

**SPECIAL REPORT OF THE
JOINT LEGISLATIVE
AUDIT AND REVIEW COMMISSION ON**

ADP Contracting at the State Corporation Commission

**TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA**



House Document No. 4

**COMMONWEALTH OF VIRGINIA
RICHMOND
1985**

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RAY D. PETHTEL
Director

November 12, 1984

Delegate L. Cleaves Manning
Chairman
Joint Legislative Audit and Review Commission
910 Capitol Street
Richmond, Virginia 23219

Dear Delegate Manning:

Attached is a copy of the JLARC special study
"ADP Contracting At The State Corporation Commission".
The study examines SCC compliance with the
Commonwealth's Public Procurement Act.

We wish to acknowledge the cooperation and
assistance extended to our staff by the State
Corporation Commission.

Sincerely,

A handwritten signature in cursive script that reads "Ray D. Pethtel".

Ray D. Pethtel
Director

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ADP CONTRACTING AT THE STATE CORPORATION COMMISSION

In March 1984, Speaker A. L. Philpott requested a review of ADP contracting practices at the State Corporation Commission (SCC). The commission authorized the project during April 1984 as a follow-up to our 1980 report on the Management and Use of Consultants by State Agencies and focused it on two key concerns: (a) Has the SCC complied with State statutes, policies and procedures in contracting ADP services? and (b) Have SCC personnel and the Commission's ADP contractors complied with the "Ethics in Public Contracting" provisions of the Public Procurement Act?

The staff reviewed relevant statutes, policies and procedures; analyzed the SCC's contract files and project expenditures since 1976; interviewed key personnel from the SCC and the Department of Management Analysis and Systems Development (MASD). Three consultants were interviewed. The major findings of the study are:

1. The current practices used by the SCC in consultant procurement are not consistent with provisions of law contained in the Virginia Public Procurement Act, and have great potential for abuse.
2. The SCC does not usually award ADP contracts on a competitive basis and there has not been an effort to establish a competitive environment following the enactment of the Virginia Public Procurement Act.
3. Consistent with our 1980 findings, the ADP contract administration procedures at the SCC are sound and effectively carried out. However, policies and procedures governing the procurement of ADP services are outdated and need to be revised taking into account the requirements of the Public Procurement Act.
4. JLARC staff found no evidence to suggest there have been any violations of the code of ethics contained in the Public Procurement Act; but some of the contractual relationships between the SCC and its contractors are unusual for a public agency, are contrary to prudent management practice, and are vulnerable to allegations of favoritism.
5. Despite administrative and statutory deficiencies, the ADP systems procured by the SCC are in place, and each system examined appears to be operating well. Because the systems were developed in a non-competitive environment, it is not possible to determine if they were developed and installed at the most economic price.

COMPLIANCE WITH POLICIES AND PROCEDURES

The SCC is a unique organization within Virginia State government. It exercises legislative and judicial functions by direct delegation from the State Constitution. Administrative directives or guidelines developed by executive agencies for regulating the use of consultants or vendors do not apply to the SCC. From time to time, however, the Commission has adapted executive directives to fit its own special operating needs.

On January 1, 1983, the Virginia Public Procurement Act became law. The Act spells out a policy calling for public agencies to use full and open competition "to the maximum feasible degree." The Act defines specific procurement policies, establishes procurement methods, and lays out a code of procurement ethics to be followed by all public employees involved with procurement. The Act does apply to the SCC and the SCC's General Counsel, in a memorandum dated February 23, 1983, informed appropriate SCC personnel that the Act encompassed SCC contracting activities.

The intent of the Public Procurement Act is clear. All qualified potential contractors should have the opportunity to do business with State agencies and should have the right to compete equally with others. Competition provides some assurance that the agency pays, and the contractor receives, reasonable prices. The chance to win a State contract provides a key incentive for greater efficiency, economy, and effectiveness. When competition is restricted unnecessarily, the Commonwealth loses opportunities, not only to obtain lower prices, but also to increase the productivity and the effectiveness of its programs.

Reliance on Sole-Source Contracting

To assess the adequacy of the contracting process, JLARC staff examined all ADP contracts awarded by the SCC since 1976. The review revealed that nearly all contracts awarded between 1976 and January 1, 1983 were non-competitive (sole-source). All of the contracts awarded after the enactment of the Procurement Act also were sole-source.

Personnel of the SCC, including the Commissioner in charge of administration, have stated that they have the best ADP systems in State government and that they have avoided significant time and cost overruns, and major project failures. This is attributable, they say, to the approach they have taken in selecting and managing consultants. However, since there was no opportunity for competition, there is no existing basis which can confirm the accuracy of those statements or assumptions.

Origin of the ADP Program. To fully understand the SCC's position on competitive contracting, it is necessary to review the history of ADP administration at the Commission. Planning for

automated information systems began around 1974-75. At that time, there were no automated processes in place. According to Frank Williams, the former-Comptroller, "the most advanced machine we were operating was an electric typewriter." The Comptroller was assigned the responsibility of developing a computerized information system under the direction of Judge Shannon. Because of his limited computer knowledge, Frank Williams hired Jack DeLoyht, who had extensive data processing experience, as the in-house expert and Director of Planning and Development. DeLoyht was to technically manage the vendors while line authority remained with Williams. The appointment was intended to be for a period of five years and DeLoyht's work was to be reviewed regularly by outside auditors hired by Williams. Certain projects were reviewed periodically by an outside review committee. DeLoyht resigned his full-time position in June 1982, but he is currently a paid consultant. Williams retired on March 1, 1983 and is also a consultant to the Corporation Commission. Williams serves as a watchdog over the ADP activities of DeLoyht and Chester Roberts, the current Director of Planning and Development.

According to DeLoyht, he laid out three specific conditions for his employment at the SCC: "...no in-house staff, no competitive procurement, and use of Univac technology." He added that he "wanted the ability to pick out people who could do the job." Based on his previous experience with government agencies and the SCC's early problems in automating the Clerk's Office, he believed that "low bidders did not always do a good job." DeLoyht claims that the Commission agreed to these terms. All three Commission members stated that they have never taken a position with regard to awarding ADP contracts non-competitively. Frank Williams generally concurred with DeLoyht's statements but clarified his position. He stated that his management philosophy was "to get the job done, get people qualified to do the work, get a realistic price and results." Williams agreed to a non-competitive approach but not in all cases. However, he could recall only one contract that was awarded competitively since 1976.

During the period 1976 to 1982, at least 14 major automated systems were implemented at a cost of over \$5 million. Annual system maintenance costs are about \$200,000.

Clerk's Office	Case Management
Charter Document Control	Cash Management
Uniform Commercial Code	Incident Reporting
Agent's Licensing	Decision Support
Motor Carrier	General Correspondence
Consumer Services	Fuel Monitoring
Financial Information	Cost of Utility Services

A review of the systems indicates that they are used extensively by SCC staff and that the users are generally satisfied with the results. Judge Shannon, Williams and DeLoyht believe that the SCC has the best automated systems of any State agency. Williams stated that "they put it together and it works." Several systems have been purchased by other state or federal agencies.

Sole Source Contracts. Reflecting the non-competitive ADP practices of the SCC, nearly all of the ADP contracts awarded since 1976 have been awarded on a sole-source basis to a handful of firms (see table below). Since 1976 over 200 separate contracts have been awarded without competitive bidding or negotiation. Although SCC personnel contend that there was sufficient justification to award many of these contracts, sole-source documentation is lacking. Two reasons are given for relying on sole-source contracting and on the same firms to perform the work: (a) a firm's familiarity with the operations of the SCC; and (b) prior working knowledge of a particular automated system.

SCC SYSTEMS DEVELOPMENT CONTRACTS
AWARDED TO FIRMS

<u>Firm</u>	<u>Amount Paid</u>	<u>Percent of Total</u>
JBA, Inc.	\$2,469,797	46
Viar and Co.	1,004,124	19
Applied Systems Concepts, Inc.	723,566	14
Temple, Barker and Sloane	485,578	9
Systems Software Support	222,249	4
M.S. Gerber	161,266	3
CAI, Inc.	104,208	2
All Others	<u>162,725</u>	<u>3</u>
	\$5,333,513	100%

Source: SCC Mapper System (March 1976 to April 1984).

Compliance With the Public Procurement Act

To test SCC compliance with the Public Procurement Act, all ADP contracts signed after January 1, 1983 were analyzed. Based on this analysis and the interviews with division personnel, it is clear that there are some questionable contracting policies and practices at the SCC. First, the procurement process remains non-competitive. Second, while some of the sole source procurements may be appropriate, some others are unjustified; that is, the reasons for a sole-source procurement stated by the SCC is inadequate. Finally, in most instances, the documentation of the procurement, as required by law, is wholly inadequate.

