

INTERIM REPORT OF THE

# Special Joint General Laws Subcommittee Studying the Virginia Public Procurement Act

TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA



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**Members  
of the  
Special Joint General Laws Subcommittee Studying  
the Virginia Public Procurement Act  
(2013)**

Delegate Chris Jones, Chair	Senator Frank Ruff, Jr. (alternate)
Delegate Dave Albo	Senator J. Chapman Petersen
Delegate Thomas "Tag" Greason	Senator Richard Stuart
Delegate Nick Rush	Senator Bryce Reeves
Delegate Matthew James	

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# Report of the Special Joint General Laws Subcommittee Studying the Virginia Public Procurement Act. Interim Report, 2013

## *Executive Summary*

House Bill 2079 (Delegate S. Chris Jones) was enacted by the 2013 Session of the General Assembly. By its terms, HB 2079 will not become effective until July 1, 2014 to allow the House Committee on General Laws and the Senate Committee on General Laws and Technology to conduct a comprehensive study of the Virginia Public Procurement Act (VPPA) (§ 2.2-4300 et seq.) of the Code of Virginia during the 2013 interim, and to identify weaknesses and other problems in the VPPA, and to recommend improvements where such weaknesses or problems exist. HB 2079 also required the Chairmen of the House Committee on General Laws and the Senate Committee on General Laws and Technology to convene a work group in 2013 to examine the provisions of the VPPA. It was decided by the Chairmen that workgroups would be selected in 2014, after the Special Joint General Laws Subcommittee Studying the Virginia Public Procurement Act (Special Joint Subcommittee) met in 2013, in accordance with Rules 18 and 19 of the Rules of the House of Delegates and Rule 20(h) of the Rules of the Senate of Virginia, to solicit comment from interested parties on problems identified in the VPPA.

Year One of this study (2013) was a comprehensive fact-finding mission by the Special Joint Subcommittee, including an educational component on the operation of the VPPA for the benefit of the membership as it undertook this study. Four meetings conducted during the 2013 interim were dedicated to receiving public comment from parties involved in public procurement, including representatives of state and local government and the vendor community, and other interested parties. The fourth and final meeting identified issues to be addressed by the workgroups to be selected by the Special Joint Subcommittee in 2014. No recommendations for legislation were expected, and none were made, for the 2014 Session from the Special Joint Subcommittee. At the conclusion of this first year of study, the Special Joint Subcommittee identified the points of consensus where a problem or issue in the VPPA existed that needed to be addressed.

The membership of the Special Joint Subcommittee consisted of House Committee on General Laws members: Delegate S. Chris Jones, Chair, Delegate Dave Albo, Delegate Thomas "Tag" Greason, Delegate Nick Rush, and Delegate Matthew James; and Senate Committee on General Laws and Technology members Senator Frank Ruff, Jr. (alternate), Senator Richard Stuart, Vice-Chair, Senator J. Chapman Petersen, and Senator Bryce Reeves.

The Special Joint Subcommittee also directed that a website be created for interested parties to follow this study. Available on the website are agendas, meeting summaries, copies of all presentations made to the Special Joint Subcommittee, issue matrixes, and directions on how to

participate in the work of the Special Joint Subcommittee. The website address is:  
[http://dls.virginia.gov/interim\\_studies\\_procurement.html](http://dls.virginia.gov/interim_studies_procurement.html).

Year Two of this study (2014) will focus on the issues identified during Year One. The workgroups will be selected by the Special Joint Subcommittee to examine specific VPPA issues and will begin their work to recommend resolution to these issues during the 2014 interim. The goal at the conclusion of the second year of this study is the recommendation of VPPA legislation by the Special Joint Subcommittee for consideration by the 2015 Session of the General Assembly.

The principal objective of the workgroups will be to develop consensus on as many issues as possible and make recommendations for their resolution to the Special Joint Subcommittee in 2014. Any issues on which consensus cannot be achieved will be referred to the Special Joint Subcommittee for disposition. The Special Joint Subcommittee agreed to establish three workgroups as follows:

1. Construction, including Design Professional Services
2. IT Procurement and Other Professional Services
3. Goods and Nonprofessional Services

### ***Study Authority and Scope***

HB 2079 (Delegate Jones) was enacted by the 2013 Session of the General Assembly. House Bill 2079 reorganized the definitions of and processes for competitive sealed bidding and competitive negotiation, and added a definition of job order contracting and specified procedures to be used by public bodies when utilizing job order contracting. By its terms, HB 2079 will not become effective until July 1, 2014 to allow the House Committee on General Laws and the Senate Committee on General Laws and Technology to conduct a comprehensive study of the Virginia Public Procurement Act (VPPA) (§ 2.2-4300 et seq.) during the 2013 interim. House Bill 2079 also required the Chairmen of the House Committee on General Laws and the Senate Committee on General Laws and Technology to convene a work group in 2013 to examine the provisions of the VPPA. It was decided by the Chairmen that workgroups would be selected in 2014, after the Special Joint General Laws Subcommittee (Special Joint Subcommittee) met in 2013 to solicit comment from interested parties on problems with the VPPA in accordance with Rules 18 and 19 of the Rules of the House of Delegates and Rule 20(h) of the Rules of the Senate of Virginia.

### ***2013- 2014 Study Plan***

The VPPA became effective in 1983. State and local public bodies as well as the vendor community have had 30 years' experience with VPPA; but with legislation introduced virtually every year in the General Assembly to amend the VPPA, the VPPA has become riddled with exceptions and often conflicting provisions, which in turn leads to inconsistencies and the lack of oversight of public procurement in Virginia. Because of this, the Special Joint Subcommittee was constituted to make a comprehensive examination of the VPPA, identify weaknesses and other problems in the VPPA, and to see where improvements might be made. Public procurement is a very nuanced, layered, and complex process, but one that is essential to form public-private partnerships to provide goods, services and construction for the benefit of Virginia's citizens.

It was decided by the Special Joint Subcommittee that its first year of study needed to include an educational component for the benefit of the membership as it undertook this study as well as a fact-finding mission by the Special Joint Subcommittee. Parties involved in public procurement, whether state or local government representatives, representatives of the vendor community, or other interested parties, were given the opportunity to provide information and identify specific problems with the VPPA. Four meetings during the 2013 interim were dedicated to receiving public comment. The fourth and final meeting identified issues to be addressed by the workgroups selected by the Special Joint Subcommittee in 2014. No recommendations for legislation were expected, and none were made, for the 2014 Session from the Special Joint Subcommittee as 2013 was dedicated to a comprehensive fact-finding mission about the VPPA. At the conclusion of this first year of study, the Special Joint Subcommittee identified the points of consensus where a problem or issue exists that needed to be addressed.

Year Two of this study (2014) will focus on the identified issues and work will begin on their resolution. Workgroups will be selected by the Special Joint Subcommittee to examine specific issues. The goal at the conclusion of year two of this study is the recommendation of VPPA legislation by the Special Joint Subcommittee for the 2015 Session.

The membership of the Special Joint Subcommittee consisted of House Committee on General Laws members Delegate Chris Jones, Chair, Delegate Dave Albo, Delegate Thomas "Tag" Greason, Delegate Nick Rush, and Delegate Matthew James; and Senate Committee on General Laws and Technology members Senator Richard Stuart, Vice-Chair, Senator Frank Ruff, Jr. (alternate), Senator J. Chapman Petersen, and Senator Bryce Reeves.

To assist the Special Joint Subcommittee in its work, Chairman Jones requested that presentations to the Special Joint Subcommittee include, at a minimum, the following information:

- Identification of the specific public procurement issue(s) or topic(s) that are the focus of a presentation;
- Identification of the problem(s) associated with the specific public procurement issue/topic; and
- Recommendation for resolution of the problem identified.

At the direction of the Special Joint Subcommittee a website was created for interested parties to follow this study ([http://dls.virginia.gov/interim\\_studies\\_procurement.html](http://dls.virginia.gov/interim_studies_procurement.html)). Available on the website are agendas, meeting summaries, copies of all presentations made to the Special Joint Subcommittee, issue matrixes, and directions on how to participate in the work of the Special Joint Subcommittee.

## ***WORK OF THE SPECIAL JOINT SUBCOMMITTEE***

**May 14, 2013**

The Special Joint Subcommittee held its initial meeting on May 14, 2013. The first order of business was the election of the chair and vice-chair. The Special Joint Subcommittee elected Delegate S. Chris Jones as chair and Senator Richard H. Stuart as vice-chair. Chairman Jones discussed the proposed direction of the study, including the initial work plan. He emphasized that the charge of the Special Joint Subcommittee would involve a substantive and comprehensive review of all aspects of the VPPA and would likely be a two-year study process. The first year of the study will be devoted to fact-finding and providing interested parties with the opportunity to share information and identify concerns related to the public procurement process. The information developed during this period will assist the Special Joint Subcommittee in identifying the key areas where improvements may be made. Chairman Jones indicated that three additional meetings are anticipated for the first year for the receipt of public comment from interested parties. The fourth meeting of the first year would be held to identify those issues or concerns for which there is a general consensus that a problem existed and needed to be addressed.

