such claims are in accordance with the purchase orders or contracts of employment from which same arise; to draw all checks in settlement of such claims; to keep a record of the revenues and expenditures of the county; to keep such accounts and records of the affairs of the county as shall be prescribed by the Auditor of Public Accounts; and at the end of each month to prepare and submit to the board of county supervisors statements showing the progress and status of the affairs of the county in such form as shall be agreed upon by the Auditor of Public Accounts and the board of county supervisors.

(g) Director as purchasing agent. -- The director of finance shall act as purchasing agent for the county, unless the board of county supervisors shall designate some other officer

or employee for such purpose. The director of finance or the person designated as purchasing agent shall make all purchases, subject to such exceptions as may be allowed by the board of county supervisors. ~~- for the county in such manner as may be provided by resolution of the board.~~ He shall have authority to make transfers of supplies, materials and equipment between departments and offices, to sell any surplus supplies, materials or equipment and to make such other sales as may be authorized by the board of county supervisors. He shall also have power, with the approval of the board of county supervisors, to establish suitable specifications or standards for all supplies, materials and equipment to be purchased for the county and to inspect all deliveries to determine their compliance with such specifications and standards. He shall have charge of such storerooms and warehouses of the county as the board of county supervisors may provide.

All purchases ~~and sales~~ shall be made in accordance with Chapter 7 of Title 11 and under such rules and regulations as the board of county supervisors may by ordinance or resolution establish. ~~Subject to such exceptions as the board may provide, he shall before making any purchase or sale invite competitive bidding under such rules and regulations as the board may by ordinance or resolution establish.~~ He shall not furnish any supplies, materials, equipment or contractual services to any department or office except upon receipt of a properly approved requisition and unless there be an unencumbered appropriation balance sufficient to pay for the same.

Except as provided by the board, he shall before making any sale invite competitive bids under such rules and regulations as the board may by ordinance or resolution establish.

(h) Other duties. - He shall perform such other duties as may be imposed upon him by the board of county supervisors.

(i) Assistants. - The director may have such deputies or assistants in the performance of his duties as may be allowed by the board of county supervisors.

(j) Approval of chief assessing officer. - Before the appointment of the chief assessing officer of the county, whether he be the director of finance, a deputy or supervisor of assessments in the department of finance or the head of the department of assessments, shall become effective, it shall be approved by the State Tax Commissioner and such officer shall be subject to the obligations and penalties imposed by general law upon commissioners of the revenue. (Code 1950, Section 15-288; 1959, Ex. Sess., c.69; 1962, cc.399, 623.)

Section 15.1-640. Department of finance. - (a) Director; general duties. - The director of finance shall be the head of the department of finance and as such have charge of the administration of the financial affairs of the county, including the budget, the assessment of property for taxation; the collection of taxes, license fees and other revenues; the custody of all public funds belonging to or handled by the county; supervision of the expenditures of the county and its subdivisions; the disbursement of county funds; the purchase, storage and dis-

tribution of all supplies, materials, equipment and contractual service needed by any department, office or other using agency of the county unless some other officer or employee is designated for this purpose; the keeping and supervision of all accounts; and such other duties as the board of county supervisors may by ordinance or resolution require.

(b) Expenditures and accounts. - No money shall be drawn from the treasury of the county, nor shall any obligation for the expenditure of money be incurred except in pursuance of appropriation resolutions. Accounts shall be kept for each item of appropriation made by the board of county supervisors. Each such account shall show in detail the appropriations made thereto, the amount drawn thereon, the unpaid obligations charged against it, and the unencumbered balance in the appropriation account, properly chargeable, sufficient to meet the obligation entailed by contract, agreement or order.

(c) Powers of commissioners of revenue. - The director of finance shall exercise all the powers conferred and perform all the duties imposed by general law upon commissioners of the revenue, not inconsistent herewith, and shall be subject to the obligations and penalties imposed by general law.

(d) Real estate reassessments. - (1) Every general reassessment of real estate in the county, unless some other person be designated for this purpose by the county manager in accordance with Section 15.1-634 or unless the board of county supervisors shall create a separate department of assessments in accordance with Section 15.1-639, shall be made by the director of finance; he shall collect and keep in his office data and devise methods and procedure to be followed in each such general reassessment that will make for uniformity in assessments throughout the county.

(2) In addition to any other method provided by general law or by this article or to certain classified counties the director of finance may provide for the annual assessment and equalization of real estate and any general reassessment order by the board of county supervisors. The director of finance or his designated agent shall collect data, provide maps and charts, devise methods and procedures to be followed for such assessment that will make for uniformity in assessments throughout the county.

There shall be a reassessment of all real estate at periods not to exceed six (6) years between such reassessments.

All real estate shall be assessed as of January first of each year by the director of finance or such other person designated to make such assessment and such annual assessment shall provide for the equalization of assessments of real estate, correction of errors in tax assessment records, addition of erroneously omitted properties to the tax rolls, and the removal of properties acquired by owners not subject to taxation.

The taxes for each year on such real estate assessed shall be extended on the basis of the last assessment made prior to such year.

This section shall not apply to real estate assessable under the law by the State Corporation Commission, and the director of finance or his designated agent shall not make any real estate assessments during the life of any general reassessment board.

Any reassessments made, which shall change the assessment of real estate shall not be extended for taxation until forty-five days after there is mailed a written notice to the person in whose name such property is to be assessed at his last known address, setting forth the amount of the prior assessment and the new assessment.

The board of county supervisors shall establish a continuing board of real estate review and equalization to review all assessments made under authority of this section and to which all appeals by any person aggrieved by any real estate assessment shall first apply for relief. The board so established shall consist of not less than three nor more than five members who shall be freeholders in the county. The appointment, terms of office and compensation of the members of such board shall be prescribed by the board of county supervisors; such board shall have all the powers conferred upon boards of equalization by general law. All applications for review to such board shall be made not later than April first of the year for which extension of taxes on the assessment is to be made. Such board shall grant a hearing to any person making application at a regular advertised meeting of the board and shall rule on all applications within sixty days after the date of the hearing, and shall thereafter promptly certify its action thereon to the director of finance, shall conduct hearings at such time or times as is convenient after publishing a notice in a newspaper having a general circulation in the county, ten days prior to such hearing at which any person applying for review will be heard.

Any person aggrieved by any reassessment or action of the real estate board of review and equalization may apply for relief to the circuit court of the county in the manner provided by general law.

(e) Powers of county treasurer; deposit of moneys. - The director of finance shall also exercise all the powers conferred and perform all the duties imposed by general law upon county treasurers, and shall be subject to all the obligations and penalties imposed by general law. All moneys received by any officer or employee of the county for or in connection with the business of the county shall be paid promptly into the hands of the director of finance; all such money shall be promptly deposited by the director of finance to the credit of the county in such banks or trust companies as shall be selected by the board of county supervisors. No money shall be disbursed or paid out by the county except upon check signed by the chairman of the board of county supervisors, or such other person as may be designated by the board, and countersigned by the director of the department of finance.

The board may designate one or more banks or trust companies as a receiving or collecting agency or agencies under

the direction of the department of finance. All funds so collected or received shall be deposited to the credit of the county in such banks or trust companies as shall be selected by the board.

Every bank or trust company serving as a depository or as a receiving or collecting agency for county funds shall be required by the board of county supervisors to give adequate security therefor, and to meet such requirements as to interest thereon as the board may by ordinance or resolution establish. All interest on money so deposited shall accrue to the benefit of the county.

(f) Claims against counties; accounts. - The director of finance shall audit all claims against the county for goods or services; it shall also be his duty to ascertain that such claims are in accordance with the purchase orders or contracts of employment from which same arise; to draw all checks in settlement of such claims; to keep a record of the revenues and expenditures of the county; to keep such accounts and records of the affairs of the county as shall be prescribed by the Auditor of Public Accounts; and at the end of each month to prepare and submit to the board of county supervisors statements showing the progress and status of the affairs of the county in such form as shall be agreed upon by the Auditor of Public Accounts and the board of county supervisors.

(g) Director as purchasing agent. - The director of finance shall act as purchasing agent for the county, unless the board of county supervisors shall designate some other officer or employee for such purpose. The director of finance or the person designated as purchasing agent shall make all purchases, subject to such exceptions as may be allowed by the board of county supervisors, ~~for the county in such manner as may be provided by resolution of the board~~. He shall have authority to make such transfers of supplies, materials and equipment between departments and offices, to sell any surplus supplies, materials or equipment and to make such other sales as may be authorized by the board of county supervisors. He shall also have the power, with the approval of the board of county supervisors, to establish suitable specifications or standards for all supplies, materials and equipment to be purchased for that county and to inspect all deliveries to determine their compliance with such specifications and standards. He shall further have the power, with the approval of the board of county supervisors, to sell supplies, materials and equipment to volunteer rescue squads and fire-fighting companies at the same cost as the cost of such supplies, materials and equipment to the county. He shall have charge of such storerooms and warehouses of the county as the board of county supervisors may provide.

All purchases and sales shall be made <u>in accordance with Chapter 7 of Title 11</u>, and under such rules and regulations as the board of county supervisors may by ordinance or resolution establish. ~~Subject to such exceptions as the board may provide, he shall before making any purchase or sale invite competitive bidding under such rules and regulations as the board may by ordinance or resolution establish.~~ He shall not

furnish any supplies, materials, equipment or contractual services to any department or office except upon receipt of a properly approved requisition and unless there be an unencumbered appropriation balance sufficient to pay for the same.

Except as provided by the board, he shall before making any sale invite competitive bids under such rules and regulations as the board may by ordinance or resolution establish.

(h) Other duties. - He shall perform such other duties as may be imposed upon him by the board of county supervisors.

(i) Assistants. - The director may have such deputies or assistants in the performance of his duties as may be allowed by the board of county supervisors.

(j) Approval of chief assessing officer. - Before the appointment of the chief assessing officer of the county (whether he be the director of finance, a deputy or supervisor of assessments in the department of finance or the head of the department of assessments) shall become effective, it shall be approved by the State Tax Commissioner and such officer shall be subject to the obligations and penalties imposed by general law upon commissioners of the revenue. (Code 1950, Section 15-320; 1954, c. 46; 1956, c. 349; 1959, Ex. Sess., c. 69; 1962, cc. 399,623.)

Section 15.1-712. County purchasing agent. - (a) There shall be in the county a county purchasing agent. The executive secretary shall, unless and until the board of county supervisors shall select a county purchasing agent or designate some other officer to act as county purchasing agent, exercise all the powers conferred and perform all the duties imposed upon the county purchasing agent.

(b) The county purchasing agent shall, subject to such exceptions as may be allowed by the board of county supervisors, make all purchases for the county and its departments, officers and agencies.

(c) He shall also have authority to make transfers of supplies, materials and equipment between, and to sell surplus equipment, materials and supplies not needed by, the departments, officers and agencies of the county.

(d) With the approval of the board of county supervisors, he may establish suitable specifications or standards for all equipment, materials and supplies to be purchased and inspect all deliveries to determine their compliance with such specifications and standards.

(e) All purchases and sales by the county purchasing agent shall be made in accordance with Chapter 7 of Title 11, and under such rules and regulations as the board of county supervisors shall provide.

(f) The county purchasing agent shall have charge of such storage rooms and warehouses of the county as the board of county supervisors may provide. (Code 1950, Section 15-376; 1950, p. 125; 1962, c. 623; 1972, c. 820.)

Section 15.1-766. Department of finance. - (a) Director; general duties. - The director of finance shall be the head of the department of finance and as such have charge of the administration of the financial affairs of the county, including the budget; the assessment of property for taxation; the collection of taxes, license fees and other revenues; the custody of all public funds belonging to or handled by the county; supervision of the expenditures of the county and its subdivisions; the disbursement of county funds; the purchase, storage and distribution of all supplies, materials, equipment and contractual service needed by any department, office or other using agency of the county unless some other officer or employee is designated for this purpose; the keeping and supervision of all accounts; and such other duties as the urban county board of supervisors may by ordinance or resolution require.

The urban county board of supervisors may assign the budget function to the urban county manager or executive, or a budget officer.

(b) Expenditures and accounts. - No money shall be drawn from the treasury of the county, nor shall any obligation for the expenditure of money be incurred, except in pursuance of a legally enacted appropriation resolution, or legally enacted supplement thereto passed by the urban county board of supervisors. Accounts shall be kept for each item of appropriation made by the urban county board of supervisors. Each such account shall show in detail the appropriation made thereto, the amount drawn thereon, the unpaid obligations charged against it, and the unencumbered balance in the appropriation account, properly chargeable, sufficient to meet the obligation entailed by contract, agreement or order.

(c) Powers of commissioners of revenue. - The director of finance shall exercise all the powers conferred and perform all the duties imposed by general law upon commissioners of the revenue, not inconsistent herewith, and shall be subject to the obligations and penalites imposed by general law.

(d) Real estate reassessments. - (1) Every general reassessment of real estate in the county, unless some other person be designated for this purpose, shall be made by the director of finance; he shall collect and keep in his office data and devise methods and procedure to be followed in each such general reassessment that will make for uniformity in assessments throughout the county.

(2) In addition to any other method provided by general law or by this article the director of finance may provide for the annual assessment and equalization of real estate and any general reassessment ordered by the urban county board of supervisors. The director of finance or his designated agent shall collect data, provide maps and charts, devise methods and procedures to be followed for such assessments that will make for uniformity in assessments throughout the county.

All real estate shall be assessed as of January first of each year by the director of finance or such other person designated to make such assessment and such annual assessment shall provide for the equalization of assessments of real

estate, correction of errors in tax assessment records, addition of erroneously omitted properties to the tax rolls, and the removal of properties acquired by owners not subject to taxation.

This section shall not apply to real estate assessable under the law by the State Corporation Commission.

Any reassessments made, which shall change the assessment of real estate, shall not be extended for taxation until after there is mailed a written notice to the person in whose name such property is to be assessed at his last known address, setting forth the amount of the new assessment.

(e) Powers of county treasurer; deposit of moneys. - The director of finance shall also exercise all the powers conferred and perform all the duties imposed by general law upon county treasurers, and shall be subject to all the obligations and penalties imposed by general law. All moneys received by any officer or employee of the county for or in connection with the business of the county shall be paid promptly into the hands of the director of finance; all such money shall be promptly deposited by the director of finance to the credit of the county in such banks or trust companies as shall be selected by the urban county board of supervisors. No money shall be disbursed or paid out by the county except upon check signed by the chairman of the urban county board of supervisors, or such other person as may be designated by the urban county board of supervisors, and countersigned by the director of the department of finance.

The urban county board of supervisors may designate one or more banks or trust companies as a receiving or collecting agency or agencies under the direction of the department of finance. All funds so collected or received shall be deposited to the credit of the county in such banks or trust companies as shall be selected by the urban county board of supervisors.

Every bank or trust company serving as a depository or as a receiving or collecting agency for county funds shall be required by the urban county board of supervisors to give adequate security therefor, and to meet such requirement as to interest thereon as the urban county board of supervisors may by ordinance or resolution establish. All interest on money so deposited shall accrue to the benefit of the county.

(f) Claims against counties; accounts. - The director of finance shall audit all claims against the county for goods or services; it shall also be his duty to ascertain that such claims are in accordance with the purchase orders or contracts of employment from which same arise; to present such claims to the urban county board of supervisors for approval after such audit; to draw all checks in settlement of such claims after approval by the urban county board of supervisors unless the said urban county board of supervisors otherwise provides; to keep a record of the revenues and expenditures of the county; to keep such accounts and records of the affairs of the county as shall be prescribed by the Auditor of Public Accounts; and at the end of each month to prepare and submit to the urban county board of supervisors statements showing the progress and

status of the affairs of the county in such form as shall be agreed upon by the Auditor of Public Accounts and the urban county board of supervisors. Such accounts and records may be kept in such form, including microphotography or other reproductive method, as the urban county board of supervisors may prescribe.

(g) Director as purchasing agent. - The director of finance shall act as purchasing agent for the county, unless the urban county board of supervisors shall designate some other officer or employee for such purpose. The director of finance or the person designated as purchasing agent shall make all purchases, subject to such exceptions as may be allowed by the urban county board of supervisors, ~~for the county in such manner as may be provided by resolution of the urban county board of supervisors~~. He shall have authority to make transfers of supplies, materials or equipment between departments and offices, to sell any surplus supplies, materials or equipment and to make such other sales as may be authorized by the urban county board of supervisors. He shall also have power, with the approval of the urban county board of supervisors, to establish suitable specifications or standards for all supplies, materials and equipment to be purchased for the county and to inspect all deliveries to determine their compliance with such specifications and standards. He shall further have the power, with the approval of the urban county board of supervisors, to sell supplies, materials and equipment to volunteer rescue squads and fire-fighting companies at the same cost of such supplies, materials and equipment to the county. He shall have charge of such storerooms and warehouses of the county as the urban county board of supervisors may provide.

