

FINAL 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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of the
Special Joint General Laws Subcommittee
Studying the Virginia Public Procurement
Act
(2014)**

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Report of the Special Joint General Laws Subcommittee Studying the Virginia Public Procurement Act. Final Report, 2014

Executive Summary

In 2013, House Bill 2079 (Delegate S. Chris Jones) was enacted by the General Assembly. By its terms, HB 2079 did not become effective until July 1, 2014 to enable 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, identify weaknesses and other problems in the VPPA, and 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 to allow the Special Joint General Laws Subcommittee Studying the VPPA (Special Joint Subcommittee) to solicit comment from interested parties on problems in the VPPA during the 2013 interim.¹

Year one of this study (2013) was a comprehensive fact-finding mission by the Special Joint Subcommittee, including an educational component on the for the benefit of the membership as it undertook this study. The four meetings conducted during the 2013 interim were dedicated to receiving public comment from persons involved in public procurement, including representatives of state and local government and the vendor community, and other interested persons. The fourth and final meeting identified issues to be addressed by the work groups appointed by the Special Joint Subcommittee in 2014.

¹ The Special Joint Subcommittee was created 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.

No recommendations for legislation were expected, and none were made, for the 2014 Session by the Special Joint Subcommittee. At the conclusion of this first year of study, the Special Joint Subcommittee identified the points of consensus about problems and issues in the VPPA that needed to be addressed. The Special Joint Subcommittee also expressed concern, based on comments made by both governmental entities and vendors, of the lack of a "Virginia playbook" for public procurement, which adversely affects vendors and government alike. Confusion exists for vendors because of multiple and disparate rules resulting in a less user-friendly environment for conducting the Commonwealth's procurement business. Methods of procurement have become disjointed and difficult to observe. It was reported that because public procurement has become fragmented, increased costs and complexity of contracts for both agencies and vendors has resulted. Further, duplication of contracts results in less aggregated spending, leading to higher prices and increased contract award and administration costs. The Special Joint Subcommittee directed staff to ensure that this issue was brought to the attention of 2014 work groups, with an instruction that a Virginia public procurement playbook be established by unifying powers, terms and conditions, and implementing the tenants of the VPPA across the satellites². The Special Joint Subcommittee also directed that a website be created for interested parties to follow this study. Available on the website³ 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.

Year two (2014) of this study focused on the issues identified during year one, including unifying powers, terms and conditions, and implementing the tenants of the VPPA across the satellites. The principal objective of the work

² "Satellites" was the unofficial name given for the varying procurement authority granted different governmental entities by the General Assembly. Specifically, the procurement satellites include: DGS, VITA, Public Institutions of Higher Education--Level 2 institutions: Radford University, Virginia Military Institute, James Madison University, George Mason University, Old Dominion University, Longwood University, Mary Washington University, Virginia Community College System (for capital construction and IT), Christopher Newport University (for capital construction and IT), and Level 3 institutions: Virginia Tech, University of Virginia, College of William and Mary, and Virginia Commonwealth University, and local public bodies subject to the VPPA, and those local public bodies that have adopted resolutions pursuant to subdivisions 9 through 12 of § 2.2-4343.

³ Website address is http://dls.virginia.gov/interim_studies_procurement.html.

groups was to develop consensus on as many issues as possible and make recommendations for their resolution to the Special Joint Subcommittee in the fall of 2014. Any issues on which consensus could not be reached were referred to the Special Joint Subcommittee for disposition. The topic areas for the two work groups selected by the Special Joint Subcommittee were as follows: Work Group No. 1-- Construction, including Design Professional Services and Work Group No. 2-- IT Procurement, Goods and Nonprofessional Services, and Other Professional Services. Both work groups began their work in May 2014 and each held a total of five meetings, eventually achieving consensus on legislation to recommend to the Special Joint Subcommittee for consideration by the 2015 Session of the General Assembly. For a detailed account of the work group activities, including meeting summaries and other work group study materials, please see the Special Joint Subcommittee's website noted above. Additionally, work group membership, scope of work documents and meeting summaries are appended to this report as Appendices B, C, and D for Work Group No. 1 and Appendices E, F, and G for Work Group No. 2, respectively.

The 2014 membership of the Special Joint Subcommittee consisted of House Committee on General Laws members: Delegate C. Todd Gilbert, Chair, Delegate Dave Albo, Delegate Thomas "Tag" Greason, Delegate Nick Rush, Delegate Richard Anderson and Delegate Betsy Carr; and Senate Committee on General Laws and Technology members Senator Frank Ruff, Jr. Vice-Chair, Senator J. Chapman Petersen, Senator Bryce Reeves and Senator Mamie Locke.

On November 24, 2014, the Special Joint Subcommittee reviewed the legislative drafts recommended by the two work groups, and received additional public comment concerning these drafts. The Special Joint Subcommittee voted to recommend two of the three work group drafts with amendments.⁴

The Special Joint Subcommittee also continued its consideration of HB 1223 (Yancey) referred to the Special Joint Subcommittee by the 2014 General Assembly. The Special Joint Subcommittee again heard from Delegate Yancey concerning his bill. Delegate Yancey requested that the portion of HB 223 that

⁴ Work Group No. 1 draft relating to job order contracting and cooperative procurement, the Special Joint Subcommittee vote was 6 - 0 to recommend to the 2015 Session of the General Assembly.

Work Group No. 2 drafts relating to: (i) equal footing between competitive sealed bidding and competitive negotiation for goods, services, and insurance, the Special Joint Subcommittee vote was 6 - 0 to recommend to the 2015 Session of the General Assembly, and (ii) newspaper publication of RFPs, the Special Joint Subcommittee vote was 6 - 0 to table.

related to historic black colleges and universities to be included in the SWaM requirements under the VPPA be favorably considered by the Special Joint Subcommittee, while other portions of his bill be stricken. The Special Joint Subcommittee voted 6 -0 to recommend HB 1223, as amended, to the 2015 Session of the General Assembly.

There was consensus in both work groups for the need to establish a VPPA oversight body to provide, among other things, an administrative appeal process and increased enforcement. A measure was offered on behalf of the AGC that would establish a nine-member independent review board for construction. The Board would have the authority to reach findings and either compel corrective action or refer the matter to a body that could compel the corrective action. It was asserted, however, that the focus should be on gathering empirical data rather than establishing a review board. Other options discussed included (i) starting small by having either the Office of the Inspector General or DGS provide advisory opinions, (ii) establishing an advisory procurement council to encourage and facilitate compliance with the state's procurement laws, including the powers and duties to: conduct training seminars and educational programs; publish educational materials; review written determinations of public bodies regarding methods of procurement; collect data necessary to evaluate the effectiveness of the VPPA; provide a forum to address concerns regarding public procurement; and monitor changes in state procurement law and make recommendations for changes to the General Assembly. Each work group discussed the possibility of establishing an advisory entity with limited powers, but could not reach an agreement on the composition and size of the board, the powers it would exercise, the scope of its authority, or staffing. Due to this lack of a consensus, the work group did not advance any specific language or recommend any legislation for consideration by the Special Joint Subcommittee.

Background

Procurement of goods and services is an important aspect of government operation, involving the expenditure of public money and often used as a vehicle for implementing public policy through favoring disadvantaged persons and business enterprises. Public procurement is also one of the key points where the public sector and the private sector interact financially. Each year, the Commonwealth of Virginia alone purchases more than \$5 billion in materials, equipment, supplies, printing, and professional and nonprofessional

services. Of all government activities procurement is probably the most vulnerable to corruption, cronyism, favoritism, and outright bribery because of the amount of money at stake.

National development of procurement law began in **the early 1970's**. For many years, procurement law for public bodies in the Commonwealth was scattered throughout the Code of Virginia. Procurement policies were interwoven with more general agency or locality specific statutes. Before 1980, statutory provisions governing public procurement were found in nine different Code titles. Procurement for construction, for instance, was located in Title 11 and applied only to the Commonwealth and agencies of the Commonwealth. Virginia procurement law was not centralized and each agency contracted in its own right.⁵ Further, prior to 1979 no law required competitive bidding. This resulted in public bodies following varying contract processes that were not only difficult to regulate but often confusing for vendors and contractors to follow.

Concerns about the need to develop a uniform set of public procurement practices to prevent abuse and corruption and to establish a clear process allowing for the participation of a wider variety of vendors led to the passage of Senate Joint Resolution 148 during the 1979 Session of the General Assembly. SJR 148 directed the then Secretary of Administration and Finance to establish a task force to consider, among other things the desirability and feasibility of public contract legislation applying uniformly to the state, localities, and other political subdivisions. It also required a comparison of Virginia law to other state procurement laws and the Model Procurement Code as approved by the American Bar Association in 1979. The resolution required the task force to provide an interim report to the Committees on General Laws of the Senate and House of Delegates in 1979 and a final report by 1980.

The 1980 final report found (i) no uniform, coherent statement of public procurement policy existed in Virginia which led to conflicting interpretations of law, (ii) serious omissions in procurement activities resulted in state and county governments being governed by state law and city governments guided by their individual charter provisions, (iii) procurement rules changed based on the identity of the contracting agency, and (iv) Virginia procurement laws

⁵ The Division of Engineering and Buildings of the Department of General Services did have some administrative control of public procurement when construction involved capital outlay funds.

needed to be overhauled "and that the final product should be a comprehensive statement applicable to all levels and agencies of government, articulating **broad fundamental operating policies, the foremost of which is competition**".⁶ As a result of these findings, the adoption of a comprehensive public procurement act for Virginia was recommended. Senate Bill 96 (Senator Buchanan, Wise County) creating the VPPA was introduced during the 1982 Session of the General Assembly and passed that same year. Under the terms of SB 96, the VPPA became effective on January 1, 1983 (Chapter 647, 1982 Acts of Assembly).

II. Creation of the Virginia Public Procurement Act

As noted above, the work of the 1979-1980 task force ultimately resulted in legislation establishing the Virginia Public Procurement Act (§ 2.2-4300 et seq. of the Code of Virginia), which became effective on January 1, 1983. 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.⁷ The VPPA consolidates the states 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.

Since its creation in 1983, the VPPA has been the subject of several other legislative and executive branch studies, including the Effect of Authorizing Design-Build and Construction Management Contracts for Public Bodies pursuant to HJR 643((1995); House Document No. 68, 1996); Prison Industries pursuant to HJR 606 ((1999); House Document No. 104, 2000); State Government Procurement Practices and Procedures pursuant to SJR 474 ((1999), Senate Document 55, 2000); and Governor Gilmore's Task Force on Procurement Assessment, February 2000.

⁶ Virginia Procurement Law Study Final Report dated November 1, 1980, Office of the Secretary of Administration and Finance.

⁷The other nine states were: Arkansas, Colorado, Indiana, Kentucky, Louisiana, Maryland, South Carolina, and Utah.

A. VPPA Statement of Purpose and Intent

The VPPA contains the public policies of the Commonwealth pertaining to governmental procurement from nongovernmental sources. Section 2.2-4300 of the VPPA expresses the intent of the General Assembly in establishing the VPPA:

“To the end that public bodies in the Commonwealth obtain high quality goods and services at reasonable cost, and that:

- 1. All procurement procedures be conducted in a fair and impartial manner with avoidance of any impropriety or appearance of impropriety;*
- 2. All qualified vendors have access to public business and that no offeror be arbitrarily or capriciously excluded, it is the intent of the General Assembly that competition be sought to the maximum feasible degree;*
- 3. Procurement procedures involve openness and administrative efficiency, that individual public bodies enjoy broad flexibility in fashioning details of such competition;*
- 4. The rules governing contract awards be made clear in advance of the competition, that specifications reflect the procurement needs of the purchasing body rather than being drawn to favor a particular vendor;*
- 5. The purchaser and vendor freely exchange information concerning what is sought to be procured and what is offered; and*
- 6. Public bodies may consider best value concepts when procuring goods and nonprofessional services, but not construction or professional services. The criteria, factors, and basis for consideration of best value and the process for the consideration of best value shall be as stated in the procurement solicitation.”*

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, or 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.

B. Organization of the VPPA

The VPPA is organized into the following six topical articles.

Article 1- General Provisions. This article contains the purpose and declaration of intent. It also includes the section on definitions which contains several substantive definitions related to the procurement process.

Article 2- Contract Formation and Administration. This article covers all aspects of the formation of the contract and the subsequent administration of the contract. The article provides permissible methods of procurement, required contract provisions, allowable procurement preferences, rules for prequalification of vendors, and bid and performance bond processes. This article also provides for public inspection of certain procurement records.

Article 3- Exemptions and Limitations. This article covers the myriad type of exemptions found in the VPPA, including specific transactions that are exempted totally from the application of the VPPA. In addition, this article provides for (i) contracting with certain religious organizations, (ii) certain exemptions from competition generally, (iii) exemptions for certain public bodies from competitive sealed bidding and competitive negotiation, and (iv) other exemptions based on the nature of the transaction. Keep in mind that the exemptions contained in the VPPA are not exhaustive. Many exemptions from the VPPA are found in other Titles of the Code of Virginia.

Article 4- Prompt Payment. This article establishes a rule regarding timely payment to vendors for goods or services. Specifically, payment is required either on the date agreed upon in the contract or if no date is specified, 30 days after receipt of a proper invoice or the receipt of the goods or services by a state agency or 45 days in the case of a local government. The article also includes required contract provisions regarding payment.

Article 5- Remedies. This article establishes the remedies available to bidders or offerors and vendors throughout the procurement process. Provisions are also included authorizing public bodies to establish administrative appeal and alternative dispute resolution procedures.

Article 6- Ethics in Public Contracting. This article establishes rules of ethical conduct for public employees having official responsibility for

procurement transactions. The provisions of this article do not supersede the State and Local Government Conflict of Interests Act (§ 2.2-3100 et seq.) or the Virginia Governmental Frauds Act (§ 18.2-498.1 et seq.). Rather the provisions are meant to be read in conjunction with these statutes to provide a consistent set of rules regarding ethical conduct in the procurement process.

C. Other Laws/Issues Impacting the VPPA

1. Mandatory Procurement of goods produced by Virginia Correctional Enterprises (VCE).

Section 53.1-47, requires that state departments, institutions, and agencies purchase any articles and services produced or manufactured by persons confined in state correctional facilities. Purchases from VCE however are discretionary for localities. There are exceptions from these mandatory purchase requirements found in § 53.1-48 that may be granted with the consent of both the Director of the Division of Purchases and Supply and the Chief Executive Officer of the Virginia Correctional Enterprises Program in any case where:

- (a) The article so produced or manufactured does not meet the reasonable requirements of the department, institution or agency,
- (b) An identical article can be obtained at a verified lesser cost from the private sector, which is evidenced by a verified request for pricing, or
- (c) The requisition made cannot be complied with on account of an insufficient supply of the articles or supplies required, or otherwise.

2. Supplier Diversity--Small, women-, minority- and service disabled veteran-owned business (SWaM) and the Role of the Department of Small Business and Supplier Diversity⁸.

Section 2.2-4310 is the SWaM provision of the VPPA. It defines the relevant terms and provides that in the solicitation or awarding of contracts, no public body shall discriminate against a bidder or offeror because of race, religion, color, sex, national origin, age, disability, status as a service disabled veteran, or any other basis prohibited by state law relating to discrimination in employment. Whenever solicitations are made, each public body shall include businesses selected from a list made available by the Department of Small

⁸ Effective January 1, 2014, the Department of Minority Business Enterprise was consolidated with the existing Department of Business Assistance and this combined agency was renamed to the Department of Small Business and Supplier Diversity pursuant to Chapter 482 of the 2013 Acts of Assembly. (SB 1350, McWaters).

Business and Supplier Diversity. This section also requires all public bodies to establish programs consistent with the VPPA to facilitate the participation of small businesses and businesses owned by women, minorities, and service disabled veterans in procurement transactions. State agencies shall submit annual progress reports on small, women- and minority-owned business procurement and on service disabled veteran-owned business procurement to the Department of Small Business and Supplier Diversity.

In 2006, Governor Kaine issued Executive Order No. 33 which established procurement goals for executive branch agencies to award contracts to SWaM vendors. In 2014, Governor McAuliffe issued Executive Order No. 20, which also establishes procurement goals for executive branch agencies and public institutions of higher education to award contracts to SWaM vendors. Executive Order No. 20 also establishes a "micro business designation" within the small business certification program.

3. Non-profit employment services organizations (formerly "sheltered workshops").

Under the VPPA, contracts may be awarded to employment services organizations that offer transitional or supported employment services serving individuals with disabilities without competition.

4. Public-Private Partnerships

Since 1995, public bodies have been authorized by the Code of Virginia to use public-private partnerships as a method for procuring goods and services. The Public-Private Transportation Act of 1995 (PPTA) was limited to transportation-related projects. Later, with the passage of the Public-Private Education Facilities and Infrastructure Act of 2002 (PPEA), public bodies were authorized to create public-private partnerships for the development of a wider range of projects for public use. Both acts have the objective of allowing public bodies to take advantage of innovative financing mechanisms that may be available through the private sector as well as providing for the project in a timely and cost-effective fashion. Both acts allow solicited and unsolicited proposals. A significant difference between the standard procurement process and projects initiated under the two public-private partnership acts is that the acts allow a private sector business to submit an unsolicited proposal to the public body.

a. Public Private Transportation Act of 1995 (PPTA)

The PPTA became effective on July 1, 1995, and is limited to "qualifying transportation projects," which include any road, bridge, tunnel, overpass, ferry, airport, mass transit facility, vehicle parking facility, port facility or similar commercial facility used for the transportation of persons or goods, together with any buildings, structures, parking areas, appurtenances, and other property needed to operate such facility. Its supporters view the process established by the PPTA as a way to make needed improvements and additions to the state transportation system sooner, more cost-effectively, and more efficiently than with public funds alone.

Toll roads are the clearest example of a transportation public-private partnership. However, the PPTA has become increasingly central to the **Commonwealth's transportation program**. **Projects undertaken so far under the PPTA** include the Dulles Greenway and Route 28 interchanges in Northern Virginia, the Pocahontas Parkway (Route 895) in Richmond, and Route 288 in Richmond. There are numerous additional PPTA proposals currently underway or under consideration by Virginia Department of Transportation.

b. Public-Private Education Facilities and Infrastructure Act of 2002 (PPEA)

The PPEA became effective July 1, 2002, and was seen as an expansion of the PPTA process to a wider range of projects. It grants responsible public entities the authority to create public-private partnerships for the development of "qualifying projects" that include public buildings and facilities of all types. The definition has been expanded to include an even wider range of facilities as well as services designed to increase the productivity or efficiency through the use of technology or other means.

The PPEA establishes requirements that a public entity must adhere to when reviewing and approving proposals received pursuant to the PPEA. In addition, the PPEA specifies the criteria that must be used to select a proposal and the contents of the interim or comprehensive agreement detailing the relationship between a public entity and a private entity.

One of the main objectives of the PPEA is to speed up the process of procuring buildings and other infrastructure by allowing private entities to

propose, through the submittal of an unsolicited proposal, the type of structure, financing, and in some instances the location of the structure. This would have the effect of placing the risk on the private entity for completion of the project. Several extensive PPEA projects have been undertaken. In 2005, the Virginia Information Technologies Agency awarded a 10-year contract valued at \$2 billion to help transform and improve its information technology infrastructure to ensure quality services are delivered to state agencies and the citizens they serve. The objective of the contract was to control information technology costs while updating the Commonwealth's technology infrastructure. To date, the contract stands as the largest procurement contract of its kind in the country.

5. Public Institutions of Higher Education and the Restructured Higher Education Financial and Administrative Operations Act.

Beginning July 1, 2005, the General Assembly enacted the Restructured Higher Education Financial and Administrative Operations Act, which sets forth enabling legislation for the restructuring of public institutions of higher education (institutions) that will extend, upon the satisfaction of various conditions, autonomy, which includes but is not limited to, capital building projects, procurement and personnel, while providing oversight mechanisms and establishing certain expectations. Under this Act, three levels of autonomy will be available to all public institutions of higher education with the level of autonomy depending on each institution's financial strength and ability to manage day-to-day operations.