The second year of the study will focus on working to resolve the identified issues in the context of achieving consensus on the solutions that will ultimately be recommended. Chairman Jones further indicated that workgroups would be established during this second year to deal with some of the more complicated issues. The ultimate goal of the Special Joint Subcommittee's work is to develop recommendations for VPPA legislation for the 2015 Session.

The first meeting was designed as an educational session for the Special Joint Subcommittee members on the various aspects of public procurement, including the background of the VPPA and a primer on the fundamentals of public procurement.

### *Overview of the Virginia Public Procurement Act*

*Maria J. K. Everett, Senior Attorney, Division of Legislative Services*

Ms. Everett provided the Special Joint Subcommittee with an overview of the VPPA, starting with the status of public procurement in the Commonwealth prior to the Act.

The VPPA is based on the American Bar Association's Model Procurement Code. In 1982, Virginia became the tenth state to consolidate its procurement statutes based on the model code. The VPPA consolidates the state's policies, including purchasing methods, remedies in the event of controversy, and ethical standards governing procurement. The VPPA applies to all state entities and political subdivisions, except that counties, cities, and towns that adopt "alternative procurement policy based on competitive principles" are exempted from most of the provisions of the VPPA. Briefly stated, the VPPA seeks to ensure that (i) public bodies obtain high-quality goods and services at reasonable costs, (ii) public procurement is administered in a fair and impartial manner, and (iii) qualified vendors have access to the public's business. To achieve these purposes, the VPPA establishes a procedure for awarding public contracts based on competitive principles



and provides that all public contracts with nongovernmental contractors for the purchase or lease of goods, for the purchase of services, or for construction be awarded after either competitive sealed bidding or competitive negotiation, unless otherwise provided by law. As originally conceived, competitive sealed bidding was and remains the preferred method of public procurement.

Ms. Everett also provided an overview of the organization of the VPPA as well as the impact of major developments on public procurement, including (i) mandatory procurement of goods produced by Virginia Correctional Enterprises, (ii) supplier diversity and enhancement provisions and the role of the Department of Minority Business Enterprise (DMBE), (iii) nonprofit employment services organizations, (iv) public-private partnerships, (v) the Restructured Higher Education Financial and Administrative Operations Act and the authority it provides to Level III and Level II institutions, and (vi) electronic procurement.

*Collette Sheehy, Vice President for Management and Budget  
University of Virginia*

Ms. Sheehy summarized the Restructured Higher Education Financial and Administrative Operations Act (Restructured Operations Act) of 2005 and the authority granted to public institutions of higher education, focusing on Level III institutions.

Under the Restructured Operations Act, all public institutions of higher education in the Commonwealth may obtain authority to conduct business practices with a level of autonomy in the areas of (i) human resources, (ii) financial management, (iii) information technology, (iv) real estate, (v) procurement, and (vi) capital outlay. The Restructured Operations Act provides for three levels of authority, with Level III providing the broadest available authority. Ms. Sheehy stated that the University of Virginia entered into a Level III management agreement in 2006, which gave the institution the broadest level of authority in all six of the business practice areas. Ms. Sheehy indicated that the University has used the expanded procurement authority to adopt rules that were based on the Virginia Public Procurement Act but tailored more specifically to the needs of higher education. The University also replaced the Construction and Professional Services Manual (CPSM) with a Higher Education Capital Outlay Manual (HECO), which provided a wider range of construction procurement options and flexibility. Ms. Sheehy provided examples of how the University had used the flexibility in procurement authority to successfully complete contract purchases and capital outlay projects.

Senator Stuart asked if any overall cost-benefit analysis had been conducted to review whether the authority provided under the management agreement was advantageous to the Commonwealth. Ms. Sheehy indicated that when the authority was initially established there was some tracking that was done supporting costs savings. Senator Petersen asked what put the University in a better position than the Department of General Services to better administer procurement activities. Ms. Sheehy replied that a chief factor was size, citing the University's annual operations budget of over \$ 2.5 billion and 40-person procurement department. Delegate Greason asked if public institutions of higher education with Level I and II procurement authority are able to purchase off of each other's contracts using cooperative procurement. Ms. Sheehy

replied that all public institutions of higher education and all public bodies generally are able to purchase from the University's contracts.

*Richard Sliwoski, P.E., Director  
Department of General Services*

Mr. Sliwoski addressed the Special Joint Subcommittee on the responsibilities of the Department of General Services. Mr. Sliwoski noted that Virginia is recognized as a leader in innovation and ethical procurement practices both nationally and internationally, receiving several awards and citations. He further noted that the agency is proactive in seeking and implementing best practices and provided several examples of how best practices have been implemented since the Governor's Task Force on Procurement Assessment, conducted in 1999. Mr. Sliwoski also provided examples of procurement operations that have increased efficiency and generated procurement savings, including the use of statewide leveraged contracts resulting in \$40 million in savings annually and the Commonwealth's statewide electronic procurement program, eVA, which has resulted in savings of \$368 million since the program began.

Mr. Sliwoski stated that the VPPA generally provides for transparent, competitive, and reliable procurement processes by which billions of dollars in public funds are spent through contracts with private sector businesses. He noted that recent legislation has exempted various public bodies from the VPPA under the premise that doing so would allow for greater efficiency and cost effectiveness. While these decisions on a micro basis may have merit, Mr. Sliwoski noted that they have also created an imbalance resulting in possible increased costs to the nonexempt agencies. These impacts include increased resource costs and complexity of contracts for agencies and vendors; confusion for vendors due to multiple and disparate procedures resulting in a less friendly environment to conduct the state business; fractured efficiency of cooperative contracting such that one public body cannot use another public body's contract without expending resources to bring it into compliance with laws; and duplication of contracts resulting in less aggregated spending, higher prices, and increased contract award and administration costs. Mr. Sliwoski then reviewed the procurement process under the VPPA for construction, professional services, and nonprofessional services.

Mr. Sliwoski noted three general areas that the Special Joint Subcommittee may want to consider for improvement: (i) the lack of consequences for violating the VPPA, (ii) the small business set-aside preference, and (iii) the absence of any central procurement oversight, making achievement of enterprise cost savings and efficiencies difficult. Delegate Albo asked how an individual or company with a "great idea" would approach a public body under the VPPA. Mr. Sliwoski responded that if it is a product, the public body entertaining the idea may proceed with a Request for Proposals. Senator Stuart asked if a cost-benefit analysis has been done on the SWaM program to determine whether and how much the program was saving or costing the state. Mr. Sliwoski responded that no hard data exists. Senator Ruff expressed concern that smaller localities may be at a disadvantage when it comes to procurement because they do not have extensive staff. He asked if smaller localities could contract with the state to do construction projects. Mr. Sliwoski responded that there was nothing to prevent such partnerships.

*Sam Nixon, Chief Information Officer  
Virginia Information Technologies Agency*

Mr. Nixon discussed with the Special Joint Subcommittee the procurement services that the Virginia Information Technologies Agency (VITA) provides for the state. VITA procures information technology for most state agencies, and all such procurements must be made pursuant to the VPPA. VITA's oversight does not extend to independent agencies, Tier I and II public institutions of higher education, the legislative or judicial branches, or local governments. Mr. Nixon noted that 50 percent of spending on VITA's contracts is from localities, K-12 education, and non-executive branch agencies. Other major efforts undertaken by VITA include leveraging the Commonwealth's information technology (IT) buying power, RFP, and contract templates for IT.

Mr. Nixon suggested the following areas for improvement of the VPPA:

(i) Clarification of statutory provisions. As an example, Mr. Nixon noted the prequalification of vendors provided by § 2.2-4317 of the VPPA and confusion about whether that pertains to all goods and services or just to construction projects.

(ii) Removal of preference for competitive sealed bidding over competitive negotiation. Currently, the VPPA establishes competitive sealed bidding as the preferred method for procurement and requires the public body to justify the use of competitive negotiation.

(iii) Modification of cooperative procurement language. The current language effectively creates a de facto "statewide" contract, which dilutes competition and leverage.

(iv) Provision of explicit enforcement authority.

Delegate Albo asked what would prevent VITA from accepting a "great idea" from a vendor. Mr. Nixon responded that the agency must first agree that the idea is great idea and then it must be determined if funding is available before moving forward.

*Ida McPherson, Director  
Department of Minority Business Enterprise*

Ms. McPherson began by briefly describing the certification programs administered by the Department. The SWaM program is designed to promote access and to enhance procurement opportunities for businesses participating in state-funded projects. Currently certification numbers for this program are as follows: 20,926 small businesses, 5,383 women-owned businesses, and 6,775 minority-owned businesses. The Service Disabled Veteran-owned Business Program, which consists of 224 certified businesses, allows veterans who are classified as "service disabled" by the Virginia Department of Veterans Services to include such certification in the SWaM vendor base. The Department also administers a certification program for nonprofit employment services organizations (ESO) that have been accredited by both the Commission on Accreditation of Rehabilitation Facilities (CARF) and the Department for Aging and Rehabilitative Services. Only

one business has been certified as an ESO. Finally, the Department administers a component of the federal Disadvantaged Business Enterprise Program designed to increase the participation of such business enterprises in projects funded by the United States Department of Transportation and other federal organizations. There are 1,435 disadvantaged businesses certified in the state.