All purchases and sales shall be made in accordance with Chapter 7 of Title 11 and under such rules and regulations as the urban county board of supervisors may by ordinance or resolution establish, which ordinance or resolution may, notwithstanding the provisions of subsection (f) hereof, provide for the use of a combination purchase order -- check, which check may be made valid for such maximum amount as the board may fix, not to exceed two hundred fifty dollars. Subject to such exceptions as the urban county board of supervisors may provide, he shall before making any ~~purchase or~~ sale invite competitive bidding under such rules and regulations as the urban county board of supervisors may by ordinance or resolution establish. He shall not furnish any supplies, materials, equipment or contractual services to any department or office except upon receipt of a properly approved requisition and unless there be an unencumbered appropriation balance sufficient to pay for the same.

(h) Other duties. - He shall perform such other duties as may be imposed upon him by the urban county board of supervisors.

(i) Assistants. - The director may have such deputies or assistants in the performance of his duties as may be allowed by the urban county board of supervisors.

(j) Approval of chief assessing officer. - Before the appointment of the chief assessing officer of the county (whether he be the director of finance, a deputy or supervisor of assessments in the department of finance, or the head of the department of assessments) shall become effective, it shall be approved by the State Tax Commissioner and such officer shall be subject to the obligations and penalties imposed by general law upon commissioners of the revenue. (Code 1950 [Suppl.], Section 15-384.53; 1960, c. 382; 1962, c. 623; 1972, c. 456.)

6. That Section 33.1-185, 33.1-190, and 33.1-192.1 of the Code of Virginia be amended and reenacted as follows:

Section 33.1-185. Advertising for bids. - All projects that the State Highway and Transportation Commission may undertake for construction, shall when such projects are reasonably estimated to cost two hundred thousand dollars or more, ~~except in cases of emergency,~~ be let in accordance with Chapter 7 of Title 11. ~~after public advertising~~. When such projects are reasonably estimated to cost ~~between twenty~~ below ~~five thousand and~~ two hundred thousand dollars, the Commission may let them to contract, and if such projects are let to contract they shall, ~~except in cases of emergency,~~ be let only ~~after public advertising~~ in accordance with Chapter 7 of Title 11. ~~The Commission shall advertise for bids for such work at least two weeks (fourteen days) prior to the letting of any contract therefor. The advertisement shall state the place where bidders may examine the plans and specifications and the time and place where bids for such work will be opened by the Commission.~~

The word "project" as used in this section shall mean construction and shall not include routine maintenance work or the installation of traffic control devices, unless such work is to be performed under contract. ~~Failure to receive two bids from qualified contractors at least one of which is within the estimated cost for any project shall for the purposes of this section be regarded an emergency.~~

Section 33.1-190. Construction by force account. - Irrespective of the provisions of Section 33.1-185 ~~to 33.1-189 inclusive~~, in cases of emergency or on any project reasonably estimated to cost not more than two hundred thousand dollars the Commission may, in its discretion, build or maintain any of the roads in any system of State highways by force account.

Section 33.1-192.1. Limitation of suits on contracts executed after June 30, 1976. - No suit or action shall be brought against the Department of Highways and Transportation, Commonwealth of Virginia, by a contractor or any persons claiming under him, on any contract executed pursuant to this chapter, after June thirty, nineteen hundred seventy-six, or by others on any claim arising from the performance of the contract by the contractor, unless the claimant shall have exhausted the review process provided by Section 33.1-386. Further, no such action shall be brought unless the same shall

be brought within ~~eighteen~~ six months from ~~the completion of the work on the project to the satisfaction of the chief engineer,~~ receipt of the decision of the Commissioner, Department of Highways and Transportation. In no event shall any delay therein on the part of the contractor be construed as a reason for extending the time within which such suit or action must be brought.

No suit or action shall be brought against the contractor or surety on any such contract or claim unless the same shall be brought within five years after the completion of the work on the project to the satisfaction of the chief engineer, Department of Highways and Transportation.

Section 33.1-192 of this Code shall continue in full force and effect as to contracts entered into prior to July one, nineteen hundered seventy-six, or claims arising therefrom.

That Section 53-67, 53-68, and 53-70 of the Code of Virginia be amended and reenacted as follows:

Section 53-67. Agencies may purchase. - All departments, institutions and agencies of this State which are supported in whole or in part by the State shall, and all counties and districts of such counties and cities and towns in this State may, purchase from the Director all articles and services required by such departments, institutions and agencies of the State for their use or the use of the person or persons whom they assist financially, or by such counties, districts, cities or towns, produced or manufactured by the Director by convicts or misdemeanants confined within the penitentiary or elsewhere employed within this State, including products of the State correctional institutions and no such article or service shall be purchased by any such department, institution or agency of the State from any other source unless excepted under the provisions of Section 53-69. ~~The purchase of services required herein may be excepted by the Director of the Department of Purchases and Supply in the event that such services do not meet the reasonable requirements of such department, institution or agency of the State, or in any case where the requisition for such service cannot be complied with substantially on account of an insufficient supply of the services required or otherwise.~~

Section 53-68. Procedure for P purchases. ~~to be made through Department of Purchases and Supply.~~ All purchases by departments, institutions and agencies of the State shall be made as provided by the Division of Purchases and Supply of the Department of General Services. All other purchases shall be upon requisition by the proper authority ~~of the department, institution, or agency of the State or~~ of the county, district, city or town requiring such articles.

Section 53-69. Exceptions as to purchases. - Exceptions from the operation of the mandatory provisions of Section 53-67 to 53-72 may be made in any case where in the opinion of the

Director of the Division of Purchases and Supply the article so produced or manufactured does not meet the reasonable requirements of such department, institution, or agency of the State, or in any case where the requisition made cannot be complied with completely on account of an insufficient supply of the articles or supplies required or otherwise.

Section 53-70. Evasion by variance from standards of Director. - No such department, institution or agency of the State shall be allowed to evade the intent and meaning of Section 53-67 to 53-72 by slight variations from standards adopted by the ~~Director,~~ Division of Purchases and Supply of the Department of General Services pursuant to Section 2.1-446, when the articles produced or manufactured ~~by him~~ in accordance with ~~his~~ the standards are reasonably adapted to the actual needs of such department, institution or agency.

8. That Section 2.1-374, 2.1-375, 2.1-376, 2.1-376.1, 2.1-436, 2.1-437.1, 2.1-437.2, 2.1-437.3, 2.1-439, 2.1-443, 2.1-448, 2.1-449, 2.1-452, 2.1-454, 2.1-458, 2.1-459, 2.1-460, 2.1-461, 2.1-462, 2.1-463, Chapter 4 of Title 11, containing Section 11-17 through 11-23.5, 15.1-287, 22.1-141, 33.1-186, 33.1-187, 33.1-188 and 33.1-198, of the Code of Virginia be repealed.

INDEX OF THE DISPOSITION
OF
PERTINENT LEGISLATION

SECTION	SUMMARY	DISPOSITION
2.1-374	Declaration of policy to eliminate discrimination in employment on account of race, color, religion, sex or national origin	Repeal, see §11-51
2.1-375	Definitions of: person, agency and contractor	Repeal
2.1-376	All State contracts of over $10,000 required to have declaration of elimination of discrimination and contractor required to be an equal opportunity employer	Repeal, see §11-51
2.1-376.1	Discrimination because of race, religion, color, sex or national origin prohibited	Repeal, see §11-44
2.1-410	Duties for the Department of Management Analysis and Systems Development includes equipment purchases--laboratory measuring equipment	Amended
2.1-436	P and S Appeal Board of five members created	Repeal, see §11-71 and §11-69(b)
2.1-437.1	Appeals: - appeal disqualification within thirty days of notice	Repeal, see §11-71
2.1-437.2	Judicial review of Appeal Board	Repeal, see §11-71(b)
2.1-437.3	Court may stay awarding of contract upon showing of irreparable injury either before or after Appeal Board hearing	Repeal, see §11-68 and §11-70
2.1-439	All proceedings, records, contracts and orders open to public inspection	Repeal, see §11-52
2.1-442	All purchases to be made in accordance with Division rules	Amended, see §2.1-442 and §11-41

SECTION	SUMMARY	DISPOSITION
2.1-443	Division may require successful bidder to post bond equal to one-half of bid guaranteeing execution of contract	Repeal, see §11-62
2.1-448	Preference given to Virginia-produced goods, as practicable	Repeal, see §11-47
2.1-449	No building materials, etc can be purchased from the architect or engineer on the building; violation results in void contract and misdemeanor conviction if guilty	Repeal, see §11-79
2.1-450	Purchases from Commission for Visually Handicapped	Amended, see also §11-45
2.1-450.1	Purchases from non-profit sheltered workshops serving the handicapped without competitive bidding	Amended, see §11-45
2.1-451	When purchasing through Division not mandatory	Amended
2.1-452	Act not applicable to ABC beverage purchases or real estate purchases and leases	Repeal, also see §4-7 and §11-45
2.1-454	Counties, Cities and Towns, public telecommunications etc., may seek aid from the Division in their purchases so as to obtain cheaper prices through central purchasing	Repeal, see §2.1-454.1
2.1-458	Division responsible for all public printing, agencies responsible for requisition from Division for printing	Repeal
2.1-459	Act not applicable to binding of books in State Libraries	Repeal

SECTION	SUMMARY	DISPOSITION
2.1-460	Competitive bidding required for printing, if practicable	Repeal, see §11-41
2.1-461	Division required to give notice of time and place of bidding; may require written contract of party undertaking to do work; may require performance bond equal to one-third of contract price	Repeal, see §11-37, §11-41, and §11-62
2.1-462	Division shall purchase paper required for printing and supply to contractors; use competitive bidding if practicable	Repeal, see §11-41
2.1-463	Division shall employ another if the printing is not done satisfactorily and bring an action on the bond of the defaulting contractor for the State's loss	Repeal
4-7	Functions, duties and powers of the Board (i.e., Alcoholic Beverage Control Commission)	Amended
11-17	All contracts in excess of $10,000 (exceptions noted) require advertisement ten days prior to letting	Repeal, see §11-41 and §11-37
11-17.1	Fixed price design-build or construction management contracts authorized	Repeal, see §11-43
11-18	Each bidder required to accompany his bid with a certified check as a guarantee that if the contract is awarded to him he will accept it and do the work	Repeal, see §11-57 and §11-61
11-19	Bond may accompany bid in lieu of certified check	Repeal, see §11-57 and §11-61
11-20	Contract required to be let to the lowest responsible bidder; unless the contract is for less than $10,000, the contractor is required to give a performance and payment bond	Repeal, see §11-58 and §11-61

SECTION	SUMMARY	DISPOSITION
11-20.1	Preference allowed resident bidder	Repeal, see §11-47
11-20.2	Time limits and means for withdrawal of bids when the mistake was due to a clerical as opposed to a judgmental error; judicial review allowed bidder when contracting authority denies withdrawal claim	Repeal, see §11-54
11-21	State authorized to reject all bids; State may negotiate with lowest bidder if bid within three per cent of appropriation level of project	Repeal, see §11-42 and §11-53
11-22	All bids and contracts are public records	Repeal, see §11-52
11-23	Bonds required on local government construction contracts over $25,000	Repeal, see §11-58 and §11-61
11-23.1	Specifications relating to equal brand products in contracts for public buildings	Repeal, see §11-49
11-23.2	Contractors are not required to procure a surety bond or insurance from a particular surety or insurance company	Repeal
11-23.3	Preceeding section doesn't affect the right of a State officer to approve or disapprove the surety bonds or insurance	Repeal
11-23.4	All provisions in bid invitations or contract documents in violation of 11-23.2 - 22-23.3 are void	Repeal
11-23.5	Amount of retainage on certain contracts pending completion of the work; not applicable to Highway contracts	Repeal, see §11-56

SECTION	SUMMARY	DISPOSITION
15.1-108	All purchases and sales are to be based on competitive bids when feasible; if sale more than $5,000, sealed bids solicited by public notice	Amended
15.1-109	All contracts by the county purchasing agent must be awarded to the lowest and best bidder; any or all bids may be rejected; bids are public records	Amended
15.1-127	The governing body of a county with an executive secretary is authorized to provide for the centralized competitive purchasing of supplies	Amended
15.1-287	Material for buildings not to be purchased from architect	Repeal, see §11-79
15.1-605	Department of Finance	Amended
15.1-640	Department of Finance	Amended
15.1-712	County Purchasing Agent	Amended
15.1-766	Department of Finance	Amended
22.1-141	Competitive bidding required on all State-aid school construction projects, in compliance with Sections 11-17 et seq; architect or engineer on project prohibited from bidding	Repeal, see §11-57 et seq
33.1-185	All highway construction work over $200,000 must be after public advertising 14 days prior to letting the contract. The Highway Commission may award contracts between $25,000 and $200,000 by competitive bidding, or do the work with its own forces	Amended, see §11-41, §11-37, and §33.1-185
33.1-186	Each bidder required to submit a certified check or in lieu of the check, a bond, with his bid	Repeal, see §11-57

SECTION	SUMMARY	DISPOSITION
33.1-187	Contract must be let to the lowest responsible bidder and the successful bidder must present a performance bond in the sum of 100% of the cost of the work, payable to the State	Repeal, see §11-58
33.1-188	Commission authorized to reject any and all bids	Repeal, see §11-42
33.1-189	All bids and contracts open to public inspection	Repeal, see §11-52
33.1-190	In cases of emergency or on project costing more than $200,000, Commission may build roads by force account	Amended, see §11-41(d)
33.1-192.1	Contracts entered into after June 30, 1976 - claimant must exhaust the review process in Section 33.1-386 before bringing an action against the Highway Dept. - must be brought within 18 months of work completion; claims against the contractor or surety must be brought within 5 years after work completion	Amended, see §33.1-192.1
53-67	Agencies required to purchase goods needed from Dept. - counties and districts may purchase, as well as volunteer nonprofit rescue squads	Amended
53-68	Purchases must be made through the Dept. of Purchases and Supply	Amended
53-70	Departments and agencies not allowed to evade the meaning of the sections by slight variations from standards adopted by the Director	Amended

COMPARISON OF GOVERNMENT ACCOUNTING OFFICE BASIC PROCUREMENT PRINCIPLES, VIRGINIA PUBLIC PROCUREMENT ACT, AND ATTACHMENT O TO OMB CIRCULAR A-102

GAO BASIC PROCUREMENT PRINCIPLES	VIRGINIA PUBLIC PROCUREMENT ACT	SECTION OF ATTACHMENT O
1. Code of Conduct		
The governmental activity should maintain a written code or standards of conduct to govern the performance of its officers, employees or agents engaged in awarding and administering contracts. The governmental activity's officers, employees, or agents should neither solicit nor accept gratuities, favors or anything of monetary value from contractors or potential contractors -- disciplinary actions should be applied for violations.	Many statutes dealing with ethics in public contracting are located outside of the Act. For example, see the Virginia Conflict of Interest Act (§§ 2.1-347 et seq), the Virginia Governmental Frauds Act (§§ 18.2-498.1 et seq), and Articles 2 and 3 of Chapter 10, Title 18.2. Those provisions in Article IV of the Act prohibit public employees from participating in procurement transactions in which they have a pecuniary interest, from solicitating and accepting gifts or receiving kickbacks. Further, the statutes require disclosure of subsequent employment by public employees who once had responsibility for procurement transactions. The maximum penalty for willful violation of the statutes is confinement in jail for not more than 12 months, a fine of not more than $1000, or both. In addition a public employee convicted forfeits his employment.	7
2. Extent of Competition		
All procurement transactions regardless of whether by formal advertising or by negotiation and without regard to dollar value, should be conducted in a manner that provides maximum open and free competition.	Competitive sealed bidding or competitive negotiation is required on all public contracts over $10,000 with nongovernmental contracts for the purchase or lease of goods, or for the purchase of services, insurance or construction unless exempt by statute. Even where the contract is for less than $10,000, the competition is required when practicable.	10a

GAO BASIC PROCUREMENT PRINCIPLES	VIRGINIA PUBLIC PROCUREMENT ACT	SECTION OF ATTACHMENT O
3. Procurement Procedures		
Written procurement procedures should provide, as a minimum:		
(a) Proposed procurement actions should be reviewed to consider consolidation of requirements to obtain a more economical purchase and to avoid unnecessary or duplicative items.	Each public body must develop its own procedures, including provisions to review proposed purchases for economy or consolidation. The Act does not prescribe these procedures.	8
(b) Solicitations of offers, whether by formal advertising or negotiation, should incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a "brand name or equal" description may be used as a means to define the performance or other salient requirements of a procurement.	Both competitive sealed bidding and competitive negotiation require a written description of what is being sought. See §§ 11-37(1) and (2). The use of "brand names" does not restrict bidders to the specific brand; it conveys the general style and any article which is equal is acceptable. See § 11-49.	10b(1)(a)
(c) Invitations for Bids and Requests for Proposals should clearly set forth all requirements which bidders must fulfill in order for bids and proposals to be properly evaluated.	Competitive sealed bidding requires the issuance of a written invitation to bid containing or incorporating by reference the specifications and contractual terms and conditions applicable to the procurement. See § 11-37(1). Competitive negotiation requires the issuance of a written Request for Proposal indicating in general terms that which is sought to be procured and specifying the evaluation factors to be used. See § 11-37(2).	10b(1)(a)