6. Role of the Department of General Services.

a. Division of Purchases and Supply. (Article 3 (§§ 2.2-1109 et seq.) of Chapter 11 of Title 2.2) Generally, the Division of Purchases and Supply is responsible for the procurement of goods and nonprofessional services by all units of state government, except VITA. Unless otherwise specified in law, all such units of state government are required to purchase through the Division in accordance with regulations of the Division. There are exceptions to this requirement found in § 2.2-1119.

b. Division of Engineering and Buildings (Article 4 (§§ 2.2-1129 et seq.) of Chapter 11 of Title 2.2) The Division of Engineering and Buildings is

responsible for the administration of capital outlay construction projects for state government and as such has developed the Capital Outlay Manual.

Exempted from these provisions are public institutions of higher education.

7. eVA; the Department of General Services' central electronic procurement website.

eVA is the Commonwealth's online, electronic procurement system that originated as a component of a wider effort by Governor Gilmore in 2000 to create a legal framework for statewide e-government initiatives. It is a web-based vendor registration and purchasing system that allows state agencies, colleges, universities and many local governments to conduct purchasing and sourcing activities for goods and services. Sourcing activities include sealed, unsealed, and reverse auction procurements, public posting, vendor invitations via email, accepting electronic bids, quotes and proposals, and placing orders or contracts electronically. Purchasing activities include on-line requisitioning, contract and non-contract catalog shopping, electronic order delivery to vendors and on-line receiving. The eVA system has been in operation since March, 2001.

In 2013, HB 1890 (LeMunyon)(Chapter 493, 2013 Acts of Assembly) was passed which requires the Department of General Services and the State Comptroller to match all purchases of goods, commodities, and other services (information currently available on eVA) to the related payment activity and make the matched information available on the Commonwealth Data Point. This information is required to be available at a transactional level and be in sufficient detail to make clear what an agency has purchased, when the purchase was made, the vendor from whom the purchase is made, the amount purchased, if applicable, and how much was paid.

As noted above, 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 see where improvements might be made. While public procurement is a very nuanced, layered, and complex process, it is essential to ensure accountability, competition, and fairness among the public-private partnerships formed to provide goods, services and construction for the benefit of Virginia's citizens.

HB 2079 (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 did not become effective until July 1, 2014 to enable the House Committee on General Laws and the Senate Committee on General Laws and Technology to conduct a comprehensive study of the VPPA during the 2013 interim, identify weaknesses and other problems in the VPPA, and 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 to allow the Special Joint General Laws Subcommittee Studying the VPPA (Special Joint Subcommittee) to solicit comment from interested parties on problems in the VPPA during the 2013 interim.⁹

2013- 2014 Study Plan

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 by the Special Joint Subcommittee. At the conclusion of year one, the Special Joint

⁹ The Special Joint Subcommittee was created 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.

Subcommittee identified the points of consensus about problems and issues in the VPPA that needed to be addressed.

Year two of this study (2014) focused on the identified issues and work began on their resolution. Workgroups were selected by the Special Joint Subcommittee to examine specific issues. The goal at the conclusion of year two was the recommendation of VPPA legislation by the Special Joint Subcommittee for the 2015 Session. Each work group was provided with a scope of work document that assigned specific issues to be considered by them. The respective scope of work document appears as Appendix C (Work Group No. 1) and Appendix F (Work Group No. 2) to this report.

The 2014 membership of the Special Joint Subcommittee consisted of House Committee on General Laws members: Delegate C. Todd Gilbert, Chair, Delegate Dave Albo, Delegate Thomas "Tag" Greason, Delegate Nick Rush, Delegate Richard Anderson and Delegate Betsy Carr; and Senate Committee on General Laws and Technology members Senator Frank Ruff, Jr. Vice-Chair, Senator J. Chapman Petersen, Senator Bryce Reeves and Senator Mamie Locke.

WORK OF THE SPECIAL JOINT SUBCOMMITTEE

July 14, 2014

The Special Joint Subcommittee met on July 14, 2014, in Richmond, Virginia, in House Room C of the General Assembly Building to review legislation referred by the General Assembly from the 2014 regular session.

The first order of business was the election of chair and vice-chair. Delegate C. Todd Gilbert was elected chair and Senator Frank Ruff, Jr., was elected vice-chair.

Progress report on Work Groups

The Special Joint Subcommittee received a staff briefing on the status of the two work groups established to assist the Special Joint Subcommittee in its review of the VPPA by developing consensus for legislative recommendations. Representatives from state and local government, higher education and the vendor community were included on each work group. Work Group No. 1

focused on issues related to construction and related design professionals, and Work Group No. 2 focused on information technology, goods, other professional services, and nonprofessional services. Each work group was assigned a scope of work document (SOW) that laid out the issues to be examined. The membership of the work groups and the full schedule of meetings are available on the study website.

Review of legislation referred by the General Assembly

The Special Joint Subcommittee reviewed the referred legislation, beginning with the bills of patrons in attendance at the meeting.

House Bill 223 (Dance)

House Bill 223 would require the Department of General Services and the Virginia Information Technologies Agency to develop procurement regulations for the utilization of small businesses located in historically underutilized business zones (HUB zones). Under the bill, a HUB zone is defined as an area in Virginia so designated by the U.S. Small Business Administration pursuant to relevant federal law. Delegate Dance stated that the legislation would assist urban, economically depressed areas by encouraging the state to establish procurement relationships with small businesses in those areas. Delegate Dance indicated that additional work on HB 223 was necessary. She asked to bring an amended version to the next meeting of the Special Joint Subcommittee. After discussion, the Special Joint Subcommittee voted to defer action on the legislation to its next meeting.

House Bill 1223 (Yancey)

House Bill 1223 consists of two components. The first component would expand the definition of "minority-owned business" to include historically Black colleges and universities (HBCUs). The second component would require small, women-owned, and minority-owned business (SWaM) programs to include a provision for the fair and equitable evaluation of opportunities for small businesses and all businesses owned by women, minorities, or service-disabled veterans. Regarding the first component, Delegate Yancey stated that federal law included HBCUs under its disadvantaged business program. Testimony in favor of the first component was provided by William Thomas of Hampton University. Mr. Thomas related how a program at the University lost a contract bid to an Oklahoma company to provide parenting skills training even

though the Hampton program was the low bid. Also speaking in favor of this component of the legislation was Rodney Thomas of Richmond, Virginia. Arlene Kleindenst, Esq., spoke in favor of the second component of the bill on behalf of Top Guard Security, a women-owned business based in Virginia. She asserted that while Top Guard Security meets the definition of a women-owned business, because it has over 400 employees it does not meet the current definition of a small business, which sets a maximum of 250 employees. The second component of the bill would allow full participation in SWaM programs for women-owned and minority-owned businesses that did not also meet the current definition of a small business.

After discussion, the Special Joint Subcommittee voted to defer action on HB 1223 until its next meeting.

House Bill 793 (Lopez)

House Bill 793 would change the definition of small business to require a qualifying business to have both 250 or fewer employees and average annual gross receipts of \$10 million or less averaged over the previous three years. Under current law, a business must meet either the employee limit or the average gross receipts condition to be classified as a small business. The patron of the legislation, Delegate Alphonso H. Lopez, stated that 95 percent of Virginia businesses fit the current definition and that the change was needed to more directly assist truly small businesses. According to Delegate Lopez, the change would cause 3.6 percent of Virginia firms, or 765 total firms, and 2,228 non-Virginia firms to lose their certification as a small business. Testimony in support of the bill was provided by Bernice Travers, President, Travers Corporation; Lee Brazzell, President of Transformation Consulting LLC; Bruce Williams, Hampton Roads Committee of 200+ Men, Inc.; Gwen Davis, Chair, Equipping Businesses for Success Institute; William Thomas; Marty Jewel; Earl Bradley; and Willie Lee.

After some additional discussion, the Special Joint Subcommittee voted to recommend HB 793 to the 2015 Session of the General Assembly.

House Bill 289 (Albo)

House Bill 289 would prohibit the use of cooperative procurement for construction. Currently the law only prohibits the use of cooperative procurement in the case of construction in excess of \$200,000 by a local public body from the contract of another local public body that is more than a straight

line distance of 75 miles from the territorial limits of the local public body procuring the construction. Lee Brazzell, President and CEO of Transformation Consulting LLC., expressed concern that procuring construction using cooperative procurement would significantly limit the ability of small businesses to compete for the work. Cindy Shelor, owner of John T. Morgan Roofing and Sheet Metal of Roanoke, Virginia, told the Special Joint Subcommittee that when cooperative procurement was used to re-roof three Roanoke City public schools, her company and other local contractors were not able to participate. She asserted that cooperative procurement should not be used for procuring construction. The Special Joint Subcommittee voted to refer HB 289 to Work Group No. 1.

House Bill 290 (Albo)

House Bill 290 would make several technical changes to the job order contracting (JOC) provisions that became effective in 2014. Legislation passed during the 2013 legislative session with a one-year delayed effective date established a definition for JOC as well as limitations on the total contract and project fee amounts and the length and number of renewable terms such contract arrangement may extend. Staff noted that interested parties had expressed concern regarding the definition of JOC, the project limits, and the effect that these provisions would have on current procurement practices. The Special Joint Subcommittee voted to refer the legislation to Work Group No. 1.

House Bill 421 (Minchew) and Senate Bill 174 (Black)

Identical bills HB 421 and SB 174 would increase the term contract limits for architectural and engineering services from \$1 million to \$2.5 million per project for state agencies and from \$5 million to \$10 million per contract term. The Special Joint Subcommittee voted to refer both bills to Work Group No. 1.

House Bill 549 (Filler-Corn) and Senate Bill 645 (McEachin)

House Bill 549 and Senate Bill 645 provide that when awarding transportation construction projects, the procuring entity may consider certain specified factors other than price. An additional provision in SB 645 would allow any locality to use design-build or construction management delivery methods for construction, provided the locality had the personnel, expertise, and procedures for engaging in such contracts. Currently, the procurement methods are available to localities with a population in excess of 100,000. Richard Thomas of the Design Build Institute spoke in favor of the bills. He

asserted that the bills would authorize state and local governments to use the design-build delivery method while still allowing the use of traditional delivery methods. Mr. Thomas stated that like traditional projects, design-build projects would be competitively procured. He noted that 78 percent of the states have fully authorized local governments to use design-build. According to Mr. Thomas, the delivery method resulted in lower costs, faster construction time, higher quality, and greater owner satisfaction.

Several individuals spoke in opposition to the legislation. Bruce Williams, Hampton Roads Committee of 200+ Men, Inc., expressed concern that design-build construction contracts may not adequately provide for the participation of minority-owned businesses. Myles Louria, Senior Director of Governmental Affairs, Hunton & Williams, stated that injecting subjective criteria would be extremely problematic. Andrew Sinclair, Virginia Association of Governmental Purchasing, expressed concern regarding both of the bills and further noted that he believed public bodies could already do most of what the bills propose to accomplish, with the exception of the removal of the population threshold. Herschel Keller stated that overuse of design-build by public bodies adversely affected small contractors. Reginald Jones, Williams Mullen, noted that as a construction procurement method, design-build is an exception. He further stated that originally a locality had to come to the General Assembly to get authorization to use the method. The 200,000 population threshold, stated Mr. Jones, was put in place as a means to ensure that the locality using the delivery method was large enough to have appropriate staff in place to advise the locality because under the method the design professional would not be responsible to the buyer. Steve Vermillion, Associated General Contractors, stated that the issues encompassed in the bill needed more study. The Special Joint Subcommittee voted to table both bills.

House Bill 769 (Hugo)

House Bill 769 provides, under certain conditions, that when engaged in procuring products or services or awarding contracts for construction, manufacture, maintenance, or operation of any state funded project, neither the Commonwealth Transportation Board nor any state transportation agency, may in the bid specifications, project agreements, or other controlling documents, provide an incentive in the scoring of bids that favors entities entering into project labor agreements.

Staff noted that legislation passed in 2011 provided that state entities cannot require adherence to labor agreements or discriminate based on

adherence to such agreements. HB 769 would establish a more restrictive policy for transportation projects. Staff further noted that the need to establish a different, more stringent policy for transportation projects had not been raised as an issue during the first year of the study. The Special Joint Subcommittee voted to refer the legislation back to the House of Delegates with no recommendation.

House Bill 1159 (Rasoul)

House Bill 1159 would add several local government officials to the current prohibition against certain state officials from knowingly soliciting or accepting a contribution, gift, or other item with a value greater than \$50 from any bidder, offeror, or private entity who has submitted a bid or proposal pursuant to the VPPA, the Public-Private Transportation Act, or the Public-Private Education Facilities and Infrastructure Act during the bidding period.

The Special Joint Subcommittee voted to refer the legislation to the newly created Virginia Conflict of Interest and Ethics Advisory Council.

House Bill 1194 (James) and Senate Bill 632 (Lucas)

Identical bills House Bill 1194 and Senate Bill 632 would require the Department of Small Business and Supplier Diversity, in conjunction with the Department of General Services, the Virginia Information Technologies Agency, and the Department of Transportation, to develop a program establishing a requirement that at least 15 percent of all state purchases be made from minority-owned or women-owned businesses that are also certified as small businesses. Several individuals provided testimony in support of the bills. Lawrence Wright, who indicated that he was previously employed by the former Department of Minority Business Enterprise, asserted that the current purchasing goals are aspirational and of less value to women-owned and minority-owned businesses. Ms. Davis, of the Equipping Businesses for Success Institute, asserted that disparity studies conducted in 2004, 2010, and 2011 clearly indicate that the race-neutral and gender-neutral programs currently in use were not working. She further noted that while training regarding how to access the state's procurement system is always good for small businesses, training does not compensate for the fact that certified and capable minority-owned and women-owned businesses are still not being awarded state contracts.

Carmen Taylor, President of the Virginia State Conference of the National Association for the Advancement of Colored People, asserted that 15 percent is not a large amount and that the pursuit of fairness and equity in the state's purchasing activities was an appropriate objective. Rodney Thomas stated that Virginia has never reached its SWaM goals. He contrasted the state's program and the program used in North Carolina, which he asserted has a mandatory set aside of 23 percent. Mr. Thomas maintained that program implementation is also a problem in Virginia. Members of the Special Joint Subcommittee expressed concern that the 15 percent figure may be arbitrary. Ms. Brazzell responded that the disparity study completed in 2012 documented availability, defined as minority-owned or women-owned businesses that were able, willing, and capable of performing. Chris Williams added that the completed disparity studies consistently and clearly indicated disparity that the state was severely underutilizing minority-owned businesses in comparison with availability as documented by the studies, and that addressing the disparity will help establish an economic ecosystem in depressed communities. Vivian Blaze, who indicated that she had been a business owner since 2003, stated that the 15 percent figure is not high considering the discriminatory practices that have caused much more money to be lost by minority-owned and women-owned businesses over the centuries. Speaking against the bills, Andrew Sinclair asserted that the state's SWaM program needed reform and that the VPPA should not be used to advance social measures.

Discussion among the Special Joint Subcommittee members centered on the need to address programmatic issues related to SWaM and whether it was appropriate to recommend increasing the set aside percentage without first addressing the programmatic issues. The Special Joint Subcommittee took no action on the bills.

House Bill 1208 (Albo)

This legislation prohibits the consideration of discounts for early payment of invoices offered by any bidder in the determination of the lowest priced bid on any contract awarded using competitive sealed bidding. The Special Joint Subcommittee voted to table HB 1208.

House Bill 1238 (Gilbert)

House Bill 1238 would prohibit an Invitation to Bid or Request for Proposal from containing the procuring public body's cost estimate for the

work or goods sought to be procured. The Special Joint Subcommittee voted to refer the bill to Work Group No. 1.

Senate Bill 616 (Alexander)

Senate Bill 616 would eliminate the Department of Small Business and Supplier Diversity and recreate the Department of Minority Business Enterprise and the Department of Business Assistance as those two departments existed prior to January 1, 2014. Several individuals testified in support of the bill. Gwen Davis asserted that the focus on increasing the utilization of minority-owned businesses had been diminished by combining the two agencies. She further noted that the recent disparity studies did not support combining the two agencies. Rodney Thomas maintained that a separate agency devoted to increasing state utilization of minority-owned and women-owned businesses is needed and should be restored. Delegate Greason noted that despite the existence of a single devoted agency for several years, the disparity numbers continue to be low. Mr. Thomas replied that the problem was in the implementation of the programs. Delegate Albo suggested that those concerned about the merger of the two agencies should request the Governor to appoint an advocate for women-owned and minority-owned businesses to ensure that the interests of such businesses were adequately supported.

Ida McPherson, Director of the Department of Small Business and Supplier Diversity, stated that in many instances, the merger was accomplished with the same staff performing the same functions as they did with the previous agency. She further stated that the commitment of the agency has not been diluted and cited the need for a procurement compliance division to assist in the enforcement of the state's procurement policies relative to minority-owned businesses and women-owned businesses. Mr. Wright noted that the focus of the agency must be on educating the vendor, which needs to be a significant part of the agency's mission. He also asserted that the agency needs the authority to enforce procurement policies. A representative of TSI Technology, an information technology company, stated that she stood as an example of a qualified minority-owned and women-owned business and yet her company has been unable to secure a contract award in Virginia.

At the end of the testimony, the Special Joint Subcommittee voted to pass SB 616 by indefinitely.

Public comment

Bruce Tyler, Baskervill

Mr. Tyler stated that he was a principal with Baskervill, an architectural, engineering, and design firm. He expressed concern about the implementation of the Virginia Public Private Education Facilities and Infrastructure Act (PPEA). He asserted that while the PPEA was an important statute, he feared that its implementation has not been fair and equitable. He provided copies of a chart that he asserted detailed a skewed procurement process. Mr. Tyler urged the Special Joint Subcommittee to take the time to study the PPEA. Delegate Greason suggested that Mr. Tyler discuss his concerns with staff for review at a future meeting.

There was no additional public comment.

Next meeting

Chairman Gilbert indicated that the next meeting of the Special Joint Subcommittee will be scheduled after the last meetings of the work groups.

NOVEMBER 24, 2014

The Special Joint Subcommittee met on November 24, 2014, in Richmond, Virginia, in House Room D of the General Assembly Building to receive recommendations from Work Groups 1 and 2 and to complete its review of legislation referred by the General Assembly from the 2014 Regular Session.

Amigo Wade, Senior Attorney, Division of Legislative Services, reminded the Special Joint Subcommittee of the work groups' charge and their activities in examining the concerns raised during the first year of the study as presented in each work group's SOW. Mr. Wade reported that the work groups agreed to proceed with issues that appeared easily resolved. Extensive, substantive discussion on these initial issues prevented both work groups from being able to address all of the issues in their respective SOWs. Each work group was able, however, to reach consensus on some issues, with Work Group No. 1 recommending a single omnibus consensus draft and Work Group No. 2 recommending two consensus drafts for consideration by the Special Joint Subcommittee.

Mr. Wade advised the Special Joint Subcommittee that there was consensus in both work groups for the need to establish a VPPA oversight body to provide, among other things, an administrative appeal process and increased enforcement. Mr. Wade discussed a measure offered on behalf of the AGC that would establish a nine-member independent review board for construction. This Board would have the authority to reach findings and either compel the corrective action or refer the matter to a body that could compel the corrective action. Mr. Wade advised that it was the opinion of some work group members that the focus should be on gathering empirical data rather than establishing a review board. Other options discussed included (i) starting small by having either the Office of the Inspector General or DGS provide advisory opinions, (ii) establishing an advisory procurement council to encourage and facilitate compliance with the state's procurement laws, including the powers and duties to: conduct training seminars and educational programs; publish educational materials; review written determinations of public bodies regarding methods of procurement; collect data necessary to evaluate the effectiveness of the VPPA; provide a forum to address concerns regarding public procurement; and monitor changes in state procurement law and make recommendations for changes to the General Assembly. Each work group discussed the possibility of establishing an advisory entity with limited powers, but could not reach an agreement on the composition and size of the board, the powers it would exercise, the scope of its authority, or staffing. Due to this lack of consensus, the work group did not advance any specific language or recommend any legislation for consideration by the Special Joint Subcommittee.