Ms. McPherson also discussed the small business set-aside program established under Executive Order 33, which was initially signed on August 10, 2006, by Governor Timothy Kaine and extended by Governor Robert McDonnell. The order established a goal of 40 percent of purchases from SWaM businesses for the Commonwealth and established a small business set-aside program, as well as several other initiatives for state agencies and departments to enhance SWaM participation in procurement activities. Delegate Greason asked who makes the determination of whether a business is a small business under the statutory definition and what indicia are used. Ms. McPherson replied that when an application for certification is received, the Department reviews a variety of information and documents, including tax returns and stock reports. Delegate Albo asked how the small business set-aside program legally operates if the lowest bidder is not awarded the contract. Secretary of Administration Lisa Hicks-Thomas moved forward to respond that the preference is reflected through the awarding of additional points during the procurement review process. Chairman Jones asked if that would raise the contract price, and Secretary Hicks-Thomas replied that cost was only one of the factors that would be considered. Delegate James added that while there may not be specific statistical data bearing out a cost-benefit analysis, most small companies add to the local economy by hiring local workers and contributing sales taxes. Senator Stuart asked how many small businesses were certified and how the procurement documents were structured to include such firms. Director McPherson replied that there are over 20,000 certified small businesses in the state, 90 percent of which are Virginia firms. She further stated that eVA allowed for the inclusion of all businesses.

Regarding areas for possible change, Ms. McPherson offered that the Special Joint Subcommittee may wish to consider amending the definition of "small business." Current law defines a small business as a business with 250 or fewer employees or average annual gross receipts of \$10 million or less averaged over the previous three years. Most Virginia businesses meet this definition. According to Ms. McPherson, most Virginia businesses have 0 to 15 employees.

*Patti Innocenti, Deputy Director  
Department of Purchasing and Supply Management, County of Fairfax*

Ms. Innocenti provided the Special Joint Subcommittee with a large-county perspective on the VPPA. The Department of Purchasing and Supply Management has authority for the Fairfax County government and public schools. The Department employs 28 contracts professionals, oversees 2,300 term contracts, and administers procurement expenditures with an average value of \$700 million. Ms. Innocenti stated that some aspects of the VPPA work well, including (i) the flexibility for local public bodies to establish alternative procurement procedures, (ii) the ability to post solicitations notices and contract awards on eVA, and (iii) cooperative purchasing, which allows localities to purchase off of national and regional contracts.

Ms. Innocenti also noted areas that present challenges, including understanding that one size does not fit all. Large and small localities have different needs and have varying in-house procurement capabilities. Ms. Innocenti also cited proposed changes to the VPPA that conflict with the Act's intent as well as the cumulative effect of changes to the VPPA that adversely affect readability and create conflicting provisions. She stated that the VPPA should also be more nimble in order to adapt to current technology and business practices. Ms. Innocenti noted that the American Bar Association's Model Procurement Code had been revised and could serve as a good starting point for the Special Joint Subcommittee.

*William Lindsey, CPPO, C.P.M.  
President of the Virginia Association of Government Purchasers  
Gloucester County Purchasing Agent*

Mr. Lindsey provided the Special Joint Subcommittee with a small-county perspective on the VPPA. He explained that the procurement office for Gloucester County consists of three employees who are responsible for \$69.8 million in total expenditures, including 108 term contracts. The office services the procurement needs of both the county government and the public school system. Mr. Lindsey noted that the advantages of the VPPA include the authority for local governments to establish alternative procurement procedures. He further noted that Gloucester County has adopted a 37-page Procurement Ordinance. Mr. Lindsey also cited several problems with the VPPA, including:

- (i) A "one size fits all" approach;
- (ii) Legislative actions that apply to all public bodies based on the noncompliance of one;
- (iii) Legislative actions that do not champion competition at the highest degree, such as state and local preferences;
- (iv) Legislative actions that seek to make the procurement function perform a regulatory function such as requiring evidence of registration with the State Corporation Commission to do business in the Commonwealth and the use of the E-Verify program;
- (v) The skewed lines of defined authority;
- (vi) The use of population thresholds associated with application of the VPPA;
- (vii) The wide variety of exceptions and exemptions to the Act that have been made since 1983 that have served to make it difficult to read, follow, and interpret; and
- (viii) The disjointed provisions and difficult-to-observe methods of procurement.

Delegate Rush asked what percentage of localities have enacted procurement ordinances. Mr. Lindsey responded that about one-third of all localities have such ordinances.

**JULY 9, 2014**

The Special Joint Subcommittee held its second meeting of the 2013 interim on July 9, 2013 to receive comments from the vendor community. After opening remarks from Chairman Jones, the Special Joint Subcommittee first heard a presentation from Christopher D. Lloyd on procurement procedures using public-private partnerships, namely the Public-Private Transportation Act of 1995 (PPTA) and the Public-Private Educational Facilities and Infrastructure Act of 2002 (PPEA).

*Public-Private Partnerships and Procurement in Virginia*  
*Christopher D. Lloyd, McGuire Woods Consulting*

Mr. Lloyd explained that the PPTA and PPEA are alternative procurement tools existing outside of the Virginia Public Procurement Act (VPPA) available to a wide variety of public entities at the state, local, and regional levels. From the perspective of the private sector, the legislative framework that has been established for both the PPTA and PPEA creates an alternative project delivery process that is consistent, repeatable, and predictable. He noted that these alternative procurement tools allow the bundling of procurement and financing mechanisms to make the project delivery process easier and more timely. In general, the public-private partnership differs from a VPPA process in several important ways, including (i) selection based on qualifications and best value and not just price, (ii) the use of both solicited and unsolicited proposals, (iii) encouragement of open exchange of ideas between public and private sectors, (iv) public entity recoupment of review and transaction costs, (v) enhanced transparency and public access to proposals and contracts, and (vi) the use of interim agreements.

Responding to comments from members of the Special Joint Subcommittee concerning transparency and openness of the process under the PPTA and PPEA procurement processes, Mr. Lloyd stated that the level of transparency has evolved since the inception of both acts. In particular, amendments to the PPTA and PPEA in 2005 significantly expanded public access and transparency.

The Special Joint Subcommittee then received comment from representatives of the vendor community who registered to speak. Speakers were instructed to (i) identify the specific public procurement issue or topic to be addressed, (ii) describe the problem or concern associated with the issue or topic, and (iii) provide a recommendation to resolve the problem. A total of eleven speakers registered to deliver comments.

*Patrick Cushing, Esq., Williams Mullen*  
*James Gehman, Virginia Society of the American Institute of Architects (VSAIA)*  
*Glenn W. Rehberger, American Council of Engineering Companies of Virginia (ACEC)*

Patrick Cushing introduced James Gehman, Virginia Society of the American Institute of Architects (VSAIA), and Glenn W. Rehberger, American Council of Engineering Companies of Virginia (ACEC). The topic of their discussion was the procurement of professional services.

Mr. Cushing noted that the procurement of professional services worked well under the current VPPA but expressed concern on behalf of the design community regarding the lack of an enforcement mechanism to address violations or divergences from the required procedures. Under current law, the only remedy is litigation. Mr. Cushing further stated that the design community also supported the continued importance of qualifications in procurement under alternative procurement procedures, including the PPTA, PPEA, design-build, and construction manager at risk. Mr. Gehman echoed the need for a more effective enforcement mechanism, citing the ineffectiveness of relying upon litigation by a losing bidder to enforce the law. Mr. Rehberger noted that while the VPPA is generally clear and understandable, public bodies would benefit from clarification regarding the use of term contracts. He suggested more clarification of how the selected professionals are used after the term contract has been established. Regarding procurements under the PPTA and PPEA, Mr. Rehberger stressed the need to emphasize qualifications in the selection criteria and to ensure that public bodies that are receiving the proposals have the appropriately skilled personnel to guarantee a good selection process.

*Dan Cook, Mid Atlantic Regional Manager  
The Gordian Group*

Mr. Cook spoke on the job order contracting (JOC) provision added to the VPPA by HB 2079, passed during the 2013 Session and scheduled to become effective on July 1, 2014. He asserted that independent studies have estimated the total cost savings from JOC programs to be between 8 and 15 percent. These savings are realized from increased efficiencies in procurement, design, construction, and post-construction. Mr. Cook suggested the \$2 million per term limit for JOC contracts be raised and the \$400,000 project fee limit be eliminated. In addition, he observed that the VPPA should include a definition that encompasses all types of indefinite quantity contracts and is not limited to JOC programs. Finally, Mr. Cook noted that the VPPA is unclear regarding whether performance and payment bonds are required for a JOC contract or for the individual projects that are included under the contract.

*Tonya Matthews, President and Chairman  
TMG Construction Company*

Ms. Matthews also addressed the JOC contracting provision of the VPPA. She expressed concern that the \$2 million limit would adversely affect larger public bodies, many of which have substantial experience with JOC programs and have instituted policies and procedures to assure a competitive process when awarding such contracts. Ms. Matthews suggested that rather than a hard dollar cap on JOC contract term limits and project fees, the Special Joint Subcommittee should consider a cap connected to the percentage of the public body's total portfolio. Ms. Matthews also suggested either requiring a public body to adopt JOC contracting procedures prior to allowing such contracts or exempting a public body that has adopted such procedures, an approach similar to the approach currently taken in the VPPA authorizing public bodies to use construction management and design-build methods.