GAO BASIC PROCUREMENT PRINCIPLES	VIRGINIA PUBLIC PROCUREMENT ACT	SECTION OF ATTACHMENT O
4. Type of Procuring Instrument		
The type of procuring instrument used should be appropriate for the particular procurement. "Cost-plus-a-percentage of cost" types of contracts should be prohibited.	Public contracts may be awarded on a fixed price or cost reimbursement basis. Only in cases of an emergency shall contracts be awarded on a cost-plus-a-percentage of cost basis. See § 11-43.	12
5. Method of Procurement		
Procurement should be made by one of the following methods: (a) small purchase procedures; (b) competitive sealed bids (formal advertising); (c) competitive negotiation; (d) non-competitive negotiation.	"Noncompetitive negotiation" is the equivalent of sole source procurement under the Act. See § 11-41(c).	
(a) Small purchase procedures - relatively simple and informal procurement methods that are sound and appropriate for a procurement of services, supplies or other property, costing in the aggregate not more than a specific dollar amount established as a ceiling. If so used, price or rate quotations should be obtained from an adequate number of qualified sources.	Competitive sealed bidding or competitive negotiation are not required for procurements under $10,000 if a public body adopts purchasing procedures in writing, but competition is still required wherever practicable. See § 11-41(e).	11a
(b) Competitive sealed bids - method in which sealed bids are publicly solicited and a firm-fixed-price contract is awarded to the responsible bidder whose bid, conforming exactly with all the	The sections dealing with competitive sealed bidding require the issuance of a written Invitation to Bid containing the specifications and conditions, public notice of the Invitation, public opening of all bids received, criteria for	11b

GAO BASIC PROCUREMENT PRINCIPLES	VIRGINIA PUBLIC PROCUREMENT ACT	SECTION OF ATTACHMENT O
material terms and conditions of the Invitation for Bids is the lowest in price.	evaluating the bid and award to the lowest responsive and responsible bidder. See § 11-37(1).	
(1) The following, as a minimum, must be present for competitive sealed bidding to be feasible:		
(a) A complete, adequate and realistic specification or purchase description is or can be made available.	The issuance of a written Invitation to Bid containing or incorporating by reference the specifications and contractural terms and conditions applicable to the procurement is required. See § 11-37(1).	11b(1)(a)
(b) Two or more responsible suppliers are willing and able to compete effectively.	If there are not two or more responsible suppliers, the procurement is treated as a sole source procurement. See § 11-41(c).	11b(1)(b)
(c) The procurement lends itself to a firm-fixed-price contract, and selection of the successful bidder can appropriately be made principally on the basis of price.	Awards are required to be made to the lowest responsive and responsible bidder. See § 11-37(1).	11b(1)(c)
(d) Sufficient time is available to prepare a complete statement of needs and terms and for the bidders to prepare and submit their bids.	If insufficient time is available, the procurement is treated as an emergency. See § 11-41(d).	

GAO BASIC PROCUREMENT PRINCIPLES	VIRGINIA PUBLIC PROCUREMENT ACT	SECTION OF ATTACHMENT O
(2) The following requirements should apply:		
(a) A sufficient time prior to the date set for opening of bids, bids should be solicited from an adequate number of known suppliers. In addition, the Invitation should be publicly advertised. The Invitation should clearly define the items or services needed in order for the bidders to properly respond.	Public notice of the Invitation to Bid is required ten days prior to the date set for receipt of bids. The Invitation to Bid is required to contain or incorporate by reference the specifications and contracted terms and conditions applicable to the procurement. See § 11-37(1).	11b(2)(a) and (b)
(b) All bids should be opened publicly at the time and place stated in the Invitation. A firm-fixed-price contract award should be made with reasonable promptness by written notice to that responsible bidder whose bid conforming to the Invitation for Bids is lowest. Where specified in the bidding documents, factors such as discounts, transportation costs, and life-cycle costs should be considered in determining which bids may be rejected when there are sound documented business reasons in the best interest of the program.	Public opening and announcement of all bids received is required. The bids are required to be evaluated upon the requirements set forth in the Invitation, which may include special qualifications of potential contractors, life-cycle costing, value analysis and other criteria; with the award to be made to the lowest responsive and responsible bidder. See § 11-37(1). An Invitation to Bid, a Request for Proposal, or any other solicitation, or all bids or proposals, may be cancelled or rejected. See § 11-42.	11b(2)(c), (d) and (e)

GAO BASIC PROCUREMENT PRINCIPLES	VIRGINIA PUBLIC PROCUREMENT ACT	SECTION OF ATTACHMENT O
(c) When the possibility exists that only a single bid might be received, the governmental activity should insure that a fair and reasonable price will be obtained. Written notice should be provided to the prospective bidders that, in the event that a single bid is received, a price or cost analysis of the bid will be performed.	If the public body is unable to determine that the procurement is a sole source procurement, bids are going to be solicited from more than one vendor. A public body always has the option of performing a cost analysis on a bid.	
(c) Competitive negotiation - Method in which proposals are requested from a number of sources and the request for proposal is publicized, negotiations are normally conducted with more than one of the sources submitting offers, and either a fixed-price or cost-reimbursable contract is awarded, as appropriate.	The sections dealing with competitive negotiation require the issuance of a written Request for Proposal and public notice of the proposal, optional discussion or negotiation with each responsible offeror and award to the offeror whose proposal is most advantageous. The essence of competitive negotiation is comparison of proposals from several offerors. See § 11-37(2).	11c
The following requirements should apply:		
(1) Proposals, including price, should be solicited from an adequate number of qualified sources to permit reasonable competition consistent with the nature and requirements of the procurement. The request for proposals should be publicized, and reasonable requests by other sources to compete should be honored to the maximum extent practicable.	Public notice of the Request for Proposal is required ten days prior to the date set for receipt of the proposals. Proposals may be solicited directly from potential contractors. See § 11-37(2).	11c(1)

GAO BASIC PROCUREMENT PRINCIPLES	VIRGINIA PUBLIC PROCUREMENT ACT	SECTION OF ATTACHMENT O
(2) When price is not the only factor, the request for proposal should identify all significant evaluation factors including price or cost and their relative importance.	The written Request for Proposal is required to indicate in general terms the subject of the procurement and the evaluation factors to be used. See § 11-37(2).	11c(2)
(3) The governmental activity should provide mechanisms for technical evaluation of the proposals received, determination of responsible offerors for the purpose of written or oral discussions, and selection for contract award.	The "mechanisms" must be developed by the public body. Evaluation, negotiation and award are all authorized in the Act. See § 11-37(2).	11c(3)
(4) Written or oral discussions should be conducted with all responsible offerors who submit proposals within a competitive range, price, and other factors considered, except that the discussions may be omitted where clearly inappropriate.	A public body may discuss or negotiate with each responsible offeror who submitted a proposal reasonably susceptible of being selected for award. See § 11-37(2).	
(5) Award may be made to the responsible offeror whose proposal will be most advantageous to the procuring party, price, and other factors considered. Unsuccessful offerors should be notified promptly. Upon request by an unsuccessful offeror, such offeror should be informed of the reasons for not receiving the award.	The public body is required to award the contract to the offeror whose proposal is determined in writing to be the most advantageous, taking into consideration the evaluation factors set forth in the Request for Proposal. See § 11-37(2).	11c(4).

GAO BASIC PROCUREMENT PRINCIPLES	VIRGINIA PUBLIC PROCUREMENT ACT	SECTION OF ATTACHMENT O
(d) Noncompetitive negotiations - Procurement through solicitation of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate.	The Act uses the terms "single source" and "emergency" to refer to instances which the GAO lables as a "noncompetitive negotiation."	11d
Selection of Procurement Method		
(a) Except as provided for in the remaining paragraphs of this section, competitive sealed bidding should be the method used.	Article II, § 11-41 - Methods of Procurement -- Competitive sealed bidding or competitive negotiation is required on all public procurement contracts, except as provided in the Act. See § 11-41(a).	
(b) Small purchase procedures may be used if the procuring party does not expect the aggregate amount to exceed the established ceiling. All items must be properly grouped together. Requirements should not be broken down into two or more transactions for the purpose of using small purchase procedures.	Article II, § 11-41(e) Competitive sealed bidding is not required for procurements under $10,000, if a public body adopts in writing purchasing procedures, but competition is still required whenever practicable. See § 11-41(e).	11a
(c) Competitive negotiation may be used if conditions are not appropriate for the use of competitive sealed bidding. The records should include a written determination setting forth the reasons for not using competitive sealed bids.	A public body must determine in writing that competitive sealed bidding is either not practicable or not advantageous before competitive negotiation may be used, except that professional services may always be procured by competitive negotiation. See § 11-41.	11c

GAO BASIC PROCUREMENT PRINCIPLES	VIRGINIA PUBLIC PROCUREMENT ACT	SECTION OF ATTACHMENT O
(d) Noncompetitive negotiation may be used when the award of a contract is infeasible under the methods set forth in subparagraphs a, b, and c above. Circumstances under which a contract may be so awarded should be limited to the following:		
(1) The item is available only from a single source.	If a public body determines in writing that the item is available only from one source, competitive sealed bidding or competitive negotiation are not required to award to that source. See § 11-41(c).	11d(1)
(2) Public exigency or emergency will not permit a delay, incident to competitive solicitation.	In cases of emergencies, contracts may be awarded without competitive sealed bidding. See § 11-41(d).	11d(2)
A written statement, satisfying the use of noncompetitive negotiation should be included in the contract file prior to the award of a contract negotiated under noncompetive conditions.	Article II, § 11-41(c) and (d) - The Act requires a public body to determine in writing that an item is available from only one source or state that an emergency exists before the contract may be awarded without using competitive sealed bidding or competitive negotiation. In addition, a public body may enter into contracts without competition for the purchase of goods or services produced by persons or in schools under the supervision of the Virginia Commission for the Visually Handicapped, or which are performed or produced by nonprofit sheltered workshops serving	

GAO BASIC PROCUREMENT PRINCIPLES	VIRGINIA PUBLIC PROCUREMENT ACT	SECTION OF ATTACHMENT O
	the handicapped. Competition is not required for contracts for legal services, expert witnesses, and other services associated with litigation or regulatory proceedings, or for the purchase of alcoholic beverages by the Alcoholic Beverage Control Commission. See § 11-45.	
7. Contractor Responsibility		
Contracts should be awarded only to responsible contractors that possess the potential ability to perform successfully under the terms and conditions of a proposed procurement. Consideration should be given to such matters as contractor integrity, record of past performance, and financial and technical resources or accessibility to necessary resources.	A responsible bidder is defined as a person who has the capability in all respects to perform fully the contract requirements and the integrity and reliability which will assure good faith performance, and who has been prequalified if required. See § 11-37(9).	10b(2)
8. Cost Principles		
State and local governments should develop and use cost principles for determining allowable costs under cost-type contracts and for use in negotiating fixed-priced contracts which are based on cost estimates.	Cost principles must be developed by the individual public body where appropriate.	12

GAO BASIC PROCUREMENT PRINCIPLES	VIRGINIA PUBLIC PROCUREMENT ACT	SECTION OF ATTACHMENT O
9. Cost or Price Analysis		
Governmental activities should perform some form of cost or price analysis in connection with every negotiated procurement action including contract modifications. Prior to the award of any negotiated contract or modification of any contract over $100,000, except when price reasonableness is based on adequate price competition or established catalog or market price or law or regulation, the contracting activity should require the contractor to submit the elements of its estimated costs supported by cost or pricing data in writing and to certify that, to the best of his knowledge and belief, the data is accurate, complete and current at the time of agreement on price. Contracts or modifications negotiated with reliance on such data should provide the governmental activity a right to a price adjustment to exclude any significant sum by which the price was increased because the contractor had submitted data that was not accurate, complete, and current as certified.	The extent of cost or price analysis has been left to each public body. All of the items mentioned by the G.A.O. are either authorized by the Act or are matters of contract between the parties.	

GAO BASIC PROCUREMENT PRINCIPLES	VIRGINIA PUBLIC PROCUREMENT ACT	SECTION OF ATTACHMENT O
10. Procurement Records		
Records should sufficiently detail the history of a procurement including, but not limited to, information pertinent to rationale for the method of procurement, selection, and the basis for the cost of price negotiated.	The Act requires all significant determinations to be in writing, and these documents are a part of the contract file.	13
11. Contractor Records, Access & Audit		
Governmental activities should have access to pertinent records of contractors' and subcontractors' books and documents or other evidence for the purpose of audit, examination and copying, and shall be permitted to enter and inspect, upon reasonable notice, the premises where the contractor is performing the work required by the contract.	The availability of a contractor's records is a matter of contract under the Act.	14h
12. Value Engineering		
Governmental activities should be encouraged to incorporate value engineering provisions in contracts for projects of sufficient size and duration to offer reasonable opportunities for cost reductions. Value engineering is defined as a systematic and creative effort which analyzes each contract item or task to insure that its essential function is provided at the overall lower cost.	Value engineering is permissible under the Act, but as the G.A.O. notes, is a matter of contract.	

GAO BASIC PROCUREMENT PRINCIPLES	VIRGINIA PUBLIC PROCUREMENT ACT	SECTION OF ATTACHMENT O
13. Contract Administration		
Governmental activities should maintain a system for contract administration to insure that contractors conform with the terms, conditions, and specifications of the contract or purchase orders, including modifications.	The implementation and administration of contracts must be left to regulations formulated by the particular public body involved.	15
14. Payments		
Payments should be made promptly for contract work performed, including, when appropriate, partial payment for goods, materials, or work received or accepted. Progress payments may be made for work performed under a contract, upon the basis of costs incurred not to exceed the contract price, if permitted under state law, in certain instances.	Payments are largely a matter of contract. The Act does contain provisions concerning payment of retainage on construction contracts. See § 11-56.	
15. Subcontracts		
The governmental activity should not restrict competition for subcontracts by directing their contractors to use a particular subcontractor or any selected group of subcontractors. When the prime contract is not a competitively awarded firm-fixed-price contract, the contracting activity should review the award of subcontracts to the extent necessary to ensure that sound procurement practices are being followed.	The Act does not restrict the selection of subcontractors. Review of subcontractors and subcontracts is a matter of contract.	

GAO BASIC PROCUREMENT PRINCIPLES	VIRGINIA PUBLIC PROCUREMENT ACT	SECTION OF ATTACHMENT O
16. Profit Guidelines		
For each contract for which cost analysis is performed, profit, if any, should be negotiated as a separate element of the price. The aim of the negotiation is to establish a fair and reasonable profit in light of the risk borne by the contractor, the contractor's capital investment, and the quality of its record of past performance.	The Act contains no provision comparable to this, but such an analysis is clearly permitted.	
17. Contingent Fees		
The governmental activity should include in every contract awarded a "covenant against contingent fees" in which the contractor warrants that no person or selling agency has been employed or retained to solicit or secure the contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business. For breach of violation of the warranty, the governmental activity should have the right to annul or terminate the contract or to deduct from the contract price or consideration or otherwise recover the full amount of such commission, percentage, brokerage or contingent fee.	A public body may include such a contractual provision wherever appropriate. The Act does not contain such a provision because the exceptions are imprecise and ambiguous, and a contract for "influence peddling" affecting an official's judgment is void as contrary to public policy in Virginia.	

GAO BASIC PROCUREMENT PRINCIPLES	VIRGINIA PUBLIC PROCUREMENT ACT	SECTION OF ATTACHMENT O
18. Gratuities		
The governmental activity should include in every contract awarded a "covenant against gratuities" in which the contractor shall represent and warrant that neither it nor any employee, agent, or representative of the contractor or of any subcontractor, offered or gave any gratuities to any official, employee, or agent of the governmental body for which the contract is being awarded with a view toward securing a contract or securing favorable treatment with respect to the awarding or amending, or the making of any determinations with respect to the performance of the contract. Such provisions should provide that, in addition to other rights and remedies provided by law, the contracting activity may terminate the contract by written notice or may assess exemplary damages in an amount which should be ten times the value of the gratuities.	The Act states that any contractor, subcontract, bidder or offeror who willfully confers upon any public employee a gift, etc., unless consideration of substantially equal or greater value is exchanged, is guilty of a misdemeanor. See § 11-77. There is no requirement that such a "covenant against gratuities" be included in each public procurement contract, but any public body could do so if appropriate.	
19. Contractor Provisions		
The governmental activity should insure that contracts for the performance of work define a sound and complete agreement, including provisions to define, to the extent appropriate:	All of the items listed are possible contractual provisions which may be used when appropriate by any public body.	