Use of a Competitive Process. Even after the enactment of the Public Procurement Act, the procurement process at the SCC is still non-competitive. The use of sole-source procurements, almost exclusively, appears to be the result of the anti-competitive attitude of most SCC employees who are in decision-making positions. The widely held view at the SCC is that the competitive procurement

process results in the selection of vendors who cannot provide the high level of performance perceived to be the standard at the SCC. There is also a belief that competition does not lead to lower costs.

Of the 23 ADP contracts reviewed, none were competitively procured. The total value of those contracts was \$926,072.50.

In reviewing many of the contracts with SCC personnel, they were asked why the procurements were sole-source. The standard response was that the consultants had specific knowledge about the SCC and its automated systems, and could therefore perform additional tasks with minimum effort. This answer was found to apply in some cases, but in two of the contracts reviewed it was not applicable. These two contracts represent a specific failure of the SCC Planning and Development Division to comply with both the Public Procurement Act, and the SCC's own procurement policies. The details of these procurements are described in the examples below:

EXAMPLE 1

The Railroad Revitalization and Regulatory Reform Act of 1976 and the Staggers Rail Act of 1980 have resulted in the need for the SCC to involve itself in the setting of certain rates for rail shipments. The Interstate Commerce Commission (ICC) requires the states to use a costing model which it had developed for that purpose. Because of the difficulties in adapting the system, many of the states, including Virginia, have only recently begun to use the automated model.

The State of Iowa was one of the first to get the automated system to operate. The SCC acquired a copy of the system from Iowa for use in Virginia. The system was designed for the IBM environment, but the Economic Research Division requested that it be adapted to the Univac environment it was accustomed to. After much delay and several failures, the transfer to the Univac system was abandoned. At that time, Jack DeLoyht was requested to retain a consultant to install the model on the IBM computer.

No competitive bidding or negotiation took place as required by the Procurement Act. Broughton Systems, Inc. (BSI) was procured as the sole-source for the services on March 20, 1984. The amount of the contract was \$4,720. BSI did not develop the original system for the ICC, nor did they assist the State of Iowa in its implementation of the system. Because it was a stand-alone system, and not integrated into other SCC automated systems, any argument that BSI had

previous knowledge of the SCC systems is irrelevant. In fact, neither the Economic Research Division nor the Director of Planning and Development could provide JLARC staff with any unique qualifications for BSI that would justify the sole-source procurement.

* * * *

EXAMPLE 2

When the SCC began to automate its work in the 1970's, several of the divisions were not included because of their unique needs that could not be met with existing technology. One of those divisions was Public Service Taxation (PST). While some functions could have been automated, the division would have lost direct control over some processes -- a situation considered unacceptable. With the use of microcomputers, however, the division could automate and retain control over processes and data by physically locating the equipment in its offices. With such technology now available, the decision was made to automate some functions on the microcomputer, and make other SCC systems available through terminal emulation.

To begin the process, a preliminary study was needed. The SCC's procurement policy is to competitively bid for preliminary studies. For this procurement, that policy was ignored, and Jack DeLoyht negotiated a contract for \$8,520 on a sole-source basis with Broughton Systems, Inc. (BSI). Work was initiated on March 28, 1984. The contract file gave no justification for the sole-source procurement. (The SCC filed documentation on June 28, 1984 citing its reasons for the sole-source contract.)

SCC staff estimate that the project will eventually cost over \$50,000 when completed. BSI, Inc. was hired to implement the findings of the preliminary study since SCC policy calls for subsequent phases of a system development project to be awarded to the contractor who satisfactorily completes the previous phase. SCC staff have stated that the preliminary study was satisfactory. The first stage of the project involves acquisition of microcomputers and training of PST staff on such software packages as Lotus 1, 2, 3 and dBASEIII, commonly referred to as "off-the-shelf" software.

In interviews with SCC personnel, the reason given for the sole-source contract was BSI's previous experience with the SCC. In fact, however, PST had no existing systems. The efforts contracted for represented a new effort. No microcomputers were in use in any other division at the SCC, so BSI certainly had no previous experience in such an effort with the agency. While BSI was involved in development of some SCC systems, there would be no interface of the new systems at PST with the older systems in other divisions. The conclusion seems to be then, that BSI had no unique qualification in this particular instance.

* * * *

In many of the contracts which were reviewed, the SCC's explanation for the sole source procurement seemed valid. However, these explanations were not supported with factual documentation as required by the Public Procurement Act. The work represented modifications to or enhancements of existing systems -- and in such cases hiring the consultant that did the original work may make sense. But in the two cases described above, there was no justification for a sole-source procurement. Instead these cases reflect the SCC staff's anti-competitive predisposition. The personnel responsible for procurement of professional services do not give any consideration to a competitive approach. They are so accustomed to working outside of the competitive environment that they no longer recognize when a competitive procurement may be appropriate -- or actually required by the Public Procurement Act.

Documentation of the Process. The Public Procurement Act requires that any procurement which is not made competitively be fully documented. Specifically, the Act requires that the contracting agency document in writing the basis for determining that "there is only one source practicably available...." In the absence of a fully competitive procurement, this is the key requirement of the Act.

In a review of 23 ADP and 28 non-ADP contracts at the SCC, we found little or no documentation of the basis for the sole source procurements. In some cases there was no written justification at all. In almost all of the other cases, the justification consisted of a hand-written note from the Director of Planning and Development to Judge Shannon. The notes state the conclusion that the consultant was the only available source, but there is generally no statement of relevant facts.

The SCC is not in compliance with the documentation requirements of the Public Procurement Act. In an interview with the Commission's General Counsel, he agreed with that conclusion. He went on to note that the justifications he has most recently reviewed at the direction of Judge Shannon are still inadequate and do not meet the requirements of the Act. The General Counsel will be reviewing all documentation on sole-source procurements in the future.

Satisfaction with Contractor Services and Products. After the review of the contracts, JLARC staff interviewed the SCC division personnel responsible for the work done by the ADP contractors. One purpose of these interviews was to assess the satisfaction of the division with the work done. Interviews were conducted in the following SCC divisions or bureaus: Planning and Development, Fiscal, Public Service Taxation, Insurance, Energy Regulation, Economic Research, and Motor Carrier.

In each of the interviews that were conducted, personnel in the selected divisions or bureaus were asked if the ADP system or other product was satisfactory. The response in every case was that the consultants hired by the SCC had done an excellent job and that the products were satisfactory -- or in many cases, exceeded the requirements of the contracts. Any problems that the divisions may have encountered appear to have been resolved to their satisfaction.

Interviews were also used as an opportunity to view some of the systems in operation. JLARC staff were given a demonstration of the systems in the Bureau of Insurance, for example. Those systems appeared to operate as they were supposed to, and some of the personnel that use the systems reported that they were useful and functioned properly.

Outdated Contract and Procurement Manual

The 1980 JLARC consultant study found that after a contract was awarded by the SCC, procedures for project monitoring, controlling expenditures, and record-keeping were sound. This is still true today. A review of contracts showed that (a) written progress reports were required of contractors, (b) requests for payments had to be approved by the project initiator, and had to be authorized by the SCC fiscal officer, and (c) contract files are well-maintained and up-to-date. Expenditure data on each contract are available through a well-designed information system. The fiscal officer was found to provide the focus necessary for maintaining an adequate record-keeping system.

While contract administration procedures are sound, the SCC policy and procurement manual is out-of-date and in need of revision. The manual "Planning and Development Contract and Procurement Policy" was prepared in 1978 and does not reflect the requirements of the Public Procurement Act. Moreover, the SCC has not adhered to its own policies in selecting contractors. Several policies in the manual are presented below:

"The task order for a Preliminary Study which is the first phase of a system development project shall be awarded after evaluation of contractor bids submitted in response to a Request for Proposal issued by the SCC Director of Planning and Development."

* * * *

"...all personnel used in the conduct of systems and organization development projects be procured under contract between individuals, partnerships, and/or corporations, registered with and certified by the Department of Management Analysis and Systems Development, and the SCC."

* * * *

"Whenever a special development task order is awarded without competitive bid, the SCC Director of Planning and Development shall certify to the Commission that the contractor's fees are commensurate with the mid-range or lower of the fees of all contractors registered with the Department of Management Analysis and Systems Development."

The JLARC analysis of contracts revealed that none of these policies were being followed by SCC personnel involved in procuring ADP services. Four of the firms doing business with the SCC -- Applied Systems Concepts, Inc; Temple, Barker, and Sloane; M.S. Gerber; CAI, Inc. -- were not registered with MASD. No evidence of fee certification was found.