The Special Joint Subcommittee was reminded of its concern expressed in 2013 that there is no "Virginia playbook" for public procurement, which was added to the SOW for each work group. Essentially, confusion exists for vendors because of multiple and disparate rules resulting in a less user-friendly environment for conducting the Commonwealth's procurement business. Methods of procurement have become disjointed and difficult to observe. Because public procurement has become fragmented, increased costs and complexity of contracts for both agencies and vendors has resulted. Further, duplication of contracts results in less aggregated spending, leading to higher prices and increased contract award and administration costs. The Special Joint Subcommittee was advised that this issue was brought to the attention of work groups, with the instruction that a Virginia public procurement playbook be established by unifying powers, terms and

conditions, and implementing the tenants of the VPPA across the satellites¹⁰; however, time ran out and this issue was not addressed.

I. Work Group No. 1. Omnibus Consensus Draft

Maria J.K. Everett, Senior Attorney, Division of Legislative Services, presented each of the consensus drafts to the Special Joint Subcommittee. Ms. Everett reviewed the technical and substantive provisions of the draft from Work Group No. 1, which contained provisions relating to, among other things, JOC and cooperative procurement methods, and professional design services term contracts. Highlights of the substantive provisions included:

- Clarifying that construction may be procured using small-purchase procedures;
- Relocating the architectural and engineering term contract provisions from the definitional section of the VPPA to a separate section within the act;
- Establishing a separate section for job order contracting that (i) increases the maximum sum of all jobs performed in a one-year contract term from \$2 million to \$5 million; (ii) decreases the number of renewable one-year terms from four to two; (iii) increases the limit on individual job orders from \$400,000 to \$500,000; (iv) prohibits the splitting of orders with the intent of keeping a job order under the maximum dollar thresholds; (v) prohibits the use of JOC solely for the purpose of procuring architectural and engineering services, but allows for such services that are incidental and directly related to a job, with a limit of 25 percent of total construction costs and not to exceed \$60,000; and (vi) prohibits JOC for the construction, maintenance, or asset management services for highway, bridge, tunnel, or overpass;
- Distinguishing joint procurement from cooperative procurement;
- Maintaining the current prohibition on a locality from using cooperative procurement to purchase construction over \$200,000 from another locality more than 75 miles from its territorial limits;

¹⁰ *Id* n.2.

- Requiring all public bodies to report their respective experiences and findings on the appropriateness and effectiveness of job order contracting in general and more specifically, the JOC project cost limits, and architectural and professional engineering term contract limits.

Regarding the JOC provisions, Delegate Gilbert opined that the term "order splitting" may not be clear and may need to be defined. Senator Ruff noted that the draft did not specify who would decide if the requisite intent to circumvent the threshold was present.

Delegate Gilbert then requested public comment on the draft. Initial comment centered on the provisions dealing with cooperative procurement. Matthew D. Benka, Coalition for Procurement Reform, expressed opposition to the use of cooperative procurement to purchase construction and suggested amending the draft to absolutely prohibit this practice. He asserted that cooperative procurement should be limited to the procurement of goods. Bert Jones, Associate Vice Chancellor for Facilities Management Services, Virginia Community College System (VCCS) and member of Work Group No. 1, noted that ultimately the consensus of the work group was not to change the current law. He further asserted that The Virginia Association of State College and University Purchasing Professionals (VASCUPP) provides opportunities for **Virginia's public colleges and universities to routinely utilize** cooperative procurement to purchase construction in a very cost effective manner. Mark Flynn, Virginia Municipal League, pointed out that cooperative procurement allows small localities to take advantage of a larger locality's ability to use economies of scale. W. Earl Bradley, Bradley Construction, asserted that localities should be given enough flexibility to customize procurement to suit the unique needs of their jurisdictions. Senator J. Chapman Petersen noted that the 75 mile limitation in current law would still allow several localities surrounding Fairfax County to take advantage of the county's contracts and asked if the concern could be alleviated by making the limitation tighter. Delegate Albo made a motion to prohibit the purchase of any construction using cooperative procurement, which motion was properly seconded. The Special Joint Subcommittee approved the motion by a vote of 5-1.

The discussion then moved to the JOC provisions of the draft. Patrick Cushing, Esq., Williams Mullen, stated that JOC should not be used to procure

architectural and engineering services (A/E services). He offered an amendment to accomplish this objective. Delegate Albo asked why he did not agree with the work group's compromise. Mr. Cushing responded that when JOC was initially authorized in 2012, it was intended for jobs installing windows and doors, painting, or replacing carpet, and A/E services were not included. He asserted that the draft essentially creates another exception from the requirement that A/E services be procured using competitive negotiation. He further stated that if A/E services were required during the course of a job order contract, a public body could use either its existing A/E services term contract or the small-purchase exception to procure such services.

Mr. Jones stated that the issue was discussed thoroughly and the consensus that was reached is reflected in the draft. He further asserted that while JOC is new to Virginia, it is not new in the country. Delegate Gilbert asked how fixed costs are applied to A/E services under a JOC. Mr. Jones replied that an hourly rate is built into the contract. Mr. Chris Stone, P.E., President, Clark Nexsen, and member of Work Group No. 1, noted that other states either do not allow JOC for A/E services or, if they do, find the practice subject to abuse. Rich Sliwoski, Director, Department of General Services (DGS), and member of Work Group No. 1, stated that JOC is in reality a mini design/build contract and that there is limited impact on A/E services because JOC is used primarily for carpet replacement and painting. Steve Vermillion, CEO, Associated General Contractors of Virginia, contended that while an independent review panel did not make it into the consensus draft, the establishment of such a panel would be extremely critical to addressing important issues related to compliance with the VPPA. Senator Ruff agreed that a review panel established in the DGS should be a part of the package. Rodney Thomas, Central Virginia Business and Construction Association, stated that any review panel should include minority representation including the state's major HBCUs.

Delegate Albo moved to amend the draft to strike from line 378 after "§ 54.1-100" through the end of line 380¹¹. Senator Petersen offered a substitute motion to use the language offered by Mr. Cushing. Delegate Albo withdrew his motion. Senator Petersen's motion passed unanimously. The Special Joint Subcommittee voted unanimously to recommend the draft as amended.

¹¹ See Work Group No. 1's recommended draft found in Appendix D of this report

II. Work Group No. 2.

Consensus Draft #1. Use of competitive sealed bidding or competitive negotiation for the procurement of goods, certain services, and insurance

Ms. Everett presented the first consensus draft removing the requirement that a determination be made in advance by a public body and set forth in writing that competitive sealed bidding (CSB) is either not practicable or not fiscally advantageous to the public, in order for goods, services, or insurance to be procured by competitive negotiation (CN). Ms. Everett noted that the draft does not affect the current preference for procuring construction through CSB or the requirement for using CN to procure professional services.

The Special Joint Subcommittee voted unanimously to recommend Consensus Draft #1 to the 2015 General Assembly.

III. Work Group No. 2.

Consensus Draft #2. Publication of Notices of Requests for Proposals

Ms. Everett presented the second draft recommended by Work Group No. 2. The draft requires DGS to (i) provide an electronic data file of all agencies' business opportunities posted on the DGS's central electronic procurement website at no charge to any requesting newspaper or other print publication with circulation in Virginia and (ii) send the data file automatically via electronic mail on a daily, weekly, or monthly basis as agreed to by the parties. Local public bodies would have the option to either post all business opportunities on the DGS's central electronic procurement website or provide an electronic data file of all business opportunities to any requesting newspaper or other print publication with circulation in Virginia.

The draft also establishes a two-year transition period from July 1, 2015, to June 30, 2017, with regard to the required publication in newspapers of all Requests for Proposals (RFP), after which time newspaper publication of RFPs will be discretionary. During the transition period, public bodies that issue an RFP will continue to publish a public notice of the RFP in a newspaper of general circulation; however, the notice must include a statement indicating the website, either DGS's central electronic procurement website or the public body's public government or other appropriate website, where all public notices for RFPs issued from the public body are located. In addition, the draft establishes a reporting requirement for all public bodies issuing RFPs on or

after July 1, 2015, through June 30, 2016, to ascertain the method by which an offeror submitting a proposal in response to the RFP became aware of the solicitation, whether by newspaper publication, website posting, other method, or combination of the above. After review of the contents of the draft, Delegate Gilbert opened the floor for public comment.

Ginger Stanley, Executive Director, Virginia Press Association (VPA), stated that removing the publication requirement will adversely affect citizens who have limited internet access and will also limit government transparency. Delegate Albo noted that newspapers certify that the notice has been published, which provides an assurance that the public body is complying with the VPPA notice requirements. Delegate Anderson supported the position of the VPA, stating that he represents Prince William County, which is still a very rural area. Delegate Gilbert acknowledged that some citizens continue to read the newspaper to keep abreast with the activities of their government.

The Special Joint Subcommittee voted 6-2 to table the draft.

IV. House Bill 1223 (Yancey)

House Bill 1223 consists of two components. The first component would expand the definition of "minority-owned business" to include historically Black colleges and universities (HBCUs). The second component would require small, women-owned, and minority-owned business (SWaM) programs to include a provision for the fair and equitable evaluation of opportunities for small businesses and all businesses owned by women, minorities, or service-disabled veterans. Delegate Yancey indicated that he only wanted to proceed with the first component of HB 1223. The Special Joint Subcommittee accepted his proposal and voted unanimously to recommend the bill as amended.

V. Future Study Plan

Delegate Gilbert stated that the work groups would not be continued unless the Special Joint Subcommittee subsequently determines a need exists. Delegate Albo asserted that the Special Joint Subcommittee and work groups had done what they could, but the issue of the use of design-build and construction management in public procurement had not been resolved. He stated that it may be feasible to reconstitute a Design-Build Board in some form as a means of addressing the problem.

There being no further business before the Special Joint Subcommittee, the meeting was adjourned.

Conclusion

The members of the Special Joint Subcommittee and the members of the respective work groups received materials and heard comment from a great number of groups and individuals and the process educated all. The Special Joint Subcommittee would like to express its gratitude to the members of the work groups for their participation, deliberations, and dedication.

Respectfully submitted,

C. Todd Gilbert, Chair

Frank M. Ruff, Jr., Vice-Chair

David B. Albo

Thomas "Tag" Greason,

L. Nick Rush

Richard L. Anderson

Betsy B. Carr

J. Chapman Petersen

Bryce Reeves

Mamie Locke

APPENDIX A

FINAL LEGISLATIVE RECOMMENDATIONS BY THE SPECIAL JOINT SUBCOMMITTEE

1. Bill Summary:

Virginia Public Procurement Act (VPPA); methods of procurement; job order contracting and cooperative procurement. Clarifies that small purchase procedures include the procurement of construction and that any such procedures shall not waive compliance with the Uniform State Building Code. The bill also increases contract amounts for job order contracting and provides that (i) order splitting with the intent of keeping a job order under the maximum dollar amounts prescribed is prohibited, (ii) no public body shall issue or use a job order solely for the purpose of procuring professional architectural or engineering services, and (iii) job order contracting shall not be used for construction, maintenance, or asset management services for a highway, bridge, tunnel, or overpass. The bill clarifies the provisions of the VPPA related to cooperative procurement and requires that by October 1, 2017, the Department of Small Business and Supplier Diversity, public institutions of higher education having level 2 or 3 authority under the Restructured Higher Education Financial and Administrative Operations Act of 2005, any state agency utilizing job order contracting, and the Virginia Association of Counties, the Virginia Municipal League, and the Virginia Association of Governmental Purchasing on behalf of local public bodies working cooperatively report their respective experiences and findings relating to the appropriateness and effectiveness of job order contracting in general, the job order project cost limitations as added by this bill, and the architectural and professional engineering term contract limits to the Chairmen of the House Committee on General Laws and the Senate Committee on General Laws and Technology. The bill further provides that its provisions shall not apply to any solicitation issued or contract awarded before July 1, 2015, except that the provisions of subsection B of § 2.2-4303.2, as added by this bill, shall apply to any renewal of a job order contract. The bill contains numerous technical amendments and is a recommendation of the General Laws Special Joint Subcommittee Studying the Virginia Public Procurement Act.

Bill Text:

A BILL to amend and reenact §§ 2.2-2012, 2.2-4301, 2.2-4302.2, 2.2-4303, 2.2-4304, 2.2-4343, 23-38.110, and 33.2-283 of the Code of Virginia and to amend the Code of Virginia by adding sections numbered 2.2-4303.1 and 2.2-4303.2, relating to the Virginia Public Procurement Act; methods of procurement; job order contracting and cooperative procurement.

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-2012, 2.2-4301, 2.2-4302.2, 2.2-4303, 2.2-4304, 2.2-4343, 23-38.110, and 33.2-283 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding sections numbered 2.2-4303.1 and 2.2-4303.2 as follows:

§ 2.2-2012. Procurement of information technology and telecommunications goods and services; computer equipment to be based on performance-based specifications.

A. Information technology and telecommunications goods and services of every description shall be procured by (i) VITA for its own benefit or on behalf of other state agencies and institutions or (ii) such other agencies or institutions to the extent authorized by VITA. Such procurements shall be made in accordance with the Virginia Public Procurement Act (§ 2.2-4300 et seq.), regulations that implement the electronic and information technology accessibility standards of the Rehabilitation Act of 1973 (29 U.S.C. § 794d), as amended, and any regulations as may be prescribed by VITA. In no case shall such procurements exceed the requirements of the regulations that implement

the electronic and information technology accessibility standards of the Rehabilitation Act of 1973, as amended.

The CIO shall disapprove any procurement that does not conform to the Commonwealth strategic plan for information technology developed and approved pursuant to § 2.2-2007 or to the individual strategic plans of state agencies or public institutions of higher education.

B. All statewide contracts and agreements made and entered into by VITA for the purchase of communications services, telecommunications facilities, and information technology goods and services shall provide for the inclusion of counties, cities, and towns in such contracts and agreements. Notwithstanding the provisions of § 2.2-4301, 2.2-4302.1, ~~or 2.2-4302.2~~, 2.2-4303.1, or 2.2-4303.2, VITA may enter into multiple vendor contracts for the referenced services, facilities, and goods and services.

C. VITA may establish contracts for the purchase of personal computers and related devices by licensed teachers employed in a full-time teaching capacity in Virginia public schools or in state educational facilities for use outside the classroom. The computers and related devices shall not be purchased with public funds, but shall be paid for and owned by teachers individually provided that no more than one such computer and related device per year shall be so purchased.

D. If VITA, or any agency or institution authorized by VITA, elects to procure personal computers and related peripheral equipment pursuant to any type of blanket purchasing arrangement under which public bodies, as defined in § 2.2-4301, may purchase such goods from any vendor following competitive procurement but without the conduct of an individual procurement by or for the using agency or institution, it shall establish performance-based specifications for the selection of equipment. Establishment of such contracts

shall emphasize performance criteria including price, quality, and delivery without regard to "brand name." All vendors meeting the Commonwealth's performance requirements shall be afforded the opportunity to compete for such contracts.

E. VITA shall allow private institutions of higher education chartered in Virginia and granted tax-exempt status under § 501(c)(3) of the Internal Revenue Code to purchase directly from contracts established for state agencies and public bodies by VITA.

F. This section shall not be construed or applied so as to infringe upon, in any manner, the responsibilities for accounting systems assigned to the Comptroller under § 2.2-803.

§ 2.2-4301. Definitions.

As used in this chapter:

"Affiliate" means an individual or business that controls, is controlled by, or is under common control with another individual or business. A person controls an entity if the person owns, directly or indirectly, more than 10 percent of the voting securities of the entity. For the purposes of this definition "voting security" means a security that (i) confers upon the holder the right to vote for the election of members of the board of directors or similar governing body of the business or (ii) is convertible into, or entitles the holder to receive, upon its exercise, a security that confers such a right to vote. A general partnership interest shall be deemed to be a voting security.

"Best value," as predetermined in the solicitation, means the overall combination of quality, price, and various elements of required services that in total are optimal relative to a public body's needs.

"Business" means any type of corporation, partnership, limited liability company, association, or sole proprietorship operated for profit.

"Competitive negotiation" is the method of contractor selection set forth in § 2.2-4302.2.

"Competitive sealed bidding" is the method of contractor selection set forth in § 2.2-4302.1.

"Construction" means building, altering, repairing, improving or demolishing any structure, building or highway, and any draining, dredging, excavation, grading or similar work upon real property.

"Construction management contract" means a contract in which a party is retained by the owner to coordinate and administer contracts for construction services for the benefit of the owner, and may also include, if provided in the contract, the furnishing of construction services to the owner.

"Design-build contract" means a contract between a public body and another party in which the party contracting with the public body agrees to both design and build the structure, roadway or other item specified in the contract.

"Employment services organization" means an organization that provides employment services to individuals with disabilities that is an approved Commission on the Accreditation of Rehabilitation Facilities (CARF) accredited vendor of the Department for Aging and Rehabilitative Services.

"Goods" means all material, equipment, supplies, printing, and automated data processing hardware and software.

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

"Job order contracting" means a method of procuring construction services by establishing a book of unit prices and then obtaining a contractor to

perform work as needed using the prices, quantities, and specifications in the book as the basis of its pricing. The contractor may be selected through either competitive sealed bidding or competitive negotiation depending on the needs of the public body procuring the construction services. A minimum amount of work may be specified in the contract. The contract term and the project amount shall not exceed the limitations specified in ~~§ 2.2-4302.2 or 2.2-4303.2~~ 2.2-4303.2.

"Multiphase professional services contract" means a contract for the providing of professional services where the total scope of work of the second or subsequent phase of the contract cannot be specified without the results of the first or prior phase of the contract.

"Nonprofessional services" means any services not specifically identified as professional services in the definition of professional services.

"Potential bidder or offeror," for the purposes of §§ 2.2-4360 and 2.2-4364, means a person who, at the time a public body negotiates and awards or proposes to award a contract, is engaged in the sale or lease of goods, or the sale of services, insurance or construction, of the type to be procured under the contract, and who at such time is eligible and qualified in all respects to perform that contract, and who would have been eligible and qualified to submit a bid or proposal had the contract been procured through competitive sealed bidding or competitive negotiation.

"Professional services" means work performed by an independent contractor within the scope of the practice of accounting, actuarial services, architecture, land surveying, landscape architecture, law, dentistry, medicine, optometry, pharmacy or professional engineering. "Professional services" shall also include the services of an economist procured by the State Corporation Commission.

"Public body" means any legislative, executive or judicial body, agency, office, department, authority, post, commission, committee, institution, board or political subdivision created by law to exercise some sovereign power or to perform some governmental duty, and empowered by law to undertake the activities described in this chapter. "Public body" shall include any metropolitan planning organization or planning district commission which operates exclusively within the Commonwealth of Virginia.

"Public contract" means an agreement between a public body and a nongovernmental source that is enforceable in a court of law.

"Responsible bidder" or "offeror" means a person who has the capability, in all respects, to perform fully the contract requirements and the moral and business integrity and reliability that will assure good faith performance, and who has been prequalified, if required.

"Responsive bidder" means a person who has submitted a bid that conforms in all material respects to the Invitation to Bid.

"Reverse auctioning" means a procurement method wherein bidders are invited to bid on specified goods or nonprofessional services through real-time electronic bidding, with the award being made to the lowest responsive and responsible bidder. During the bidding process, bidders' prices are revealed and bidders shall have the opportunity to modify their bid prices for the duration of the time period established for bid opening.

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

§ 2.2-4302.2. Process for competitive negotiation.