GAO BASIC PROCUREMENT PRINCIPLES	VIRGINIA PUBLIC PROCUREMENT ACT	SECTION OF ATTACHMENT O
(a) The scope and extent of the contract work;		
(b) The time for completion of the contract work, including where appropriate, dates for completion of significant tasks;		
(c) The contract price and method of payment;		
(d) Identification of key personnel and facilities necessary to accomplish the work within the required time;		
(e) The extent of subcontracting and consulting agreements;		
(f) Provision for changes by the governmental activity within the general scope of the contract in the services or work to be performed;		
(g) Provision for termination by the governmental activity of contract performance for default by the contractor or for the convenience of the governmental activity and, where appropriate, for suspension by the governmental activity of the contractor's performance of project work under the contract;		

GAO BASIC PROCUREMENT PRINCIPLES	VIRGINIA PUBLIC PROCUREMENT ACT	SECTION OF ATTACHMENT O
(h) Provision for resolution of disputed matters arising under the contract through adjudication, administrative remedies, or arbitration, at the option of the governmental activity;		
(i) Sanctions or penalties for nonperformance by the contractor;		
(j) Price reduction for defective cost or pricing data;		
(k) Contractor records, access and audit;		
(l) All provisions needed to ensure contractor conformance with the terms, conditions and specifications;		
(m) Prohibition against contingent fees and gratuities.		
20. Cooperative Intergovernmental Agreements		
To foster greater economy and efficiency in public procurement, governmental activities are encouraged to enter into cooperative intergovernmental agreements for procurement and/or use of common goods and services.	The Act authorizes such agreements. See § 11-40.	

PUBLIC CONTRACT CASES

PUBLIC CONTRACT CASES
I. STATE CONTRACTS

Bowers v. Town of Martinsville

159 S.E. 196, 156 Va. 497 (1931)

The general contractor, Bowers, entered into a contract with the State Highway Commission to construct several bridges. Bowers subsequently contracted with Loving to construct the bridges; the contract providing that, "this job would be handled in the same manner that it would be if you (Loving) had the direct contract with the State Highway Commission." The work was done negligently and an attachment proceeding was instituted by the Town of Martinsville against Bowers, Loving and the Surety (Royal) as principal defendants and the State Highway Commissioner and Treasurer of Virginia as codefendants.

The Court held that the contract between the Commonwealth and Bowers was not assignable without the consent of the Commonwealth. Not only was the consent of the Commonwealth neither procured nor sought, "but the very terms of the contract show(ed) that it was the intention of the parties that Bowers should remain as the person contracting with Commonwealth, and that he and his surety should remain responsible to the Commonwealth for the performance of this contract.

The Court concluded that Loving was an independent subcontractor and not an assignee. However, the Court held that the duty of the general contractor (Bowers) to see that the property was not damaged in the bridge construction was nondelegable; hence the general contractor was held liable for the subcontractor's negligence.

The town of Martinsville was allowed to maintain an action in its own name on the bond, for payment of damages to the property because the bond had been executed, in part, for the town's benefit as owner of the property.

The Court also stated that the mechanics' lien statutes have no application to contracts with the State for construction of public improvements nor do they give a subcontractor (Lovings) any liens on sums due by the State on such projects.

Button v. Day

139 S.E. 2d 91, 205 Va. 629 (1964)

The Attorney General brought this action on behalf of the Peninsula Ports Authority of Virginia to determine whether the Legislative Act (Enabling Act) creating the authority was within Virginia's constitution and whether an agreement entered into between the Authority and the City of Newport News was valid.

The Court held that the Enabling Act was constitutional, but where the Act authorized the city to enter into a contract with the Port Authority for a "contingent liability," the contract being one which declared that the obligaation assumed by the City would be and continue effective notwithstanding any legal disability of the State to make appropriations, the Act exceeded its powers. The Court stated that Section 127 of Article VIII of Virginia's Constitution limits the obligations which a City may incur; the "Constitutional inhibition is a restriction upon the power of the legislature to delegate to municipalities the right to incur debts or obligations contrary to the provisions stated therein."

Crowder v. Commonwealth Department of Welfare and Institutions

121 S.E. 2d 487, 202 Va. 871 (1961)

The State sued for specific performance of defendant's contract for the sale of land. The Court stated that the Superintendent of the State Convict Road Force under the Division of Corrections, Department of Welfare and Institutions had authority, as an agent of the State, to bind the Commonwealth for which he was acting, as to the option to purchase land.

Day v. Abernathy

133 S.E. 2d 299, 204 Va. 723 (1963)

The partnership of L. S. Abernathy & Company sued Sidney Day, Comptroller of Virginia, the Highway Department, and the Highway Commissioner for the balance allegedly due on the contract for the construction of a bridge and approaches to it. The plaintiff successfully argued that it bought materials in accordance with the terms of the contract but they were not used because the Highway Department eliminated them from the contract and substituted the use of other materials; thus the plaintiff argued that it was entitled to be reimbursed for the materials purchased and not used. The Court held that the road and bridge specifications which provided that allowance would not be made to a contractor for items found unnecessary except for materials purchased prior to notification of elimination of items, applied to the contractor's claim for materials which had been purchased before the Highway Department determined that another type should be substituted.

Graham v. Commonwealth

143 S.E. 2d 831, 206 Va. 431 (1965)

In an action by construction contractors against the State, the Court held that the contractors were entitled to have any contract doubts resolved in their favor and against the State, the author of the instrument.

Jones v. Nelson County

120 S.E. 140, 137 Va. 612 (1923)

The road construction contract provided that if the State Highway Commissioner was dissatisfied with the work of the contractor the County could take over and complete the work at the cost of the contractor, provided certain contractural provisions were complied with.

Held that such provisions were conditions precedent to the County doing any work. Case remanded for a determination of the factual issues as to whether such conditions were complied with by the County, and if not, to what extent the County was liable.

Main v. Department of Highways

142 S.E. 2d 524, 206 Va. 143 (1965)

A highway contractor sued the Highway Department for breach of a highway construction and improvement contract.

The contractor was notified several months after the work began that the sources of materials intended to be used "were not of suitable quality and could no longer be used." The Highway Department thereupon directed the contractor to secure another type of select material and to finish the graded roadway with the latter material to a depth of six inches. The contractor complied with these directions of the Department and performed all conditions to the contract on their part. The extra work required of the contractor was performed at a cost of $509,468.97 over and above the original contract price of the project.

The lower court held that the contractor was not entitled to recover for the alleged extra work performed because he had failed to obtain supplemental agreements or work orders relating to the contract modifications, as required in the specifications, in order to bind the Department for the additional work and materials.

The contractor alleged that the Department was estopped to rely on those provisions in the specifications when it was determined that the material previously designated was not suitable and the Department directed the contractor to secure material from another source.

The Virginia Supreme Court rejected the contractors arguments. It reaffirmed that the construction, maintenance and operation of a highway system is a governmental function and that the doctrine of estoppel does not apply to the rights of a state when acting in its governmental capacity. The Court further stated that it knew of no principal of law which supported the view that failure to act upon or pay an obligation constituted a waiver of any defense to an alleged obligation or an estoppel to assert such a defense. Thus,

the Highway Department's argument that the contractor had failed to protect himself by obtaining the required supplemental work orders was upheld on appeal.

The Court held that the provision in the specifications providing that the Highway Commissioner "shall decide all questions which may arise as to the character, quality, amount and value of any work done and material furnished, and that his estimates and decisions shall be final and conclusive upon the parties" was valid and binding in the absence of any allegation that the Commissioner was guilty of fraud, bad faith or had exceeded his authority. The Court also stated that the fact that the Commissioner was made the arbiter did not affect the validity of the argument, nor did his decision-making authority oust the jurisdiction of the courts.

The Court concluded by stating that the contractor and subordinate employees of the Department could not enter into an oral agreement for the modification of a formal written contract, to place upon the State an added obligation of more than $500,000. Thus, the contractor's failure to obtain written work orders to cover the extra work precluded him from recovering on an implied agreement or a quantum meruit basis.

Phillips & Neal v. Baker

131 S.E. 129, 144 Va. 138 (1926)

Case limited to specific contract and evidentiary points - Baker (plaintiff below) asserted a claim against Phillips & Neal and designated the State Highway Commission as being indebted to Phillips & Neal (general contractors who entered into a contract with the State).

Evidence held sufficient to support the verdict for compensation to Baker for grading the road.

Ragland v. Commonwealth

200 S.E. 601, 172 Va. 186 (1939)

Facts are similar to Trinkle - contractor sued to recover for overhaul of top soil. The contractor's bid was based on specifications prior to an amendment by the Highway Department.

The Court reaffirmed its decision in Trinkle, stating that when a contractor agrees to work according to the Department's specifications, the specifications which are in effect at the date of and are referred to in the advertisement calling for the bids, are binding.

The Court stated that the statute places a burden on the contractor to review the specifications and the Highway Department is not required to ascertain specifications under which he is bidding.

The Court also held that the specifications can't be changed by subordinate Department employees.

No recovery on a quantum meruit basis was allowed.

C. W. Regan, Inc. v. Parsons, Brinckerhoff, Quade & Douglas

411 F. 2d 1379 (4th Cir. 1969)

The contractor (Regan) on the Elizabeth River Tunnel sued to recover for damages which occured when a temporary bulkhead built by another contractor and approved by the project's engineer (Parsons) leaked and caused flooding. The Court held that because Regan had not been a party to the original agreement between the project's consulting engineer (Parsons) and the Tunnel Commission, he could not recover against the engineer (the Tunnel's representative) for damages on the theory that the engineer breached some warranty to him by not properly performing the contract with the Tunnel Commission.

The Court stated that the contract did not make the engineer responsible to one contractor for the negligence of another.

Stuart v. Smith-Courtney Co.

96 S.E. 241 123 Va. 231 (1918)

The plaintiff below, Smith-Courtney Co., sold machinery to the State Lime Board (suit is against Board members). The Court allowed recovery of the sale price but denied the plaintiff's request for the amount expended on repairs in order to make the machinery comply with the contract specifications. In response to the State's demurrer that it could not be sued without its consent, the Court stated that "The Commonwealth will not be astute to escape inquiry into its liability for its alleged contracts, or to take advantage of technical defenses which are permissible to other litigants."

Thompson v. Commonwealth

89 S.E. 2d 64, 197 Va. 208 (1955)

The State was granted specific performance in a contract action involving the manufacture and delivery of legislative electrical voting system spare parts. The contract was held to be within the State's authority to enter into it because it was made for the purpose of settling a dispute which stemmed from earlier contractual dealings between the defendants and the State.

Trinkle v. Commonwealth

196 S.E. 652, 170 Va. 429 (1938)

Action by subcontractor Trinkle against the State to recover charges for "overhaul" of gravel in construction of road. The

Highway Department changed the specifications to exclude "overhaul" before the bids from the contractors were accepted; however, earlier contracts had allowed for such charges.

Held that the Highway Department had a right to make changes in the specifications prior to final bid acceptance and that knowledge by the contractor of such changes was properly chargeable against the subcontractor.

Held also that only the plans and specifications on file in the Highway Department are authentic and all information sent from the Department unless furnished by a proper official is used at the bidder's risk.

The Court placed the burden on the contractor to inform himself of plans which were subject to change by the Department. The Court further stated that if the contractor had any doubts as to the interpretation of the specifications, then such should be clarified before the bids are submitted and the contracts executed.

"If the contractor, through ignorance or carelessness, fails to inform himself of the plans and specifications which are subject to change or modification at any time by the other contracting party, then he enters into such contract at his risk and cannot claim that he did not know that there had been changes or modifications in the specifications, when there was available to him at any time the original one in the office of the Highway Department and kept there by mandate of law." Id, p. 656.

The Court stated that it would not rule on the policies of the Highway Department in giving information to bidders or in bringing changes to their attention.

Held that the Highway Department determines whether there has been an unreasonable delay by the contractor in completing a project and that the Department's judgment should not be lightly set aside by the Court.

Subcontractor denied recovery on quantum meruit basis for overhaul of gravel.

PUBLIC CONTRACT CASES
II. LOCAL GOVERNMENT CONTRACTS

Alleghany County v. Parrish

25 S.E. 882, 93 Va. 615 (1896)

The Court noted the statutory restrictions placed on the county in dealing with county property, and refused to recognize an agreement wherein the county attempted to allow a private citizen to use courthouse square land for a law office. The Court also held that where orders made by the county court and by the Board of Supervisors as to the use of the county property are beyond the scope of their poweres and in violation of their duties, the county is not estopped from denying their authority as its agents.

American-LaFrance and Foamite Industries, Inc. v. Arlington County

178 S.E. 783, 164 Va. 1 (1935)

The Court held that the contract entered into between the county and the plaintiff for the purchase of fire engines was void because the county failed to observe a constitutional provision in creating the debt and it was not approved by qualified electors. The seller was not allowed to recover the balance of the purchase price on an implied contract to pay for the value of the goods sold and delivered, nor could it recover upon quantum meruit. The issues of restoration and compensation for the use of the property were not raised here.

American-LaFrance and Foamite Industries, Inc. v. Arlington County

192 S.E. 758, 169 Va. 1 (1937)

Here the Court noted that title to the fire engines never passed to the city; thus the Court ordered that the equipment be returned to its owner along with a fair amount of rent or compensation for its use while retained by the county.

Town of Appalachia v. Mainous

93 S.E. 566, 121 Va. 666 (1917)

The Court held in pertinent part, that it is for the council of a municipality to decide what streets it will grade or pave and the character of the work. Thus in matters of this character, the decision of the council is, in the absence of fraud, final and conclusive and should not be reversed by the courts, unless the council transcends its powers. Also, whether a bond should be required of municipal contractors rests within the discretion of the council and the courts will not interfere, even on the complaint of a citizen.

Town of Ashland v. Newman

175 S.E. 724, 163 Va. 500 (1934)

The Court held, in pertinent part, that "A contract entered into by a municipality which has no reference to some public duty or governmental activity of the municipality is subject to a practical construction as in the case of individuals."

W. D. Bunn & Co. v. Dickenson County

89 S.E. 872, 119 Va. 408 (1916)

Case limited to specific contract. The contract allowed the county to make minor location changes in the location of the road and provided that the contractor would be paid at unit prices for any excess in total quantities resulting from the change. Contractor allowed to recover.

City of Bristol v. Dominion National Bank

149 S.E. 632, 153 Va. 71 (1929)

The City of Bristol entered into a contract to exempt certain property from taxes for 10 years in consideration for the property owners developing the land. The contract was held void under the City's charter provisions, requiring competitive bidding and auditor's certificate. The City was not liable on quantum meruit for the totally void contract.

The Court stated that City contracts not authorized by the City charter or statute are void and that persons dealing with public officials are responsible for knowing the limitations on the officials' power to contract.

Campbell County v. Howard

112 S.E. 876, 133 Va. 19 (1922)

The Court held in pertinent part that a county board of supervisors can only act to obligate the county in employing counsel at authorized meetings duly held and as a corporate body by resolution duly adopted, and not by the action of its members separately and individually. The board's subsequent resolution allowing the attorneys to account for their services and expenses was held to be a ratification of their unauthorized acts.

Carpenter v. Town of Gate City

40 S.E. 2d 268, 185 Va. 734 (1946)

The Court held in pertinent part that "a contract to drill a well for the Town of Gate City was to be taken most strongly against the driller who drew and prepared the contract."

Davis v. City of Newport News

91 S.E. 136, 120 Va. 290 (1917)

Here the contractor entered into a contract with the city to pave certain streets and guaranteed to keep the work done in good repair for 10 years. On some of the streets the city operated street cars and on others it did not. The Court held that the parties contracted with the different conditions in mind so that the contractor could not be excused from the performance of his guaranty by reason of the settlement of the foundation of the street car tracks which caused injury to the work guaranteed.

Good v. Board of Supervisors of Augusta County

125 S.E. 321, 140 Va. 399 (1924)

Held that in the absence of fraud, a taxpayer cannot bring an action to question the amount of consideration of a construction contract, otherwise valid, entered into by the Board of Supervisors.

Hicks v. Roanoke Brick Co.

27 S.E. 596, 94 Va. 741 (1897)

The Court reiterated its position that a mechanic's lien cannot be claimed against public buildings; nor does the furnishing of materials to be used by a contractor in the building of public buildings give any lien on the funds due by the city or the contractor.

Holston Corp. v. Wise County

109 S.E. 180, 131 Va. 142 (1921)

The Court held that the contract between the county and the quarry company whereby the county guaranteed the payment for rock furnished to contractors in paving county roads was not within the county's constitutional inhibition concerning the granting to the county's credit. The Court recognized the county's authority to make such a contract through its Board of Supervisors, thus when the board ratified the county's engineer in making the contract, all the action was approved. The Court refused to release the county from its liability when the quarry company entered into an agreement with a road contractor.

Home Building & Conveyance Co. v. City of Roanoke

20 S.E. 895, 91 Va. 52 (1895)

The Court held that a city may, under its legislative charter, raise and lower the grade of its streets without compensating abutting owners for damage caused. The Court stated that Roanoke's

charter giving it the power "to build bridges in and culverts under the streets" authorizes it to construct approaches in the streets to bridges built by the city.