*Wanda Edwards*  
*Coalition for Procurement Reform*

The comments of Ms. Edwards focused on the use of professionals to manage construction projects and the potential for procurement irregularities under cooperative and sole source procedures. She noted that it was problematic for the design professional or contractor on a project to have any connection with the manufacturer of the materials that will be used for the same project. She also stated that group purchase entities were not subject to the same openness requirements as public bodies are when conducting procurement activities and that the lack of transparency could lead to inappropriate or illegal contract arrangements. Ms. Edwards provided copies of reports from other states citing price gouging and contract manipulation relating to unnecessary roofing repairs. She recommended that more controls be placed on the use of sole source contracts and that such contracts should be limited to \$50,000.

*Hershel V. Keller, Esq.*  
*Petty, Livingston & Richards, P.C.*

Mr. Keller addressed what he described as the inappropriate use of competitive negotiation by some public bodies to procure construction. He stated that despite the VPPA's stated preference for using competitive sealed bidding to procure construction, certain public bodies were using competitive negotiation, which prevented all qualified contractors from having access to public business. Under the VPPA, the public body may decide to use competitive negotiation if doing so is the public body's best interests. Mr. Keller noted that under current law there is no effective means for an offeror to challenge that decision. He contended that the use of alternative procurement methods for construction projects rather than competitive sealed bidding has adversely affected both taxpayers, by increasing project costs for the public body, and small businesses in the state, because public bodies consistently awarded projects to large contractors, some which are not Virginia-based companies.

Mr. Keller offered several recommendations to the Special Joint Subcommittee to alleviate the problem, including (i) requiring competitive sealed bidding if the project is expected to be less than \$10 million, (ii) restricting the use of the construction management method of project delivery to only those projects for which the method is necessary due to the need for real time value engineering or constructability analysis, (iii) affording the offeror or potential offeror the right to appeal a public body's decision to use competitive negotiation, and (iv) removing the exemption from the VPPA for public institutions of higher education for construction projects not expected to exceed \$10 million in total cost.

*Jack Dyer, Gulfseaboard Construction*  
*Chairman, Associated General Contractors of Virginia, Inc.*

Mr. Dyer focused his remarks on the use by public bodies of design-build, construction management, and construction manager at risk as alternative procurement methods. He asserted that VPPA should be strengthened to make these alternative procurement processes an exception to the normal procurement route for construction, in particular for projects that are not expected



to exceed \$20 million in total costs. He noted that in the awarding of smaller public contracts, maximum competition yields the best value. When the method for participating in the procurement process becomes burdensome, asserted Mr. Dyer, then qualified contractors are excluded, thereby limiting the total pool of bidders. He noted that members of Associated General Contractors of Virginia, Inc., (AGC) were concerned about the use of construction manager at risk by public bodies with review criteria that preclude qualified firms from competing.

The comments of Mr. Keller and Mr. Dyer elicited several responses and questions from the Special Joint Subcommittee seeking clarification on how the use of the alternative procurement processes adversely affected smaller contractors and were not ultimately beneficial to the public body. In response to these concerns, it was asserted that the issue was not whether a small contractor was qualified to complete the project, but rather whether that small contractor could afford to add layers of overhead for marketing and other costs that were not needed for the project, in order to compete with larger contracting firms.

*Steve Vermillion, Chief Executive Officer  
Associated General Contractors of Virginia, Inc.*

Mr. Vermillion also focused on the use of the alternative procurement methods to procure construction, in particular construction manager at risk. He stated that the AGC was not opposed to the method in general, but was concerned that the increased use of the process was not giving many small- and medium sized contractors an opportunity to compete. Delegate David Albo asked why a small contractor would be unable to compete, and Mr. Vermillion responded that the process favors contractors with construction manager at risk experience. Mr. Vermillion presented several recommendations for changes to the VPPA that had been approved by the AGC Board of Directors to serve as best practices for the use of construction management by public bodies. These changes included (i) requiring the public body to conduct a debriefing and provide full disclosure of results, including all associated documents relating to a response for qualifications and technical expertise and fee price proposals, (ii) prohibiting public bodies from requiring previous construction management or construction manager at risk experience as a prerequisite for qualification if the contractor has relevant experience with similar projects within the past 10 years, and (iii) requiring the public body to provide a written justification for using construction management or construction manager at risk in lieu of competitive sealed bidding.

*Michael O'Neill, Sr.  
Centennial Contractors Enterprises, Inc.*

The topic of Mr. O'Neill's comments was the term and project fee limitations on JOC contracts. He asserted that the \$2 million limit was too low and would reduce the cost effectiveness and potential benefit of JOC programs to public bodies. He suggested that a limit of at least \$5 million would help meet the unique needs of larger localities. The higher limit would also increase the potential savings to the public body by establishing a lower overall price per project and increasing contractor efficiency. In addition, Mr. O'Neill stated that the language relating to project fee included in the version of § 2.2-4303.2 of the Code of Virginia that will become effective on July 1, 2014, may inhibit the implementation of JOC programs because it does not fit the manner

in which JOC contracts are negotiated and awarded. He explained that JOC contracts are awarded to a contractor in the form of a firm, fixed-price construction contract for each specific project based on a compilation of the sum of all individual tasks from a unit price book multiplied by the bid coefficient. Under this process, a project fee is not used by the JOC contractor in the development of each individual project price or submitted with the initial JOC contract. Mr. O'Neill suggested examining the language to alleviate the uncertainty.

*Michael J. Filipowicz, Vice President  
HITT Contracting*

Mr. Filipowicz, the final speaker of the day, also addressed the \$2 million JOC contracting limit. He stated that a statewide flat cap was not appropriate for the wide variety of contracts that JOC contracts encompass. He suggested that instead of a flat cap, the Special Joint Subcommittee should consider flexible and adaptable controls and guidelines for using the procurement method.

### ***Special Joint Subcommittee Review***

At the close of the vendor community presentations, there was discussion among Special Joint Subcommittee members on how to proceed. Delegate Albo requested additional information detailing the procedures for procurement using design-build, construction management, and construction manager at risk. Delegate Matthew James stated that among the issues that the Special Joint Subcommittee needs to consider are components of procurement process that may cause small and medium sized firms to make the strategic decision not to compete. Chairman Jones added that a major area of inquiry will be the possibility of developing controls governing when and how a public body may use one of the alternative procurement methods. Chairman Jones also noted that it will be important to determine if the alternative methods ultimately resulted in the best value for the public body by providing measurable cost savings. He directed staff to contact the appropriate agency to determine the cost per square foot for a structure that is built using competitive sealed bidding as opposed to one of the alternative processes. Delegate Nick Rush added that it would also be helpful to review how many construction projects under \$20 million were procured using one of the alternative methods as opposed to competitive sealed bidding and, in those instances where an alternative method was used, how many contractors actually bid on the project.

### **October 9, 2013**

The Special Joint Subcommittee held its third meeting of the 2013 interim. After opening remarks from Chairman Jones, the Special Joint Subcommittee received two scheduled presentations. Delegate Jones indicated that topic for the meeting was IT procurement in Virginia. Delegate Jones stated that after the first meeting, the Special Joint Subcommittee thought it had a handle on IT procurement in the Commonwealth. It appears, however, that this is not necessarily the case. Staff provided information about alternative procurement processes contained in the budget bill as well as legislation introduced in the 2013 Session that raised questions about the

Special Joint Subcommittee's understanding of IT procurement. Specifically, HB 2074 (Robinson) attempted to clarify that all information technology and telecommunications goods and services of every description procured on behalf of state agencies may only be purchased by VITA. This bill also detailed VITA's role in all aspects of the procurement of such goods and services on behalf of state agencies. In addition, the bill provided that any contract for information technology or telecommunications goods or services entered into by a state agency or institution without written authorization from VITA shall be void and prohibits the Comptroller from issuing payment under any contract for information technology and telecommunications goods and services not approved or authorized by VITA. (HB 2074 was stricken from the docket.) Upon being so advised, Delegate Jones question was why this bill?

That inquiry lead to 2005 budget language, which authorized the Enterprise Applications Master Services Agreement (EAMSA) between the Commonwealth and CGI Technologies and Solutions, Inc. Then, in 2011, budget language expanded the use of EAMSA to allow individual agencies to contract with CGI for certain services, one of which was information technology management.

Delegate Jones indicated that it was his feeling, and likely other Special Joint Subcommittee members as well, that the issue of how IT is procured in Virginia deserves another look. The goal in taking a closer look is not to point fingers or accuse, but to understand who the players in IT are, identify their respective roles, and decide from a public policy standpoint whether this is the best way to do this.