A. The process for competitive negotiation shall include the following:

1. Issuance of a written Request for Proposal indicating in general terms that which is sought to be procured, specifying the factors that will be used in evaluating the proposal and containing or incorporating by reference the other applicable contractual terms and conditions, including any unique capabilities, specifications or qualifications that will be required;

2. Public notice of the Request for Proposal at least 10 days prior to the date set for receipt of proposals by posting on the Department of General Services' central electronic procurement website or other appropriate websites. Additionally, public bodies shall publish in a newspaper of general circulation in the area in which the contract is to be performed so as to provide reasonable notice to the maximum number of offerors that can be reasonably anticipated to submit proposals in response to the particular request. Posting on the Department of General Services' central electronic procurement website shall be required of any state public body. Local public bodies are encouraged to utilize the Department of General Services' central electronic procurement website to provide the public with centralized visibility and access to the Commonwealth's procurement opportunities. In addition, proposals may be solicited directly from potential contractors. Any additional solicitations shall include certified businesses selected from a list made available by the Department of Small Business and Supplier Diversity; and

3. For goods, nonprofessional services, and insurance, selection shall be made of two or more offerors deemed to be fully qualified and best suited among those submitting proposals, on the basis of the factors involved in the Request for Proposal, including price if so stated in the Request for Proposal. Negotiations shall then be conducted with each of the offerors so selected. Price shall be considered, but need not be the sole or primary determining

factor. After negotiations have been conducted with each offeror so selected, the public body shall select the offeror which, in its opinion, has made the best proposal and provides the best value, and shall award the contract to that offeror. When the terms and conditions of multiple awards are so provided in the Request for Proposal, awards may be made to more than one offeror. Should the public body determine in writing and in its sole discretion that only one offeror is fully qualified, or that one offeror is clearly more highly qualified than the others under consideration, a contract may be negotiated and awarded to that offeror; or

4. For professional services, the public body shall engage in individual discussions with two or more offerors deemed fully qualified, responsible and suitable on the basis of initial responses and with emphasis on professional competence, to provide the required services. Repetitive informal interviews shall be permissible. The offerors shall be encouraged to elaborate on their qualifications and performance data or staff expertise pertinent to the proposed project, as well as alternative concepts. In addition, offerors shall be informed of any ranking criteria that will be used by the public body in addition to the review of the professional competence of the offeror. The Request for Proposal shall not, however, request that offerors furnish estimates of man-hours or cost for services. At the discussion stage, the public body may discuss nonbinding estimates of total project costs, including, but not limited to, life-cycle costing, and where appropriate, nonbinding estimates of price for services. In accordance with § 2.2-4342, proprietary information from competing offerors shall not be disclosed to the public or to competitors. At the conclusion of discussion, outlined in this subdivision, on the basis of evaluation factors published in the Request for Proposal and all information developed in the selection process to this point, the public body shall select in

the order of preference two or more offerors whose professional qualifications and proposed services are deemed most meritorious.

Negotiations shall then be conducted, beginning with the offeror ranked first. If a contract satisfactory and advantageous to the public body can be negotiated at a price considered fair and reasonable, the award shall be made to that offeror. Otherwise, negotiations with the offeror ranked first shall be formally terminated and negotiations conducted with the offeror ranked second, and so on until such a contract can be negotiated at a fair and reasonable price.

Notwithstanding the foregoing, if the terms and conditions for multiple awards are included in the Request for Proposal, a public body may award contracts to more than one offeror.

Should the public body determine in writing and in its sole discretion that only one offeror is fully qualified or that one offeror is clearly more highly qualified and suitable than the others under consideration, a contract may be negotiated and awarded to that offeror.

~~B. For multiple projects, a contract for architectural or professional engineering services relating to construction projects, or a contract for job order contracting, may be negotiated by a public body, provided (i) the projects require similar experience and expertise, (ii) the nature of the projects is clearly identified in the Request for Proposal, and (iii) the contract is limited to a one-year term or when the cumulative total project fees reach the maximum cost authorized in this subsection, whichever occurs first.~~

~~Such contracts may be renewable for four additional one-year terms at the option of the public body. The fair and reasonable prices as negotiated shall be used in determining the cost of each project performed and the sum of all~~

~~projects performed in a one-year contract term shall not exceed \$500,000, except that for:~~

~~1. A state agency, as defined in § 2.2-4347, the sum of all projects performed in a one-year contract term shall not exceed \$1 million as may be determined by the Director of the Department of General Services;~~

~~2. Any locality or any authority, sanitation district, metropolitan planning organization or planning district commission with a population in excess of 80,000, or any city within Planning District 8, the sum of all projects performed in a one-year contract term shall not exceed \$5 million and those awarded for any airport as defined in § 5.1-1 and aviation transportation projects, the sum of all such projects shall not exceed \$1.5 million;~~

~~3. Architectural and engineering services for rail and public transportation projects by the Director of the Department of Rail and Public Transportation, the sum of all projects in a one-year contract term shall not exceed \$2 million. Such contract may be renewable for two additional one-year terms at the option of the Director;~~

~~4. Environmental location, design and inspection work regarding highways and bridges by the Commissioner of Highways, the initial contract term shall be limited to two years or when the cumulative total project fees reach \$5 million, whichever occurs first. Such contract may be renewable for two additional one-year terms at the option of the Commissioner, and the sum of all projects in each one-year contract term shall not exceed \$5 million; and~~

~~5. Job order contracting, the sum of all projects performed in a one-year contract term shall not exceed \$2 million.~~

~~Competitive negotiations for such contracts may result in awards to more than one offeror provided (i) the Request for Proposal so states and (ii) the~~

~~public body has established procedures for distributing multiple projects among the selected contractors during the contract term.~~

~~C. For any single project, for (i) architectural or professional engineering services relating to construction projects, or (ii) job order contracting, the project fee shall not exceed \$100,000, or for architectural or engineering services for airports as defined in § 5.1-1 and aviation transportation projects, the project fee of any single project shall not exceed \$500,000, except that for:~~

~~1. A state agency as defined in § 2.2-4347, the project fee shall not exceed \$200,000, as may be determined by the Director of the Department of General Services;~~

~~2. Any locality or any authority or sanitation district with a population in excess of 80,000, or any city within Planning District 8, the project fee shall not exceed \$2 million; and~~

~~3. Job order contracting, the project fee shall not exceed \$400,000.~~

~~D. For the purposes of subsections B and C, any unused amounts from the first contract term shall not be carried forward to the additional term.~~

~~E.—~~Multiphase professional services contracts satisfactory and advantageous to the completion of large, phased, or ~~long term~~ long-term projects may be negotiated and awarded based on a fair and reasonable price for the first phase only, where the completion of the earlier phases is necessary to provide information critical to the negotiation of a fair and reasonable price for succeeding phases. Prior to ~~the~~ entering into any such contract, the public body shall (i) state the anticipated intended total scope of the project and (ii) determine in writing that the nature of the work is such that the best interests of the public body require awarding the contract.

§ 2.2-4303. Methods of procurement.

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

B. Professional services shall be procured by competitive negotiation.

C. Upon a determination made in advance by the public body and set forth in writing that competitive sealed bidding is either not practicable or not fiscally advantageous to the public, goods, services, or insurance may be procured by competitive negotiation. The writing shall document the basis for this determination.

Upon a written determination made in advance by (i) the Governor or his designee in the case of a procurement by the Commonwealth or by a department, agency or institution thereof or (ii) the local governing body in the case of a procurement by a political subdivision of the Commonwealth, that competitive negotiation is either not practicable or not fiscally advantageous, insurance may be procured through a licensed agent or broker selected in the manner provided for the procurement of things other than professional services set forth in § 2.2-4302.2. The basis for this determination shall be documented in writing.

D. Construction may be procured only by competitive sealed bidding, except that competitive negotiation may be used in the following instances upon a determination made in advance by the public body and set forth in writing that competitive sealed bidding is either not practicable or not fiscally advantageous to the public, which writing shall document the basis for this determination:

1. By the Commonwealth, its departments, agencies and institutions on a fixed price design-build basis or construction management basis under § 2.2-4306;

2. By any public body for the construction of highways and any draining, dredging, excavation, grading or similar work upon real property;

3. By any governing body of a locality with a population in excess of 100,000, provided that the locality has the personnel, procedures, and expertise to enter into a contract for construction on a fixed price or not-to-exceed price design-build or construction management basis and shall otherwise be in compliance with the provisions of this section, § 2.2-4308, and other applicable law governing design-build or construction management contracts for public bodies other than the Commonwealth. The procedures of the local governing body shall be consistent with the two-step competitive negotiation process established in § 2.2-4302.2; or

4. As otherwise provided in § 2.2-4308.

E. 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. The public body shall issue a written notice stating that only one source was determined to be practicably available, and identifying that which is being procured, the contractor selected, and the date on which the contract was or will be awarded. This notice shall be posted on the Department of General Services' central electronic procurement website or other appropriate websites, and in addition, public bodies may publish in a newspaper of general circulation on the day the public body awards or

announces its decision to award the contract, whichever occurs first. Posting on the Department of General Services' central electronic procurement website shall be required of any state public body. Local public bodies are encouraged to utilize the Department of General Services' central electronic procurement website to provide the public with centralized visibility and access to the Commonwealth's procurement opportunities.

F. In case of emergency, a contract may be awarded without competitive sealed bidding or competitive negotiation; however, such procurement shall be made with such competition as is practicable under the circumstances. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file. The public body shall issue a written notice stating that the contract is being awarded on an emergency basis, and identifying that which is being procured, the contractor selected, and the date on which the contract was or will be awarded. This notice shall be posted on the Department of General Services' central electronic procurement website or other appropriate websites, and in addition, public bodies may publish in a newspaper of general circulation on the day the public body awards or announces its decision to award the contract, whichever occurs first, or as soon thereafter as is practicable. Posting on the Department of General Services' central electronic procurement website shall be required of any state public body. Local public bodies are encouraged to utilize the Department of General Services' central electronic procurement website to provide the public with centralized visibility and access to the Commonwealth's procurement opportunities.

G. A public body may establish purchase procedures, if adopted in writing, not requiring competitive sealed bids or competitive negotiation for single or term contracts for (i) goods and services other than professional

services and (ii) construction, if the aggregate or the sum of all phases is not expected to exceed \$100,000; however, such small purchase procedures shall provide for competition wherever practicable. ~~For local public bodies, such~~ Such purchase procedures may allow for single or term contracts for professional services without requiring competitive negotiation, provided the aggregate or the sum of all phases is not expected to exceed \$60,000. Where small purchase procedures are adopted for construction, the procedures shall not waive compliance with the Uniform State Building Code.

For state public bodies, purchases under this subsection that are expected to exceed \$30,000 shall require the (i) written informal solicitation of a minimum of four bidders or offerors and (ii) posting of a public notice on the Department of General Services' central electronic procurement website or other appropriate websites. Posting on the Department of General Services' central electronic procurement website shall be required of any state public body. Local public bodies are encouraged to utilize the Department of General Services' central electronic procurement website to provide the public with centralized visibility and access to the Commonwealth's procurement opportunities.

~~H. A state public body may establish purchase procedures, if adopted in writing, not requiring competitive negotiation for single or term contracts for professional services if the aggregate or the sum of all phases is not expected to exceed \$50,000; however such small purchase procedures shall provide for competition wherever practicable.~~

~~†. Upon a determination made in advance by a public body and set forth in writing that the purchase of goods, products or commodities from a public auction sale is in the best interests of the public, such items may be purchased at the auction, including online public auctions. Purchase of information~~

technology and telecommunications goods and nonprofessional services from a public auction sale shall be permitted by any authority, department, agency, or institution of the Commonwealth if approved by the Chief Information Officer of the Commonwealth. The writing shall document the basis for this determination. However, bulk purchases of commodities used in road and highway construction and maintenance, and aggregates shall not be made by online public auctions.

~~§ 1.~~ The purchase of goods or nonprofessional services, but not construction or professional services, may be made by reverse auctioning. However, bulk purchases of commodities used in road and highway construction and maintenance, and aggregates shall not be made by reverse auctioning.

§ 2.2-4303.1. Architectural and professional engineering term contracting: limitations.

A. A contract for architectural or professional engineering services relating to multiple construction projects may be awarded by a public body, provided (i) the projects require similar experience and expertise, (ii) the nature of the projects is clearly identified in the Request for Proposal, and (iii) the contract is limited to a term of one year or when the cumulative total project fees reach the maximum authorized in this section, whichever occurs first.

Such contracts may be renewable for four additional one-year terms at the option of the public body. The fair and reasonable prices as negotiated shall be used in determining the cost of each project performed.

B. The sum of all projects performed in a one-year contract term shall not exceed \$500,000, except that for:

1. A state agency, as defined in § 2.2-4347, the sum of all projects performed in a one-year contract term shall not exceed \$1 million;

2. Any locality or any authority, sanitation district, metropolitan planning organization or planning district commission with a population in excess of 80,000, or any city within Planning District 8, the sum of all projects performed in a one-year contract term shall not exceed \$5 million and those awarded for any airport as defined in § 5.1-1 and aviation transportation projects, the sum of all such projects shall not exceed \$1.5 million;

3. Architectural and engineering services for rail and public transportation projects by the Director of the Department of Rail and Public Transportation, the sum of all projects in a one-year contract term shall not exceed \$2 million. Such contract may be renewable for two additional one-year terms at the option of the Director; and

4. Environmental location, design, and inspection work regarding highways and bridges by the Commissioner of Highways, the initial contract term shall be limited to two years or when the cumulative total project fees reach \$5 million, whichever occurs first. Such contract may be renewable for two additional one-year terms at the option of the Commissioner, and the sum of all projects in each one-year contract term shall not exceed \$5 million.

C. Competitive negotiations for such architectural or professional engineering services contracts may result in awards to more than one offeror, provided (i) the Request for Proposal so states and (ii) the public body has established procedures for distributing multiple projects among the selected contractors during the contract term. Such procedures shall prohibit requiring the selected contractors to compete for individual projects based on price.

D. The fee for any single project shall not exceed \$100,000; however, for architectural or engineering services for airports as defined in § 5.1-1 and

aviation transportation projects, the project fee of any single project shall not exceed \$500,000, except that for:

1. A state agency as defined in § 2.2-4347, the project fee shall not exceed \$200,000, as may be determined by the Director of the Department of General Services or as otherwise provided by the Restructured Higher Education Financial and Administrative Operations Act (§ 23-38.88 et seq.); and

2. Any locality or any authority or sanitation district with a population in excess of 80,000, or any city within Planning District 8, the project fee shall not exceed \$2 million.

The limitations imposed upon single-project fees pursuant to this subsection shall not apply to environmental, location, design, and inspection work regarding highways and bridges by the Commissioner of Highways or architectural and engineering services for rail and public transportation projects by the Director of the Department of Rail and Public Transportation.

E. For the purposes of subsection B, any unused amounts from one contract term shall not be carried forward to any additional term, except as otherwise provided by the Restructured Higher Education Financial and Administrative Operations Act (§ 23-38.88 et seq.).

§ 2.2-4303.2. Job order contracting; limitations.

A. A job order contract may be awarded by a public body for multiple jobs, provided (i) the jobs require similar experience and expertise, (ii) the nature of the jobs is clearly identified in the solicitation, and (iii) the contract is limited to a term of one year or when the cumulative total project fees reach the maximum authorized in this section, whichever occurs first. Contractors may be selected through either competitive sealed bidding or competitive negotiation.

B. Such contracts may be renewable for two additional one-year terms at the option of the public body. The fair and reasonable prices as negotiated shall be used in determining the cost of each job performed, and the sum of all jobs performed in a one-year contract term shall not exceed \$5 million. Individual job orders shall not exceed \$500,000.

C. For the purposes of this section, any unused amounts from one contract term shall not be carried forward to any additional term.

D. Order splitting with the intent of keeping a job order under the maximum dollar amounts prescribed in subsection B is prohibited.

E. No public body shall procure architectural or engineering services through a job order contract.

F. Job order contracting shall not be used for construction, maintenance, or asset management services for a highway, bridge, tunnel, or overpass.

§ 2.2-4304. Joint and cooperative procurement.

A. Any public body may participate in, sponsor, conduct, or administer a cooperative joint procurement agreement ~~on behalf of or~~ in conjunction with one or more other public bodies, or public agencies or institutions or localities of the several states, of the United States or its territories, the District of Columbia, or the U.S. General Services Administration, for the purpose of combining requirements to increase efficiency or reduce administrative expenses in any acquisition of goods ~~and~~ services, or construction.

~~A-B.~~ In addition, a public body may purchase from another public body's contract even if it did not participate in the request for proposal or invitation to bid, if the request for proposal or invitation to bid specified that the procurement was a cooperative procurement being conducted on behalf of

other public bodies, except for:

1. Contracts for architectural or engineering services; or

2. ~~Construction in excess of \$200,000 by a local public body from the contract of another local public body that is more than a straight line distance of 75 miles from the territorial limits of the local public body procuring the construction. The installation of artificial turf or other athletic surfaces shall not be subject to the limitations prescribed in this subdivision. Nothing in this subdivision shall be construed to prohibit sole source or emergency procurements awarded pursuant to subsections E and F of § 2.2-4303.~~

In instances where any authority, department, agency, or institution of the Commonwealth desires to purchase information technology and telecommunications goods and services from another public body's contract and the procurement was conducted on behalf of other public bodies, such purchase shall be permitted if approved by the Chief Information Officer of the Commonwealth. Any public body that enters into a cooperative procurement agreement with a county, city, or town whose governing body has adopted alternative policies and procedures pursuant to subdivisions A 9 and A 10 of § 2.2-4343 shall comply with the alternative policies and procedures adopted by the governing body of such county, city, or town.

~~B.~~ C. Subject to the provisions of §§ 2.2-1110, 2.2-1111, 2.2-1120 and 2.2-2012, any authority, department, agency, or institution of the Commonwealth may participate in, sponsor, conduct, or administer a cooperative joint procurement arrangement ~~on behalf of or~~ in conjunction with public bodies, private health or educational institutions or with public agencies or institutions of the several states, territories of the United States, or the District of Columbia, for the purpose of combining requirements to effect cost

savings or reduce administrative expense in any acquisition of goods and services, other than professional services, and construction.

A public body may purchase from any authority, department, agency or institution of the Commonwealth's contract even if it did not participate in the request for proposal or invitation to bid, if the request for proposal or invitation to bid specified that the procurement was a cooperative procurement being conducted on behalf of other public bodies. In such instances, deviation from the procurement procedures set forth in this chapter and the administrative policies and procedures established to implement this chapter shall be permitted, if approved by the Director of the Division of Purchases and Supply.

Pursuant to § 2.2-2012, such approval is not required if the procurement arrangement is for telecommunications and information technology goods and services of every description. In instances where the procurement arrangement is for telecommunications and information technology goods and services, such arrangement shall be permitted if approved by the Chief Information Officer of the Commonwealth. However, such acquisitions shall be procured competitively.

Nothing herein shall prohibit the payment by direct or indirect means of any administrative fee that will allow for participation in any such arrangement.

~~E. D.~~ As authorized by the United States Congress and consistent with applicable federal regulations, and provided the terms of the contract permit such purchases:

1. Any authority, department, agency, or institution of the Commonwealth may purchase goods and nonprofessional services, other than telecommunications and information technology, from a U.S. General Services Administration contract or a contract awarded by any other agency of the U.S.

government, upon approval of the director of the Division of Purchases and Supply of the Department of General Services;

2. Any authority, department, agency, or institution of the Commonwealth may purchase telecommunications and information technology goods and nonprofessional services from a U.S. General Services Administration contract or a contract awarded by any other agency of the U.S. government, upon approval of the Chief Information Officer of the Commonwealth; and

3. Any county, city, town, or school board may purchase goods and nonprofessional services from a U.S. General Services Administration contract or a contract awarded by any other agency of the U.S. government.

§ 2.2-4343. Exemption from operation of chapter for certain transactions.

A. The provisions of this chapter shall not apply to:

1. The Virginia Port Authority in the exercise of any of its powers in accordance with Chapter 10 (§ 62.1-128 et seq.) of Title 62.1, provided the Authority implements, by policy or regulation adopted by the Board of Commissioners, procedures to ensure fairness and competitiveness in the procurement of goods and services and in the administration of its capital outlay program. This exemption shall be applicable only so long as such policies and procedures meeting the requirements remain in effect.

2. The Virginia Retirement System for selection of services related to the management, purchase or sale of authorized investments, actuarial services, and disability determination services. Selection of these services shall be governed by the standard set forth in § 51.1-124.30.