A revised procurement manual is needed to account for the requirements of the Public Procurement Act. The revised manual should clearly define the roles and responsibilities of all personnel involved in ADP contracting and should include guidelines on the appropriateness of sole-source solicitation.

Personnel Concerns

During the course of the JLARC inquiry, there was no evidence to suggest that the "Ethics in Public Contracting" provisions of the Public Procurement Act were violated. However, several general concerns regarding the use of contractors and SCC personnel have been identified. First, the business relationship that currently exists between the SCC and two ADP firms may be perceived as unusual or irregular for a public agency. Second, the role of the Director of Planning and Development appears confused, and some functions are delegated inadvisably to consultants. Third, the SCC has a practice of hiring retired personnel as consultants without any policies or procedures to limit any abuses which might result from such arrangements.

Unusual Business Relationship. Since 1976, the SCC has awarded 60 percent of its ADP contract work (\$3.2 million) to JBA, Inc. and Applied Systems Concepts, Inc. Harry Garmon is President of JBA, Inc. and is the husband (and former employer) of Ann Roberts Garmon, President of Applied Systems Concepts, Inc. (ASCI), a firm

which was incorporated in July 1978. According to Jack DeLoyht, he recommended Ann Garmon work on a separate contract with the SCC at that time because of business conflicts which had arose at JBA because of the Garmon's personal relationship. ASCI is located in Ann Garmon's home and there are no other full-time employees. Recently, ASCI was awarded the contract to prepare a preliminary study for the clerk's office, a project that will eventually cost about \$250,000 to complete. Because ASCI employs no full-time staff, other than Ann Garmon, the firm relies extensively on JBA for systems design support. Conversely, JBA often uses Ann Garmon as a systems analyst or project manager on ADP contracts it receives from the SCC. SCC personnel have a high regard for the systems work performed by both JBA and ASCI. A review of Ann Roberts professional credentials indicates that she has considerable systems development experience in government and the private sector. However, nearly all of her firm's ADP business has been done with the SCC.

The business relationship between JBA and ASCI cannot be described as "arms length." Although both firms have performed satisfactorily on SCC projects, there is no competition between the two firms on ADP contracts. The two principals are married. In fact, although the firms are incorporated separately, the SCC essentially treats them as a single firm on many contracts. It may make sense to rely on these firms for enhancing and maintaining systems. However, new systems development projects should not be awarded on a sole-source basis to JBA and ASCI as has been done on many occasions in the past.

The current practice of awarding sole-source contracts to JBA, ASCI, and other ADP vendors, makes the SCC vulnerable to allegations of favoritism and risks collusion between contractors and SCC personnel. At the present time, there is no assurance that the SCC pays the most economic price for work performed by these two firms.

Role of the Director of Planning and Development. The Director of Planning and Development is supposed to be responsible for coordination of all ADP systems development, maintenance, and hardware acquisition contracting for the SCC. In the course of this review, several of the procedural problems were discussed with the current director, and it is clear that many of the functions he should perform with regard to the hiring of consultants have been delegated to Jack DeLoyht, the former director and now a consultant to Judge Shannon. In addition, Frank Williams was hired by Judge Shannon as a consultant to oversee the activities of Jack DeLoyht and the Director of Planning and Development. So, these two consultants were hired because the director's inexperience in ADP matters was a concern.

Among the most apparent problems with the current arrangement are (1) the failure of the director to participate in negotiations with consultants, (2) the inability of the director, or his staff, to assess the technical validity of consultants' work, and (3) the use of a consultant for those functions. When questioned about his participation in negotiations with contractors, the current director reported that he was not involved. Instead, Jack DeLoyht

negotiates the technical and cost items in the SCC contracts. Apparently, the director is not even present when the negotiations take place. Thus, the contracts for ADP consultants at the SCC are being negotiated on a sole-source basis by another consultant. The director also reported that he has no way of judging the reasonableness of contract prices, or the technical approaches proposed. This, it seems, is the role played by Jack DeLoyht.

The current arrangement is inadvisable. It places great control of the procurement process in the hands of a consultant. While Judge Shannon may have complete confidence in that consultant, the current director will never be able to meet the requirements and responsibilities of his position if he is not involved in the major functions he should be performing. And on the face of it, it is inadvisable for the SCC to delegate its control of the technical and price negotiations for consultants to anyone other than a full-time administrative employee of the Commission.

Reliance on Consultants. One other practice of the SCC in its use of consultants may be a potential problem. Several of the consultants were former employees of the commission. The SCC uses such consultants for projects where special knowledge of the commission's programs, functions, or practices is considered vital. Since January 1, 1983, the SCC has had contracts with three former employees. While there appears to be no impropriety in any of those contracts, the practice of hiring former employees may lend itself to abuse. The commission currently has no policies or procedures to govern the use of former employees. To protect itself from the potential for abuses, the SCC should have such procedures.

CONCLUSION AND RECOMMENDATIONS

Since the initiation of its ADP program in 1976, the SCC has awarded contracts noncompetitively to a small number of firms without giving others the opportunity to compete for its business. This same practice has been followed even after the passage of the Public Procurement Act. SCC personnel generally possess an anti-competitive predisposition. They believe that a competitive procurement process does not usually lend itself to obtaining a high level of contractor performance or to a reasonable price. The automated systems developed over the years are in place and being used by SCC personnel. Users are generally satisfied with these systems. SCC staff contend that their systems are the best in Virginia State government and that they were installed for a good price. However, because of the noncompetitive practices of the Commission there is no assurance that the SCC paid, and the vendors received, a reasonable price.

Recommendations for bringing the SCC into compliance with the Public Procurement Act and for improving its procurement procedures are listed below.

Recommendation (1). The SCC should take immediate steps to ensure that its procurement of professional services is in compliance with the Public Procurement Act. To the greatest extent possible, the SCC should use the competitive processes required by the Act. Documentation of sole-source procurements should be retained, and such documentation should state clearly the points of fact, not just conclusions. A mere knowledge of the SCC by one vendor should not be considered sufficient cause to exclude other vendors from public contracts.

Recommendation (2). The SCC should reduce its reliance on a consultant to conduct negotiations with other contractors. The Director of Planning and Development should be involved in all such activities. The commission should also develop sufficient in-house technical expertise to be able to assess the appropriateness of systems development costs and design approaches. To the greatest extent possible, the Director of Planning and Development should assume the functions now performed by consultants.

Recommendation (3). A revised procurement manual is needed to account for the requirements of the Public Procurement Act. The revised manual should clearly specify the roles and responsibilities of all personnel involved in ADP contracting and should include guidelines on the appropriateness of sole-source solicitation.

Recommendation (4). The SCC should develop policies and procedures relating to the hiring of former employees as consultants. For example, the commission may wish to set limits on the length of the consulting contracts and on the fee which may be paid.

AGENCY RESPONSE

State agencies involved in a JLARC evaluation effort are given the opportunity to comment on an exposure draft of the report, and appropriate corrections are made. Page references in a response may not correspond to the page numbers in this final report.

The following documents are attached as an appendix to this report:

- Response from the State Corporation Commission
- JLARC Comments on the SCC Response

COMMONWEALTH OF VIRGINIA



THOMAS P. HARWOOD, JR.
CHAIRMAN
JUNIE L. BRADSHAW
COMMISSIONER
PRESTON C. SHANNON
COMMISSIONER

WILLIAM C. YOUNG
CLERK OF THE COMMISSION
BOX 1197
RICHMOND, VIRGINIA 23209

STATE CORPORATION COMMISSION

August 28, 1984

Mr. Ray D. Pethtel, Director
Joint Legislative Audit and
Review Commission
910 Capitol Street, Suite 1100
Richmond, Virginia 23219

Dear Mr. Pethtel:

Enclosed is a single copy of the SCC's response to the JLARC Exposure Draft ADP Contracting at the State Corporation Commission, three copies of which were received under your cover letter of August 14, 1984, addressed to me as the current Chairman.

After talking with you, our Ms. Patricia Murray reported your present desire for the single copy. We stand ready to provide additional copies at your request.

We understand that our response will accompany your staff's Special Report when its findings and recommendations are presented to the Joint Legislative Audit and Review Commission and that we will be informed when this takes place.

Sincerely,

Thomas P. Harwood, Jr.

Thomas P. Harwood, Jr.
Chairman

TPHjr:lmc
Enclosure

RESPONSE FROM THE STATE CORPORATION COMMISSION*

We have reviewed the exposure draft of the Special Study of ADP Contracting at the State Corporation Commission, prepared by certain staff of JLARC, received by the Commission on August 14, 1984, and are disturbed to find some very fundamental differences of understanding between ourselves and the drafters of the report, both as to pertinent factual data and as to the legal standards embodied in the Virginia Public Procurement Act - Code §§ 11-35 et seq. These differences, we feel, are too important to a fair assessment of the designated area of review to go unaddressed.