The City of Roanoke, in making the street improvements authorized by its charter, was held to be an agent of the State and performing a public duty imposed upon it by the legislature. It was therefore held not to be liable for consequential damages if acting within its jurisdiction and with care and skill.

The Court stated that the City charter provision requiring all contracts for public improvements to be let to the lowest responsible bidder, after notice, etc., does not prohibit the city from constructing approaches to a bridge under the direction of its own engineers and officers. "It simply provides that when such buildings or improvements are let to contract, it shall be to the lowest bidder and after advertisement as provided."

Fairbanks, Morse & Co. v. Town of Cape Charles

131 S.E. 437, 144 Va. 56 (1926)

Fairbanks supplied materials to a contractor which were used in the construction of the water works of the town. The contractor assigned his contract to a bank to secure a loan. The contractor became insolvent. The Court held that the materialmen had no lien on the property of the town, nor on the fund due from the town to the contractor. Thus, having no lien their claims were not superior to the assignment to the bank of the contract.

Legg v. School Board of Wise County and National Surety Company

160 S.E. 60, 157 Va. 295 (1931)

The general contractor, O'Dell, entered into a contract with the school board to construct an addition to one of its buildings. The bond provided merely for the "faithful performance by O'Dell of his contract with the Board." O'Dell sublet the heating and plumbing to Legg. The school board paid O'Dell, but O'Dell declared bankruptcy prior to paying Legg.

The Court held that the school board, by accepting from O'Dell a bond different from that called for by the original conditions before Legg contracted with O'Dell, did not incur any liability to the subcontractor Legg.

Prior to Legg completing his work, he wrote to the school board concerning his payment and received from the school board assurances that "Legg (plaintiff) and the school board would be protected on account of any money which might be due from said O'Dell to plaintiff." The Court stated that the school board owed no liability to Legg and that this statement did not create any.

The Court stated that mechanics liens are not applicable to public buildings, thus the subcontractor could not place a mechanic's lien on the school building for the amount due him from the contractor or fix the school board's liability by giving it notice of the debt.

Further, the division superintendent of schools was held not to be an ex officio agent of the school board, thus his assurances to Legg did not bind the board. The Court noted that while bidders were directed to send their proposals to the board in care of the superintendent, this did not confer on the superintendent the authority to act as the board's agent for purposes other than receiving proposals.

Leonard v. Town of Waynesboro

193 S.E. 503, 169 Va. 376 (1937)

Mrs. Leonard sought a determination as to whether her property was within the corporate City limits, and if so, she then asked to be reimbursed for a water line she constructed. The Trial Court held the property was within but denied any reimbursement. The Supreme Court reversed (as to the money allotment) stating that "As a general rule, a municipal corporation is not bound by a contract made without corporate action by the council, duly assembled, manifested by an order entered of record in the minute book. But if the municipality has power to contract therefore by express contract and the contract is not against public policy and there are no statutory or charter provisions limiting the mode of execution of a like express contract, it will be liable on an implied contract where, with the knowledge and consent, express or implied, of the members of the council, it (municipality) has received benefits rendered at the instance and request of its duly authorized agents acting for on its behalf . . . ."

Luck Construction Co. v. Russell County

79 S.E. 393, 115 Va. 335 (1913)

In this highway construction contract action the Court held that the County's pleas of offset alleging that Luck Construction Co. had failed to perform its agreement and that the county was therefore damaged in excess of the plaintiff's claim, was sufficient to allow the county to recover from the plaintiff.

Held that the monthly payments made on an engineer's estimates did not make the estimates conclusive of the facts recited in them or prevent inquiry into the adequacy of the work, nor were the estimates regarded as a final acceptance of the work. The Court explained that to decide otherwise would negate the contractual provision which stated that, "no work shall be regarded as accepted until the final acceptance of the whole work herein contracted for."

The jury was instructed that such estimates are not binding upon either party where they are induced by fraud, or are the result of fraud or mistake so great as to amount to fraud on the part of the engineers.

Mack Manufacturing Co. v. William A. Smoot & Co.

47 S.E. 859, 102 Va. 724 (1904)

The Court held that a written order from a city contractor, addressed to the city engineer who had supervision of the work, requesting him to pay to Mack Manufacturing Co. the amount due to the contractor as payments became due, was a valid equitable assignment of the amount due or to become due from the city to the contractor. In this case the assignment was for value and took priority over all subsequent executions against the contractor.

Manly Manufacturing Co. v. Broaddus

27 S.E. 438, 94 Va. 547 (1897)

The Court refused to allow a group of taxpayers to enjoin the Board of Supervisors from accepting a jail until it was completed according to the contract. The cost of the jail was originally set at $6,486.00, but as the Court noted, through the "cunning wiles and clever devices of Mr. Robert Manly" (general contractor), the Board was persuaded to accept changes which raised the total price to $13,423.00.

The Court stated that where the Board had the right to enter into the contract and where no fraud was charged nor was it alleged that the Board transcended its power, the taxpayers were not entitled to an equitable injunction remedy. They could, the Court noted, obtain legal relief because the Code states that a claim (as here, by the general contractor) against a county must be approved by the Board and if it appears to the taxpayers to be unjust, then the taxpayers may appeal the Board's decision to pay to the County Court.

Corporation of Mt. Jackson v. Nelson

145 S.E. 355, 151 Va. 396 (1928)

The Court held that the Town's contract for the construction of a water main to carry surplus water to inhabitants outside of the corporate limits was within the city's authority, thus the contractors could sue for the balance due them.

The Court stated that to the extent that the contract attempted to force the town to supply non-residents with water, it was unlawful and ultra vires. However, the contractors were allowed to recover on a quantum meruit theory for the work and labor done, as the town retained and controlled the water main.

City of Newport News v. Doyle & Russell, Inc.

179 S.E. 2d 493, 211 Va. 603 (1971)

The contractor here inadvertently priced one item in the lowest bid to construct an incinerating plant for the city at $100,000 less than intended. The bids were opened before the contractor tried to cancel and withdraw his bid. The official bid form provided that the bidder could not withdraw a bid within 30 days after the opening of the bids and that no plea of mistake in the bid would be available to the bidder for recovery of his deposit or as a defense to any action based upon neglect or refusal to execute the contract.

The Court rejected a California case, whose facts were similar to the present case, wherein the California Court stated: "that the city could not enforce a bid against a contractor who refused to enter into a performance contract when the city knew prior to acceptance of the bid that it contained a material error; that the language that bidders will not be released on account of errors applied only to errors of judgment, not to clerical errors; and that to deny relief in such cases would force the bidder to perform an agreement he had no intention of making."

In holding the contractor liable on the bid bond the Virginia Court stated:

> "While it might seem harsh to hold against a bidder who has actually made a clerical mistake in the preparation of its bid for its refusal to enter into the contract awarded to it to give a performance bond, Doyle & Russell must be held bound by the express provisions of its contract stating that it will not rely on a plea of mistake for cancellation of its bid. To hold otherwise would be to ignore the terms of the official bid form, the provisions of the bid form, and the purpose of requiring a bond to accompany a bid. It would also seriously jeopardize the sanctity of the system for bidding on public contracts and lead to the uncertainty and unreliability of bids. The system followed here for awarding such contracts saves the public harmless, as well as the bidders themselves from favoritism or fraud in its varied forms."

Earlier the Court stated that the language in the bid form indicated that it was within the contemplation of the parties that the risk of mistake in the bid was to be borne by the bidder.

City of Newport News v. Potter

122 F. 321 (1903) (4th Cir)

Potter was employed to superintend the construction of a sewer and sued the City to recover money due him. The Court stated that in such an action, the declaration need not allege that the City had the power to make the contract; such is assumed as well as that such authority is properly exercised, the contract being on its face valid and within the scope of the general powers of the City.

The Court stated that the City charter provision which required that all public contracts be let to the "lowest responsible bidder" was not applicable to the employment of an engineer to supervise the work of a contractor, especially where, as here, the work was done at the contractor's expense and the City could obligate itself by implication to pay for the services rendered.

The Court noted that the City's charter requiring that notice be given 30 days before the work was finally let by advertisement, did not render a contract invalid because only 29 days intervened between the date of the first notice and the opening of the bids, where the contract was let later. A single publication was sufficient.

Court allowed Potter to recover.

City of Portsmouth v. Portsmouth & Norfolk Corporation

95 S.E. 278, 122 Va. 258 (1918)

The Court held that an ordinance which required bidders for a public utility franchise to post a forfeit check was valid. Also the rule that forfeitures are not favored is inapplicable to security deposited by a bidder for a public utility franchise.

City of Richmond v. Barry

63 S.E. 1074, 109 Va. 274 (1909)

Case limited to specific contract and amount of recovery allowed to contractor. The Court held in pertinent part that, although a contract with a city provides that the city engineer shall decide all questions, difficulties and disputes growing out of the contract, and that his estimates and decisions shall be final and conclusive upon the parties thereto, he cannot violate the provisions of the contract nor ignore the meaning attached by trade usage to words or expressions used in the contract, and which are made a part thereof by operation of law.

City of Richmond v. Burton

78 S.E. 560, 115 Va. 206 (1913)

The Court held that under a contract for the construction of a sewer system which provided that the city engineer would decide all questions and disputes of every nature relative to the construction, prosecution and fulfillment of the contract, as well as the character, quality, amount and value of the work done and materials furnished, his decision was final and conclusive on all parties. Held also that the parties are bound by the decision of the engineer even if it is erroneous, unless it can be proved by a preponderance of the evidence that the decision was fraudulently made, or that

such a gross mistake was made as to imply bad faith on his part, or a plain failure to exercise an honest judgment.

Case primarily limited to an interpretation of the particular contract.

City of Richmond v. A. H. Ewings's Sons, Inc.

114 S.E. 2d 608, 201 Va. 862 (1960)

The general contractor (Ewing's) and the City of Richmond entered into a contract to build a juvenile detention home. The site had been approved by the City Manager and City Council. The contractor, however, was denied a building permit because the location was not properly zoned. The decision was appealed to the Board of Zoning Appeals, which granted the permit after several changes were agreed to. A nearby apartment owner obtained an injunction from the Supreme Court restraining the City and the contractor from building on the site. The actions which occurred during the apartment owner's appeal caused that suit to be brought.

The Court held that the contract was not illegal and unenforceable because it contemplated the construction on a site forbidden by the zoning laws.

After the injunction was upheld, the City Council adopted a resolution abandoning the work. The Court held that by this action the city breached its contract with the contractor because the contract said that the city could cancel upon giving seven days' notice in writing to the contractor and this course was not taken.

The contractor was allowed to recover on the basis of its actual expenses under the contract and its liabilities to the subcontractors, as well as the profit it would have earned had it been permitted to carry out the contract.

City of Richmond v. Jackson

88 S.E. 49, 118 Va. 674 (1915)

Here the contractor entered into a contract with the city to dig ditches and lay sewer pipe and guaranteed to keep the work done in good repair for 12 months after the work was completed. The Court held that the contractor was not required to guard and protect the work for the safety of the public for the 12 months after its completion and acceptance by the city, but only during its progress.

City of Richmond v. I. J. Smith & Co.

89 S.E. 123, 119 Va. 198 (1916)

The contractor was allowed to recover the value of the extra work he performed in constructing the Mayo Bridge. The Court held that his letter to the city stating that the city's blueprints were

incorrect concerning the depth of the bedrock, his request as to whether he should excavate to the bedrock, and his request for an estimate of the value of such work sufficiently complied with the contract provision which provided that no claim for extra work would be allowed unless notice was given by the contractor and it was done under a written order from the city. The city engineer, by letter, told the contractor to drill to the solid rock, although he never gave the contractor an estimate as to the value of the extra work. The contractor was able to recover the expenses he incurred in drilling the extra distance.

Royer v. Board of County Supervisors of Albermarle County

10 S.E. 2d 876, 176 Va. 268 (1940)

This factually specific case involves a Board of Supervisors' liability to a civil engineer on an express contract "contingent" upon the happening of certain events, which never occurred. The County was not liable under the terms of the contract as through no fault of either party, the contingency did not happen, nor could the express terms of the agreement be disregarded to allow recovery for the value of the services rendered.

Scofield Engineering Co. v. City of Danville

126 F. 2d 942 (1942) (4th Cir)

The Court held that under Danville's charter and the Virginia law requiring approval of voters before incurring indebtedness for public works, Danville could not, in advance of such approval, enter into a contract. The contract here was void and the Court refused recovery on quantum meruit for engineering services which were never rendered.

South Hampton Apartments v. Elizabeth City County

37 S.E. 2d 841, 185 Va. 67 (1946)

The County sued the Apartments to recover a fee for the maintenance and inspection of the Apartment's sewerage system. Case primarily limited to interpretation of specific contract. The Court stated in pertinent part that a county board of supervisors may employ agents and servants to do what the board has the authority to do and to perform acts and to enter into contracts approved by the board in the exercise of its discretion. Anyone dealing with the officers and agents of the County board must ascertain at his peril the nature and extent of the agent's authority. A county has the power to ratify such contracts made by its agents as the county has the authority to make.

The Court also stated that a county has the power to make all contracts which are proper and reasonably necessary to the execution of its corporate objects and purposes.

Sydnor Pump & Well Co. v. County School Board of Henrico County

28 S.E. 2d 33, 182 Va. 156 (1943)

Sydnor was a sub-subcontractor of Gerhardt and was responsible for drilling the well under the original contract. The well cost more than had been originally estimated. Gerhardt informed the general contractor Atkinson of this fact and requested that the account be paid. All but $1,212.30 was paid, but the balance was refused by the School Board, Atkinson and Gerhardt. Sydnor's contract was with Gerhardt so he looked to him for payment.

The Court held that the subcontractor (Gerhardt) by admitting to the general contractor that the sub-subcontractor's (Sydnor) account rendered for drilling the water well was in accord with the specifications and by recommending that the account should be paid, permitted the Court to enter a judgment against the subcontractor for the amount due. The case was remanded to the lower court so the pleadings could be amended as to allow Gerhardt to recover from the school board--where the ultimate liability for the judgment rested.

This case is interesting because of its lengthy discussion of arbitration. Such means had originally been used in an attempt to resolve the dispute, but because the arbitrators had been misinformed as to their assignment, the award was declared invalid as to all the parties. The Court noted that the parties had spent 3 years in litigation and quoted from a Pennsylvania case:

> "The parties elected to submit their dispute to arbitration. This method of trying issues of fact and law is now somewhat in fashion. It may well be that after other experiences such as the present litigants have had, it will be determined that the ancient method of trial in duly constituted courts of law is a more satisfactory way to settle controversies. This is for further experience to demonstrate."

The Court said such language was fitting to the present case.

Taylor v. Arlington County Board

53 S.E. 2d 34, 189 Va. 472 (1949)

Suit by Taylor and others against Arlington's County Board and others for a writ of mandamus to compel the County Board to award a contract for building a garbage and refuse incinerator to Morse Boulger, and for an order restraining the Board from executing the contract to Nichols Engineering. The Court denied the request and upheld the County's action.

The Court stated that "in the absence of some constitutional or statutory requirement therefore, competitive bidding is not ordinarily essential to the validity of contracts for public works, but it is generally considered that the interests of the public are best served by submitting such contracts, if of important size, to

competitive bidding." The Court did not decide if Section 2725d of the Code which stated that all contracts be let to the "lowest and best bidder" required competitive bidding. Rather, the Court noted that "it was the purpose from the beginning of the enterprise to have competitive bidding."

In this case the County asked for a mechanical stoker which only Nichols made and patented. The Court stated that the fact that there could be only one bid for that type did not make competition impossible, especially where the mechanical stoker was made to compete with the hand-stoked type. The Virginia Court quoted from an A.L.E. which stated: "The weight of authority appears to sustain the right of municipal authorities to designate a patented or monopolized material to be used for public improvements, if it is not the purpose or the effect of the specification to prevent or restrict the competitive bidding required by statute."

The Court noted that the specifications specifically reserved to the County the right to reject any or all proposals and to accept the one that in its judgment best served the interests of the County. Such a reservation, the Court stated, "is generally held to vest in the authorities a wide discretion as to who is the best as well as the lowest bidder, and this involves inquiry, investigation, comparison, deliberation and decision which are quasi-judicial functions, and when honestly exercised, may not be reviewed by the courts."

According to the Court, the factors in determining who is the "lowest and best bidder," or who can best serve the County, involve the experience of the bidder in that field, the quality of his previous work and the cost, not alone at constructing what he proposes to build but of operating it after it is built. All else being equal, it is the duty of the public authorities to accept the bid involving the least expenditure of public funds."

"When the decision of the authorities is based upon a fair and honest exercise of their discretion, it will not be interfered with by the courts, even if erroneous. Courts do not in such cases substitute their judgment for the judgment of the body to which the decision is confided. Interference by the courts is limited to cases in which the public body has proceeded illegally or acted arbitrarily or fraudulently."

The Court held that "the County Board had the clear right to consider the bids in the light of the operational cost as well as the installation costs in ascertaining which bid best served the interests of the County, and that the method used to that end was proper."