*Matt Conrad, Deputy Chief of Staff  
Program Director, Enterprise Applications Master Services Agreement (EAMSA)*

Mr. Conrad stated that the EAMSA was competitively bid and awarded in 2005 under the administration of Governor Mark Warner. The initial seven-year contract provided for two three-year renewal options. Since 2005 there have been 36 statements of work (SOWs) for a total value of \$18 million. Of that amount, according to Mr. Conrad, only about \$2 million has been awarded under the administration of Governor McDonnell. Over the course of the contract the largest user has been the Department of Taxation, which used the EAMSA for delinquent tax collection. He explained that the 2011 biennial budget provided for executive branch agencies to use the EAMSA in five areas, including financial management, supply chain management, and information technology (IT) management and application development.

Chairman Jones raised the issue of possible overlap of the functions performed under the EAMSA and those performed by the Virginia Information Technologies Agency (VITA). Mr. Conrad asserted that there was no incursion or duplication of VITA functions. Regarding technology procurements, Chairman Jones expressed his hope that there was some communication with VITA to ensure that what is procured fits with current programs.

*Sam Nixon, Jr.,  
Chief Information Officer of the Commonwealth*

Mr. Nixon stated that his presentation was a follow-up to the high-level overview that he provided previously at the Special Joint Subcommittee's May 14, 2013 meeting, regarding information technology procurement in the state. VITA possesses oversight authority for the procurement of IT and telecommunication goods and services of every description for executive branch agencies. In performing this oversight, VITA ensures that the business requirements of covered executive branch agencies are aligned with technical expertise. In addition, VITA works to achieve interoperability between agencies by ensuring that procurements comply with state standards and architecture. Other VITA oversight responsibilities include protecting state data from growing cyber security threats by constantly assessing vulnerabilities and risks, implementing system integration and software licensing, and overseeing intellectual property rights.

Mr. Nixon went on to provide the Special Joint Subcommittee with observations relative to IT procurements and opportunities for improvement in three key areas:

- (i) Improper use of the sole source procurement;
  - use of the sole source procurement exemption without clear justification;
  - use of sole source because of prior work by a vendor; and
  - requests for proposals that are essentially noncompetitive
  
- (ii) Improper use of contract change orders
  - Initiating major IT projects by issuing change orders to existing contracts;
  - Change orders that can greatly expand the scope and cost of existing contracts; and
  - Change orders that may not be subject to the same level of review as the original contract; and
  
- (iii) Unauthorized procurements
  - Agencies that procure IT without approval or delegation; and
  - Possible violation of procurement laws in instances where the original contract scope is exceeded

Mr. Nixon then expressed concern that VITA lacks the oversight tools that are used by the Department of General Services (DGS) to ensure compliance with the state's procurement laws. He noted that while procurement authority for information technology procurement was transferred from DGS to VITA in 2003, the requisite oversight authority was not transferred. As a result, with regard to IT procurements, VITA does not have the authority to debar vendors, refuse to authorize contract payments, or review and approve contract modifications. These are powers the DGS exercises in its role of procurement oversight. Delegate David Albo noted that VITA does not seem to have much oversight authority. Chairman Jones noted that, while he does not think fraud is occurring, there remains a need to provide VITA with enforcement or oversight authority so the agency may enforce compliance with statutory procurement requirements. To that end, it may be appropriate to work with the Auditor of Public Accounts and the Office of the Inspector General to craft an appropriate solution in time for the 2014 Session.

*Ellen Davenport, Virginia Community College System*

Ms. Davenport stated that the Virginia Community College System (VCCS) received Level II authority for IT procurement in 2008. This authority enables the VCCS to better leverage the purchasing power of its 23 colleges to secure discounts and reduce overall costs that may not be possible through standard state contracts. Level II authority also provides the VCCS with the flexibility to support students while minimizing the need to increase tuition and fees. Ms. Davenport further stated that the VCCS maintains a good working relationship with VITA and will use VITA contracts for IT procurements when it is the most economical and efficient manner to proceed. The VCCS is required to submit an IT strategic plan to the CIO of the Commonwealth 45 days prior to the beginning of each fiscal year in addition to submitting a report on the previous year's IT expenditures by October 1 of each year.

According to Ms. Davenport, current procurement standards and guidelines for technology purchases ensure that the state's procurement practices are being followed while allowing higher education to obtain discounts and reduction of overall IT purchases.

*Andrew Sinclair, Virginia Association of Governmental Purchasing (VAGP)*

Mr. Sinclair stated that there were three areas that have received the most attention over the course of the first year of the Special Joint Subcommittee's review of the public procurement law: (i) the appropriate use of competitive negotiation, (ii) procurement procedures for construction contracting, and (iii) IT procurement. Regarding the use of competition negotiation, Mr. Sinclair asserted that the intent of the Virginia Public Procurement Act (VPPA) is to allow individual public bodies broad flexibility in fashioning the details of competitions. He maintained that many concerns expressed over the course of the study appeared to be based on anecdotal events and that changes to the process should be made based the demonstrated need for such change. He suggested that the Special Joint Subcommittee request the collection of supplemental data regarding the use of competitive negotiation, considering factors such as the construction project delivery method, the project scale, the type of public body making the procurement, and the statutory procurement authority that the public body is relying upon. If the General Assembly determines that an appeals process is necessary, Mr. Sinclair stated that his organization would support a board to hear such appeals rather than a state agency administrative review. Regarding IT procurement, Mr. Sinclair stated that the VAGP favored collaborating with VITA or other stakeholders to investigate methods to (i) reduce the time and cost of IT procurements, (ii) increase competition for IT procurements, (iii) better allocation of risks for such projects.

*Special Joint Subcommittee Review*

At the close of the public comment period, discussion among the Special Joint Subcommittee focused on best next steps. Areas of interest included (i) reviewing a system to allow potential vendors to complain or appeal the use of competitive negotiation or the terms of the request for proposal and (ii) increasing enforcement tools.

November 12, 2013

The Special Joint Subcommittee held its fourth and final meeting of 2013 to hear presentations about the procurement of construction and construction related services in Virginia, including construction management at risk and design-build methods of contracting. The Special Joint Subcommittee also was briefed on the enforcement and oversight of the VPPA.

*Richard Sliwoski, P.E.,  
Director, Department of General Services*

Mr. Sliwoski provided the Special Joint Subcommittee with an overview of selected methods of construction procurement. He stated that prior to 2005, all state agencies followed the construction procurement policies established by the Department of General Services (the Department) in the Construction and Professional Services Manual (CPSM). As of 2005, several changes limited the application of the manual. In terms of public institutions of higher education, Tier 3 institutions and Tier 2 institutions with capital authority may create their own version of the CPSM and have different requirements for approval. Tier 1 and Tier 2 institutions follow the CPSM, but have different requirements for approval in a nongeneral fund construction project. In addition, as of 2005, the General Assembly authorized the Department of Corrections to use design-build procurements without the approval of the Department.

The top three construction procurement methods used by public bodies are Design-Build-Build (DBB), Construction Management at Risk (CM), and Design-Build (DB). Under the DBB method, the owner engages a designer under an architectural or engineering services contract to design the facility. The owner separately engages a contractor to build the facility, and contractors' bids are based on the design specifications. The advantages of the DBB method are that it allows maximum competition and, if the design and specifications are complete, can be extremely cost efficient. The method is also ideal for projects that do not require specialized expertise. Problems related to this method include a higher probability of litigation and the potential for change orders to increase the cost of project.

Under the CM method, the designer and construction manager are separately contracted. The owner's architect or engineer designs the project, but in contrast to the DBB method, the construction manager is hired early in the design process to assist with the system selection, schedule, and budget. The construction manager provides a guaranteed maximum price before design documents are complete. Benefits of the CM method include (i) the selection of the construction manager or general contractor is both qualifications-based and cost-based, (ii) the construction manager is engaged early to review documents, which reduces conflict and helps keep the project within budget, and (iii) the construction manager is responsible to the owner to finish on time and within the guaranteed maximum price. A major problem associated with the method is its potential for overuse. The method should only be used where specialized expertise or skills are required and should not be used for small projects. Mr. Sliwoski reviewed a recent a survey of state agencies conducted by the Department covering the five-year period between September 1,

2008, and September 1, 2013. Of the 108 CM projects reported during this period, 52 percent had a total cost greater than \$20 million, 27 percent had a total cost between \$10 and \$20 million, and 21 percent had a total cost of less than \$10 million. These numbers appear to indicate that the tendency to use the CM method increases with the overall costs and size of the project.

The DB method consists of the agency and the design professional preparing the Request for Qualifications (RFQ) and the Request for Proposal (RFP). Under this method, each proposer submits a technical proposal and a separately sealed cost proposal on the basis of the RFQ and RFP. The technical proposals are evaluated and then the cost proposals are opened. A DB contractor is then selected for award of the contract. Problems can occur with this method if the scope of work and project requirements are not adequately defined in the RFP. Also, since the prequalification selection criteria are not customized to the specific project, the RFP may be unclear to potential responders. In addition, the owner does not have the benefit of the design professional's independent oversight of the work.

*John Westrick, Esq.,  
Senior Assistant Attorney General*

Mr. Westrick provided a review of public procurement enforcement and oversight provisions. Mr. Westrick noted that generally sovereign immunity protects government from disruptive lawsuits except where the legislature has authorized lawsuits. In the case of procurements, the General Assembly has authorized five vendor remedies in the Virginia Public Procurement Act (VPPA). Mr. Westrick indicated that his presentation would focus on the remedy allowing the vendor to protest a contract award or decision to award a contract.