At the outset, the closest the study comes to recognizing that there are very specific statutory exemptions from the competitive processes prescribed by the Act are two isolated statements - one on page 6, the other on page 10, viz.:

. . . while some of the sole source procurements may be appropriate, some others are unjustified; that is, the reasons for the sole source procurement stated by the SCC is inadequate.

* * *

. . . The work represented modifications to or enhancements of existing systems -- and in such cases hiring the consultant that did the original work may make sense.

The purport of the report is that the SCC's policies and procedures, both before and after the passage of the Procurement Act, are non-competitive as "... the result of the anti-competitive attitude of most SCC employees who are in the decision-making positions." (Page 7)

"Attitudes of Commission employees" neither formulate nor direct Commission policy. Prior to January 1, 1983, the Commission was free to use its best judgment in fashioning policies and procedures for the contracting of all services. Shortly after the effective date of the Act we requested our General Counsel to outline its effect upon our activities, and especially upon the remainder of our development program, which was begun in the mid-1970's.

Our General Counsel, therefore, specifically addressed the impact of the Procurement Act upon our ADP activities.¹ It was, and is, our intent to comply fully with the Act - including the utilization of the exemptions contained in the Act when the facts, together with sound judgment, so dictate.

*This response has been retyped in a single-spaced format for printing.

¹ A copy of his letter, dated February 23, 1983, is attached as Ex. 1.

Section 11-41 of the Act contains the following specific exceptions to either competitive sealed bidding, or competitive negotiation, or both:

1. Two specific exemptions from competitive sealed bidding (§11-41 B and C);
2. One unqualified exemption from both competitive sealed bidding and competitive negotiation, ". . . upon determination in writing that there is only one source practicably available for that which is to be procured, . . ." (§11-41 D);
3. An emergency exemption (§11-41 E);
4. A conditioned exemption from the competitive processes in cases of single contracts not expected to exceed \$10,000 if the agency has, in place, written procedures so providing; this exemption further requires the procedures to ". . . provide for competition wherever practicable." (§11-41 F).

The foregoing is in addition to the blanket exceptions enumerated in Code §11-45. The majority of our non-ADP agreements fall within these exceptions to all requirements for competitive procurement - specifically, contracts for "legal services" and "expert witnesses and other services associated with litigation or regulatory proceedings." (§11-45 B.) Analysis of each of these agreements can be provided.²

Finally, the legislative "intent" - embodied in §11-35 G - is that ". . . competition be sought to the maximum feasible degree, . . . NOT "(t)o the greatest extent possible," as set forth in Recommendation (1) of the study (page 18).

It is the position of the Commission that our unbroken endeavors for six to seven years prior to the Procurement Act to create a multiple set of fully integrated ADP systems have established a "systems environment" which places virtually all of our post-Act ADP contracting fairly and squarely within the legitimate exceptions contained in §11-35, most generally, the single "practicably available" source exception.

The identification of Procurement Act exemptions obviously requires managerial judgment - as does the "feasibility" standard of §11-35 G. Honest men may differ in such matters, but it is hardly objective to denigrate the considered judgment of the Commission by characterizing it as a violation of the Procurement Act and blaming it upon ". . . the SCC Staff's anti-competitive predisposition." (Page 10)

² The objective of the study purports to be limited to ADP contracts since January 1, 1983, despite references to non-ADP contracts and to those dating from 1976.

There is no dispute that the SCC files did not contain adequate exemption documentation for some of the contracts arising after the Act. The Special Study served to bring this to our attention and to the attention of our General Counsel. Proper documentation has been filed and we have amended our procedures to avoid a recurrence. Our prior inadequacy of documentation might be characterized as a violation of the Act, but we note that the Code is silent regarding the timing of the documentation; it is not mandated as a condition precedent.

It is reported that 23 ADP contracts were reviewed while completing the study. It is said that none were competitively procured, and that is correct. Details of the justification for exemption from the Act can be supplied. On the other hand, three of the 23 are said to, "represent a specific failure of the SCC Planning and Development Division to comply with both the Public Procurement Act, and the SCC's own procurement policies." We do not agree with that assessment.

EXAMPLE 1 in the report provides adequate description of the project, and we regret that our documentation apparently failed to establish that, after our abortive attempts to adopt the software to our Univac system, three bids were sought for installing the software in the state's IBM system and training our people in its use. Only one bid was received - that from BSI, and it was accepted.

EXAMPLE 2 properly reports that documentation of sole source procurement was lacking. This has been corrected by memorandum dated June 28, 1984, and can be furnished.

EXAMPLE 3 contains some incorrect historical data apparently provided by one of our employees. However, the only relevant observation to be made is that the vendor in this contract, Ann Roberts, (Ann Garmon - ASCI) was the architect for the entire motor carrier system as it exists today. The work to be done under the subject contract is an extension of our existing system, intended to correct certain inadequacies previously recognized by JLARC. A complete working knowledge of what we now have is essential to performing the enforcement project. In our judgment, this falls clearly within the intent of Code §11-41D.

This leads to another broad area of apparent differences between our actual operation and how that operation is characterized in the Special Study. We refer specifically to the assorted references in the report to SCC Staff influence or outright control over the ADP contracting processes and the hiring of the people involved. No person is employed at the Commission without the written approval of at least two Commissioners. Key personnel are both selected and hired only by the Commissioners -or at least two of them. This was the case with all members of our staff referred to, or named, in the study - including Frank Williams and Jack DeLoyht. Further, all such persons are answerable to the Commission - regardless of internal administration reporting procedures. No contract - ADP or otherwise - can be executed on behalf of the SCC without first being understood and approved by at least two Commissioners.* Needless to say, the hiring of all consultants - including former employees - can only be done upon the approval of at least two Commissioners. The effect of this in the latter area

* Non-ADP contracts may be signed by one Commissioner; two must sign ADP contracts.

of activity is that the Commissioners determine who is hired, for how long, and for how much.

With regard to Recommendation (4), it would serve little purpose for the Commissioners to adopt rules to implement, or constrain, what the Commissioners regard as a matter of their own judgment and discretion, to be exercised on a case by case basis.

A few more words need to be said regarding "our" anti-competitive pre-disposition, and with specific regard to our pre-Procurement Act policies and practices.

Competitive bidding processes were not embraced at the outset of our extensive development program, for one simple reason - no one at the SCC knew enough about systems development even to recognize what we needed, much less to recognize a competent vendor or a fair price. Early in the program, the SCC expended some \$80,000 in a vain attempt to establish effective automation in our Clerk's Office. We did so in reliance upon the advice and recommendations of State personnel outside the SCC. The decision was then made to hire an "in-house" expert who could assess and articulate our needs, evaluate the qualifications of the available vendors, negotiate prices determined to be fair for a pre-described piece of work,³ and supervise the activities from the point of determination of feasibility to full operation. Provided, however, all aspects of planning and contracting had to be presented to the Commissioners before any implementation. Until the Commissioners were satisfied, stage by stage, no contracts were made and no work was done by any outside vendor. Jack DeLoyht, of course, was the man employed by the Commission⁴ to guide its development program.

The Commission first became aware of Mr. DeLoyht through his contacts with then Commission Comptroller, Frank Williams. As Comptroller, Mr. Williams was concerned about the system in the Clerk's Office which its developer, the central State agency, had advised was about to collapse. A significant amount of money was projected for its correction. Mr. DeLoyht was then a consultant with Univac, servicing a contract between Univac and the central State agency. The SCC was able to secure the services of DeLoyht from the central State agency to perform an analysis of the SCC and the potential for automation. Approximately nine months were devoted to this effort, and during that time we evaluated Mr. DeLoyht and determined that Mr. DeLoyht was amenable to a job offer. Commissioner Bradshaw indicated that he knew Mr. DeLoyht and would negotiate his hiring.

DeLoyht served as Director of Planning and Development until he resigned in mid-1982, in accordance with the original plan to limit his employee status to about five years, or to coincide with the automation of major processes. When the major processes were completed, the job was no longer a full-time one for a creative technical manager. It became more cost-beneficial to hire Mr. DeLoyht

³ Rates were established for industry-accepted skill classifications based upon rates of reasonably corresponding skill classifications fixed and published by the Virginia Department of Management Analysis and System Development (MASD); present rates are determined in like manner.