The Court rejected the appellant's argument that the Nichols bid did not comply with the specifications. It stated that "Generally before a variation from the specifications will be deemed to destroy the competitive character of a bid for a public contract, the variation must be substantial, that is, it must affect the

amount of the bid. It is sufficient if the bid conforms substantially to the advertisement." The Court stated only that this claim related to differences between the specifications and the drawings of Nichols' bid.

The Court refused to disturb the award since Nichols agreed to let the County do some of the outside work connected with constructing the plant because it was shown that the awarding of the contract was not conditioned or influenced by the agreement. Also the Court did not find any evidence of fraud prejudicial to Morse Boulger on the part of the County Board members or the consulting engineers.

Thomas Somerville Co. v. Broyhill

105 S.E. 2d 824, 200 Va. 358 (1958)

Somerville supplied plumbing material for use in two Fairfax County schools to Hammer, a subcontractor under Broyhill. Somerville brought an action, to recover the purchase price, against the general contractor, Broyhill, and its surety.

The Court held that in such an action evidence showing that goods were furnished and delivered to the school site, constitutes prima facie proof or a rebuttable presumption that the materials were used.

The Court stated that Section 11-23 of Virginia's Code requiring a bond is remedial in nature and was enacted to afford protection to materialmen and subcontractors, and must be liberally construed in their favor because public buildings and improvements are not subject to mechanic's or materialman's liens. The intent of the statute is to protect those who furnish supplies, material and labor in and about the construction of public buildings, whether furnished to the principal contractor or to a subcontractor. The Court noted that general contractors can protect themselves against the shortcomings of subcontractors by requiring bonds of them. Thus, the Court held that Section 11-23 obligated the principal (Broyhill) and its surety to Somerville who furnished supplies to the subcontractors.

Wiley N. Jackson Co. v. City of Norfolk

87 S.E. 2d 781, 197 Va. 62 (1955)

The Court addressed the question of whether the State and city had the authority to enter into a contract to construct an underpass, stating that: "if the enterprise may be regarded as within their respective functions and is not otherwise prohibited by law, the State, city or other political subdivision may unite in such an undertaking."

Wise County School Board v. Saxon Lime and Lumber Co.

93 S.E. 579, 121 Va. 594 (1917)

The school board entered into a contract with Phillips who, prior to completion of the work, was adjudicated a bankrupt. Phillips' materialman, Saxon Lime and Lumber, supplied goods which were ultimately accepted by the school board and used in the building. The Court held that regardless of whether Saxon Lime and Lumber had any right of stoppage in transit or whether there was any express contract, there was an implied agreement on the part of the school board to pay for the materials. The Court noted that the school board probably would not have fought payment but for the contractor's bond and also noted the school board's caution not to do anything which could be construed as releasing the bonding company.

PUBLIC CONTRACT CASES
III. ACTIONS ON PUBLIC CONTRACT BONDS

Aetna Casualty & Surety Co. v. Earle-Lansdell Co.

129 S.E. 263, 142 Va. 435, rehearing denied
130 S.E. 235, 142 Va. 435 (1925)

The bankrupt contractor owed the Earle-Lansdell Co. money for materials and labor supplied under the contract. Earle-Lansdell sued under the contractor's bond citing a provision which obligated the surety to pay for "all labor and materials" furnished in the construction of the highway. The surety denied liability stating that its obligations were measured by the terms of the statute and that the statute did not contemplate such liability.

The Court held that although the Virginia statutes don't require bonds conditioned upon the contractor paying all debts incurred by him for labor and materials, the highway commission has the power to require bonds more broadly conditioned than as required by the statute, and if such bond is given voluntarily it may be enforced according to its terms. Held that a contractor's bond for public works could contain any conditions not prohibited by the statute.

The surety was held liable on the bond to persons with whom the contractor himself became indebted for labor and materials, thus Earle-Lansdell was able to sue on the contractor's bond for the labor and materials he furnished the contractor.

Aetna Casualty & Surety Co. v. U.S. Plywood

180 S.E. 2d 689, 211 Va. 720 (1971)

U.S. Plywood, as supplier for a contractor, sued the general contractor and its surety for amounts due for materials supplied to the subcontractor.

The Court held that the subcontractor was a "manufacturer or fabricator" and under the provisions of Section 11-20, was exempt from the requirements of executing a payment bond. Thus the general contractor and its surety had no duty to require the subcontractor to give a payment bond to protect Plywood for the materials furnished by it to the subcontractor.

The Code states, in pertinent part, at Section 11-20:
". . .provided, however, that subcontracts between the contractor and a manufacturer or a fabricator shall be exempt from the provisions requiring a payment bond . . ."

Atlantic Trust & Deposit Co. v. Town of Laurinburg

163 F. 690, Cert. denied 212 U.S. 573 (1908) (4th Cir)

All the bids for the construction of a water and sewer system

were rejected by the town because they exceeded the $34,000 limit. The lowest bidder agreed that he would construct the system within the limit and certain changes were made and a bond was given by Atlantic Trust for the "amended construction of a water and sewer system upon a basis of 10 percent upon the materials and labor furnished not to exceed $34,000."

The Court held that the contract was not one to do work for the town to the extent of $34,000; but was for the completion of the work. The surety was held liable to the town for the damages it sustained when the contractor became bankrupt and it (town) completed the project, to the extent of the penalty named in the bond.

Board of County Supervisors of Henrico County v. Insurance Co. of North America

494 F. 2d 660 (1974) (4th Cir)

In the action by the county against the surety on the bond, the Court held that the surety, which guaranteed performance under an ordinance whereby the contractor received permission from the county to mine sand and gravel and which contained a provision permitting cancellation by the surety, was prejudiced and released from obligation to perform the restoration work. The Court stated that the county permitted the contractor to proceed without a permit, to do work outside of the original area, to construct a processing plant, and allowed work by the contractor's successor, all without consulting or advising the surety.

Century Indemnity Co. v. Esso Standard Oil Co.

79 S.E. 2d 625, 195 Va. 502 (1954)

Action by materialman against surety and contractor to recover for materials furnished in the construction and installation of the pipeline. The contract between the City and the contractor did not require a bond, nor did any statute require one in this instance. The contract stated that the contractor would settle all claims for labor and materials, but the bond stated that it would indemnify only the city against loss.

The Court stated that when the contract and the bond were read together, the surety assumed no obligation additional to that in its bond.

Daughtry v. Maryland Casualty Co.

48 F. 2d 786 (1931) (4th Cir)

The Court ruled that the public works contract and the surety bond should be construed together, as regards to labor and material claims. In so doing, the Court held that the contractor's surety was liable to the materialmen on the bond which was executed concurrently with and attached to the contract, which guaranteed payment of labor and material bills.

Fidelity & Casualty Co. of N. Y. v. Copenhaver Contracting Co.

165 S.E. 528, 159 Va. 126 (1932)

The subcontractor (Crowell Construction Co.) on a defaulted construction contract, was allowed to recover on the contractor's bond for work performed. The bond stated that the surety guaranteed prompt payment by the contractor for labor and materials incurred by the principal (contractor). The Court held that the prime contractor and the surety on the bond were liable for claims against the subcontractor by materialmen for labor, materials and supplies which were used in the construction.

The Court also stated that the Highway Commission by electing to complete the defaulted road contract itself could not charge the contractor liquidated damages for delayed completion. Thus the contractor and contractor's surety could not make a like charge against the subcontractor.

The Court also stated that the claims for the rental of a steam shovel, a steam roller and teams, and the purchase price of small tools, tents and mattresses used by the men while in camp were "materials" within the highway contractor's bond.

Fidelity & Casualty Co. of N. Y. v. Lackland

8 S.E. 2d 306, 175 Va. 178 (1940)

The surety company tried to escape liability in this action, brought by a materialman, on a highway contractor's bond. The Court held that such a suit is governed by the 10 year statute of limitations and thus not barred by the 3 year limitation relating to actions on open accounts.

The Court also held that mere delay by the creditor to enforce his claim against the principal debtor does not discharge the surety on grounds of laches nor does the creditor's failure to file proof of its claim in bankruptcy against the debtor's estate release the surety.

In this case, the general contractor requested the materialman (Lackland) not to press its claim, pending the outcome of litigation between the general contractor and the subcontractor. The Court stated that the materialman, in agreeing, acted purely voluntarily and without consideration and for no definite time, thus this action did not constitute such an "extension of time" as to release the surety on the contractor's bond.

Fidelity and Deposit Co. of Maryland v. Bailey

133 S.E. 797, 145 Va. 126 (1926)

Companion case to F. D. Co. v. Mason - here the Court held that the supplying of food to the men working on the road and hay and grain for the teams was within the bond provisions obligating the surety to pay for "all labor and materials." The Court stated that the conditions of the bond must be read in connection with the contract.

Fidelity and Deposit Co. of Maryland v. Bailey - Spencer Hardware

133 S.E. 797, 145 Va. 133 (1926)

Third action against the surety - recovery for explosives and hardware allowed.

Fidelity and Deposit Co. of Maryland v. Mason

133 S.E. 793, 145 Va. 138 (1926)

Facts similar to Aetna -- Court reaffirmed it's holding in Aetna, stating that Virginia's statute authorized one who furnished "labor and materials" for the construction of a highway to sue that contractor's surety on the bond; and that such a contractor's bond is legal and may contain any conditions not prohibited by statute. Here the Court held that the services of a superintendent were within the bond provisions obligating the surety to pay for "all labor and materials."

Gallimore Inc. v. Home Indemnity Co.

432 F. Supp. 434 (1977)

Gallimore entered into a contract with the Montgomery School Board for the construction of an elementary school building. The contract required a payment bond for each subcontractor, although it did not require the procurement of performance bonds. Gallimore subcontracted the electrical work to Martin Electric, who was supplied with goods from two materialmen. However, due to Martin Electric's financial condition, the materialmen refused to work without a guarantee of payment from Gallimore. After Martin Electric became insolvent and Gallimore paid the materialmen's bills, it sought to recover from the Home Indemnity Co. (under the payment bond obtained by Martin Electric) for the losses it incurred because of the subcontractor's failure to perform.

The Court held that the payment bond gave Gallimore no such right of recovery.

The Court also held that Section 11-23 gave no rights to Gallimore which would allow it to recover against the Home Indemnity Co. The Court said that while the statute requires a performance bond for the public authority, and a payment bond for the protection of materialmen, as well as a payment bond by subcontractors for materialmen; there is no requirement that a subcontractor obtain a performance bond for the protection of materialmen. Thus Gallimore

had no recovery rights against the surety through subrogation of the rights of the materialmen because they acquired no rights by virture of Section 11-23.

Hendrick Construction Co. v. C. E. Thurston & Sons, Inc.

153 S.E. 2d 204, 207 Va. 803 (1967)

A sub-subcontractor was denied recovery from the general contractor on a state contract, even though the subcontractor had failed to give the required payment bond and was bankrupt. The Court stated that the Code did not require surety on subcontractor's bonds and therefore it could not impose any liability on the general contractor for failing to obtain such.

In 1962 the legislature amended Section 11-20 to require surety on subcontractor's bonds and to allow "a direct right of action [only] against the sureties on the bond;" however, these changes were subsequent to the dates of the contract in this case and thus not applicable.

Joseph F. Hughes & Co. v. George H. Robinson Corp.

175 S.E. 2d 413, 211 Va. 4 (1970)

Robinson furnished materials to a subcontractor of Hughes to be used in the construction of a public high school. Robinson brought suit on the bond and Hughes argued that the action was untimely.

The bond provided that no action was to be commenced "after the expiration of one year following the date on which Principal ceased work . . . however, if any limitation embodied in the bond is prohibited by any law controlling the construction hereof such limitation shall be deemed to be amended so as to be equal to the minimum period of limitation permitted by such law."

Virginia Code Section 11-23, requiring the bond, provides: "No action on any bond required herein shall be brought unless within one year after substantial completion of the contract."

The Court held that the statutory limitation was prohibitory and that the amended provision of the bond was included in contemplation of a statutory limitation, thus it operated to incorporate the statutory period into the bond. Because the statutory language controlled the time for bringing an action on the bond, in this case, the action was untimely.

Johnson Service Co. v. Glaubke Construction Co., Inc.

193 S.E. 2d 655, 213 Va. 466 (1973)

The limitation period for bringing a direct action against a general contractor on a public project and the surety on its bond by a materialman who supplied goods to a subcontractor is controlled by

Code Section 11-23. In June, 1970, it was amended to allow an action within one year after last performance of labor or the furnishing of materials. It had formally read: "one year after substantial completion of the contract."

In this case, the project was substantially completed in July, but Johnson, the supplier, did not complete its work until September. The Court ruled that the amended limitation provision applied, even though the contract between the subcontractor and the supplier was executed in 1969. The Court stated that the suppliers' cause of action accrued when his work was completed and the subcontractor failed to pay, not when the contract between the subcontractor and the supplier was executed.

London Brothers v. National Exchange Bank of Roanoke

93 S.E. 699, 121 Va. 460 (1917)

The Court held that the Code language which stated that no assignment of a debt due to a contractor would be valid until the claims of all subcontractors, supplymen, etc. against the general contractor for labor and materials furnished for the construction were satisfied, was too plain to need construction. The Court rejected the Bank's argument (to whom an assignment had been made prior to the settlement of the subcontractor's claims) that the Code section was confined to the subcontractors and materialmen who had perfected mechanics' liens; which it was admitted by the Bank was impossible because the building under constrcution was a publicly owned building.

C. S. Luck & Sons v. Boatwright

162 S.E. 53, 157 Va. 490 (1932)

In this case the contractor, C. S. Luck, was by statute made liable for all debts "incurred by him" while in his contract he promised to pay for labor and materials for which he was "liable." Reading the statute and the bond together, the Court held that Boatwright, whose contract was with, and who worked for the subcontractor, could enforce his claim against the principal contractor (C. S. Luck) and his surety.

The Court noted that the general highway contractor and surety promised more than the minimum statutory requirements on the voluntarily given bond, thus the terms of the bond were observed. Court cites Aetna.

The Court held that claims for renting a tractor and a truck were "materials" within the bond.

The Court held that Boatwright's claim was barred by estoppel because he had asked that payment be made from the contractor to the subcontractor (and it was so made) and not to him directly. Also, the Court stated that any recovery could not be based upon a quantum meruit theory for the period which had been covered by the contract.

Maryland Casualty Co. v. City of South Norfolk

54 F. 2d 1032 (1932) (4th Cir)

The original contract, on which the Maryland Casualty Co. served as surety, called for the paving of two or three streets, allowing the city engineer to make the designation. Subsequent to the date when the work was to be completed, the City Council passed a resolution directing the city engineer to instruct the contractor to pave 13 additional streets.

The Court held that the agreement providing for work to be done on different streets and at a cost equalling a large percentage of the cost under the original contract, was clearly a supplemental or additional contract and was not to be treated as an extension of the original contract, on which the surety was liable.

The Court stated that even though the contract and bond covered "additional work," this meant work involved in modifications and changes, and not an independent project. The independent project was not covered by the surety, thus the bond did not guarantee the payment of labor and materials furnished under the supplemental contract (for the 13 streets). However, the making of the supplemental contract did not avoid the bond, for it did not change the terms of the original contract.

56 F. 2d 822 rehearing denied and modified, cert denied 286 U.S. 562 (1932)

The Court held that because the bond sued on guaranteed the claims for labor and materials furnished under the original contract but did not cover the claims under the supplemental contract, the claimants had the burden of showing that the materials furnished were for use under the original contract covered by the bond.

New Amsterdam Casualty Co. v. Moretrench Corp.

35 S.E. 2d 74, 184 Va. 318 (1945)

New Amsterdam served as surety on a bond executed by the contractor. Moretrench entered into an agreement with the contractor to lease certain equipment for use in connection with the construction of the sewerage system. The bond referred to the contract which covered the payment of claims of subcontractors, materialmen and laborers.

The Court held that in determining the surety's liability to third persons, the contract and the bond were to be construed together. Because the bond referred to the contract and they formed one transaction, the surety's liability was held to extend to all those who furnished equipment to the contractor. The surety was held liable for all that the contractor agreed to do.

The Court said that the rentals of equipment to the general contractor were within the coverage of the contractor's performance bond as constituting "materials" furnished in the carrying forward, performing or completion of the contract.

Reliance Insurance Co. v. Trane Co.

184 S.E. 2d 817, 212 Va. 394 (1971)

Action by a subcontractor's materialman to recover on the general contractor's bond after the subcontractor defaulted in payment of its account. The surety conceded that the materialman was covered under the bond but argued that Section 11-23 allows a materialman to recover only if he shows that the general contractor did not obtain a bond from the subcontractor. The Court allowed the materialman to recover, stating that the Code did not require proof that a subcontractor's bond was not given before a materialman could recover on the prime contractor's bond.

Solite Masonry Units Corp. v. Piland Construction Co., Inc.

232 S.E. 2d 759, 217 Va. 727 (1977)

The Court reaffirmed its holding in Broyhill that Section 11-23 is to be liberally construed in favor of materialmen and subcontractors.