3. The State Treasurer in the selection of investment management services related to the external management of funds shall be governed by the standard set forth in § 2.2-4514, and shall be subject to competitive guidelines

and policies that are set by the Commonwealth Treasury Board and approved by the Department of General Services.

4. The Department of Social Services or local departments of social services for the acquisition of motor vehicles for sale or transfer to Temporary Assistance to Needy Families (TANF) recipients.

5. The College of William and Mary in Virginia, Virginia Commonwealth University, the University of Virginia, and Virginia Polytechnic Institute and State University in the selection of services related to the management and investment of their endowment funds, endowment income, gifts, all other nongeneral fund reserves and balances, or local funds of or held by the College or Universities pursuant to § 23-44.1, 23-50.10:01, 23-76.1, or 23-122.1. However, selection of these services shall be governed by the Uniform Prudent Management of Institutional Funds Act (§ 64.2-1100 et seq.) as required by §§ 23-44.1, 23-50.10:01, 23-76.1, and 23-122.1.

6. The Board of the Virginia College Savings Plan for the selection of services related to the operation and administration of the Plan, including, but not limited to, contracts or agreements for the management, purchase, or sale of authorized investments or actuarial, record keeping, or consulting services. However, such selection shall be governed by the standard set forth in § 23-38.80.

7. Public institutions of higher education for the purchase of items for resale at retail bookstores and similar retail outlets operated by such institutions. However, such purchase procedures shall provide for competition where practicable.

8. The purchase of goods and services by agencies of the legislative branch that may be specifically exempted therefrom by the Chairman of the Committee on Rules of either the House of Delegates or the Senate. Nor shall

the contract review provisions of § 2.2-2011 apply to such procurements. The exemption shall be in writing and kept on file with the agency's disbursement records.

9. Any town with a population of less than 3,500, except as stipulated in the provisions of §§ 2.2-4305, 2.2-4308, 2.2-4311, 2.2-4315, 2.2-4330, 2.2-4333 through 2.2-4338, 2.2-4343.1, and 2.2-4367 through 2.2-4377.

10. Any county, city or town whose governing body has adopted, by ordinance or resolution, alternative policies and procedures which are (i) based on competitive principles and (ii) generally applicable to procurement of goods and services by such governing body and its agencies, except as stipulated in subdivision 12.

This exemption shall be applicable only so long as such policies and procedures, or other policies and procedures meeting the requirements of § 2.2-4300, remain in effect in such county, city or town. Such policies and standards may provide for incentive contracting that offers a contractor whose bid is accepted the opportunity to share in any cost savings realized by the locality when project costs are reduced by such contractor, without affecting project quality, during construction of the project. The fee, if any, charged by the project engineer or architect for determining such cost savings shall be paid as a separate cost and shall not be calculated as part of any cost savings.

11. Any school division whose school board has adopted, by policy or regulation, alternative policies and procedures that are (i) based on competitive principles and (ii) generally applicable to procurement of goods and services by the school board, except as stipulated in subdivision 12.

This exemption shall be applicable only so long as such policies and procedures, or other policies or procedures meeting the requirements of § 2.2-4300, remain in effect in such school division. This provision shall not exempt

any school division from any centralized purchasing ordinance duly adopted by a local governing body.

12. Notwithstanding the exemptions set forth in subdivisions 9 through 11, the provisions of subsections C and D of § 2.2-4303, and §§ 2.2-4305, 2.2-4308, 2.2-4311, 2.2-4315, 2.2-4317, 2.2-4330, 2.2-4333 through 2.2-4338, 2.2-4343.1, and 2.2-4367 through 2.2-4377 shall apply to all counties, cities and school divisions, and to all towns having a population greater than 3,500 in the Commonwealth.

The method for procurement of professional services through competitive negotiation set forth in subsection B of ~~§ 2.2-4302.2~~ 2.2-4303.1 shall also apply to all counties, cities and school divisions, and to all towns having a population greater than 3,500, where the cost of the professional service is expected to exceed \$60,000 in the aggregate or for the sum of all phases of a contract or project. A school board that makes purchases through its public school foundation or purchases educational technology through its educational technology foundation, either as may be established pursuant to § 22.1-212.2:2 shall be exempt from the provisions of this chapter, except, relative to such purchases, the school board shall comply with the provisions of §§ 2.2-4311 and 2.2-4367 through 2.2-4377.

13. A public body that is also a utility operator may purchase services through or participate in contracts awarded by one or more utility operators that are not public bodies for utility marking services as required by the Underground Utility Damage Prevention Act (§ 56-265.14 et seq.). A purchase of services under this subdivision may deviate from the procurement procedures set forth in this chapter upon a determination made in advance by the public body and set forth in writing that competitive sealed bidding is

either not practicable or not fiscally advantageous to the public, and the contract is awarded based on competitive principles.

14. Procurement of any construction or planning and design services for construction by a Virginia nonprofit corporation or organization not otherwise specifically exempted when (i) the planning, design or construction is funded by state appropriations of \$10,000 or less or (ii) the Virginia nonprofit corporation or organization is obligated to conform to procurement procedures that are established by federal statutes or regulations, whether those federal procedures are in conformance with the provisions of this chapter.

15. Purchases, exchanges, gifts or sales by the Citizens' Advisory Council on Furnishing and Interpreting the Executive Mansion.

16. The Eastern Virginia Medical School in the selection of services related to the management and investment of its endowment and other institutional funds. The selection of these services shall, however, be governed by the Uniform Prudent Management of Institutional Funds Act (§ 64.2-1100 et seq.).

17. The Department of Corrections in the selection of pre-release and post-incarceration services.

18. The University of Virginia Medical Center to the extent provided by subdivision B 3 of § 23-77.4.

19. The purchase of goods and services by a local governing body or any authority, board, department, instrumentality, institution, agency or other unit of state government when such purchases are made under a remedial plan established by the Governor pursuant to subsection C of § 2.2-4310 or by a chief administrative officer of a county, city or town pursuant to § 15.2-965.1.

20. The contract by community services boards or behavioral health authorities with an administrator or management body pursuant to a joint agreement authorized by § 37.2-512 or 37.2-615.

21. [Expired].

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

§ 23-38.110. Procurement; discrimination prohibited; participation of small, women-owned, and minority-owned business enterprises.

A. Subject to the express provisions of the management agreement described in § 23-38.88, covered institutions may be exempt from the provisions of the Virginia Public Procurement Act (§ 2.2-4300 et seq.), except for § 2.2-4342 (which section shall not be construed to require compliance with the prequalification application procedures of subsection B of § 2.2-4317);¹ provided, however, that any deviations from the Virginia Public Procurement Act approved in a Management Agreement shall be uniform across all covered institutions; and provided further that the governing body of a covered institution shall adopt, and the covered institution shall comply with, policies for the procurement of goods and services, including professional services, that

shall be based upon competitive principles and shall in each instance seek competition to the maximum practical degree. The policies shall implement a system of competitive negotiation for professional services pursuant to subsections ~~A, B, and E of § 2.2-4302.2, § 2.2-4303.1;~~ shall prohibit discrimination because of race, religion, color, sex or national origin of the bidder or offeror in the solicitation or award of contracts; shall incorporate the prompt payment principles of §§ 2.2-4350 and 2.2-4354; and shall consider the impact on correctional enterprises under § 53.1-47.

B. Such policies may, among other things, (i) provide for consideration of the dollar amount of the intended procurement, the term of the anticipated contract, and the likely extent of competition; (ii) implement a prequalification procedure for contractors or products; and (iii) include provisions for cooperative arrangements with other covered institutions, other public or private educational institutions, other public or private organizations or entities, including public-private partnerships, public bodies, charitable organizations, health care provider alliances or purchasing organizations or entities, state agencies or institutions of the Commonwealth or the several states, the District of Columbia, the territories and the United States, and any combination thereof. Nothing in this section shall preclude a covered institution from requesting and utilizing, and covered institutions are hereby encouraged to utilize, the assistance of the Virginia Information Technologies Agency in information technology procurements.

C. In the solicitation and awarding of contracts, no covered institution shall discriminate against a bidder or offeror because of race, religion, color, sex, national origin, age, disability, or any other basis prohibited by state or federal law. The procurement policies of a covered institution shall provide that, whenever solicitations are made seeking competitive procurement of

goods or services, it shall be a priority of the institution to provide for fair and reasonable consideration of small, women-owned, and minority-owned businesses and to promote and encourage a diversity of suppliers. The institution shall post on the Department of General Services' central electronic procurement website all Invitations to Bid, Requests for Proposal, sole source award notices, and emergency award notices to ensure visibility and access to the Commonwealth's procurement opportunities on one website.

D. As part of any procurement provisions of a management agreement, the governing board of a covered institution shall identify the public, educational, and operational interests served by any procurement rule or rules that deviate from those in the Virginia Public Procurement Act.

§ 33.2-283. Powers and duties of the Director of the Department of Rail and Public Transportation.

Except such powers as are conferred by law upon the Board, or such services as are performed by the Department of Transportation pursuant to law, the Director of the Department of Rail and Public Transportation shall have the power to do all acts necessary or convenient for establishing, maintaining, improving, and promoting public transportation, transportation demand management, ridesharing, and passenger and freight rail transportation in the Commonwealth and to procure architectural and engineering services for rail and public transportation projects as specified in ~~§ 2.2-4302.2~~ 2.2-4303.1.

2. That by October 1, 2017, the Department of Small Business and Supplier Diversity, public institutions of higher education having level 2 or 3 authority under the Restructured Higher Education Financial and Administrative Operations Act of 2005 (§ 23-38.88 et seq. of the Code of Virginia), state agencies utilizing job order contracting, and the Virginia Association of Counties, the Virginia Municipal League, and the Virginia

Association of Governmental Purchasing on behalf of local public bodies working cooperatively shall report their respective experiences and findings relating to the appropriateness and effectiveness of (i) job order contracting in general, (ii) the project cost limitations set forth in subsections B and C of § 2.2-4303.1, as added by this act, and (iii) the architectural and professional engineering term contract limits set forth in § 2.2-4303.1, as added by this act, to the Chairmen of the House Committee on General Laws and the Senate Committee on General Laws and Technology.

3. That the provisions of this act shall not apply to any solicitation issued or contract awarded before July 1, 2015, except that the provisions of subsection B of § 2.2-4303.2, as added by this act, shall apply to any renewal of a job order contract.

#

2. Bill Summary:

Virginia Public Procurement Act; use of competitive sealed bidding or competitive negotiation for the procurement of goods, certain services, and insurance. Removes the requirement that a determination be made in advance by a public body and set forth in writing that competitive sealed bidding is either not practicable or not fiscally advantageous to the public, in order for goods, services, or insurance to be procured by competitive negotiation.

Bill Text:

A BILL to amend and reenact § 2.2-4303 of the Code of Virginia, relating to the Virginia Public Procurement Act; use of competitive sealed bidding or

competitive negotiation for the procurement of goods, certain services, and insurance.

Be it enacted by the General Assembly of Virginia:

1. That § 2.2-4303 of the Code of Virginia is amended and reenacted as follows:

§ 2.2-4303. Methods of procurement.

A. All public contracts with nongovernmental contractors for the purchase or lease of goods, or for the purchase of services, insurance, or construction, shall be awarded after competitive sealed bidding⁷ or competitive negotiation as provided in this section, unless otherwise authorized by law.

B. Professional services shall be procured by competitive negotiation.

~~C. Upon a determination made in advance by the public body and set forth in writing that competitive sealed bidding is either not practicable or not fiscally advantageous to the public, goods, services, or insurance may be procured by competitive negotiation. The writing shall document the basis for this determination.~~

Upon a written determination made in advance by (i) the Governor or his designee in the case of a procurement by the Commonwealth or by a department, agency or institution thereof or (ii) the local governing body in the case of a procurement by a political subdivision of the Commonwealth, that competitive negotiation is either not practicable or not fiscally advantageous, insurance may be procured through a licensed agent or broker selected in the manner provided for the procurement of things other than professional services set forth in § 2.2-4302.2. The basis for this determination shall be documented in writing.

D. Construction may be procured only by competitive sealed bidding, except that competitive negotiation may be used in the following instances upon a determination made in advance by the public body and set forth in writing that competitive sealed bidding is either not practicable or not fiscally advantageous to the public, which writing shall document the basis for this determination:

1. By the Commonwealth, its departments, agencies and institutions on a fixed price design-build basis or construction management basis under § 2.2-4306;

2. By any public body for the construction of highways and any draining, dredging, excavation, grading or similar work upon real property;

3. By any governing body of a locality with a population in excess of 100,000, provided that the locality has the personnel, procedures, and expertise to enter into a contract for construction on a fixed price or not-to-exceed price design-build or construction management basis and shall otherwise be in compliance with the provisions of this section, § 2.2-4308, and other applicable law governing design-build or construction management contracts for public bodies other than the Commonwealth. The procedures of the local governing body shall be consistent with the two-step competitive negotiation process established in § 2.2-4302.2; or

4. As otherwise provided in § 2.2-4308.

E. 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. The public body shall issue a written notice stating that only

one source was determined to be practicably available, and identifying that which is being procured, the contractor selected, and the date on which the contract was or will be awarded. This notice shall be posted on the Department of General Services' central electronic procurement website or other appropriate websites, and in addition, public bodies may publish in a newspaper of general circulation on the day the public body awards or announces its decision to award the contract, whichever occurs first. Posting on the Department of General Services' central electronic procurement website shall be required of any state public body. Local public bodies are encouraged to utilize the Department of General Services' central electronic procurement website to provide the public with centralized visibility and access to the Commonwealth's procurement opportunities.

F. In case of emergency, a contract may be awarded without competitive sealed bidding or competitive negotiation; however, such procurement shall be made with such competition as is practicable under the circumstances. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file. The public body shall issue a written notice stating that the contract is being awarded on an emergency basis, and identifying that which is being procured, the contractor selected, and the date on which the contract was or will be awarded. This notice shall be posted on the Department of General Services' central electronic procurement website or other appropriate websites, and in addition, public bodies may publish in a newspaper of general circulation on the day the public body awards or announces its decision to award the contract, whichever occurs first, or as soon thereafter as is practicable. Posting on the Department of General Services' central electronic procurement website shall be required of any state public body. Local public bodies are encouraged to utilize the

Department of General Services' central electronic procurement website to provide the public with centralized visibility and access to the Commonwealth's procurement opportunities.

G. A public body may establish purchase procedures, if adopted in writing, not requiring competitive sealed bids or competitive negotiation for single or term contracts for goods and services other than professional services if the aggregate or the sum of all phases is not expected to exceed \$100,000; however, such small purchase procedures shall provide for competition wherever practicable. For local public bodies, such purchase procedures may allow for single or term contracts for professional services without requiring competitive negotiation, provided the aggregate or the sum of all phases is not expected to exceed \$60,000.

For state public bodies, purchases under this subsection that are expected to exceed \$30,000 shall require the (i) written informal solicitation of a minimum of four bidders or offerors and (ii) posting of a public notice on the Department of General Services' central electronic procurement website or other appropriate websites. Posting on the Department of General Services' central electronic procurement website shall be required of any state public body. Local public bodies are encouraged to utilize the Department of General Services' central electronic procurement website to provide the public with centralized visibility and access to the Commonwealth's procurement opportunities.

H. A state public body may establish purchase procedures, if adopted in writing, not requiring competitive negotiation for single or term contracts for professional services if the aggregate or the sum of all phases is not expected to exceed \$50,000; however such small purchase procedures shall provide for

competition wherever practicable.

I. Upon a determination made in advance by a public body and set forth in writing that the purchase of goods, products or commodities from a public auction sale is in the best interests of the public, such items may be purchased at the auction, including online public auctions. Purchase of information technology and telecommunications goods and nonprofessional services from a public auction sale shall be permitted by any authority, department, agency, or institution of the Commonwealth if approved by the Chief Information Officer of the Commonwealth. The writing shall document the basis for this determination. However, bulk purchases of commodities used in road and highway construction and maintenance, and aggregates shall not be made by online public auctions.

J. The purchase of goods or nonprofessional services, but not construction or professional services, may be made by reverse auctioning. However, bulk purchases of commodities used in road and highway construction and maintenance, and aggregates shall not be made by reverse auctioning.

APPENDIX B

WORK GROUP NO. 1 MEMBERSHIP

(Construction and professional services for architecture, land surveying, landscape architecture and professional engineering)

Higher Education

1. Annette Cyphers, Director of Facilities Planning and Construction, University of Virginia (LEVEL 3)
2. Bert Jones, Associate Vice Chancellor for Facilities Management Services, VCCS (LEVEL 2)

State Entities

3. Rich Sliwoski, Director, Department of General Services (or designee)
4. Steve Owens, Senior Assistant Attorney General
5. Ida McPherson, Director, Department of Small Business and Supplier Diversity, *(Replaced by Tracey Jeter, Director)*

Local Government

6. Gary Mitchell, Director of Planning and Community Development (Town of Colonial Beach)
7. Uwe Weindel, P. E., Director (Frederick County Sanitation Authority)
8. Elizabeth Dooley, Assistant Purchasing Agent (Arlington County; VAGP)
9. Anthony Arnold, P. E., Director of Facilities Planning and Construction (VA Beach Public Schools)
10. Cecelia Stowe, Purchasing Director (Henrico County)

Vendor Community

11. Thomas Julian, Jr., P.E., (Centennial Contractors Enterprises, Inc.)
12. Chris Lloyd (McGuire Woods Consulting)
13. William H. Hefty, Esq. (Hefty & Wiley PC)
14. Steve Vermillion, CEO (Associated General Contractors of Virginia)
15. Hunter Merrill, 2nd Vice President (Virginia Association of Roofing Professionals)
16. Chris Stone, P.E., President of Clark Nexen Architectural & Engineering

17. Reginald M. Jones, Esq. (Williams Mullen) *(Replaced by Patrick Cushing, Williams Mullen)*
18. Bernice Travers, President, Travers Corporation.
19. Lee Brazzell, President & CEO of Transformation Consulting LLC
20. Jeff Southard, Executive Vice President, Virginia Transportation Construction Alliance

APPENDIX C

WORK GROUP NO. 1--SCOPE OF WORK

2014

	GENERAL ISSUE CATEGORY	SOURCE	COMMENT
1.	Applicability/Exemptions <i>Subcategory: Method of procurement</i>	VITA	Put competitive negotiation on equal footing with competitive sealed bidding.
2.	Applicability/Exemptions <i>Subcategory: Nature of public body</i>	Level 3 Higher Ed. (University of Virginia)	Maintain current procurement and capital outlay authority provided to Level 3 Public Institutions of Higher Education.
3.	Applicability/Exemptions <i>Subcategory: Method of procurement</i>	Large Locality (Fairfax Co.)	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>

	GENERAL ISSUE CATEGORY	SOURCE	COMMENT
4.	Applicability/Exemptions <i>Subcategory: Readability/Internal consistency</i>	Large Locality (Fairfax Co.)	Review the cumulative effect of changes over several sessions. As a whole, these changes have adversely affected readability and created conflicting provisions.
5.	Applicability/Exemptions <i>Subcategory: Nature of public body</i>	Small Locality (Gloucester Co.)	Review use of population thresholds associated with application of the VPPA.
6.	Applicability/Exemptions <i>Subcategory: Readability</i>	Small Locality (Gloucester Co.)	Variety of exceptions and exemptions to the Act make it difficult to read, follow, and interpret.
7.	Applicability/Exemptions <i>Subcategory: Method of procurement</i>	Design Professionals (VSAIA, ACEC)	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.

	GENERAL ISSUE CATEGORY	SOURCE	COMMENT
8.	Applicability/Exemptions <i>Subcategory: Method of procurement</i>	Design Professionals (VSAIA, ACEC)	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.
9.	Applicability/Exemptions <i>Subcategory: Method of procurement</i>	Design Professionals (VSAIA, ACEC)	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. <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>
10.	Applicability/Exemptions <i>Subcategory: Definitions</i>	Dan Cook, <i>(The Gordian Group)</i>	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.