⁴ See Memorandum, September 16, 1976, attached as Ex. 2.

as a consultant and to replace him on the staff with an effective administrator to manage the processes, with technical support. Examination of the contracts will demonstrate that the technical needs amounted only to 91 days for 1982-83 and 83 days for 1983-84. This is the fundamental reason for our disagreement with Recommendation (2); our development program is declining in intensity and reaching completion.

Mr. DeLoyht's familiarity with SCC systems is unmatched, due to his involvement from the beginning, and, in our judgment, it would have been unwise not to have taken advantage of this knowledge when we could "retain it" for less than he was paid as a full-time employee. We have been extremely pleased by the success of our efforts under Mr. DeLoyht's direction, and he appears to be equally effective in his current role.

The key to our control of expenditures in our ADP development is our contracting methodology. We contract in segments (life cycle) and not for the total project. This is why the number of contracts appears to be large. Acceptable completion of one segment of the life cycle provides sole source consideration for the next phase. The contracts (known as task orders) must be completed within a designated time period. Each task order is broken down into sub-tasks which are limited to no more than 15 days duration. This enables us, with considerable accuracy, to describe and estimate proposed work and to evaluate it when completed. Each sub-task of each ADP agreement is performed by a specific individual, named in the agreement, within a time period and at a rate of pay which are likewise prescribed. Negotiation takes place to ensure reasonable times for completion of the sub-tasks and appropriate rates for the skill level required for that effort. Managing at this level of project task definition is the key to receiving a successful project at the most reasonable price.⁵

Generally, we are told, contracts for ADP development are awarded for a whole project, with generalizations as to tasks. This approach is quite amenable to the use of competitive bidding, but, in our judgment, it doesn't provide the ingredients for good management, nor any assurance of conservative costs. Not all vendors are comfortable with our life cycle approach, but those who have become accustomed to our requirements realize that it works best for all parties.

There remain several significant factual discrepancies to be touched upon. Under the heading of Unusual Business Relationship, page 14, the report is critical of our use of Ann Garmon as a vendor. This appears to stem from the belief that Ms. Garmon employs her husband, Harry Garmon, for systems design support. This perceived relationship is described as not at "arms length," and the report concludes that the SCC has no assurance that it pays the most economic price for work performed by these firms.

⁵ Contrary to the study report, page 13, "fee certification" is performed relative to every ADP contract, and has been from the outset of our program. Fee certification amounts to a comparative analysis of MASD rates with those paid by the Commission for each skill classification charged under each of the SCC's ADP contracts.

The foregoing perception and conclusion are not only contrary to the specific facts of the matter but reflect a lack of understanding of our life cycle approach to our contracting process.

The contract⁶ in issue is with ASCI (Ann Garmon). However, our task orders all contain a "Staffing Schedule" - which identifies each person assigned to each aspect (sub-task) of the job covered by the order, together with that person's daily rate, the number of days allocated for the completion of the sub-task, and cost totals.

In the subject contract, Harry Garmon, himself, is not assigned to any sub-task. However, several of his employees are designated to perform sub-tasks, and at prescribed daily rates which were negotiated by the Commission - not by ASCI. The latter does not "sub-contract", nor does ASCI realize a return of any kind from the contract except for the payment for the daily services of Ann Garmon, herself, at the rate prescribed in the Staffing Schedule. In short, all persons performing work under our contracts are individually identified and their rate of pay prescribed in advance of any work being performed, together with the number of work days in which the job is to be completed.

The report seems to imply disapproval of our hiring of both Mr. Jack DeLoyht and Mr. Frank Williams in a consulting capacity. We have earlier addressed the issue of Mr. DeLoyht and stated that his expertise was no longer needed as a full-time employee, that it was more cost effective to use him in a consulting capacity.

With regard to Mr. Williams, he did not resign on March 1, 1983; rather, he retired on that date after 33 years of service to the Commonwealth as a gifted, responsible employee of the SCC. During those years, he served many roles and gained a knowledge of the functions and processes of the Commission's various divisions which was unique among our employees. While we could not control his decision to retire, we concluded that part-time access to his storehouse of knowledge and experience was in the best interest of the Commission, and we so contracted with him in December, 1983.

Mr. Williams is not in the consulting business and does not solicit consulting work, but he was amenable to providing the services we desired on a transitional basis. One of his functions is to advise the current Director of Planning and Development and to help with the comprehension of system related problems, including the evaluation of technical issues presented by Mr. DeLoyht. The present Director of Planning and Development has the final responsibility in this area. The need for Mr. Williams' services in the area of automation will dissipate, but it makes good sense to take advantage of such an opportunity to train new managers so as to eliminate the risk of costly failure. Once the benefits decline or time erodes the effectiveness of his retention, it will be terminated.

⁶ A copy of the contract (No. 204000003) is attached as Ex. 3.

The Special Study challenges the belief of the Commission and our employees that we have the best ADP systems in State government and that we have avoided significant time and cost overruns, as well as major project failures. The report concludes that, ". . . since there was no opportunity for competition, there is no existing basis which can confirm the accuracy of those statements or assumptions." (Page 3)

We find no apparent connection between competitive processes and overruns or failures. Both are matters of factual determination - well after the bidding process is over, and unrelated to it. Factual documentation in the Commission can readily establish that we had no failures and overruns once we established our life cycle approach.

With regard to the quality of our systems and the fairness of the costs incurred, that is another matter - still not ascertainable from looking backward to determine the nature of a bidding process. A low bid is not guaranteed to get the job, nor will its acceptance guarantee results.

On the other hand, the Commission's systems are tangible property and can be appraised as all other such property. During the years of our development activities, we have employed outside auditors at the completion of each General Design cycle of each project whose function has been, and remains, to appraise project activity completed and proposed. Feasibility, design, anticipated performance and cost are all evaluated. This material is available for inspection. We would also welcome the evaluation of our systems, currently, by competent appraisers.

The members of JLARC may be interested to know that our Case Management System (CMS) has been sold to the California Department of Justice, the California Public Utility Commission, and the Internal Revenue Service. CMS was given to Virginia's Office of Attorney General so that a portion of it could be used in developing a system for that office.

For reasons set forth hereinabove, we do not subscribe to the legal standard contained in Recommendation (1). We affirm that the required documentation for exemption status was inadequate, or missing, with regard to some contracts entered into after January 1, 1983. This problem has been addressed and is not expected to occur again. Otherwise, the Commission believes its contracting activities to be in compliance with the Procurement Act. We further agree with the observation that "mere knowledge of the SCC" by a given vendor is not a valid ground for an exemption under Code §11-41.

Regarding Recommendation (2), for reasons hereinabove stated, we do not believe it cost effective, or otherwise desirable, to seek a Director of Planning and Development having the expertise of a Jack DeLoyht. Our present Director is, in fact, fully involved in the process of negotiating development contacts - and is responsible for matters emanating therefrom.

We endorse Recommendation (3) - to revise our procurement manual, and revision is underway.

For reasons hereinabove stated, we do not agree with Recommendation (4), regarding the formulation of policies and procedures for the hiring of former employees. Such hiring is seldom done, and when it is, the Commissioners determine the need, together with the terms and conditions of employment, on a case by case basis.

RECEIVEDCOMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION
RICHMOND


FEB 23 1983

Office of Commissioner of State

February 23, 1983

MEMORANDUM

TO: Chester A. Roberts

FROM: Lewis S. Minter 

RE: Virginia Public Procurement Act
§11-35 et seq.

This is in response to your memo to me of January 21 and in confirmation of a meeting subsequent thereto at which the captioned legislation was discussed between you, Frank Williams and me. At the outset, it is my opinion that the "Act" encompasses SCC activities.

To the extent that our regulatory activities require the employment of outside legal services or expert witnesses, the Act contains a specific exception to the otherwise standard requirement for "competitive procurement" - namely, Code §11-45.B., the text of which reads:

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 that the pertinent provisions of Chapter 11 (§2.1-117 et seq.) of Title 2.1 of the Code remain applicable.

I understand that the primary potential impact of the Procurement Act - vis-a-vis the SCC - is upon our on-going development program efforts; day-to-day supplies, purchases, etc. are not involved. With specific reference to that program, it appears to me that competitive bidding is properly inapplicable if the provisions of Code §11-41 D are complied with. Those requirements read as follows:

D. Upon a determination in writing that there is only one source practicably available for that which is to be procured, a contract may be negotiated and awarded to that source without competitive

sealed bidding or competitive negotiation.
The writing shall document the basis
for this determination.

In the case of the latter code provision, it is to be emphasized that the rationale - justification for foregoing competitive sealed bidding must be set forth in writing and properly preserved for appropriate audit, etc.