Mr. Westrick then proceeded to review with the Special Joint Subcommittee the steps involved in the protest and appeal process:

**Step 1: Notice of award or decision to award.** At this step, the bid or proposal records are available for vendor inspection.

**Step 2: Written protest within 10 days.**

**Step 3: Written response within 10 days.** If the agency deems the protest meritorious, the options that are available depend on the status of the contract. If the contract has not been awarded, the public body may rescind or revise the proposed award or cancel the procurement altogether. If the contract has been awarded but performance has not begun, the public body may enjoin performance, which is equivalent to canceling the contract. If performance has begun, the public body may void the contract if it finds that it is in the public interest.

**Step 4: Appeal within 10 days of protest denial.** This step involves the protestor filing an appeal with the appropriate court. To succeed, the protestor must show that the award or proposed award is arbitrary or capricious or not in accordance with law or solicitation. If a court finds the appeal meritorious, it may reverse the award or enjoin the agency from proceeding. Mr. Westrick noted that injunctions are rarely granted.

Mr. Westrick then discussed alternatives to litigation. The VPPA authorizes public bodies to establish an administrative appeal panel to hear disputes. This neutral panel would be outside of

the procuring agency's management chain. According to Mr. Westrick, the usefulness of this option depends on how the panel is set up. Another alternative to civil litigation is through the establishment of an oversight authority. He noted that this avenue would not allow the vendor to enforce his rights, but rather would serve to alert the oversight authority to the procurement problem. The General Assembly has assigned oversight responsibilities to officers outside of the procurement agency's management. The more general oversight of procurement is through the powers of the two central purchasing agencies, DGS and the Virginia Information Technologies Agency (VITA). The most important oversight authority is the ability to grant or withdraw contracting authority. Mr. Westrick stated that while contracts violating the VPPA are voidable, contracts signed without authority are void.

*Steve Ballard,  
S.G. Ballard Construction Company*

Mr. Ballard asserted that the CM method is that best value for the state and that state agencies are currently doing a good job using CM projects. He discussed examples of successful projects at Norfolk State University, Old Dominion University, and Radford University. Mr. Ballard stated that it is difficult to successfully bid CM contracts, citing his company's experience of submitting between 15 to 20 CM proposals before actually being awarded a contract. He emphasized that companies have to be flexible and willing to change.

*Tom Evans, Southwood Builders, Inc.*

Mr. Evans stated that smaller businesses are not given an adequate opportunity to bid on CM projects. He cited rules that require successful bidders to have completed at least three CM projects as a major reason for the lack of opportunity. Delegate Nick Rush asked if a possible cause could be the upfront costs that are involved, which many smaller companies are not able to handle. Mr. Evans replied that that was a probable cause, in combination with other factors. Senator J. Chapman Petersen noted that the position taken by Mr. Evans regarding the usefulness of CM projects was in contrast to that of Mr. Ballard's. Mr. Evans responded that he preferred competitive sealed bidding for projects to ensure that smaller contractors are able to compete. Delegate David Albo asked what prevented a smaller contractor from getting a CM project. Mr. Evans replied that the main reason was that contractors are being told that they need more experience in terms of putting together a management team. He suggested that a contractor is not inclined to protest the award because the likelihood of success is so low. Mr. Herschel Keller added that one of the problems with the protest process is that in order to have standing the contractor has to be a bidder or offeror, not a potential bidder or offeror. He asserted that the main issue is the use of unwarranted preconditions, such as the experience requirement.

### **Discussion; Review of Special Joint Subcommittee Work Plan**

The Special Joint Subcommittee discussed a legislative proposal related to JOC contracting. House Bill 2079, passed during the 2013 Session, included provisions that (i) added a definition of JOC contracting, (ii) specified procedures to be used by public bodies when utilizing JOC contracting, and (iii) established a per project limit of \$400,000 for such projects and a one-year contract term limitation of \$2 million. These provisions have a delayed effective



date of July 1, 2014. Over the course of the Special Joint Subcommittee's review of JOC contracting and related issues, concern was raised regarding these provisions, chiefly the adequacy of the monetary limits established for JOC contracting. Several options were discussed. Delegate Albo requested interested parties to submit proposals for amending the limits directly to Chairman Jones for consideration for possible legislative changes.

Discussion then centered on developing a work plan for the Special Joint Subcommittee to complete its charge. Staff recommended establishing work groups consisting of interested parties to develop recommendations for legislative changes to the VPPA in 2015. The objective of the work groups would be to develop consensus on as many measures as possible. Any issues where consensus could not be achieved would be turned over to the Special Joint Subcommittee for disposition. The members agreed to establish the following three work groups:

4. Construction, including Design Professional Services
5. IT Procurement and Other Professional Services
6. Goods and Nonprofessional Services

Delegate Albo stated that any individual desiring to serve on one of the work groups would have to notify staff by letter or email no later than Monday, December 2, 2013. Delegate Albo stated that the final composition of the work groups will be decided by the Special Joint Subcommittee. He also noted that the Special Joint Subcommittee plans to meet during the 2014 Session to announce the members of the work groups and to provide additional guidance on the process.

## *Conclusion*

At its November 12, 2013 meeting, the Special Joint Subcommittee agreed to the formation of staff recommended workgroups. The three workgroups established are as follows:

- Construction, Including Design Professional Services
- IT Procurement and Other Professional Services
- Goods and Nonprofessional Services

The final composition of the workgroups will be decided by the Special Joint Subcommittee. The Special Joint Subcommittee plans to meet during the 2014 Session, likely in early March, to announce the members of the workgroups and to provide guidance on the workgroup process. It is anticipated that each workgroup will meet beginning in the spring of 2014 and will make recommendations for legislative changes to the VPPA to the Special Joint Subcommittee in the fall of 2014. The work of the workgroups will be facilitated by Special Joint Subcommittee staff. Other interested parties are encouraged to attend the workgroup meetings and make comment.

For questions about the study or for additional information, please contact Maria Everett or Amigo Wade at 804.786.3591, extension 210 and 216, respectively or by email [meverett@dls.virginia.gov](mailto:meverett@dls.virginia.gov) or [awade@dls.virginia.gov](mailto:awade@dls.virginia.gov).

The members of the Special Joint Subcommittee received materials and heard testimony from a vast number of groups and individuals, and the process educated all. The Special Joint Subcommittee extends its gratitude to all participants for their work and dedication.

Respectfully submitted,

S. Chris Jones, Chair

David B. Albo

Thomas "Tag" Greason,

L. Nick Rush

Matthew James

Richard H. Stuart, Vice-Chair

Frank M. Ruff, Jr.

J. Chapman Petersen

Bryce Reeves

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**SPECIAL JOINT GENERAL LAWS SUBCOMMITTEE STUDYING THE  
VPPA**

**VPPA ISSUES IDENTIFIED  
AT MAY 14, 2013, JULY 9, 2013, and October 9, 2013 MEETINGS**

**NOTE:** Based on comments received at meetings held on May 14, 2013, July 9, 2013, and October 9, 2013 this document was created to facilitate future discussions of the Special Joint General Laws Subcommittee by organizing the issues raised into the following broad categories of the VPPA, identified under the heading General Issue Category: Applicability/Exemptions, Vendor Eligibility, Cooperative Procurement, Technology/Business Practice Outdated, and Enforcement/Oversight. Certain subcategories also have been identified. Additional categories and subcategories may be added depending on the issue(s) raised. See Appendix A at the end of this document for a complete list of categories and subcategories to date.

GENERAL ISSUE CATEGORY	SOURCE	COMMENT	NOTES
1. <b>APPLICABILITY/EXEMPTIONS</b>			
<b>Applicability/Exemptions</b> <i>Subcategory: Nature of public body</i>	<b>Department of General Services (DGS)</b>	Balkanization of state procurement <ul style="list-style-type: none"> <li>• Increased resource costs and complexity of contracts for agencies and vendors;</li> <li>• Duplication of contracts resulting in less aggregated spending leading to higher prices and increased contract award and administration costs.</li> </ul>	

GENERAL ISSUE CATEGORY	SOURCE	COMMENT	NOTES
<p align="center"><b>Applicability/Exemptions</b> <i>Subcategory: Nature of public body</i></p>	<p align="center"><b>DGS</b></p>	<p>Confusion for vendors due to multiple and disparate rules resulting in less friendly environment for conducting Commonwealth business.</p>	
<p align="center"><b>Applicability/Exemptions</b> <i>Subcategory: Goods, services, construction</i></p>	<p align="center"><b>Virginia Information Technologies Agency (VITA)</b></p>	<p>Consider statutory clarifications that produce benefits. <i>(Example: Prequalification of vendors; does the topic pertain to all goods and services or just to construction? (§ 2.2-4317))</i></p>	
<p align="center"><b>Applicability/Exemptions</b> <i>Subcategory: Method of procurement</i></p>	<p align="center"><b>VITA</b></p>	<p>Put competitive negotiation on equal footing with competitive sealed bidding.</p>	
<p align="center"><b>Applicability/Exemptions</b> <i>Subcategory: Nature of public body</i></p>	<p align="center"><b>Level 3 Higher Ed. (University of Virginia)</b></p>	<p>Maintain current procurement and capital outlay authority provided to Level 3 Public Institutions of Higher Education.</p>	