	GENERAL ISSUE CATEGORY	SOURCE	COMMENT
11.	Applicability/Exemptions <i>Subcategory: Readability</i>	Dan Cook, <i>(The Gordian Group)</i>	The VPPA is unclear regarding whether performance and payment bonds are required for JOC contracts; this should be clarified.
12.	Applicability/Exemptions <i>Subcategory: Method of procurement</i>	Tonya Matthews <i>(TMG Constr. Co.)</i>	Instead of the \$2 million hard cap on JOC programs consider a cap connected to the percentage of the public body's total portfolio.
13.	Applicability/Exemptions <i>Subcategory: Method of procurement</i>	Tonya Matthews <i>(TMG Constr. Co.)</i>	Requiring a public body to adopt JOC contracting procedures prior to allowing such contracts or exempting a public body that has adopted such procedures. <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>

	GENERAL ISSUE CATEGORY	SOURCE	COMMENT
14.	Applicability/Exemptions <i>Subcategory: Goods, services , construction</i>	Michael O'Neill, Sr. <i>(Centennial Contr. Enterprises, Inc.)</i>	The limit for JOC programs should be increased from \$2 million to at least \$5 million.
15.	Applicability/Exemptions <i>Subcategory: Method of procurement</i>	Michael O'Neill, Sr. <i>(Centennial Contr. Enterprises, Inc.)</i>	<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>
16.	Applicability/Exemptions <i>Subcategory: Method of procurement</i>	Michael Filipowicz <i>(HITT Contracting)</i>	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.

	GENERAL ISSUE CATEGORY	SOURCE	COMMENT
17.	Applicability/Exemptions <i>Subcategory: Method of procurement</i>	Hershel Keller <i>(Petty, Livingston & Richards, P.C.)</i>	Should require competitive sealed bidding if the project is expected to be less than \$10 million.
18.	Applicability/Exemptions <i>Subcategory: Method of procurement</i>	Hershel Keller <i>(Petty, Livingston & Richards, P.C.)</i>	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.
19.	Applicability/Exemptions <i>Subcategory: Goods, services , construction</i>	Hershel Keller <i>(Petty, Livingston & Richards, P.C.)</i>	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.
20.	Applicability/Exemptions <i>Subcategory: Method of procurement</i>	Jack Dyer <i>Gulfseaboard Constr.</i>	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.

	GENERAL ISSUE CATEGORY	SOURCE	COMMENT
21.	Applicability/Exemptions <i>Subcategory: Method of procurement</i>	Bill Lindsey <i>(VA Association of Governmental Purchasing-VAGP)</i>	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.
22.	Applicability/Exemptions <i>Subcategory: Definitions</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>
23.	Enforcement/Oversight	DGS	No consequences for violations.
24.	Enforcement/Oversight	DGS	No central procurement oversight, thus making achievement of enterprise cost savings and efficiencies difficult.
25.	Enforcement/Oversight	Hershel Keller <i>(Petty, Livingston & Richards, P.C.)</i>	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
26.	Enforcement/Oversight	Steve Vermillion <i>(Associated General Contractors of VA)</i>	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.
27.	Enforcement/Oversight	Steve Vermillion <i>(Associated General Contractors of VA)</i>	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.
28.	Enforcement/Oversight	Steve Vermillion <i>(Associated General Contractors of VA)</i>	Require a public body to provide a written justification for using construction management or construction manager at risk in lieu of competitive sealed bidding.
29.	Enforcement/Oversight	Steve Vermillion <i>(Associated General Contractors of VA)</i>	All projects should be publicly advertised in eVA and in major newspapers and be open for qualifications through the RFQ process to all interested firms. Advertisements should include a description of the delivery method and process for qualification and technical evaluation of firms.

	GENERAL ISSUE CATEGORY	SOURCE	COMMENT
30.	Enforcement/Oversight	Steve Vermillion <i>(Associated General Contractors of VA)</i>	Establish and advertise requirements for a minimum standard to qualify through the RFQ process. All firms that meet the minimum standard will be considered as qualified for the project and may submit a price/fee proposal.
31.	Enforcement/Oversight	Steve Vermillion <i>(Associated General Contractors of VA)</i>	In evaluating proposals public bodies should give critical consideration to the low price/fee submitted from a qualified contractor.
32.	Enforcement/Oversight	Steve Vermillion <i>(Associated General Contractors of VA)</i>	Construction management at risk is most effective when the contractor is brought on board at the earliest possible time but no later than completion of the schematic drawings.
33.	Enforcement/Oversight	Design Professionals <i>(VSAIA, ACEC)</i>	Lack of an enforcement mechanism to address violations or divergence 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.

	GENERAL ISSUE CATEGORY	SOURCE	COMMENT
34.	Enforcement/Oversight	Design Professionals (VSAIA, ACEC)	Ensure that public bodies receiving proposals under the PPEA and PPTA have appropriately skilled personnel to guarantee a good selection process.
35.	Vendor Eligibility <i>Subcategories: Preferences, Qualification to contract</i>	Large Locality (Fairfax Co.)	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>
36.	Vendor Eligibility <i>Subcategory: Qualification to contract</i>	Small Locality (Gloucester Co.)	Avoid legislative actions that seek to make the procurement function a regulatory program. <i>(Example: SCC registration and E-Verify requirements)</i>

	GENERAL ISSUE CATEGORY	SOURCE	COMMENT
37.	Vendor Eligibility	Wanda Edwards <i>(Coalition for Procurement Reform)</i>	The design professional or contractor on a project should not have any connection with the manufacturer of the materials for the same project.
38.	Vendor Eligibility <i>Subcategory: SWaM</i>	DGS	Small business set-aside preference should be examined for improvement.
39.	Technology/Business Practice Outdated	Large Locality <i>(Fairfax Co.)</i>	Adapt the VPPA to current technology and business practices. Consider using changes made to the Model Procurement Code as a guide.

	BILLS REFERRED FROM 2014 GENERAL ASSEMBLY	-----	BILLS REFERRED FROM 2014 GENERAL ASSEMBLY
	GENERAL ISSUE CATEGORY	SOURCE	COMMENT
40.	Vendor Eligibility <i>Subcategory: SWaM</i>	HB 223 Dance	Virginia Public Procurement Act; establishment of historically underutilized business zones (HUB zones). Requires the Department of General Services and the Virginia Information Technologies Agency to develop procurement regulations for the utilization of small businesses located in historically underutilized business zones (HUB zones). The bill also authorizes public bodies to establish programs to facilitate the participation of small businesses in HUB zones. Such programs must be in writing and comply with any enhancement or remedial measures authorized by the Governor in the case of state agencies or the chief executive of a local governing body in the case of local agencies.

	GENERAL ISSUE CATEGORY	SOURCE	COMMENT
41.	Cooperative Procurement	HB 289 Albo	Virginia Public Procurement Act; cooperative procurement. Eliminates the limitation for cooperative procurement for construction in excess of \$200,000 by a local public body from the contract of another local public body that is more than a straight line distance of 75 miles from the territorial limits of the local public body procuring the construction.
42.	Applicability/Exemptions <i>Subcategory: Method of Procurement</i>	HB 290 Albo	Virginia Public Procurement Act; competitive negotiation; job order contracting. Makes technical changes to the provisions of the Virginia Public Procurement Act related to job order contracting.
43.	Applicability/Exemptions <i>Subcategory: Nature/Identity of public body</i>	HB 421 Minchew	Virginia Public Procurement Act; competitive negotiation; term contracts for certain architectural and engineering services. Increases the term contract limits for architectural and engineering services from \$1 million to \$2.5 million per project for state agencies and from \$5 million \$10 million per term.

	GENERAL ISSUE CATEGORY	SOURCE	COMMENT
44.	Applicability/Exemptions <i>Subcategory: Nature/Identity of public body</i>	HB 549 Filler-Corn	Virginia Public Procurement Act; transportation construction services. Provides that for the award of transportation construction projects, certain specified factors other than price may be considered.
45.	Vendor Eligibility <i>Subcategory: qualification to contract</i>	HB 769 Hugo	Virginia Public Procurement Act; project labor agreements by certain state agencies. Provides, under certain conditions, that when engaged in procuring products or services or letting contracts for construction, manufacture, maintenance, or operation of any project paid for in whole or in part by state funds, or when overseeing or administering such procurement, neither the Commonwealth Transportation Board nor any state transportation agency nor any construction manager acting on behalf of such entities shall, in their bid specifications, project agreements, or other controlling documents, provide an incentive in the scoring of such bids that favors entities entering into project labor agreements. The bill sets out exceptions to this requirement.

	GENERAL ISSUE CATEGORY	SOURCE	COMMENT
46.	Vendor Eligibility <i>Subcategory: SWaM</i>	HB 797 Lopez	Department of Small Business and Supplier Diversity; definition of small business. Changes the definition of small business to require the business to have 250 or fewer employees and average annual gross receipts of \$10 million or less averaged over the previous three years. Currently, a small business is required to meet one or the other of these conditions.

	GENERAL ISSUE CATEGORY	SOURCE	COMMENT
47.	Vendor Eligibility <i>Subcategory: SWaM</i>	HB 1223 Yancey	Virginia Public Procurement Act; small, women, and minority-owned businesses. Defines "historically Black colleges and universities" and provides that the term "minority-owned business" includes historically Black colleges and universities, regardless of the percentage ownership by minority individuals or, in the case of a corporation, partnership, or limited liability company or other entity, the equity ownership interest in the corporation, partnership, or limited liability company or other entity. The bill also requires that programs to facilitate the participation of small businesses and all businesses owned by women, minorities, or service disabled veterans in procurement transactions include a provision for fair and equitable evaluations and opportunities for small businesses and all businesses owned by women, minorities, or service disabled veterans

	GENERAL ISSUE CATEGORY	SOURCE	COMMENT
48.	Enforcement/Oversight	HB 1159 Rasoul	<p>COIA: Political contributions; prohibitions during procurement process. Includes the mayor or chief executive officer of a locality, school superintendent, and any member of a local governing body, planning commission, or school board in the current prohibition against knowingly soliciting or accepting a contribution, gift, or other item with a value greater than \$50 from any bidder, offeror, or private entity who has submitted a bid or proposal pursuant to the Virginia Public Procurement Act, the Public-Private Transportation Act, or the Public-Private Education Facilities and Infrastructure Act during the bidding period. The restrictions only apply if the stated or expected value of the contract is \$5 million or more and do not apply to contracts awarded as the result of competitive sealed bidding. Furthermore, no bidder, offeror, or private entity who has submitted a bid or proposal under such acts shall offer or promise to make such a gift to the mayor or chief executive officer of a locality, school superintendent, or any member of a local governing body, planning commission, or school board. Any violation shall be subject to a civil penalty of \$500 or up to two times the amount of the contribution or gift, whichever is greater.</p>

	GENERAL ISSUE CATEGORY	SOURCE	COMMENT
49.	Vendor Eligibility <i>Subcategory: SWaM</i>	HB 1194/SB 632 James/Lucas	Department of Small Business and Supplier Diversity; establishment of minority-owned and women-owned state purchasing program. Provides for the Department of Small Business and Supplier Diversity, in conjunction with the Department of General Services, the Virginia Information Technologies Agency, and the Department of Transportation, to develop a program establishing a requirement that at least 15 percent of all state purchases be made from minority-owned or women-owned businesses that are also certified as small businesses.

	GENERAL ISSUE CATEGORY	SOURCE	COMMENT
50.	Enforcement/Oversight	HB 1208 Albo	<p>Virginia Public Procurement Act; consideration of early payment discounts. Prohibits the consideration of discounts for early payment of invoices offered by any bidder in the determination of the lowest priced bid on any contract awarded using competitive sealed bidding. The bill also provides that no bidder shall be required to offer discounts for early payment of invoices as a condition of any Invitation to Bid, and no bidder shall be declared nonresponsive for failure to offer a discount for early payment of invoices. With respect to competitive negotiation, the bill provides that any offer submitted in response to a Request for Proposal may contain offers for discounts for the early payment of invoices by public bodies; but that, if offered, such discounts shall not be considered in the selection of qualified offerors or in the evaluation of prices submitted by any such offeror. Finally, the bill provides that discounts for prompt payment shall not be considered in the evaluation or made a condition of offers or bids by any state agency or local public body. However, any offered discount may form a part of the award and shall be taken if payment is made within the discount period indicated in the offer or bid by the offeror or bidder. As an alternative to offering a prompt payment discount in conjunction with the offer or bid, offerors or bidders who are awarded contracts may include prompt payment discounts on individual invoices. In connection with any discount offered for prompt payment, time shall be computed from the date of the submission of the invoice by the contractor or supplier.</p>

	GENERAL ISSUE CATEGORY	SOURCE	COMMENT
51.	Application/Exemptions <i>Subcategory: Method of procurement</i>	HB 1238 Gilbert	Virginia Public Procurement Act; disclosure of cost estimates in solicitations prohibited. Provides that no Invitation to Bid or Request for Proposal shall contain the public body's cost estimate for that which is sought to be procured.
52.	Application/Exemptions <i>Subcategory: Nature/Identity of public body 1</i>	SB 174 Black	Virginia Public Procurement Act; competitive negotiation; term contracts for certain architectural and engineering services. Increases the term contract limits for architectural and engineering services to \$2.5 million per project for state agencies and \$10 million per term. Currently, these limits are \$1 million and \$5 million, respectively.

	GENERAL ISSUE CATEGORY	SOURCE	COMMENT
53.	Vendor Eligibility <i>Subcategory: SWaM</i>	SB 616 Alexander	Department of Small Business and Supplier Diversity; creation of Department of Minority Business Enterprise and the Department of Business Assistance. Eliminates the Department of Small Business and Supplier Diversity and re-creates the Department of Minority Business Enterprise and the Department of Business Assistance as those two departments existed prior to January 1, 2014. As such, the bill reassigns the former powers and duties of the Department of Small Business and Supplier Diversity to the Department of Minority Business Enterprise and the Department of Business Assistance. The bill contains numerous technical amendments.

	GENERAL ISSUE CATEGORY	SOURCE	COMMENT
54.	Application/Exemptions <i>Subcategory: Method of procurement</i>	SB 645 McEachin	Virginia Public Procurement Act; transportation construction services. Provides that for the award of transportation construction projects, certain specified factors other than price may be considered. The bill also provides that construction may be procured using either competitive sealed bidding or competitive negotiation and requires the public body to set forth in writing that the method selected is practicable or fiscally advantageous to the public. In addition, the bill establishes instances where the determination of the public body is presumed to be appropriate. Under current law, construction may only be procured by competitive bidding except under certain circumstances.

GENERAL ISSUE CATEGORIES AND SUBCATEGORIES:

APPLICABILITY/EXEMPTIONS

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

VENDOR ELIGIBILITY

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

COOPERATIVE PROCUREMENT

ENFORCEMENT/OVERSIGHT

TECHNOLOGY/BUSINESS PRACTICE OUTDATED

APPENDIX D

Work Group No. 1: Construction and Design Professionals Meeting Summaries and Consensus Draft Recommendation

May 8, 2014 Meeting Summary House Room 1, The Capitol, Richmond

Members present: Anthony Arnold, P.E., Lee Brazzell, Angela Chiang (for Ida McPherson), Patrick Cushing, Esq. (for Reginald M. Jones, Esq.), Annette Cyphers, Elizabeth Dooley, William H. Hefty, Esq., Bert Jones, Thomas Julian, Jr., P.E., Chris Lloyd, Esq., Hunter Merrill, Gary Mitchell, Steve Owens, Rich Sliwoski, Chris Stone, P.E., Cecelia Stowe, Steve Vermillion, and Uwe Wiendal, P.E.

Members absent: Bernice Travers, Jeff Southard.

Maria Everett, Senior Attorney, Division of Legislative Services, began the meeting by reviewing the status of the work group under the Virginia Freedom of Information Act (FOIA). The work group is a public body under FOIA and provisions regarding meetings and records generated by the by the group are applicable. Amigo Wade, Senior Attorney, Division of Legislative Services provided an overview of the activities of the Special General Laws Joint Subcommittee during the 2013 interim and reviewed the work group's study plan. A total of four additional meetings have been scheduled:

Thursday, June 19, 2014 9:30 a.m., House Room 1, The Capitol Richmond, Virginia	Wednesday, September 17, 2014 9:30 a.m., House Room 1, The Capitol Richmond, Virginia
Wednesday, July 23, 2014 9:30 a.m., House Room 1, The Capitol Richmond, Virginia	Wednesday, October 15, 2014 9:30 a.m., House Room 1, The Capitol Richmond, Virginia

Mr. Wade noted that the goal over the course of the meetings is to seek consensus on as many issues as possible. Any issues or matters upon which consensus cannot be reached will be referred to the Special General Laws Joint Subcommittee for final resolution.

Each member of the work group then made brief introductory remarks including a statement of the issues of greatest importance to their community of interest and the goals the member wishes to achieve. Dominant themes included establishing best practices; ensuring a level playing field for small, minority-owned, and women-owned businesses; and resolution of issues related to the method of procurement, job order contracting, and cooperative procurement.

The work group then reviewed the Scope of Work document (SOW) to determine which issues were manageable or where consensus could be reached relatively easily.¹² Staff offered issues related to (i) job order contracting limits (SOW Items 10 through 16, 21, and 42), (ii) technical revisions to the term contract provisions of the Virginia Public Procurement Act (SOW Items 7, 42, and 52), and (iii) suggestions to prevent the passage of legislation that conflicted with the intent of the VPPA (SOW Items 3 and 35). There was agreement that these three issue groupings were manageable.

The work group also reached consensus that the following issues were worthy of further discussion as manageable or where consensus could be reached relatively easily: (i) cooperative procurement (SOW Item 41), including whether construction should be authorized and how the method interacts with job order contracting; (ii) appropriate use of the small purchase contracting provision to procure construction; and (iii) reviewing options or increased oversight and enforcement, including the feasibility of establishing an entity to hear appeals (SOW Items 23 and 33).

Public Comment

The work group next received public comment

Mark Flynn, General Counsel, Virginia Municipal League

¹² The SOW consists of the issues matrix compiled by staff in the first year of study and the legislation referred to the Special Joint Subcommittee from the 2014 Session of the General Assembly

Mr. Flynn stated that it would be improper to assume that if a public body purchases off of a cooperative contract that it will pay more. The definition of construction in the VPPA is very broad and cooperative contracting may include activities that are within that definition.

Matthew D. Benka, Coalition for Procurement Reform.

Mr. Benka stated that the Coalition for Procurement Reform does not support the inclusion of construction under cooperative contracting.

June 16, 2014 Meeting Summary

Members present: Anthony Arnold, P.E., Patrick Cushing, Esq. (for Reginald M. Jones, Esq.), Annette Cyphers, Elizabeth Dooley, William H. Hefty, Esq., Bert Jones, Thomas Julian, Jr., P.E., Ida McPherson, Hunter Merrill, Steve Owens, Rich Sliwoski, Chris Stone, P.E., Cecelia Stowe, Steve Vermillion, and Uwe Wiendal, P.E.

Members absent: Lee Brazzell, Chris Lloyd, Esq., and Gary Mitchell.

Work Group No. 1 of the Special General Laws Joint Subcommittee Studying the Virginia Public Procurement Act (VPPA) met Monday, June 16, 2014, at 9:30 a.m. in House Room 1 at the Capitol, Richmond. After a brief recap of the items from the May 8, 2014, meeting, the work group members proceeded to review three discussion drafts prepared by staff.

I. Job Order Contracting Discussion Draft

Initial discussion focus on the definition of "job order contracting" (JOC) included in the discussion draft prepared by staff and disseminated to members of the work group prior to the meeting. Patrick Cushing, Williams Mullen, noted that the term "construction services," as used in the JOC definition, is itself not defined under the Virginia Public Procurement Act (VPPA) and recommended striking the word "services" on lines 39 and 196 of the draft. Steve Owens, Senior Assistant Attorney General, added that there is a need to clarify whether "construction" as currently defined in the VPPA includes services. Cecelia Stowe, Purchasing Director for Henrico County, noted that a

definition for "construction" may be used by the Department of Professional and Occupational Regulation, which licenses contractors. Bert Jones, Associate Vice Chancellor for Facilities Management Services, Virginia Community College System, stated that JOC was essentially a small design-build contract rather than a design-bid-build contract, citing that JOC agreements are reached using a Request for Proposal and not an Invitation for Bid. Ms. Stowe stated that the public body may not know, and often does not know, in advance whether or to what extent a JOC will involve architectural or engineering services. She suggested including language providing that any subsequent architectural or engineering services be limited to a certain percentage of the total project cost. Chris Stone, President, Clark Nexen Architectural & Engineering, agreed that "services" should be removed from the term "construction services" and suggested further that the language be tightened to specifically exclude architectural and design services.