In the event a proposed work order does not satisfy §11-41D, we may still be able to proceed with "competitive negotiation" pursuant to §11-41 C, which reads as follows:

C. 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. The writing shall document the basis for this determination.

The method of "competitive negotiation" is outlined in Code §11-37 but will not be copied herein. Should the need arise we can consider it further at that time.

I feel that you should also be aware that "computer programmers/system designers", etc. do not appear to qualify as "Professional Services" within the meaning of the Act. Such services are specifically defined by Code §11-37 and are limited as follows:

"Professional services" shall mean work performed by an independent contractor within the scope of the practice of accounting, architecture, land surveying, landscape architecture, law, medicine, optometry or professional engineering.

Further, as defined in §11-37 of the Act, "goods" specifically includes "automated data processing hardware and software." Therefore, it should be apparent that further enhancements of our development program can be contracted for without competitive bidding only if the conditions precedent of §11-41 D are fully met.

One final provision of the Act needs to be recognized within the ambit of this evaluation. All contracts over \$10,000 require the inclusion of those certain provisions contained in Code §11-51, namely:

1. During the performance of this contract, the contractor agrees as follows:

a. 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.

b. The contractor, in all solicitations or advertisements for employees placed by or on behalf of the contractor, will state that such contractor is an equal opportunity employer.

c. 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.

2. The contractor will include the provisions of the foregoing paragraphs a, b and c in every subcontract or purchase order of over \$10,000, so that the provisions will be binding upon each subcontractor or vendor.

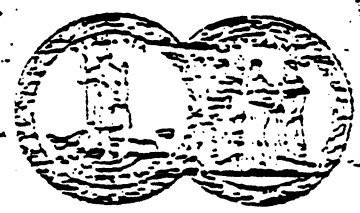
If you have further questions please let me know.

LSM:low

cc: Preston C. Shannon, Chairman
Junie L. Bradshaw, Commissioner
Thomas P. Harwood, Jr., Commissioner

WILLIAM L. BRADSHAW
DEPUTY
WILLIAM C. BRANNON
COMMISSIONER
THOMAS P. HARWOOD, JR.
COMMISSIONER

WILLIAM C. YOUNG
CLERK OF THE COMMISSION
BOX 1197
RICHMOND, VIRGINIA 23289



STATE CORPORATION COMMISSION

September 16, 1976



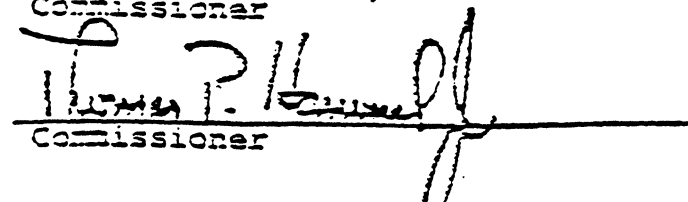
MEMORANDUM TO ALL DIVISION HEADS:

The Commission is pleased to announce the appointment of Mr. Jack DeLoyht to the new position of Director - Planning and Development. This appointment is effective immediately.

Mr. DeLoyht is responsible for the application of computer and general systems technology to the operations of the Commission and its divisions as deemed practical and economical by the Commission. He will report directly to the Commission.

He will advise the Commission on all matters related to this responsibility. He has authority for the conduct of planning and development projects approved by the Commission which utilize this technology. This authority includes, subject to the approval by the Commission, the procurement and allocation of equipment and contract services which are either coincident to the conduct of planning and development projects or which impact the overall development objectives of the Commission.

Mr. DeLoyht will be a party to all memoranda of agreement for consultant services which involve planning and development considerations. It is suggested that he be invited to participate in negotiations for other types of consultant services (expert witnesses, etc.) in order to give him an insight into our need for these services. This will help him to identify areas where development effort might benefit Commission operations. Since his work involves contact with extensive specialized technical resources, he may be able to help you in locating needed consulting and technical services.


Chairman

Commissioner

Commissioner

Document No. 840410018

CONTRACT NUMBER 204000003

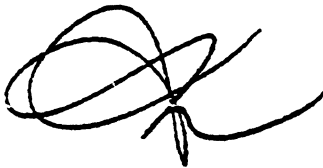
MEMORANDUM OF AGREEMENT
(Office of Planning & Development)

I. A Task Order for work to be accomplished for the Corporate Operations Division has been arranged which will use the services of Applied Systems Concepts, Inc. (ASCI). This Task Order will be executed under the Basic Ordering Agreement, dated July 3, 1978, by and between the State Corporation Commission and ASCI. A copy of the Task Order is attached to this memorandum.

II. The maximum dollar amount to be expended under this Task Order is \$57,525.00. This amount has been budgeted for the order by the Corporate Operations Division.

III. The work to be accomplished under this Task Order is expected to be completed on or before July 31, 1984.

IV. All written documents in regard to this Task Order and the Basic Ordering Agreement under which it is issued are on file in the Office of Planning and Development.

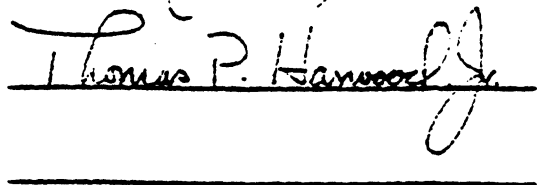


Charlotte E. Daniel
Corporate Operations Division



Chester A. Roberts, Director
Planning and Development

The above signed have been authorized to enter into an agreement as indicated; Commissioner(s).

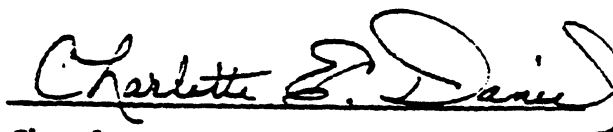


TASK ORDER*

1. This Task Order, dated April 2, 1984, is to be accomplished under a Basic Ordering Agreement by and between the Commonwealth of Virginia, State Corporation Commission (SCC) and Applied Systems Concepts, Inc. (ASCI) dated July 3, 1978. It covers work described in the Statement of Work attached hereto and made a part hereof as Attachment A.
2. ASCI shall supply the individuals to perform the work covered under this Task Order in accordance with terms and conditions and the staffing schedule attached hereto and made a part hereof as Attachment B.
3. The work covered by this Task Order shall begin April 2, 1984, and, unless sooner terminated as otherwise provided, will continue until July 31, 1984.
4. The maximum dollar amount which will be paid for the work covered by this Task Order shall be \$57,525.00.
5. In addition to termination as provided in the Basic Ordering Agreement, this Task Order may be terminated immediately upon notification of ASCI by the SCC when the SCC decides that the work described in Attachment A no longer serves SCC requirements. Notification shall be by oral notice to ASCI, confirmed by written notice promptly forwarded to ASCI by certified mail or by hand delivery. In the event of such termination, SCC will make payment to ASCI for services and expenses to the date of termination as provided in the Basic Ordering Agreement referenced in paragraph 1, or according to any applicable provisions contained in Attachment B, the latter being intended to supercede the provisions of the Basic Ordering Agreement.



Chester A. Roberts, Director
Planning and Development



Charlotte E. Daniel
Corporate Operations Division



Welton H. Jones, Jr.
Fiscal Director



Anne Roberts
Applied Systems Concepts, Inc.

* Retyped single-spaced for printing

Attachment A

STATEMENT OF WORK

The Corporate Operations Division currently utilizes four distinct automated systems to support its daily operations:

1. Clerk's Office System (COS) - installed in 1976 to provide for the recording of data relevant to corporate charters, registered agents, financial history, corporate activity (mergers, amendments, annual reports).
2. Charter Document Control System (CDC) - installed in 1981 to provide a means of recording and retrieving charter documents on microfilm.
3. Commission Cash Management System (CCM) - installed in 1981 to provide better controls for revenue collections and to expedite the depositing process.
4. Clerk's Office Correspondence System (COC) - installed in 1983 to facilitate the production of daily correspondence through automated letter composition and production.

Additionally, the Division uses the Case Management System (CMS) and its subset, the Judgements Accounts Receivable System (JARS), to record and monitor Commission cases.

Because each of the systems was designed and implemented separately and due to the prevailing budgetary constraints under which the Division has had to operate, there has been no real effort expended to-date to effectively integrate the numerous processes. The result is that, while each of the systems functions effectively as a separate entity, there is a significant amount of redundancy in both manual and automated processes.

The Clerk's Office System (COS) serves as the hub around which all of the other systems operate. The industry standard for a useful system life is 5 to 7 years. COS has been in operation for almost 8 years. There have been numerous technical advancements in the ensuing years. The relatively antiquated technology under which COS operates has constrained the techniques which could be employed in the more recently developed interfacing systems.