GENERAL ISSUE CATEGORY	SOURCE	COMMENT	NOTES
<p align="center"><b>Applicability/Exemptions</b> <i>Subcategory: Nature of public body</i></p>	<p align="center"><b>Large Locality</b> <i>(Fairfax Co.)</i></p>	<p>Change the one-size-fits-all amendments that are made to the VPPA. Large and small localities have different needs.</p>	
<p align="center"><b>Applicability/Exemptions</b> <i>Subcategory: Method of procurement</i></p>	<p align="center"><b>Large Locality</b> <i>(Fairfax Co.)</i></p>	<p>Avoid proposed changes that are in conflict with the intent of the VPPA.  <i>(Example: Changes based on (i) an Attorney General Opinion stating that a public body cannot consider factors that are not related to the goods or services being procured, (ii) enforcement of documented worker status, and (iii) preferences)</i></p>	
<p align="center"><b>Applicability/Exemptions</b> <i>Subcategory: Readability/Internal consistency</i></p>	<p align="center"><b>Large Locality</b> <i>(Fairfax Co.)</i></p>	<p>Review the cumulative effect of changes over several sessions. As a whole, these changes have adversely affected readability and created conflicting provisions.</p>	
<p align="center"><b>Applicability/Exemptions</b></p>	<p align="center"><b>Small Locality</b> <i>(Gloucester Co.)</i></p>	<p>Avoid the one-size-fits-all approach; localities have different needs.  <i>(Example: Gloucester County's Purchasing Department must answer to its County Board of Supervisors and the local school board.)</i></p>	

GENERAL ISSUE CATEGORY	SOURCE	COMMENT	NOTES
<p><b>Applicability/Exemptions</b>  <i>Subcategory: Nature of public body</i></p>	<p><b>Small Locality</b>  <i>(Gloucester Co.)</i></p>	<p>Avoid legislative actions directed at all because of the noncompliance of one.</p>	
<p><b>Applicability/Exemptions</b>  <i>Subcategory: Nature of public body</i></p>	<p><b>Small Locality</b>  <i>(Gloucester Co.)</i></p>	<p>Clarify confusion regarding lines of defined authority contained in the VPPA.   <i>(Example: Public bodies, state local bodies, and local bodies)</i></p>	
<p><b>Applicability/Exemptions</b>  <i>Subcategory: Nature of public body</i></p>	<p><b>Small Locality</b>  <i>(Gloucester Co.)</i></p>	<p>Review use of population thresholds associated with application of the VPPA.</p>	
<p><b>Applicability/Exemptions</b>  <i>Subcategory: Readability</i></p>	<p><b>Small Locality</b>  <i>(Gloucester Co.)</i></p>	<p>Variety of exceptions and exemptions to the Act make it difficult to read, follow, and interpret.</p>	
<p><b>Applicability/Exemptions</b>  <i>Subcategory: Method of procurement</i></p>	<p><b>Small Locality</b>  <i>(Gloucester Co.)</i></p>	<p>Methods of procurement have become disjointed and difficult to observe.</p>	

GENERAL ISSUE CATEGORY	SOURCE	COMMENT	NOTES
<p><b>Applicability/Exemptions</b>  <i>Subcategory: Method of procurement</i></p>	<p><b>Design Professionals</b>  (VSAIA, ACEC)</p>	<p>Public bodies would benefit from clarification regarding the use of term contracts. In particular how the selected professions are used after the term contract has been established.</p>	
<p><b>Applicability/Exemptions</b>  <i>Subcategory: Method of procurement</i></p>	<p><b>Design Professionals</b>  (VSAIA, ACEC)</p>	<p>All decisions concerning procurement of professional services should be contingent upon first identifying those most qualified to provide the required services without regard to price.</p>	
<p><b>Applicability/Exemptions</b>  <i>Subcategory: Method of procurement</i></p>	<p><b>Design Professionals</b>  (VSAIA, ACEC)</p>	<p>The VPPA should clarify that public bodies may not ask for scope and fee proposals from multiple firms holding current term contracts with the public body.</p> <p><i>(Public bodies should be required to negotiate first with the firm determined to be the most qualified for a specific task from among the group of term contract holders, and then go to the second qualified firm, if, and only if the most qualified firm declines the opportunities or the parties are unable to agree on a mutually-acceptable fee.)</i></p>	

GENERAL ISSUE CATEGORY	SOURCE	COMMENT	NOTES
<p><b>Applicability/Exemptions</b>  <i>Subcategory: Method of procurement</i></p>	<p><b>Design Professionals</b>  <i>(VSAIA, ACEC)</i></p>	<p>Eliminate the use of nonbinding or good faith estimates of price for services. Often a firm's estimate is treated by the public body as if it were a bid to be compared with similar estimates provided by other firms.</p> <p><i>(The preferred approach is to select one firm based on qualifications then either reaching an agreement or deciding to termination negotiations and move to the second ranked firm.)</i></p>	
<p><b>Applicability/Exemptions</b>  <i>Subcategory: Method of procurement</i></p>	<p><b>Design Professionals</b>  <i>(VSAIA, ACEC)</i></p>	<p>Procurements under the PPEA and PPTA need to emphasize qualifications in the selection criteria. More elements of qualification based selection criteria should be included during the evaluation /scoring process.</p>	
<p><b>Applicability/Exemptions</b>  <i>Subcategory: Method of procurement</i></p>	<p><b>Dan Cook,</b>  <i>(The Gordian Group)</i></p>	<p>The \$2 million per term limit on Job Order Contracting (JOC) programs should be raised and the \$400,000 project fee limit should be eliminated.</p>	



GENERAL ISSUE CATEGORY	SOURCE	COMMENT	NOTES
<p><b>Applicability/Exemptions</b> <i>Subcategory: Definitions</i></p>	<p><b>Dan Cook,</b> <i>(The Gordian Group)</i></p>	<p>The definition of JOC programs that is included in the VPPA should encompass all types of indefinite quantity contracts and not be limited to describing JOC programs.</p>	
<p><b>Applicability/Exemptions</b> <i>Subcategory: Readability</i></p>	<p><b>Dan Cook,</b> <i>(The Gordian Group)</i></p>	<p>The VPPA is unclear regarding whether performance and payment bonds are required for JOC contracts; this should be clarified.</p>	
<p><b>Applicability/Exemptions</b> <i>Subcategory: Method of procurement</i></p>	<p><b>Tonya Matthews</b> <i>(TMG Constr. Co.)</i></p>	<p>Instead of the \$2 million hard cap on JOC programs consider a cap connected to the percentage of the public body's total portfolio.</p>	
<p><b>Applicability/Exemptions</b> <i>Subcategory: Method of procurement</i></p>	<p><b>Tonya Matthews</b> <i>(TMG Constr. Co.)</i></p>	<p>Requiring a public body to adopt JOC contracting procedures prior to allowing such contracts or exempting a public body that has adopted such procedures.</p> <p><i>(This approach is similar to the approach currently taken in the VPPA authorizing public bodies to use construction management and design-build methods.)</i></p>	

GENERAL ISSUE CATEGORY	SOURCE	COMMENT	NOTES
<p><b>Applicability/Exemptions</b>  <i>Subcategory: Goods, services, construction</i></p>	<p><b>Michael O'Neill, Sr.</b>  <i>(Centennial Contr. Enterprises, Inc.)</i></p>	<p>The limit for JOC programs should be increased from \$2 million to at least \$5 million.</p>	
<p><b>Applicability/Exemptions</b>  <i>Subcategory: Method of procurement</i></p>	<p><b>Michael O'Neill, Sr.</b>  <i>(Centennial Contr. Enterprises, Inc.)</i></p>	<p>The language relating to project fee included in the version of § 2.2-4303.2 that will become effective on July 1, 2014, may inhibit the implementation of JOC programs because it does not fit the manner in which JOC contracts are negotiated and awarded.</p> <p><i>(JOC contracts are awarded to a contractor in the form of a firm, fixed-price construction contract for each specific project based on a compilation of the sum of all individual tasks from a unit price book multiplied by the bid coefficient. Under this process, a project fee is not used by the JOC contractor in the development of each individual project price or submitted with the initial JOC contract.)</i></p>	