Ida McPherson, Director, Department of Small Business and Supplier Diversity, asserted that overuse of JOC may lower the number of contracts available for small businesses. Richard Sliwoski, Director, Department of General Services, stated that in his experience large contractors depended upon local subcontractors to fulfill obligations under a JOC agreement. Thomas Julian, Jr., Centennial Contractors Enterprises, Inc., added that over 90 percent of the JOC work taken by his company is subcontracted to small businesses.

The discussion then moved to limitations on the use of JOC contracting. The discussion draft provided that JOC agreements would be limited to a one-year term that would be renewable for four additional one-year terms at the option of the public body. The draft also included a \$400,000 limit for any single task order under a JOC agreement and a limitation on the sum of all projects performed in a one-year contract term to \$2 million.

Mr. Sliwoski stated there is a need to have different limits for state and local entities. He recommended changing the single task order limit to \$500,000 to mirror VPPA provisions for other term contracts. He further offered that there should be either no overall limit on JOC contracts during a contract term or allow unused limits during a given contract term to roll over to subsequent contract terms. Elizabeth Dooley, Assistant Purchasing Agent, Arlington County, stated that there should be no limitations for localities or state entities. She asserted that such limits would be arbitrary and hard to

apply and that each locality had different business needs. Jeff Southard, Executive Vice President, Virginia Transportation Construction Alliance, and Hunter Merrill, Virginia Association of Roofing Professionals, maintained that there should be some monetary caps. Mr. Merrill further noted that JOC should be used only for smaller projects.

Steve Vermillion, Chief Executive Officer, Associated General Contractors of Virginia, expressed concern that JOC without limits would take a large number of construction projects off of the open market making the opportunities unavailable to a wider number of contractors. He suggested caps provided in the way that the VPPA provides caps for other types of term contracts with larger localities having higher limits. Mr. Owens suggested that it would be better to have the limit focus on the type of projects rather than on spending caps. Annette Cyphers, Director of Facilities Planning and Construction, University of Virginia, stated that prohibiting the use of JOC for new capital construction projects may be a feasible option. Mr. Stone asserted that a cap would be better and suggested a cap of between \$3 million and \$5 million. Mr. Sliwoski added that any cap should be per agency and not per contract. Mr. Jones offered a cap of \$20 million with the suggestion that the current limitations for term contracts contained in the VPPA be reviewed to determine the value of the limitations and whether any adjustment is needed. Mr. Stone added that any revision to the discussion draft should prohibit the use of JOC for professional services or for new capital construction projects.

Jeff Gore, Hefty & Wiley PC, recommended that the work group first tighten the definition of JOC contracting and then focus on whether limits are necessary and, if so, at what level the limits should be set. Mr. Merrill continued to assert that there is a need to include overall dollar limitations as well as limitations for localities based on population. Uwe Wiendal, Director of the Frederick County Sanitation Authority, maintained that the draft should follow the model for design services already included in the VPPA. He suggested that the limits be revisited and adjusted to more accurately reflect the reality of current construction costs.

When asked generally what may be acceptable to localities that opposed placing any limits on the use of JOC, Ms. Dooley replied that there may be support for (i) limiting JOC for maintenance and smaller construction projects, (ii) prohibiting JOC for new capital construction projects, and (iii) placing limits

on architectural and engineering services based on the equivalent for a total project. Ms. Stowe stated that the key will be in the definitions, including the definitions of "capital project," "renovation," and "repairs." Mr. Gore observed that by definition a JOC is limited to one year and that essentially a JOC is a term contract. He asserted that the work group should consider asking contractors what limits they are able to work with. Mr. Cushing added that in his view part of the problem is that JOC does not require competitive negotiation. Mr. Julian noted that a \$2 million cap does not allow for public body to perform enough construction or renovation to achieve any benefit. He recommended looking at a \$4 million to \$5 million cap and allowing the cap to go up on an annual basis.

At this point the work group decided to receive public comment on the JOC discussion draft.

Phil Abraham, Old Dominion Highway Contractors Association

Mr. Abraham stated that competitive sealed bidding should continue to be required for highway maintenance and assessment management administered by the Virginia Department of Transportation. He noted that the Public-Private Transportation Act of 1995 requires that procurements for maintenance or asset management services for a transportation facility as defined by the Act, must be procured using competitive sealed bidding.

Andrew Sinclair, Virginia Association of Governmental Purchasing

Mr. Sinclair stated that JOC is in fact a competitive process and that competitive sealed bidding should be left as an option for the public body. He further asserted that the references to architectural and engineering services were a red herring. He stated that JOC should not be used for procuring architectural and engineering services or for new construction.

C. Scott Shufflebarger, Hertless Brothers Roofing, (Coalition for Procurement Reform)

Mr. Shufflebarger stated that JOC should be limited to repair and maintenance projects and should not be used for capital improvements. A better definition is needed to more clearly define the projects for which the method may be used. Some dollar limits are necessary to prevent abuse, and each agency should be required to have its own JOC agreement. He further stated that the

use of JOC going forward would benefit from the establishment of a reporting mechanism to develop a record of how the method was being used.

II. Term Contract Discussion Draft

The work group then moved to review the term contract discussion draft. The goal of the draft was to remove the term contract provisions from the definitions section without making substantive language changes. Mr. Cushing noted that multiphase contracts are not term contracts and therefore should not be included with the term contract language moved to the new section proposed by the discussion draft. He recommended that the language stricken on lines 105 through 111 of the discussion draft be unstricken and remain in § 2.2-4302.2, which describes the process used to procure professional services that are multiphase in nature. The consensus of the work group was to accept the recommendation.

The work group opened the floor to receive public comment on the term contract discussion draft. No comments were offered.

III. Cooperative Procurement Discussion Draft

Staff then presented the cooperative procurement discussion draft. The draft prohibits the use of cooperative procurement to procure contracts for architectural and engineering services and construction.

Mr. Sliwoski stated that JOC should be exempted from the prohibition. Mr. Jones added that in his view there should be no restrictions on the use of cooperative procurement. Mr. Owens noted that cooperative contracts can be large and that an entity could conceivably buy all of its procurements using a cooperative contract. Mr. Sliwoski stated that while DGS is the only public body authorized to have statewide contracts, in reality multiple cooperative procurement contracts are available to state and local entities. He further noted that state agencies and localities may share the use of cooperative procurement among themselves.

Mr. Vermillion stated that cooperative procurement should not be used for construction at all. Ms. Stowe recommended limiting the prohibition to new capital construction rather than all construction. Mr. Owens asserted that the definitions of "construction" and "public body" should also be reviewed.

Ms. McPherson stated that cooperative procurement should also be limited in other areas. She recommended that Department of Small Business and Supplier Diversity approval of all cooperative procurement contracts be required.

The work group then received public comment on the cooperative procurement discussion draft.

C. Scott Shufflebarger, Hertless Brothers Roofing, (Coalition for Procurement Reform)

Mr. Shufflebarger stated that cooperative procurement should not be used for construction. He also noted that reporting on the use of cooperative procurement should be emphasized going forward.

Reginald M. Jones, Williams Mullen

Mr. Jones asserted that there has always been a natural tension between the ease of procurement and fairness to the vendor community. There is a duty to ensure that there is fairness in procurement, and it is not fair to contractors when they are not given a reasonable opportunity to compete for such contracts. He stated that cooperative procurement should not overemphasize ease of procurement at the expense of fairness to potential vendors.

Sharon Lewis, Purchasing Manager, City of Roanoke

Ms. Lewis stated that her office is bombarded by cooperative contract brokers and that there is a need to scale down the use of procurement method. She also noted that some cooperative procurement contracts are governed by the laws of jurisdiction where the contract was initially procured and may contain provisions that are not appropriate for Virginia localities and other public bodies.

IV. Work Group Actions

At the conclusion of the review of the three discussion drafts, staff suggested the following as a plan for going forward:

1) The JOC discussion draft will be revised in consideration of the comments made by work group members. As a part of the redrafting process, work group members and interested parties should provide suggestions and/or proposed language for a definition of "JOC" and for the limits or tiering of limits regarding the use of JOC. The revised discussion draft will be reviewed at the next meeting of the work group scheduled for July 23, 2014.

2) Work group members and interested parties should provide suggestions for revisions to definitions of "construction," "public body," "and capital project."

3) All suggestions and proposals should be submitted by 5:00 p.m. on July 3, 2014.

By consensus the work group agreed with the staff suggestions.

V. Special General Laws Joint Subcommittee meeting

Staff informed the work group members that the Special General Laws Joint Subcommittee Studying the Virginia Public Procurement Act will meet at 2:00 p.m. on Monday, July 14, 2014, in House Room C of the General Assembly Building for the purpose of reviewing the legislation referred from the 2014 Session.

July 23, 2014 Meeting Summary

Members present: Lee Brazzell, Patrick Cushing, Esq. (for Reginald M. Jones, Esq.), Annette Cyphers, Joe Damico (for Rich Sliwoski) Elizabeth Dooley, Ed Gillikin (for Bert Jones), William H. Hefty, Esq., Thomas Julian, Jr., P.E., Chris Lloyd, Esq., Ida McPherson, Hunter Merrill, Steve Owens, Jeff Southard, Chris Stone, P.E., Steve Vermillion, and Uwe Wiendal, P.E.

Members absent: Anthony Arnold, P.E., Gary Mitchell, Cecelia Stowe, and Bernice Travers.

Work Group No. 1 of the Special General Laws Joint Subcommittee Studying the Virginia Public Procurement Act (VPPA) held its third meeting of the 2014 interim on Monday, June 16, 2014, at 9:30 a.m. in House Room 1 at

the Capitol, Richmond. After opening the meeting, Richard Sliwoski, Director, Department of General Services, asked to make a brief statement before leaving for another meeting. He stated that Construction Management at Risk as a delivery method is being used improperly. Entities are in some cases paying more for the overall contract but not explaining why they are paying more. He added that procurement of architectural and engineering services (A/E) should be qualification-driven. The award of an A/E contracts based on price is not fair to vendors and against the stated intent that the procurement of such services be qualification-driven rather than price-driven.

The work group members then proceeded to review revised discussion drafts prepared by staff. After the June 19 work group meeting, members and interested parties were given the opportunity to submit comments and suggested amendments for consideration. The revised discussion drafts incorporated the suggestions that were submitted.

I. Term Contracts for Architectural and Engineering Services - Revised Discussion Draft

The initial objective of the draft was to remove the A/E term contract provisions from the definitions section without making substantive language changes. During the June 16 meeting, it was noted that multiphase contracts were not term contracts and therefore should not be included with the term contract language moved to the new section proposed by the discussion draft. The revised discussion draft accomplished this change.

Chris Stone, P. E., President, Clark Nexsen Architectural & Engineering, suggested that the language on page 2, line 45 of the draft be changed to take out what appeared to be a requirement for the submission of nonbinding estimates at the initial stage of consideration. William H. Hefty, Esq., Hefty & Wiley PC, stated that he thought the language should stay because it has been in place for a long time and has worked well. Elizabeth Dooley, Assistant Purchasing Agent, Arlington County, also stated that she would like to keep the language as currently written noting that it was consistent with language included in the Model Procurement Act. She asserted that price is a consideration but not the driving factor and therefore the public entity should have the information as a part of its overall consideration. Patrick Cushing, Williams Mullen, expressed support for the change suggested by Mr. Stone. Steve Owens, Senior Assistant Attorney General, stated that discussion of fees

typically occurred after the selection of fully qualified offerors. Ms. Dooley asserted that the process allows for the public body to ask for nonbinding estimates in order to take schedule into consideration. Mr. Stone asserted that at that point the offeror was merely throwing out a figure because the project was not defined to the point that an accurate figure could be provided and that it was not appropriate to use such estimates. It was simply too early to discuss price. Uwe Wiendal, P. E., Director, Frederick County Sanitation Authority, added that architects and engineers have different viewpoints of attacking a project, which must also be considered during the selection process.

Mr. Hefty stated that the language was a compromise wherein the purchasing entity would not ask for price upfront, but could do so when the vendor was short-listed. Ms. Dooley asserted that this process is the best practice used across the nation. Ida McPherson, Director, Department of Small Business and Supplier Diversity (SBSD), supported rewording the passage to make it clear that nonbinding estimates could not be required upfront. She maintained that considering price in any form at that stage would encourage an offeror to low-ball the initial estimate in order to get to the short list, and then adjust the price later. Maria Everett, Senior Attorney, Division of Legislative Services, suggested that staff develop language for clarifying when price may be considered for review at the next meeting. She added that the work group will also take a look at the current contract and project price limits for possible revision.

II. Cooperative Procurement - Revised Discussion Draft

Ms. Everett presented the draft by noting that the suggestion allow the purchase of insurance by cooperative procurement be referred of Work Group No. 2. The draft contained several options submitted by work group members and interested parties and Ms. Everett proceeded to walk through the suggestions with the work group. One suggestion submitted by Tray Adams, Esq., representing the Gordian Group, provided for new capital construction to be excluded from cooperative procurement and included a definition of "new capital construction." Annette Cyphers, Director of Facilities Planning and Construction, University of Virginia, stated that major renovations are still a capital construction project. Another suggested version would remove all construction from cooperative procurement. Another suggested direction of the draft would remove maintenance and repair services from cooperative procurement. Steve Vermillion, CEO, Associated General Contractors of

Virginia, supported the suggested changes asserting that when cooperative procurement began it was geared more towards commodities and things and construction is not a commodity or a thing. He further asserted that construction should not be cooperatively procured and that it was bad for small businesses. Lee Brazzell, President and CEO of Transformation Consulting LLC, Jeff Southard, Executive Vice President, Virginia Transportation Construction Alliance, Hunter Merrill, Virginia Association of Roofing Professionals, and Mr. Cushing also expressed support for removing construction altogether from cooperative procurement.

A version of the redraft provided by Herschel Keller, a non-work group member, would remove maintenance and repair services from cooperative procurement. The version included a definition of maintenance to consist of work that did not require the issuance of a building permit or a Department of General Services annual permit. Chris Lloyd, McGuire Woods Consulting, expressed concern that whether a specific job required the issuance of a building permit varied and may cause confusion. Mr. Hefty and Ed Gillikin, Virginia Community College System (VCCS) agreed. Mr. Wiendal asserted that this was especially the case when it came to utility projects.

Ms. McPherson maintained that the issue is whether maintenance or construction should be cooperatively procured and she asserted that they should not. Ms. Dooley stated that while the use of cooperative procurement in general may have gotten out of control, there were still instances where cooperative procurement was necessary. She offered the example of the cooperation that is needed when the District of Columbia, Arlington, Fairfax other entities have to ensure that equipment, such as radio towers, are capable of interoperability. Removing construction from cooperative procurement altogether would eliminate a tool for localities that have to make sure that systems were interoperable among jurisdictions. Mr. Hefty explained that there were two types of procurement going on under the code provision. One type involves when a public body conducts or administers a cooperative procurement agreement on behalf or in conjunction with another public body. This is the type of procurement that is contemplated by the first paragraph of Subsection A beginning at line 6. It includes some involvement by the public body at the time that the Request for Proposals (RFP) or Invitation to Bid (ITB) is issued. The second type of procurement is when a public body purchases from another public body's contract even though it did not participate in the RFP or

ITB. This possibility is contemplated by the second paragraph of subsection A beginning on line 12. The result is that it allows one public body to "piggyback" on to another public body's contract. It is this situation that is the source of the problems when it comes to construction.

Joe Damico, Deputy Director, Department of General Services (DGS) stated that a number of state agencies do not have the ability to do a construction projects so they look to DGS for assistance. This is not the same situation as when DGS uses its authority to establish state contracts, which is limited to its Division of Purchasing and Supply. Ms. McPherson asserted that cooperative procurement should not be used for construction or goods and services and further that DGS's ability to procure on behalf of state agencies should not be located in be located in the cooperative procurement section. Mr. Wiendal stated that under the proposed definitions the type of work that is done by water and sewer authorities would be adversely affected. Such entities, he asserted, are often comprised of two or three members and they do not have the ability in every case to administer a full bid process. In addition, because of the nature of some of the work, such as repairing manhole covers, water and sewer authorities could not perform the work under the first paragraph of Subsection A because of issues related to timing. Therefore, maintained Mr. Wiendal, if construction was removed from cooperative procurement, then maintenance work must be allowed under the provision. Mr. Hefty stated that some of the problem is connected to the definition of construction being so broad. He suggested not changing the definition but rather include provisions for a subset of construction that will be allowed. Ms. Everett suggested the consideration of an exception for water and sewer authorities. Mr. Gilliken added that the VCCS uses a VASCUP contract to purchase lab equipment and that lights construction may be involved. Mr. Merrill asserted that such procurements should be put on eVA to be bid out.

Mr. Stone recommended allowing construction up to \$200,000. Mr. Wiendal suggested a limit of \$300,000 and leaving prohibiting cooperative procurement for new construction. Mr. Merrill objected stating that he thought the discussion was leading to the elimination of construction from cooperative procurement rather than establishing a list of exceptions and conditions allowing for its use for construction. Ms. Cyphers maintained that cooperative procurement has been successful for small projects. Mr. Damico added that if a public body does the proper research before endeavoring to bid a cooperative

procurement, including a review of potential contractors and taking on the responsibility of looking at what other public bodies need, then the use of cooperative procurement should be acceptable. The key is for the public body to perform the requisite research regarding the availability of contractors and the need on the part of other potential public bodies. Citing that the parties were not that far apart, Mr. Hefty suggested that staff draft something encompassing the concepts that had been discussed. He further suggested that (i) the definition of construction not be changed, (ii) cooperatives procurement generally not be allowed to procure construction, and (iii) allow for cooperative procurement to be used for some limited situations or circumstances or entities.

III. Job Order Contracting - Revised Discussion Draft

The work group then moved to review the Job Order Contracting (JOC) draft. Mr. Southard maintained that highway maintenance and asset should be excluded from JOC. He noted that the Virginia Department of Transportation (VDOT) used a prequalification process and that other provisions in the Code of Virginia required such contracts to be procured by competitive sealed bidding. The exclusion could be accomplished by including a reference to the definition of "highway" found in title 33.2 of the Code of Virginia.

Mr. Owens stated that JOC should include provision for some incidental A/E services if such services came up in the context of an installation project. He further suggested that any new construction should be explicitly excluded from JOC. Ms. McPherson agreed the any A/E services should be limited to incidental work. Mr. Cushing indicated that he would oppose any what appeared to be a new category of services. He asserted that to A/E services were required to be procured by competitive negotiation and JOC allows the public body to use either method of procurement. Using JOC could end up allow A/E services to be procured by competitive bidding. Mr. Gilliken suggested tying any A/E work required by a JOC agreement to an existing A/E term contract. He asserted that the premise behind JOC was to provide a quick and nimble delivery method. Mr. Stone indicated his support this approach. Thomas Julian, Jr., P.E., Centennial Contractors Enterprises, Inc., stated that very little A/E work is done during on a typical JOC project. He asserted that tying the incidental work to an existing A/E term contract would be problematic because then you would have and architect or engineer who is tied to an owner and not the contractor. Mr. Hefty asked if it was possible to provide that JOC

allow incidental A/E services only if the services are provided by the JOC contractor. Mr. Cushing replied that there is still a problem with using "incidental." He suggested establishing a threshold of \$50,000. Mr. Owens countered that he thought a \$50,000 cap to be high and suggested alternatively that a cap be linked to the percentage of a total project. Ms. McPherson added that that consideration must be made for the how any changes to JOC provisions related to the Governor's new Executive Order on state procurement from small businesses.