In light of the situation described above, the SCC proposes to undertake the redevelopment and/or resystemization of the referenced processes.

A project task force consisting of the individuals named below has been appointed to guide this redevelopment effort.

- . Charlotte Daniel - Corporate Operations Division
- . Chester Roberts - SCC Planning and Development
- . Jack DeLoyht - Consultant, Systems Development
- . Anne Roberts - Consultant, Systems Development

The project task force has developed a set of redevelopment considerations. They are included as Attachment D.

This Task Order represents the efforts which will be required to perform a detailed analysis of both the current and the proposed, enhanced processes, as well as to develop preliminary design concepts and implementation strategies.

Work will proceed in accordance with the workplan included as Attachment C and the project task force redevelopment considerations included as Attachment D.

**Attachment B
STAFFING SCHEDULE**

<u>NAME</u>	<u>TITLE</u>	<u>RATE</u>	<u>DAYS</u>	<u>TOTAL</u>
Roberts	Project Manager	\$300	45	\$13,500.00
Padis	Senior Systems Analyst	\$280	60	16,800.00
Evans	Systems Analyst	\$235	60	14,100.00
Lacy	Systems Analyst	\$210	40	8,400.00
Anthia Magnusson	Project Consultant	\$315	5	1,575.00
Ann Welch	Data Base Administrator	\$315	<u>10</u>	<u>3,150.00</u>
			220	\$57,525.00

RESPONSE OF JUNIE L. BRADSHAW, COMMISSIONER

TO THE JLARC SPECIAL STUDY:

ADP CONTRACT WITH THE STATE CORPORATION COMMISSION

I HAVE REVIEWED THE JLARC DRAFT IN THE ABOVE-CAPTIONED MATTER.
AT THE BOTTOM OF PAGE 4 OF THE DRAFT I FIND THE FOLLOWING:

"ACCORDING TO DELOYHT, HE LAID OUT THREE SPECIFIC CONDITIONS FOR HIS EMPLOYMENT AT THE SCC: '...NO IN-HOUSE STAFF, NO COMPETITIVE PROCUREMENT, AND USE OF UNIVAC TECHNOLOGY.'" THE QUOTE ATTRIBUTABLE TO MR. DELOYHT IS WITHOUT FACTURAL FOUNDATION. IT WAS PRIMARILY BECAUSE OF "NO COMPETITIVE BIDDING" AND "NO-IN HOUSE STAFF", AND THE FACT THAT, IN MY JUDGMENT, THE BENEFITS DERIVED FROM THE PROGRAM DID NOT EXCEED THE COST, THAT I BECAME THE MINORITY VOICE IN THE ADP PROGRAM HERE AT THE COMMISSION. HOWEVER, LET ME AT THIS POINT REAFFIRM MY PHILOSOPHY OF MAJORITY RULE AND DECISIONS MADE THEREBY. SINCE MY POSITION ON ADP CONTRACTS WAS WELL KNOWN TO MY COLLEAGUES NO CONTRACTS SINCE THE EARLY STAGES OF THE PROGRAM WERE PRESENTED TO ME. HAVING NOT BEEN PRIVY TO THE CONTRACTS OR PROCEDURES PRECLUDES ANY COMMENTS ON MY PART EXCEPT FOR FACTS I CAN AFFIRM OR DISAVOW.

JLARC COMMENTS ON THE SCC RESPONSE

Competition plays a prominent role in Virginia procurement law and policy. All qualified potential contractors should have the opportunity to do business with State agencies and the right to compete equally with others. In its response, the State Corporation Commission (SCC) does not address the need to be accountable to the public -- to do business as openly and fairly as possible and to proceed in a manner that meets the spirit of the Public Procurement Act. Instead, the response is laden with reasons for not complying with the general intent of the Act and focuses on specific exceptions to either competitive sealed bidding or competitive negotiation. We still maintain that the current ADP procurement practices used by the SCC are not consistent with provisions of law contained in the Procurement Act and that there has been no effort to establish a competitive environment following the enactment of the Act.

We would like to reiterate that, after vendor selection, the process for administering an ADP contract is a sound one. Furthermore, the ADP systems procured by the SCC are in place, some are unique, and each system appears to be working well.

Specific comments on the SCC response follow. JLARC staff comments are presented in an *italicized* format.

Non-Compliance With Procurement Policies

The SCC states on page 2 of its response that "Attitudes of Commission employees neither formulate nor direct Commission policy. Prior to January 1, 1983, the Commission was free to use its best judgment in fashioning policies and procedures for the contracting of all services. Shortly after the effective date of the Act we requested our General Counsel to outline its effect upon our activities, especially upon the remainder of our development program, which was begun in the mid-1970's."

During the course of our inquiry, we identified three policies which were supposed to govern the manner in which the SCC conducted its ADP procurement activities:

1. *SCC Planning and Development Contract and Procurement Policy approved by Judges Harwood and Shannon in April, 1978. This policy requires competitive bidding for the first phase of a systems development project.*

2. *A June 12, 1980 memorandum written by Judge Shannon emphasizing the importance of documentation in the hiring of consultants.*
3. *The Virginia Public Procurement Act which went into effect on January 1, 1983. This Act spells out a policy calling for public agencies to use full and open competition "to the maximum feasible degree."*

These policies and statutes have not been followed by the SCC. Since April, 1978 all contracts for new systems development work have been awarded on a sole source basis. Documentation is either missing or wholly inadequate for many projects.

None of the contracts awarded since January 1, 1983 have been competitively bid. Even though the 1978 policy and the 1983 Procurement Act are very clear in their intent, the SCC has chosen to rely on sole source contracting as the only means of awarding ADP contracts. This approach is contrary to the purpose of the Procurement Act and the SCC's own policy and is the result of the anti-competitive attitude of Mr. DeLoyht, Mr. Williams, Mr. Roberts, and the Commission majority.

On page 4 of its response, the SCC states that "our unbroken endeavors for six to seven years prior to the Procurement Act to create a multiple set of fully integrated ADP systems have established a 'systems' environment' which places virtually all of our post-Act ADP contracting fairly and squarely within the legitimate exceptions contained in Section 11-35, most generally, the single 'practicable available' source exception."

We agree that virtually all -- but not all -- ADP contracts awarded since January 1, 1983 may be considered legitimate exceptions under Section 11-35 of the Code because they are essentially modifications of existing systems. Of the 23 contracts awarded since the effective date of the Act, however, at least two new ADP projects could have been awarded on a competitive basis.

Examples of Non-Compliance

The SCC response on page 5 points out that the three case examples presented in the report do not represent specific failures of the SCC Planning and Development Division to comply with both the Public Procurement Act, and the SCC's own procurement policies.

With the exception of the third case example, the comments of the SCC are not convincing.

1. *EXAMPLE 1: The SCC claims that three bids were sought for installing the software and only one bid was received, from Broughton Systems, Inc. This description of the process used to hire BSI is entirely misleading. The SCC has no documentation that three bids were sought. JLARC staff requested the RFP and response from BSI, but the SCC could provide neither. In fact, the SCC checked informally with contractors already engaged in other contracts, and only BSI had the personnel to do the required work. No attempt was made to contact other contractors, and no bids were sought. Moreover, the SCC contradicts itself in its response by saying that none of the 23 contracts were competitively procured.*
2. *EXAMPLE 2: This contract should have been awarded competitively under the Procurement Act. The new micro/minicomputer system software planned is not to be integrated with existing systems. This project in fact represents a new effort. In addition, there was no documentation of the sole source procurement at the time JLARC reviewed the contract. Documentation was filed on June 28, 1984 to comply with the Act.*
3. *EXAMPLE 3: Apparently, SCC employees provided JLARC staff with some incorrect data. The draft will be corrected.*

Documentation

The SCC states on page 4 of its response that "There is no dispute that the SCC files did not contain adequate exemption documentation for some of the contracts arising after the Act. The Special Study served to bring this to our attention and to the attention of our General Counsel. Proper documentation has been filed and we have amended our procedures to avoid a recurrence. Our prior inadequacy of documentation might be characterized as a violation of the Act, but we note that the Code is silent regarding the timing of the documentation; it is not mandated as a condition of precedent."

The JLARC review found that nearly all of the contracts signed after January 1, 1983 did not contain adequate documentation. Mr. Russell Boraas, Assistant Attorney General, was asked to comment on what point in time an agency should document in writing its justification for a sole source procurement pursuant to Section 11-41(D) of the Virginia Public Procurement Act. Mr. Boraas' understanding of this provision is based on his continuing work with the Act. His comments follow:

The word "Upon" at the beginning of the subsection.....quite clearly indicates that the written determination is a legal precondition to negotiation with a sole source. It indicates both that the written determination takes place before the negotiations and that negotiations with a sole source are based or grounded upon the written determination.