GENERAL ISSUE CATEGORY	SOURCE	COMMENT	NOTES
<p><b>Applicability/Exemptions</b>  <i>Subcategory: Method of procurement</i></p>	<p><b>Michael Filipowicz</b>  <i>(HITT Contracting)</i></p>	<p>A statewide cap of \$2 million is not appropriate for the wide variety of contracts that JOC programs encompass; consider flexible and adaptable controls and guidelines for using this procurement method.</p>	
<p><b>Applicability/Exemptions</b>  <i>Subcategory: Method of procurement</i></p>	<p><b>Wanda Edwards</b>  <i>(Coalition for Procurement Reform)</i></p>	<p>Additional controls should be placed on the use of sole source contracts; such contracts should be limited to \$50,000.</p>	
<p><b>Applicability/Exemptions</b>  <i>Subcategory: Method of procurement</i></p>	<p><b>Hershel Keller</b>  <i>(Petty, Livingston &amp; Richards, P.C.)</i></p>	<p>Should require competitive sealed bidding if the project is expected to be less than \$10 million.</p>	
<p><b>Applicability/Exemptions</b>  <i>Subcategory: Method of procurement</i></p>	<p><b>Hershel Keller</b>  <i>(Petty, Livingston &amp; Richards, P.C.)</i></p>	<p>The use of the construction management method of project delivery should be restricted to only those projects for which the method is necessary due to the need for real time value engineering or constructability analysis.</p>	

GENERAL ISSUE CATEGORY	SOURCE	COMMENT	NOTES
<p><b>Applicability/Exemptions</b>  <i>Subcategory: Goods, services ,  construction</i></p>	<p><b>Hershel Keller</b>  <i>(Petty,  Livingston &amp;  Richards, P.C.</i></p>	<p>The exemption from the VPPA for public institutions of higher education granted Level III or II status should be removed for construction projects not expected to exceed \$10 million in total cost.</p>	
<p><b>Applicability/Exemptions</b>  <i>Subcategory: Method of  procurement</i></p>	<p><b>Jack Dyer</b>  <i>Gulfseaboard  Constr.</i></p>	<p>The VPPA should be strengthened to make the use of alternative procurement processes an exception, in particular for projects that are not expected to exceed \$20 million in total costs.</p>	<p><b>HB 2078</b>  <b>(Peace)</b></p>
<p><b>Applicability/Exemptions</b>  <i>Subcategory: Method of  procurement</i></p>	<p><b>Bill Lindsey</b>  <i>(VA  Association of  Governmental  Purchasing-  VAGP)</i></p>	<p>The threshold for job order contracting should be raised to \$10 million. There appears to be broad agreement from all parties that the current threshold is not sufficient.</p>	

GENERAL ISSUE CATEGORY	SOURCE	COMMENT	NOTES
<b>2. COOPERATIVE PROCUREMENT</b>			
Cooperative Procurement	<b>DGS</b>	Fractured efficiency of cooperative contracting such that one public body cannot use another public body's contract without expending resources to bring it into compliance with laws.	
Cooperative Procurement	<b>VITA</b>	Modify cooperative procurement language; current language effectively creates a de facto "statewide" contract, which dilutes competition and leverage.	
<b>3. ENFORCEMENT/OVERSIGHT</b>			
Enforcement/Oversight	<b>DGS</b>	No consequences for violations.	
Enforcement/Oversight	<b>DGS</b>	No central procurement oversight, thus making achievement of enterprise cost savings and efficiencies difficult.	
Enforcement/Oversight	<b>Hershel Keller (Petty, Livingston &amp; Richards, P.C.)</b>	An offeror or potential offeror should have the right to appeal a public body's decision to use competitive negotiation	

GENERAL ISSUE CATEGORY	SOURCE	COMMENT	NOTES
Enforcement/Oversight	<p><b>Steve Vermillion</b>  <i>(Associated General Contractors of VA)</i></p>	<p>A public body should be required to conduct a debriefing and full disclosure of results, including all associated documents, relating to a response for qualification and technical and fee price proposals.</p>	<p>HB 2078  (Peace)</p>
Enforcement/Oversight	<p><b>Steve Vermillion</b>  <i>(Associated General Contractors of VA)</i></p>	<p>Prohibit a public body from requiring previous construction management or construction manager at risk experience as a prerequisite for qualification if the contractor has relevant experience with similar projects within the previous 10 years.</p>	<p>HB 2078  (Peace)</p>
Enforcement/Oversight	<p><b>Steve Vermillion</b>  <i>(Associated General Contractors of VA)</i></p>	<p>Require a public body to provide a written justification for using construction management or construction manager at risk in lieu of competitive sealed bidding.</p>	<p>HB 2078  (Peace)</p>

GENERAL ISSUE CATEGORY	SOURCE	COMMENT	NOTES
Enforcement/Oversight	<b>Bill Lindsey</b> <i>(VAGP)</i>	It would be beneficial to have the Joint Legislative Audit and Review Commission (JLARC) to study the use of construction management. Many of the concerns and reports about the use of construction management were based on loose anecdotes and perception. Actual data on the use and practices will be beneficial.	
Enforcement/Oversight	<b>Bill Lindsey</b> <i>(VAGP)</i>	The JLARC study should also include a review of available enforcement mechanisms for ensuring compliance with procurement standards.	
Enforcement/Oversight	<b>Design Professionals</b> <i>(VSAA, ACEC)</i>	Lack of an enforcement mechanism to address violations or divergences from required procedures. There should be a process for appealing or identifying blatant violations without relying upon litigation that would be costly to all parties.	
Enforcement/Oversight	<b>Design Professionals</b> <i>(VSAA, ACEC)</i>	Ensure that public bodies receiving proposals under the PPEA and PPTA have appropriately skilled personnel to guarantee a good selection process.	

GENERAL ISSUE CATEGORY	SOURCE	COMMENT	NOTES
Enforcement/Oversight	VITA	Provide explicit enforcement authority.	
Enforcement/Oversight	VITA	Improper use of sole sourcing as a procurement method without clear justification or because of prior work by a specific vendor.	
Enforcement/Oversight	VITA	Requests for Proposals that are essentially non-competitive because the RFPs are include overly prescriptive mandatory requirements. This produces a perception of favoritism and discourages vendor participation.	
Enforcement/Oversight	VITA	Improper use of contract change orders that significantly expand the scope and cost of an existing contract. Change orders may not be subject to the same level of review as original contract	
Enforcement/Oversight	VITA	Unauthorized procurements involving (i) state agencies that procure information technology without approval or delegation from VITA and (ii) using an existing contract to purchase information technology that are not in the scope of the contract.	



GENERAL ISSUE CATEGORY	SOURCE	COMMENT	NOTES
Enforcement/Oversight	VITA	Expand VITA's oversight tools to achieve higher compliance and accountability.	
4. VENDOR ELIGIBILITY			
Vendor Eligibility <i>Subcategory: SWAM</i>	Department of Minority Business Enterprise	Consider changing the definition of small business to more adequately target small businesses.  <i>(Current language provides 250 or fewer employees or average gross receipts of \$10 million or less averaged over the previous three years.)</i>	

GENERAL ISSUE CATEGORY	SOURCE	COMMENT	NOTES
<p align="center"><b>Vendor Eligibility</b> <i>Subcategories: Preferences, Qualification to contract</i></p>	<p><b>Large Locality</b> <i>(Fairfax Co.)</i></p>	<p>Avoid proposed changes that are in conflict with the intent of the VPPA.  <i>(Example: Changes based on (i) an Attorney General Opinion stating that a public body cannot consider factors that are not related to the goods or services being procured, (ii) enforcement of documented worker status, and (iii) preferences)</i></p>	
<p align="center"><b>Vendor Eligibility</b> <i>Subcategories: SWAM, Preferences</i></p>	<p><b>Small Locality</b> <i>(Gloucester Co.)</i></p>	<p>Avoid legislative actions that do not champion competition at the highest degree (e.g. state preferences and local preferences).</p>	
<p align="center"><b>Vendor Eligibility</b> <i>Subcategory: Qualification to contract</i></p>	<p><b>Small Locality</b> <i>(Gloucester Co.)</i></p>	<p>Avoid legislative actions that seek to make the procurement function a regulatory program.  <i>(Example: SCC registration and E-Verify requirements)</i></p>	
<p align="center"><b>Vendor Eligibility</b></p>	<p><b>Wanda Edwards</b> <i>(Coalition for Procurement Reform)</i></p>	<p>The design professional or contractor on a project should not have any connection with the manufacturer of the materials for the same project.</p>	

GENERAL ISSUE CATEGORY	SOURCE	COMMENT	NOTES
<p align="center"><b>Vendor Eligibility</b> <i>Subcategories: SWAM, Preferences</i></p>	<p align="center"><b>DGS</b></p>	<p>Small business set-aside preference should be examined for improvement.</p>	
<p><b>5. TECHNOLOGY/BUSINESS PRACTICE OUTDATED</b></p>			
<p align="center"><b>Technology/Business Practice Outdated</b></p>	<p><b>Large Locality</b> <i>(Fairfax Co.)</i></p>	<p>Adapt the VPPA to current technology and business practices. Consider using changes made to the Model Procurement Code as a guide.</p>	

**APPENDIX A**  
**GENERAL ISSUE CATEGORIES AND SUBCATEGORIES**

**1. APPLICABILITY/EXEMPTIONS**

- Nature/Identity of public body
- Goods, services, construction- nature of what is being procured
- Definitions
- Method of procurement
- Readability/Internal consistency

**2. VENDOR ELIGIBILITY**

- SWAM
- Preferences
- Qualification to contract (E-Verify, etc.)

**3. COOPERATIVE PROCUREMENT**

**4. ENFORCEMENT/OVERSIGHT**

**5. TECHNOLOGY/BUSINESS PRACTICE OUTDATED**