This Court reversed the Trial Court and held that a supplier of masonry blocks (Solite) to a subcontractor under a public construction contract was not required, in order to recover the balance due on the blocks from the contractor's performance and payment surety, to demonstrate that the blocks were actually used in the construction project -- it was important only that the materials were supplied to the subcontractor.

R. C. Stanhope, Inc. v. Roanoke Construction Co.

539 F. 2d 992 (1976) (4th Cir)

This Court upheld the district court's holding that rental charges and the value of missing rental equipment furnished to a subcontractor on a public contract constituted "materials furnished" within the meaning of Section 11-23. Here a general contractor failed to require a payment bond of his subcontractor as required by Section 11-23, thus the lessor of the equipment had a valid claim against the general contractor and the surety on the payment bond for the delinquent rental charges and for the value of the missing equipment.

Vulcan Materials Co. v. Betts

315 F. Supp. 1049 (1970)

The Court followed the holding in Copenhaver that the prime contractor and surety on the bond are liable for claims against a subcontractor for labor, materials and supplies furnished.

After a lengthy discussion in an attempt to define the term "subcontractor," which included excerpts from Miller Act cases, the Court ruled that in this case, Betts was a subcontractor. Here, the general contractor (Oman) purchased from Betts all the rock to be used on a road construction project and Betts prepared such material, thereby saving the general contractor (Oman) labor. Thus Betts was held to be a "subcontractor" within Virginia's statute (Section 11-20) which forbids a highway construction contractor from subcontracting unless the subcontractor furnished a bond for payment of its suppliers. The Court held that in view of the general contractor's (Betts) supplier, Vulcan had a statutory right of action against the general contractor and its surety, even though the general contractor had paid the subcontractor the amount due under the subcontract.

The Court also held that to be a subcontractor within Virginia's statute (Section 11-20) requiring a subcontractor on public construction projects to furnish bond, it is not necessary that the person furnish both labor and materials.

OPINIONS OF THE ATTORNEY GENERAL
RELATING TO PUBLIC CONTRACTS

OPINIONS OF THE ATTORNEY GENERAL
RELATING TO PUBLIC CONTRACTS

1. Colonel LeRoy Hodges, State Comptroller, Richmond, Virginia; 1939-40; p. 176.

The 1936 Code required all printing, lithographing, engraving, ruling and binding required by any state institution or agency to be procured by way of contracts let through competitive bidding by the Director of the Division of Purchases and Printing, not through direct order. Therefore, where the work involved was the binding of certain books and magazines upon direct orders issued by certain state institutions, such procedure was not legally authorized.

2. Honorable P. E. Ketron, Director, Division of Purchase and Printing, Richmond, Virginia; 1939-40; p. 177.

The Director of the Division of Purchases and Printing should not permit the "University Press," part of the University of Virginia, to bid on contracts for bookbinding made through that office on behalf of other state agencies and institutions, because the "University Press" operates primarily for its own publications, and there was nothing in the law authorizing the University to engage in the printing or binding business, even to the extent of furnishing such work to other state agencies and institutions for compensation.

3. Honorable L. M. Walker, Jr., Commissioner of Agriculture, Commonwealth of Virginia, Richmond, Virginia; 1940-41; p. 1.

The Department of Agriculture wished to make a contract with Central Virginia Electric Cooperative for the purchase of electric power. The issue presented is whether the State can be bound to a contract to remain in effect for five years. The opinion answers this in the negative.

Since the current biennium was to extend to a time less than the five year period and since it was not known if the legislature would continue the appropriation of funds to the Agriculture Department beyond the current biennium, the Commissioner was not in a position to agree on behalf of the State to purchase power for a period beyond that date.

4. Miss Daisy L. Anderson, Librarian, State Teacher's College, Radford, Virginia; 1940-41; p. 129.

Can a specific State institution contract directly for binding or rebinding books or other papers used in the college library without having to competitively bid through the Division of Purchases and Printing. Yes, due to an amendment of the Virginia Code (Chapter 38 of the Acts of 1940), the general statutory provisions in Chapter 25 of the Virginia Code requiring competitive bidding were not applicable to the binding

and rebinding of books and other literary material of libraries operated by the State (unless otherwise authorized by the Governor).

5. Major R. M. Youell, Commissioner of Corrections, Richmond, 6, Virginia; 1946-47; p. 109.

In a contract made by the Commissioner of Corrections with architects and engineers, the contract contained an arbitration provision. Is such a provision in the contract legal? Yes; the settling of disputes via arbitration shall be made, not that the findings of the arbitrators will be binding. If the provision had had a clause making such findings binding, then the contract provision would have been illegal.

6. Major R. M. Youell, Commissioner of Corrections, Richmond, 6, Virginia; 1946-47; p. 110.

Must the proposed contract be awarded by competitive bidding? No, here the Department of Corrections contracted with Chesapeake and Ohio Railway Company. The opinion states that the contract did not fall within the purview of the statute because there was no other railroad near the State farm in question, and no other person would have been interested in undertaking such work on the same basis as a railway company.

Does the contract require a bond due to the indemnification clause in the contract? No, since Virginia is not liable for the acts of its officers, then the State Board of Corrections has no authority to agree to indemnify the railroad company for loss. Therefore, the contract clause should be deleted thereby making the bond unnecessary.

7. Honorable J. A. Anderson, Commissioner, Chairman, Elizabeth River Tunnel Commission, State Department of Highways, Richmond, Virginia; 1948-49; p. 43.

Does Chapter 242 of the Acts of Assembly of 1932 (Sec. 5779 (1) of Michie's Code of 1942) require political subdivisions to advertise for bids for construction contracts in excess of $2,500.00 before letting contracts? No, because political subdivisions do not fall within the purview of the statute. Therefore, negotiation of the contract was permissible.

8. Honorable Julius Goodman, Commonwealth's Attorney of Montgomery County; 1950-51; p. 35.

Must the Board of Supervisors for Montgomery County go through the competitive bidding process before letting a contract for building a new jail? No, there is a statute which requires such bidding on contracts let by the state, but there is no similar provision applicable to counties. Further, unless Montgomery County adopted a county purchasing act, the Board of Supervisors may decide the question as a matter of county policy.

9. Honorable Charles H. Funk, Commonwealth's Attorney for Smyth County; 1951-52; p. 142.

   May a county school board legally contract for erection of a school building out of available funds without first advertising for bids? Yes; Section 22-72 of the Virginia Code gives the Board authority to provide for erection of school buildings and there was no provision requiring the school board to advertise for bids. Absent such a provision, the school board may negotiate a contract without asking for bids.

10. Honorable Horace T. Morrison, Commonwealth's Attorney for King George County; 1951-52; p. 17.

    Is a county Board of Supervisors required to seek competitive bids for performance of a contract to alter and repair a courthouse annex in the county in question? No, after examination of the relevant statutes, and absent a determination that a County Purchasing Agent has been employed (triggering such a requirement under Sec. 15-539 et. seq. of the Virginia Code), no such requirement is evident.

11. Dr. Dowell J. Howard, Superintendent of Public Instruction; 1953-54; p. 184.

    Where school construction projects are financed in whole or in part by appropriations, grants-in-aid, or loans (i.e., StateAid projects), is competitive bidding required? Yes, this is required by Chapter 675 of the Acts of 1954, House Bill number 624 (reading "no contracts for the construction of any StateAid project shall be let except after competitive bidding.)

    May the school board act as its own contractor? There is no evidence which would compel a school board to employ a general contractor for the erection of a school building. However, if the board chooses to erect such a building by awarding subcontracts for various phases of the work, such contracts should not be awarded except after competitive bidding.

12. Honorable Charles H. Funk, Commonwealth's Attorney for Smyth County; 1954-55; p. 205.

    There is no provision requiring a school board to advertise and ask for bids or contracts for the erection of school buildings. Additionally, the school board has authority to provide for erection of school buildings (Section 22-72 of the Virginia Code). Thus, when the school board rejected all bids for a construction project, and gave the project to someone who had not submitted a bid and at a price lower than the lowest bid without giving other bidders opportunity to re-submit bids, this was a valid bid selection by the school board.

    Though Section 15-504 prohibits members of a county school board from participating in certain contracts in which they

have an interest, it would not prohibit a member of an architectural firm which furnishes the plans for a school construction project from having an interest as a stockholder, in any amount, in a corporation engaged to construct the project, either as a general or subcontractor (assuming that the corporation engaged will not furnish any building materials, supplies, or equipment whatsoever).

The opinion also cites Section 15-710 of the Virginia Code, which prohibits a county from purchasing any building materials, supplies or equipment from any business enterprise where the architect is an officer, director, or stockholder or where he is financially interested.

13. Honorable R. C. Eaton, Director, Division of Purchase and Printing; 1955-56; p. 166.

Is the purchase of medical oxygen considered an exception to the provisions dealing with centralized purchasing (Sections 2-249 to 2-268 of the Virginia Code)? Can the Department of Accounts and Purchase therefore consider such oxygen as a technical supply, making it valid for the Medical College of Virginia to place orders for oxygen without going through the Division? The opinion answers yes to both questions, noting that if the Division looks upon drugs, pharmaceutical products, and chemicals as technical supplies, then medical oxygen could certainly be considered a technical supply (thus eliminating the requirements for following Sections 2-249 to 2-268).

14. Honorable Ferdinand F. Chandler, Commonwealth's Attorney for Westmoreland County; 1957-58; p. 15.

Here, the School Board and Board of Supervisors were contemplating requesting bids from oil and gasoline distributors for use in public buildings and operation of school buses. Can the procedure for bidding be limited to distributors having their offices and business headquarters in the county itself? Yes, there is no provision of law which requires the Board of Supervisors of a county to award such contracts on a competitive basis. With the absence of such a requirement, there is no legal impediment which would prevent either board from limiting its request for bids in the manner under consideration.

15. Honorable Alfred W. Whitehurst, Commonwealth's Attorney for the City of Norfol; 1960-61; p. 249.

Under a reading of Section 11-23 of the Virginia Code (applying to contractors who subcontract work), the statute does not require a subcontractor who sublets part of his work to require a bond from his subcontractor. As a result, it is not necessary for a subcontractor to obtain a performance bond from any person to whom he sublets a part of his contract.

16. Honorable James S. Easley, Commonwealth's Attorney for Halifax County; 1962-63; p. 231.

    Where local revenues are used by a county school board for construction of a new building, such revenues do not constitute a "State-Aid" project as defined in Section 22-166.8 of the Virginia Code, and threfore does not require the county to submit to competitive bidding.

17. Honorable C. P. Miller, Jr., Assistant Comptroller; 1963-64; p. 56.

    The opinion notes the requirements for competitive bidding where the State is a party as long as the contract in question is in excess of $2,500.00 with a few noted exceptions, as provided in Section 11-17 of the Virginia Code.

18. Honorable Tyler Fulcher, Division Superintendent for Amherst County; 1963-64; p. 267.

    Where a school board contracts for the purchase of school cafeteria equipment, monies being borrowed from the Virginia Supplemental Retirement System, there is no requirement for competitive bidding unless the transaction constitutes a "State-Aid" project, as defined in Section 22-166.8 of the Virginia Code. The purchase of such equipment does not fall within the purview of the statute because the project contemplated by the statute is for the construction of buildings.

19. Dr. Hiram W. Davis, Commissioner, Department of Mental Hygiene and Hospitals; 1958-59; p. 226.

    In a contract for remodeling a building where the State is a party, where all the bids exceed the amount appropriated and substantial changes in the plans are necessary as a result, before a contract is let it is mandatory that there be re-advertising of the project in question in order to give an opportunity to interested bidders to submit bids, as provided in Section 11-22 of the Virginia Code.

20. Mr. Charles H. Graves, Director, Division of State Planning and Community Affairs; 1970-71; p. 292.

    A Planning District Commission, due to its governmental function of planning for the district, is within the purview of Section 2.1-288 of the Virginia Code, therefore enabling such a commission to purchase materials and equipment through the Virginia Department of Purchases and Supply.

21. Honorable H. Douglas Hamner, Jr., Director, Division of Engineering and Buildings; 1969-70; p. 215.

    Can submission of a five percent (5%) Bid Bond (in lieu of the six percent (6%) bond required for capital outlay projects) be

considered an informality which can be waived by the State Hospital Board? Can the Hospital Board reconsider the application after the contractor has submitted the required 6% bond? Because Section 11-19 provides, in effect, that a 6% bond is required and the statutory requirement was not fulfilled, then the submission of the 5% bond cannot be considered an informality. Therefore, both questions must be answered in the negative.

22. Honorable Otis L. Brown, Director, Department of Welfare and Institutions; 1969-70; p. 66.

Failure by a contractor to show evidence of certification of registration as required by Section 54-139 of the Virginia Code (as amended) does void such a bid by the contractor. Such a provision is mandatory and constitutes a requirement for all bids.

23. Honorable B. P. Alsop, Jr., Director, Department of Purchases & Supply; 1971-72; p. 317.

Does a lease of equipment constitute a "purchase" within the meaning of Section 2.1-273 of the Virginia Code as to require all such equipment paid for in whole or in part by the State Treasury to be purchased through the Director of the Department of Purchases and Supply? Where leases involve sales, such leases do come within the term "purchase," such as a lease-purchase agreement and option to purchase agreements. Each lease must be reviewed to determine whether or not it involves a purchase.

24. Honorable A. W. Garnett, County Attorney for Spotsylvania County; 1972-73; p. 106.

Where a county has advertised for sealed bids for a construction job, and a material change has subsequently been made in the original proposal (here, relocation of the proposed facility plus an increased rate), the county cannot properly award the contract to the low bidder on the substitute location at the increased rate. This is because Section 11-20 of the Virginia Code (1950) specified that the "contract shall be let to the lowest responsible bidder for the particular work covered in the bid . . .," which, in effect, prohibits such material changes. Therefore, the bids should be rejected and a readvertisement made in accordance with the Virginia Code.

When construing the term "lowest responsible bidder" (Section 11-20 of the Virginia Code), such construction covers not only financial resources and ability but also extends to the skill and competence of the bidder and to the quality of the work.

25. Honorable N. Samuel Clifton, Executive Director, Virginia State Bar; 1973-74; p. 296.

Is the State Bar required to make purchases of needed equipment, et cetera, through the Department of Purchases and Supply? Because of a conflict in the Virginia Code (Section 2.1-273 and Section 54-52 [1950]), one must apply the general legal principle that when a specific statute conflicts with a general statute, the subsequent specific statute controls the subject matter to which it is specifically directed. Since the specific statute (Section 54-52) allowing disbursements from the State Bar Fund to be authorized by officers of the State Bar is more recent than the general statute (Section 2.1-273) providing that all departments, divisions, or agencies of the State must purchase through the Director of the Department of Purchases and Supply, Section 54-52 will apply, therefore exempting the Virginia State Bar from purchasing through the Department of Purchases and Supply.

26. The Honorable Norman Sisisky, Member, House of Delegates; 1973-74; p. 178.

The Hospital Authority of the City of Petersburg constitutes a "public body . . ." under Section 32-214 (1) of the Virginia Code (1950), as amended. Since it constitutes a political subdivision of the State, Section 11-17 does not apply. The Hospital Authority is thereby enabled to let contracts in excess of $25.00 without the public advertisement.

27. Honorable Charles A. Osborne, Director, Division of Purchase and Printing, Richmond, Virginia; 1932-33; p. 124.

Under Section 6 of Chapter 139 of the Acts of 1928, where the Director of the Division of Purchases and Printing is making purchases of cement to companies operating in Virginia, the Director should, as far as practicable, give preference to materials, equipment, and supplies produced in Virginia.

28. Honorable C. A. Osborne, Director, Division of Purchase and Printing, Richmond, Virginia; 1936-37; p. 137.

The Director of the Division of Purchases and Printing must follow the general rule (Virginia Code [Michie, 1930], Section 584-94) requiring him to let contracts through competitive bidding and awarding them to the lowest responsive bidder. However, in the case of tie bids, where the tie is between a local concern and an essentially foreign concern, Section 585 (6) of the Code expressly authorizes the preference of local concerns "so far as may be practicable."

29. Honorable Morton G. Goode, Chairman, State Hospital Board, Richmond, 19, Virginia; 1944-45; p. 23.

Where a party to a construction contract (here, the State Hospital Board) agrees that there was a mistake made by the contractors based on a gross misconception of the full extent of the work involved and also based on good faith reliance on an agent of the hospital which has a material bearing on the cost of the work resulting in a grossly inadequate bid, the controvery may be compromised and settled by concurrent action of the Chairman of the Hospital Board, the Governor and the Attorney General (Virginia Code Section 374-q, Clause 8). If such a settlement is deemed proper by the Board, the facts constituting the mistake should be stated in writing, together with the terms of the propsed settlement.