This requirement for a prior written determination is entirely logical. Section 11-35(G) states that it is the intent of the General Assembly that competition be sought to the "maximum feasible degree". Some of the reasons given for doing so are that there be the "avoidance of any impropriety or appearance of impropriety", that all qualified vendors have access to public business", "that no offeror be arbitrarily or capriciously excluded" and that goods and services be obtained at reasonable cost. Sole source procurement is by definition procurement without competition. It runs counter to the whole philosophy behind the Public Procurement Act and is reluctantly permitted only where impracticable to do otherwise. Therefore to help avoid both impropriety and the appearance of impropriety and to help assure that less expensive goods and services could not have been obtained elsewhere, the agency is required to go through the discipline of putting its reasons on paper. A written justification for a sole source procurement produced after the procurement has taken place does not cause the agency to undergo this discipline. Furthermore, in some cases it can be argued that a determination written after the procurement has been challenged by outsiders would tend to be self-serving and unobjective.

It is always best to avoid even the appearance of impropriety. Consequently, even if the agency has acted in completely good faith, it sill (sic) exposes itself to criticism for having created a situation which tends to raise questions of possible impropriety. It therefore seems to me that logic would demand a written determination made before the sole source procurement took place, even if the Code did not."

Fee Certification

The SCC procurement policy manual requires that whenever a procurement is non-competitive, the Director of Planning and Development certify that the contractor's fees are commensurate with the mid-range or lower of the fees of contractors registered with MASD.

In our review it was clear that the SCC is not following this policy. While the director does make a comparison with MASD rates charged to other agencies, no analysis is made of the fees charged by the contractors registered with MASD. This analysis is made only once a year, not for each non-competitive contract as required by the policy.

Even the comparison with MASD rates made by the SCC staff shows that the rates charged by the vendors working for the SCC are much higher (See Attachment A). For example, the FY 1985 rate for a programmer at MASD is \$22.00 per hour. For three SCC contractors compared, the rates ranged from \$28.00 to \$37.50 per hour. The MASD rate for a programmer/analyst is \$27.00 per hour -- for the SCC vendors it ranges from \$30.00 to \$40.00 per hour. This comparison seems to call into question the SCC assertion that it receives a fair price for its contracts. The fact is, they have no way to tell.

Hiring of SCC Personnel

The SCC response on page 6 states that "No person is employed at the Commission without the written approval of at least two Commissioners. Key personnel are both selected and hired only by the Commissioners -- or at least two of them. This was the case with all members of our staff referred to, or named, in the study -- including Frank Williams and Jack DeLoyht.... The effect of this in the latter area of activity is that the Commissioners determine who is hired, for how long, and for how much."

We do not disagree with the SCC description of its hiring and contract approval processes. In all of our interviews, however, Judge Shannon was viewed as the key administrator and Commissioner responsible for providing leadership and direction in ADP planning and development. Mr. Williams and Mr. DeLoyht both stated that they were hired by, and report to Judge Shannon. Judge Shannon chairs the weekly meetings on ADP development matters attended by Mr. Williams, Mr. DeLoyht and Mr. Roberts. However, it is true that both of the consultants were hired by the Commission. We should note that sometime in early 1978 one of the Commission members chose not to sign-off on ADP contracts and on the hiring of ADP personnel.

According to the SCC, "Competitive bidding processes were not embraced at the outset of our extensive development program, for one simple reason -- no one at the SCC knew enough about systems development even to recognize what we needed, much less to recognize a competent vendor or a fair price."(p. 7)

This statement is not entirely accurate. Mr. DeLoyht, the SCC's "in-house" expert on ADP planning and development, was hired on September 16, 1976 during the initial stages of the ADP development program. One of his first duties was to prepare long range goals and plans for the Office of Planning and Development. Later on, in April, 1978, Mr DeLoyht prepared the SCC Planning and Development Contract Procurement Policy which called for competitive procurement of the first phase of a systems development project. Consequently, the SCC had a competent employee knowledgeable in both systems development and competitive bidding processes. If it chose to, the Commission could have embraced a competitive environment for ADP contracts as early as April, 1978.

Mr. DeLoyht's contract for FY 1983-84 was for a maximum of 50 days. It was amended later on to include the additional 33 days. The SCC's development program has declined in intensity but it has not reached completion. It is in a position where it must still depend on Mr. DeLoyht for technical expertise since the current Director of Planning and Development lacks these skills.

JLARC does not disapprove of the hiring of Mr. DeLoyht and Mr. Williams as consultants, as the SCC asserts on page 12 of its response. Mr. DeLoyht is an expert in ADP matters and Mr. Williams has been discribed as "very professional, very dedicated, and cost conscious". It is to the Commission's advantage to draw upon the years of professional experience possessed by both of these individuals. However, we question the Commission's continued reliance on them to support and maintain the ADP program, especially since the SCC has a full-time Director of Planning and Development responsible for administering this function. Contrary to the SCC statement on page 16, the Director of Planning and Development told two JLARC staff members that he was not fully involved in the process of negotiating development contracts. Jack DeLoyht was principally engaged in these discussions. We continue to believe that it is not a prudent management practice for a paid consultant to be involved in negotiating contractual agreements with other consultants or vendors.

Life-Cycle Process

The SCC says that "The key to our control of expenditures in our ADP development is our contracting methodology. We contract in segments (life cycle) and not for the total project"... Managing at this level of project task definition is the key to receiving a successful project at the most reasonable price".(p. 10)

The SCC Planning and Development Contract and Procurement Policy states that the task order for a preliminary study, which is the first phase of a system development project, shall be awarded after evaluation of contractor bids submitted in response to a request for proposal issued by the SCC Director of Planning and Development. Since the SCC has chosen not to follow this policy, it is not possible to determine whether the SCC received "the most reasonable price".

Unusual Business Relationship

Regarding the JLARC discussion of the business relationship between JBA and ASCI, the SCC response states "The foregoing perception and conclusion are not only contrary to the specific facts of the matter but reflect a lack of understanding of our life cycle approach to our contracting process".

The response seems to imply that the JLARC report is criticizing Mrs. Garmon for employing her husband, Harry Garmon, for systems design support.

This is not the point JLARC is making. JBA and ASCI have been awarded over 60 percent of the SCC's ADP contracts. All of these contracts have been awarded non-competitively. This practice makes the SCC vulnerable to allegations of favoritism. For that matter, this allegation can be directed at all other firms receiving sole source contracts from the SCC.

Adequacy of the Systems

The SCC maintains that it has very good systems and that several of them have been purchased by other governmental bodies.

Our assessment found that users were satisfied with these systems. However, because of the noncompetitive practices of the Commission, there is no assurance that the SCC paid a reasonable price for these systems.

Recommendations

1. *We are pleased that the SCC is strengthening its documentation of sole source contracts. But the Commission must take immediate steps to ensure that its procurement of professional services is in compliance with the Public Procurement Act by engaging in a more open, and clearly competitive procurement environment.*

2. We are not recommending that the SCC employ a new Director of Planning and Development with the expertise of Jack DeLoyht. We recommend that the current director be given ample opportunities to strengthen his technical skills and that he be actively involved in all phases of ADP contract negotiation and administration.

3. The revised procurement policy should be consistent with the requirements of the Public Procurement Act.

4. We recommend that the SCC formulate a policy on the hiring of former employees.

Attachment A

C. Roberts

**COMPARATIVE ANALYSIS
HOURLY RATE SCHEDULE
EFFECTIVE 7-1-84**

	S3C	BSI	JBA
DBA	\$50.00	\$50.00	45.00
SAC	50.00	45.00	37.50
DBA	45.00	47.50	37.50
SSA	42.50	43.50	35.00
PRA	37.50	40.00	30.00
PRG	32.50	37.50	28.00
PRT	27.50	30.00	25.00
DOC	20.00	20.00	28.00
TWR	20.00	20.00	28.00
WDP	—	15.00	—

DBA	Data Base Administrator
SAC	Senior Analyst Consultant
DBA	Data Base Analyst
SSA	Senior System Analyst
PRA	Programmer/Analyst
PRG	Programmer
PRT	Programmer/Trainee
DOC	Documentalist
TWR	Technical Writer
WDP	Word Processor

MASD

Program Manager	\$39.00
Systems Development Supervisor	32.00
Systems Analyst	32.00
Senior Systems Engineer	30.00
System Engineer	30.00
Senior Programmer/Analyst	27.00
Programmer/Analyst	27.00
Programmer	22.00

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