30. Honorable P. E. Ketron, Director, Division of Purchase and Printing, Richmond, Virginia; 1940-41; p. 127.

When a bid for a contract is definitely accepted by the office of the Director of the Division of Purchases and Printing, a binding contract arises between the Commonwealth and the bidder unless there is anything in the bid which would put the Director on notice that there has probably been a mistake thereby not binding the bidder to his mistake, as long as the bidder gives timely notice of it. Therefore, unless the Director is put on notice of this mistake, he is not authorized to forego or compromise the rights vested in the Commonwealth by agreeing to something in the nature of a settlement.

31. Honorable A. B. Gathright, Director, Division of Purchase and Printing; 1949-50; p. 89.

After a resonable effort has been made to comply strictly with the intent of the law (Sections 2-220 and 2-26) of the Re-organization Provisions of the Virginia Code) with respect to securing competitive bids and this effort has resulted in no bids being received, or no acceptable bids being received, if the Division of Purchases and Printing finds that a further effort to secure satisfactory bids (i.e., via readvertisement) would be fruitless or impracticable due to time limits or other conditions, or that the Commonwealth can obtain a better contract by direct negotiation, it is proper to reject all bids and proceed to negotiate a contract on the terms most advantageous to the Commonwealth as possible.

32. Honorable David F. Thornton, Member, Senate of Virginia; 1974-75; p. 100.

In a contract between architects and the Commonwealth of Virginia, the contract should be based on fee schedules (found in the Manual for the Planning and Execution of Capital Outlays) in effect on the date of the authorization, by the Governor, to initiate a capital outlay project.

33. Honorable Donald W. Devine, Commonwealth's Attorney for Loudoun County, 1974-75; p. 360.

Though recission of a contract for a unilateral mistake is a remedy available under Section 11-20.2 of the Virginia Code, this provision does not extend to reformation, since the statute expressly provides that a contractor invoking the statute may not be awarded the contract on another bid.

The Virginia Code (Section 11-20) is violated when a contract is awarded for an amount in excess of the bid of the lowest responsible bidder. Thus, in absence of extra work or changes in the work (or other valid considerations), the school board may not pay more than the amount submitted by the lowest responsible bidder.

34. General James A. Anderson, Commissioner, Department of Highways, 1952-53; p. 61.

Is the "arbitration of disputes" clause set forth in the contract between the Commonwealth and the federal government valid? Here, the arbitrator was the contracting officer for the federal agency. The General Assembly of Virginia has prescribed certain methods by which Virginia may be proceeded against in disputes to arbitration. Therefore, no officer or agent of the Commonwealth has the authority to enter into contracts on behalf of the Commonwealth which contain clauses agreeing to submit disputes to arbitration, regardless of the identity of the arbitrator. The clause, therefore, is invalid.

35. Mr. R. C. Eaton, Director, Division of Purchase and Printing; 1952-53; p. 194.

Here the Industrial Department of the State Penitentiary manufactures a number of uniforms for personnel of various political subdivisions of Virginia. The political subdivision states the type of cloth required and the penitentiary sends to the Division of Purchases and Printing a request to purchase the material in question. Is competitive bidding required in such a transaction? No, in effect, the Division is buying the material by the direction of the political subdivision and not the State. Therefore, Section 2-251 (requiring competitive bidding) is not triggered.

36. Honorable R. C. Eaton, Director, Division of Purchase and Printing; 1954-55; p. 185.

The responsibility of determining whether or not a bidder qualifies under the provisions of Section 2-251 as the "lowest responsible bidder" rests solely upon the Comptroller.

37. Honorable Philip R. Brooks, Director, Department of Purchases and Supply; 1974-75; p. 101.

A State agency may increase the price of an existing State contract where the contract makes no provision for price adjustment and where the State is to receive no consideration for such price increase only where such action is expressly authorized by general law (see constitutional prohibitions, Article I, Section 9, subparagraphs (8) and (10) of Section 14, Article IV of the Virginia Constitution) authorizing an award of "extra compensation" or a release of the contractor's obligation to the Commonwealth. No agency of the Commonwealth is presently empowered to permit or agree to either course of action.

A State agency may rescind a contract where the contractor requests the rescission. However, the opinion further notes that a State most probably cannot agree to rescind an existing State contract and then enter into a new contract with the same contractor for the same, or substantially the same, service or product at a higher price. (See constitutional restriction against granting extra compensation, subparagraph (10) of Section 14, Article IV, Virginia Constitution).

Is there a general rule for determining what is sufficient "legal consideration" to permit a change in a contract price? Any increase in the price of an existing State contract must be accompanied by some substantial and valuable benefit accruing to the State, or some substantial detriment accruing to the contractor, although such consideration need not be the monetary equivalent of the price increase. The validity of such modifications would depend upon the facts in each case.

May State agencies insert price adjustment clauses in future contracts so as to provide for revisions in contract prices based on increases or decreases in contractor costs? Yes, this is possible because such clauses would not contravene the constitution prohibition against awarding "extra compensation." (See subparagraph (10) of Section 14, Article IV, Virginia Constitution.)

The above answers apply equally to a contract entered into by a county, city or town. In the absence of a general law authorizing the political subdivisions of Virginia to release contractors' obligations or to award extra compensation without consideration, the political subdivisions have no authority to take such steps in their dealings with contractors.

38. Honorable Philip R. Brooks, Director, Department of Purchases and Supply; 1975-76; p. 71.

The Department of Purchases and Supply solicited bids for certain accessories to be purchased out of capital outlay funds. Due to the nature of the funding, the Department at-

tached to the bid invitation the general conditions of the Contract for Capital Outlay Projects. What is the required procedure for the opening of bids when there is a conflict between Section 1.2-275 of the Virginia Code (1950), as amended, and paragraph 10 of the General Conditions (both provide procedures)? As long as the transaction in question falls within the purview of Article 3 of Chapter 15 of Title 2.1 (establishing a centralized purchasing system . . .), the bid opening procedure specified in Section 2.1-275 applies regardless of the contrary paragraph of the General Conditions.

Since Section 2.1-275 contains a specific provision relating to the inspection of bid records, the Virginia Freedom of Information Act does not apply to require the Department from following any other procedure.

39. Honorable V. Earl Dickinson, Member, House of Delegates; 1975-76; p. 66.

It is generally recognized that the law governing a contract is usually that in force at the time of its inception. Therefore, almost all statutes apply prospectively. In order for the contract in question to be affected by the amended statute, it must be found to have retrospective application, which is never presumed in Virginia. Therefore, the amended statute (Section 53-67) in the absence of any language therein to indicate legislative intent that the statute have such application, must be given prospective application only.

40. Honorable Nathan H. Miller, Member, House of Delegates; 1975-76; p. 72.

A general requirement that contracts be awarded to the lowest responsible bidder is applicable to both State and local government contracts. As to each category of contracts, Chapter 4, Title 11 requires the contracting authority to take steps to obtain competitive bids. This procedure is required to be formal advertising for bids in the case of State contracts, but is not so restricted in the case of local governments.

41. Honorable V. Earl Dickinson, Member, House of Delegates; 1975-76; p. 69.

Here, MCV had entered into a contract with Virginia Hospital Laundry, Inc., for laundry services. What is the maximum number of years for which MCV can sign a legal contract with VHL for VHL's laundry service to MCV? Contractual obligations of State agencies which run beyond the end of the current biennium are contingent upon the continuing appropriation of sufficient funds by the General Assembly to allow the agency to fulfill its obligations. Aside from the constitutional prerequisite of continuing biennual appropriations (See Article X, Section 7 of Virginia Constitution [1971]), there is no legal authority which would limit the number of years for which VCU/MCV can sign a legally binding contract with VHL for laundry services.

At the expiration of the present MCV/VHL contract, will Section 53-67 of the Virginia Code, as amended (amended subsequent to the making of the contract), become effective? Yes (See opinion 1975-76; p. 66 supra).

42. Honorable E. Bruce Harvey, Commonwealth's Attorney for Campbell County; 1975-76; p. 63.

Constitutional officers, namely sheriff, treasurer, Commonwealth's Attorney, Commissioner of revenue and clerk of the circuit court, are considered "officers" within the purview of Section 16.1-127 of the Virginia Code (1950), as amended, and may therefore be required to purchase through a central purchasing agency where such an agency is established by the county board of supervisors. However, as a past opinion noted regarding the school board's ability to judge its needs alone, the same principle must apply to constitutional officers; i.e., they, and not the county purchasing agent, must be the judges of their needs and write the specifications for the materials they choose.

43. Honorable Gerald L. Baliles; 1977-78; p. 87.

Does a consulting engineer, when retained by a city, county or state agency to design a construction project, have the legal prerogative of drafting the specifications, or using any device or mechanism, to channel work on the project to a particular contractor, or to ensure the use of one specific brand of equipment or facility on the project to the exclusion of other worthy and well-qualified contractors and suppliers in cases where there are three or more contractors and suppliers available to produce the general end result required by the agency? No, the architect or engineer may reject a proposed substitute only if, in his opinion, the proposed substitute is not the equal of that specified, considering quality, workmanship, economy of operation, and suitability for the purpose intended.

Section 11-23.1 of the Code, incorporated into public contracts, does vest great discretion in the architect or engineer who, in assessing a proposed substitute, is acting in a public capacity. As such, he is acting in a fiduciary capacity. Courts applying Virginia law have permitted similar quasi-judicial determinations to be attacked by the contractor only on the basis of fraud, malice, bad faith, or that the architect or engineer exceeded his authority.

44. Honorable Dorothy S. McDiarmid, Member, House of Delegates; 1977-78; p. 90.

Are school boards exempt from the competitive bidding requirements of Chapter 4, Title 11, of the Virginia Code when no State aid is used for a particular building project? In 1975, the Attorney General concluded that Section 11-20 and Section

11-23, read together, indicate a legislative intent to require that public contracts be awarded by local governments on the basis of competitive bidding. However, that opinion didn't discuss whether the legislative intent also encompassed contracts awarded by school boards. Though Section 11-23 lists school boards as public bodies, Section 22-166.12 is relevant, because it requires competitive bidding by school boards only when State aid funds are expended. Therefore, the legislative intent manifested in Section 22-166.12 requiring competitive bidding on public contracts awarded by school boards only when State aid is expended is controlling. A school board constructing a facility without State aid is not required to award the contract on the basis of competitive bids. It may, if it chooses, utilize the "fixed price design/build" method of construction.

May the State of Virginia, or any department, institution of agency thereof, award a public works contract in excess of $2,500 under a "fixed price design/build" scheme? No; Section 11-17 and Section 11-20 require advertising for bids for construction after plans and specifications have been prepared. The criteria provided by the owner under the "fixed price design/build" procedure cannot be considered the equivalent of the detailed plans and specifications as those terms are used in the construction industry. Section 11-20 and Section 33.1-187 provide that public contracts must be awarded to the lowest responsible bidder. Under the "fixed price design/build" procedure there is no low bid. Though Sections 11-17, 33.1-185 and 2.1-449 all contain an exception in an emergency situation, absent an emergency, the "fixed price design/build" procedure, may not be used for the state public works contracts described in Section 11-17 and Section 33.1-185.

45. Honorable Stanley C. Walker, Member, Senate of Virginia; 1977-78; p. 88.

Must the Southeastern Public Service Authority of Virginia seek competitive bids for a proposed contract with a firm performing services as a "construction manager?" Is a bond required? No, to both questions; this public service authority is a governmental body, thereby triggering Section 11-17 of the Virginia Code (1950), as amended, requiring competitive bidding for certain buildings. However, Section 11-17 applies only to contracts exceeding $2,500 for the construction, improvement or repair of any building. The same limitations with regard to bonds is found in Section 11-23.

Since the contract is not "for construction, improvement or repair" of the projected facility and is for personal services involving special skills, Section 11-17 does not require competitive bidding and Section 11-23 does not require a bond to be provided.

However, the public contracting body may be subject to other restraints. The articles of incorporation or by-laws of an authority, a city charter provision, or the administrative procedures for state agency capital outlay projects, may preclude the use of such services, or may require that a contract for such services be awarded only after competitive bidding.

46. Honorable J. Stuart Barret, Director, Division of Engineering and Buildings; 1978-79; p. 58.

Does the failure of a bidder to place its contractor registration number both on the bid and on the envelope containing the bid (required by paragraph 7 (c) of the General Conditions of the Contract for Capital Outlay Projects) make it necessary for the bid to be rejected? No, Section 54-139 of the Virginia Code (1950), as amended, provides that a contractor must "show evidence of a certificate of registration before his bid is considered." This requirement can't be waived by a state agency. Though paragraph 7 (c) of the General Condition provides a method for a contractor to use to supply evidence of his certificate of registration (required by Section 54-139), this specific method is not prescribed by statute, thereby making it possible for a bidder to comply with the statute, even when not fully complying with the provisions in the General Conditions. If the deviation from a non-statutory requirement or specification does not affect the amount of the bid or impune the integrity of the competitive process, it may be considered an informality. Often, public contracts contain provisions which permit the public body to waive informalitites in bids if there is a finding that to do so is in the best interest of the public body. Failure to place the contractor registration number on both the envelope and the bid does not affect the amount of the bid nor the integrity of the process. As long as the statutory requirement of furnishing evidence of registration is complied with in some manner, the failure to write the registration number in both places described in paragraph 7 (c) of the General Conditions is an informality and may be waived by the State.

47. Honorable Oliver D. Rudy, Commonwealth's Attorney for Chesterfield County; Chesterfield, Virginia 23832; August 13, 1979.

Is a contract for the installation of water lines, sewer lines, subdivision roads or other similar site improvement considered a "contract for the improvement of real property" in accordance with Section 11-23.5 of the Virginia Code (1950), as amended (limiting the owner to a retainage of five percent of the periodic payments until completion of the project)? Yes, a permanent addition to or alteration of real property, its structure and appurtenances, which will substantially enhance the useful or intrinsic value of the property, constitutes an improvement of real property. The contract for "installation of water lines or sewer lines or the grading and paving of subdivision roads or other similar site improvements whether

done singly or in combination would constitute improvements to real property as contemplated by the Act."

48. Honorable Vincent F. Callahan, Jr., Member, House of Delegates; March 25, 1980.

Does the Board of Supervisors have the authority to adopt a resolution (January 28, 1980) which prohibits the county from awarding any contract to any contractor who, within the last three years, has been cited for a willful or repeated violation of the Federal Occupational Safety and Health Act of 1970 ("OSHA") or has been cited for a serious construction safety violation of that Act after having received a warning from a county inspector, in light of Dillon's rule, which limits the powers of boards of supervisors to those conferred expressly or by necessary implication? Virginia state policy includes the awarding of public contracts to the lowest responsible bidder. However, is a policy which excludes from consideration for its contracts all those contractors which have suffered specified OSHA violations a necessary or implied component of its power to award contracts to the lowest responsible bidder? No, if such a policy were implemented there would be a possibility that a number of contractors would be excluded from the bidding process and would be ones who would contribute to a determination of the lowest contract price. Such a policy could drastically effect the possibility of obtaining the "lowest responsible bidder" and could frustrate the purpose of the competitive bidding requirements. Therefore, this policy cannot be implied from any expressly granted power to the Board of Supervisors. However, the county can consider the circumstances of a citation in determining the responsibility of individual bidders and can determine whether prior violations have material bearing upon the contractor's ability to carry out the contract on which he is bidding.

In light of the federal preemption of the field of occupational health and safety regulation by the adoption of OSHA, and the approval of Virginia's State Plan under OSHA with Virginia's accompanying enforcement responsibilities, is Fairfax County precluded from making compliance with the applicable safety standards a condition of the contract? No, under the rule cited in Jones v. Rath Packing Company, 430 U. S. 519, (1977), the county apparently has not been precluded from making compliance with applicable safety standards a term of the contract.

49. Mr. H. Douglas Hamner, Jr., Director, Department of General Services; January 15, 1980.

May the Division of Purchases and Supply delegate to State agencies the authority for procurement of printing from commercial sources or other State agencies without requisition upon the division? No, reading Section 2.1-458 and Section 2.1-460 together, it is required that all printing, et cetera,

for all the departments, divisions, institutions, offices and agencies of the State be purchased upon requisition issued by the Division after competitive bidding (if practicable).

May DPS authorize a State agency to procure printing from other State agencies without State requisitions upon DPS? Yes, Section 2.1-465 authorizes DPS to establish criteria and procedures for the economical operation of State owned printing facilities. Therefore, in discharge of such responsibility, DPS may establish criteria and procedures, thereby enabling State agencies to secure printing through State-owned printing facilities.

50. Mr. H. Douglas Hamner, Jr., Director, Department of General Services, June 17, 1980.

The Department of General Services does not have to promulgate selection procedures for the services of landscape architects. Section 2.1-548.3 requires State agencies to establish selection procedures on capital projects in accordance with regulations promulgated by the Department of General Services. The Code defines the services covered by this statute to include the practice of architecture, land surveying, and engineering. This narrowly drawn definition does not include landscape architectural services (Section 2.1-548.2(3))

A certified landscape architect may not engage in the practice of architecture or engineering without holding a license to practice these professions. The practice of architecture or engineering involves much more complex considerations and the legislature did not intend for certified landscape architects to perform their services without compliance with the requisite licensing requirements.