Discussion then moved to other parts of the draft. Mr. Hefty asserted that JOC should be used for small projects and not capital projects. This could be addressed through limits. He indicated his preference for the approach taken by the JOC definition offered by DGS beginning on line 58 of the draft. Mr. Stone stated that it must be remembered that JOC requires a book of values. A book of values is conducive for maintenance and repairs but cannot work for new construction. Ms. Dooley suggested that the work group should continue to discuss monetary limits and then, if needed, move to carve outs. Mr. Gilliken asked what type of new construction would be excluded under the proposed definitions. Ms. Dooley suggested small projects such as a new small park including the installation of benches and landscaping.

Regarding the single task order limitation of \$500,000, Ms. Dooley stated that while the amount is fine, the current cap for A/E contracts is set at \$1 million. Mr. Vermillion indicated that the single task order be limited to \$400,000. Mr. Damico stated that the DGS wanted a single task limit of \$500,000 and a total amount of \$50 million. He added that a different total cap should be provided for larger localities. Ms. McPherson stated that any contemplated solution had to include language making the state's small, women-owned and minority-owned business participation requirements applicable. Mr. Vermillion added that a \$50 million total cap would not allow smaller vendors to participate. Mr. Julian indicated that eighty percent of the work under JOC agreements with which his company is involved is given to small businesses that are also local to where the work is being done. Mr. Hefty suggested \$50 million for DGS, \$10 million for localities with a population of 200,000 or more, which would be the 13 largest localities in the state. Mr. Owens maintained that \$5 million total cap suggested by some versions of the draft is very low. Ms. Dooley noted that the law was put into effect without consideration as to how it would affect public bodies. Regarding the term of

the JOC agreements, Mr. Stone suggested a one year initial contract term that is renewable for two additional terms rather than five. He further suggested that the single task amount be limited to \$500,000 and the total cap amount remain at \$5 million without a tiering structure. Mr. Stone asserted that the real fear on the part of some in the contracting community is of bad actors improperly using JOC to do large projects in a piecemeal manner. Ms. Dooley indicated support for the language prohibiting project splitting beginning on line 430, which could help to prevent such improper uses of JOC. Mr. Merrill asserted that there is just not enough data to support changing the limits that became effective on July 1, 2014 and he urged the work group to wait and see how the limits work out. Ms. Dooley replied that some public bodies were already having problems with the limitations and the new law had been effective for only a few weeks.

It was determined by consensus that staff would draft alternative approaches to address the thresholds. The first alternative will include (i) a single task limit of \$500,000, (ii) a total cap of \$5 million, (iii) one year contract terms that may renewed twice, and (iv) language prohibiting project splitting, and (v) a provisions for DGS, SBSD, the Virginia Municipal League and the Virginia Association of Counties to report by December 1 on the use of JOC by state and local entities. The second alternative will leave the current limits in place, and include the language prohibiting project splitting and the reporting requirement.

Public Comment

The work group then received public comment on the cooperative procurement discussion draft.

Herschel V. Keller, Esq. Petty, Livingston, Dawson & Richards, P.C.

Mr. Keller stressed the need to establish an effective and meaningful enforcement mechanism as a means of reaching easier compromise on other more specific issues. He suggested that all discussions should be tabled until the issues related to establishing meaningful enforcement and oversight mechanisms are resolved.

Phillip Abraham, Old Dominion Highway Contractors Association

Mr. Abraham stated that procurements for maintenance or asset management services that are administered by VDOT are unique and are required to be procured by competitive sealed bidding. He supported the position of Mr. Southard regarding the cooperative procurement and JOC discussion drafts regarding the excluding such procurements.

Jeff Gore, Hefty & Wiley, P.C.

Mr. Gore noted that Loudoun County has had success using JOC for HVAC maintenance and small construction projects, such as utility sheds. He stated that the county reaches out to small contractors to make sure that they get some of the work and that typically about fourteen contractors are involved. He maintained that JOC works well for large localities and suggested a higher limit for localities with a population of 200,000 or more. He offered to provide information on Loudoun County's JOC agreements.

September 17, 2014 Meeting Summary

Members present: Anthony Arnold, P.E., Patrick Cushing, Esq. (for Reginald M. Jones, Esq.), Annette Cyphers, Elizabeth Dooley, Mike Halvorson (for Thomas Julian, Jr., P.E.), William H. Hefty, Esq., Tracey Jeter, Bert Jones, Chris Lloyd, Esq., Hunter Merrill, Steve Owens, Richard Sliwoski, Jeff Southard, Chris Stone, P.E., Cecelia Stowe, Steve Vermillion, and Uwe Weindel, P.E.

Members absent: Lee Brazzell, Gary Mitchell, and Bernice Travers.

Work Group No. 1 of the General Laws Special Joint Subcommittee Studying the Virginia Public Procurement Act (VPPA) held its fourth meeting of the 2014 interim on Wednesday, September 17, at 9:30 a.m. in House Room 1 at the Capitol. The meeting began with a review of the actions taken by the General Laws Special Joint Subcommittee on legislation referred by the 2014 session of the General Assembly and a progress report on the activities and consensus items of Work Group No. 2. After overview and progress report, Julie Whitlock of the Department of General Services (DGS) presented a package of changes sponsored by the. The package, hereinafter referred to as the omnibus draft, includes consensus language as well as suggested provisions to

move the work group towards more final consensus in the areas of architectural and engineering services (A/E) term contracts, job order contracting (JOC), and cooperative procurement. Ms. Whitlock provided a brief overview of the changes as follows:

A/E term contracts

- Prohibit price-shopping among A/E contractors on term contracts
- Preserve current A/E term limits

JOC

- Increase JOC limits from \$2 million per term to \$5 million per term
- Increase JOC limits per project from \$400,000 to \$500,000
- Decrease the number of renewable one-year terms for JOC from four additional terms to two additional terms
- Allow ancillary A/E services up to \$60,000 per order on JOC projects

Cooperative Procurement:

- Make no changes to joint purchasing authority
- Continue with the prohibition against allowing the purchase of A/E services under a cooperative procurement contract where the public body was not involved with the initial contract ("piggybacking")
- Expand the prohibition against construction piggybacking to all contracts

In addition, Ms. Whitlock noted that the draft included miscellaneous provisions (i) clarifying that small purchase procedures may be used for construction, provided the Uniform Statewide Building Code is followed, and (ii) raising the limit on the state's ability to procure A/E services non-competitively from \$50,000 to \$60,000 to match the current limit for localities.

After presentation of the package, work group members provided comments. Jeff Southward, Executive Vice President, Virginia Transportation Construction Alliance, asserted that the omnibus draft did not include the exemption for certain transportation projects from JOC or the removal of all construction from cooperative procurement, both of which he believed consensus had been reached. It was agreed that the exemption for transportation projects was a consensus item. Chris Lloyd, McGuire Woods Consulting, asked if the joint procurement provision under cooperative procurement also applied to localities. Rich Sliwoski, Director, DGS, stated that

it was the intent of the agency to pursue separate legislation regarding its statewide contract authority. The inclusion of localities, added Sliwoski, depended on the level of resistance. Steve Vermillion, CEO, Associated General Contractors of Virginia, stated that he did not support allowing localities to use statewide contracts for localities as suggested by Mr. Lloyd. Mr. Lloyd also noted that there was a need to include a provision in the bill to cover contracts that were entered into prior to the effective date of the amendments. Uwe Weindel, P. E., Director, Frederick County Sanitation Authority, asserted that while he agreed that under cooperative procurement it was fine to prohibit new construction, the prohibition of all construction would not meet the needs of many water authorities and other utilities. Mr. Vermillion stated that the DGS omnibus draft was a good package to work from but key component missing from the draft was an independent review board. It would be important, asserted Mr. Vermillion, for the work group to move toward an independent review board that would be available at the beginning of the process and capable of making quick decisions so as not to unduly delay a project.

Patrick Cushing, Williams Mullen, expressed support for the omnibus draft but asserted that there needed to clarify that JOC may not be used to procure A/E services. Mr. Chris Stone, P.E., President of Clark Nexsen Architectural & Engineering, stated that he supported the need for an independent review entity. He also offered a language change under the definition of new capital construction to remove the work "addition." It was noted that the omnibus draft prohibited JOC from being used to procure A/E services alone. Michael Halvorson asserted that JOC should not be used to procure A/E services and that any A/E services should be limited to services that are incidental to the overall contract work. William Hefty, Esq., Hefty & Wiley PC indicated that there was a need to clarify that decisions to procure A/E term contracts cannot be based on price and offered that a remedy would be to add the word "solely." There was disagreement among the work group over this suggested change. Anthony Arnold, P. E., Director of Facilities Planning and Construction, Virginia Beach Public Schools, noted that the process used by his public body for A/E term contract involved the choosing two to three professionals and then equally distributing the work among those individuals based on expertise without any further consideration of price. Mr. Hefty offered the following changes (i) increasing the A/E term contract limits for localities with populations over 200,000 from the current \$5 million to \$10

million, and (ii) prohibit new construction from being procured using cooperative procurement but allow a carve out for public works projects.

It was agreed that the DGS omnibus draft would serve as the vehicle for achieving future consensus. Staff was instructed to make several changes to the draft for final review at the next meeting of the work group.

The work group then proceeded to discuss options for increased enforcement and oversight of the public procurement process. Amigo Wade, Division of Legislation Services, presented several suggested changes aimed at clarifying procurement processes in the areas of (i) the choice by public bodies to use a Notice of Intent to Award or a Notice of Award, (ii) the application of the automatic stay provisions, and (iii) clarification of the administrative process for protest appeals. After discussion on each of the proposals, the consensus of the work group was to not move forward with the proposals. The discussion then centered on developing appropriate oversight to ensure that the procurement process works as intended by the legislature. Mr. Hefty noted that he is not willing to support the notion that the current system did not work. Steve Owens, Senior Assistant Attorney General, stated that an appeals entity did exist in the DGS, but that the entity had been discontinued. He cited that the old board was not frequently used, possibly because vendors feared retaliation, and that the process was costly. Richard Sliwoski, Director, DGS noted that the previous appeal entity was limited to goods and nonprofessional services. Mr. Cushing asserted that there remained a need to have some level of review of some procurement decisions and he stated he could provide data on protests that had been made over the last five years. Elizabeth Dooley, Assistant Purchasing Agent, Arlington County and Cecelia Stowe, Purchasing Director, Henrico County, both asserted that not all of the protests may have involved a violation of the VPPA but rather a misunderstanding of the process. They maintained that there may be a need to move toward mandating education and training. Mr. Vermilion stated that the need for an independent review board was critical and that he would be offering an outline of a proposed independent review entity to accomplish this task.

Mr. Wade noted additional options for discussion including an increased role for the State Comptroller and the State Inspector General and the establishment of an advisory council. No consensus could be reached on an

increased role for the State Comptroller and the State Inspector General. Regarding the option to establish an advisory council, Ms. Stowe noted that if the current Freedom of Information Act Council is the intended model it is important to understand that while the Freedom of Information Act covers all public bodies across the state at all levels, the VPPA does not. Mr. Lloyd asserted that thresholds should be considered in determining which procurement disputes would be considered by the advisory council. Mr. Weindel stated that even if an advisory body is the consensus, the work group should not give up on the current process. Mr. Wade stated that at the next meeting proposed language for an advisory entity will be provided for the work group's consideration.

Public Comment

The work group opened the floor to receive public comment.

Michael Locaby, Esq., County Attorney for Louisa County; Local Government Attorney's Association

Mr. Locaby stated that many localities have very limited staff and that the current VPPA was already extremely difficult for smaller localities to navigate. He asserted that the work group should not do anything to make the VPPA more complicated. The focus should be on the original intent of the VPPA and its objective of providing general rules with some flexibility. Regarding oversight, Mr. Locaby asserted there was no need for another level of state bureaucracy.

Reginald Jones, Williams Mullen

Mr. Jones stated that he worked on the original VPPA and that the intent was for the process to be open and fair while getting the best use of taxpayer money. He stated that he supported the idea of a VPPA advisory council that would have an independent look at the process. He cautioned, however, that it would be critical to keep the entity simple and advisory in nature.

October 15, 2014 Meeting Summary

Members present: Anthony Arnold, P.E.; Patrick Cushing, Esq. (for Reginald M. Jones, Esq.); Annette Cyphers; Joseph Damico (for Richard Sliwoski); Elizabeth Dooley; Mike Halvorson (for Thomas Julian, Jr., P.E.); William H. Hefty, Esq.; Tracey Jeter; Bert Jones; Chris Lloyd, Esq.; Hunter Merrill; Steve Owens; Jeff Southard; Chris Stone, P.E.; Cecelia Stowe; Steve Vermillion; and Uwe Weindel, P.E.

Members absent: Lee Brazzell, Gary Mitchell, and Bernice Travers.

The fifth meeting of Work Group No. 1 of the General Laws Special Joint Subcommittee Studying the Virginia Public Procurement Act (Special Joint Subcommittee) was held on Wednesday, October 15, at 9:30 a.m. in House Room 1 at the Capitol.

After the call to order, the work group proceeded to review the omnibus draft containing provisions pertaining to cooperative procurement, job order contracting (JOC), small purchase procedures, and term contracts for architectural and engineering (A/E) services. The objective was to reach final consensus points on these areas for recommendation to the Special Joint Subcommittee. Initial discussion centered on the limitations for the use of cooperative procurement. The omnibus draft prohibited the use of cooperative procurement for new capital construction and included a definition of that term. Hunter Merrill, Virginia Association of Roofing Professionals, Steve Vermillion, Associated General Contractors of Virginia (AGC), and Patrick Cushing, Williams Mullen, did not approve of the definition. Mr. Merrill suggested returning to the existing language, which prohibits the use of cooperative procurement for construction in excess of \$200,000 by a local body under a contract negotiated by another local public body located more than a straight-line distance of 75 miles away. After additional discussion, the work group reached the following consensus regarding cooperative procurement:

- Specify the difference between joint procurement and cooperative procurement;

- Continue to prohibit the purchase of A/E services under a cooperative procurement contract;
- Make no changes to the existing language limiting the use of cooperative procurement for certain construction.

The discussion then moved to provisions of the omnibus draft pertaining to JOC. Chris Stone, P.E., Clark Nexsen, offered language to address concerns from the design professionals community that would (i) prevent a public body from issuing a JOC solely for the purpose of providing professional architectural and engineering services; (ii) allow incidental A/E services, provided the services do not require the seal of an architect or professional engineer; and (iii) require the public body to select or designate the architect or engineer to perform the services. Mr. Stone asserted that the public body should not allow the JOC contractor to make design decisions. Mr. Cushing noted that if a public body did not have an existing A/E services term contract, it could use the \$60,000 small purchase exemption to secure A/E services in a timely manner and avoid project delays. Steve Owens, Senior Assistant Attorney General, offered language that would limit incidental A/E services to no more than 25 percent of the total project, not to exceed \$60,000. Mike Halvorson, Centennial Contractors Enterprises, Inc., expressed support for the language, stating that JOC providers did not want to engage in providing A/E services. William H. Hefty, Esq., Hefty & Wiley, P.C., stated that the \$60,000 small purchase exemption represented 12 percent of the \$500,000 total project threshold. After additional discussion, the work group reached consensus on the following provisions relating to JOC:

- Limit the term of a JOC to one year, renewable for two additional one-year terms;
- Limit the sum of all jobs in a one-year term to \$5 million;
- Limit individual job orders to \$500,000;
- Prohibit the use of JOC for construction, maintenance, or asset management services for a highway, bridge, tunnel, or overpass;

- Prohibit the issuance of a job order solely for providing A/E services;
- Limit incidental professional services to 25 percent of the total costs, not to exceed \$60,000;
- Require an individual job order to result in a stand-alone construction project;
- Prohibit "job splitting," or the manipulation of job orders with the intent of keeping a specific job order under statutory thresholds;
- Prohibit any unused amounts from one contract term to be carried forward to any additional term; and
- Establish a reporting mechanism for participating public bodies to relate their respective experiences and findings regarding the appropriateness or sufficiency of the JOC project cost limitations.

The work group then moved to review the language in the omnibus draft relating to A/E services term contracts. The initial objective of the draft was to remove the A/E services term contract provisions from the definitions section of the Virginia Public Procurement Act (VPPA) without making substantive language changes. Mr. Hefty stated that an additional cost threshold tier should be established for larger localities. He suggested that for localities with a population of more than 200,000, the limit should be raised from the current maximum of \$5 million to \$7.5 million. Several members of the work group, including Mr. Stone, Mr. Cushing, and Mr. Merrill, argued that another tier was unnecessary. Mr. Merrill did not support adding a tier because an A/E services term contract is a relatively new mode of procurement. Without consensus, the resolution was to keep the current thresholds. Annette Cyphers, Director of Facilities Planning and Construction, University of Virginia, stated that language limiting project fees and prohibiting any unused amount from one contract term to be carried forward to any additional term did not apply to public institutions of higher education having level 2 or 3 authority under the Restructured Higher Education Financial and Administrative Operations Act of 2005 (§ 23-38.88 et seq. of the Code of Virginia). It was suggested that language be added to clarify this distinction. Concluding its review of the omnibus draft, the work group approved by consensus a provision in the draft

clarifying that small purchase procedures may be used for construction, provided the work complies with the Uniform Statewide Building Code.

The focus of the work group then turned to the review of possible improvements to the administrative appeal process and options for increased enforcement and oversight. Mr. Vermillion offered a measure on behalf of the AGC that would establish a nine-member Independent Review Board for Construction. The Board would be staffed by the Department of General Services (DGS) and would have the authority to receive complaints of noncompliance with the VPPA by all public bodies. The Board also would have the authority to reach findings and either compel corrective action or refer the matter to a body that could compel the corrective action. Bert Jones, Associate Vice Chancellor for Facilities Management Services, the Virginia Community College System, asserted that the current focus should be on gathering empirical data rather than establishing a review board. Jeff Southard, Executive Vice President, Virginia Transportation Construction Alliance, suggested starting small and having the Office of the Inspector General or DGS provide advisory opinions.

As another option for consideration, staff developed language establishing an Advisory Procurement Council that would be located in the legislative branch of government. The purpose of the 13-member Council would be to encourage and facilitate compliance with the state's procurement laws. The powers and duties of the Council would be as follows:

1. Conduct training seminars and educational programs;
2. Publish educational materials;
3. Review written determinations of public bodies regarding methods of procurement and statutory waivers and related exemptions from the laws governing public procurement and collect data necessary to evaluate the effectiveness and appropriateness of such determinations, waivers and exemptions;
4. Provide a forum to address concerns regarding public procurement;

5. Monitor changes in state laws relating to public procurement and make recommendations for changes in such laws; and
6. Provide an annual report.

The work group discussed the possibility of establishing an advisory entity with limited powers, but could not reach an agreement. Some members wanted the entity to review complaints that a public body had not complied with the VPPA; make determinations; and exercise authority to enforce its determinations. Areas of continued disagreement included the composition and size of the board, the powers it would exercise, the scope of its authority, and staffing. Due to the lack of a consensus, the work group did not advance any specific language or recommend any legislation for consideration.

Public Comment

The work group opened the floor to receive public comment.

Herschel V. Keller, Petty, Livingston, Dawson & Richards, Individual & Corporate Counsel

Mr. Keller stated that the appeal entity must have the ability to review complaints and compel compliance with its decisions. He asserted that an advisory entity would not have the authority to do so and therefore could not successfully address or alleviate the pressing concerns of the small contractor community regarding the improper use of discretion by some public bodies when procuring construction.

Next Steps

Staff informed the work group members that they were released from service. A report including the activities of the work group and consensus recommendations will be presented to the Special Joint Subcommittee at a meeting that will be scheduled prior to the commencement of the 2015 legislative session.

CONSENSUS DRAFT WORK GROUP NO. 1

BILL SUMMARY: Virginia Public Procurement Act (VPPA); methods of procurement; job order contracting and cooperative procurement. Clarifies that small purchase procedures include the procurement of construction and that any such procedures shall not waive compliance with the Uniform State Building Code. The bill also increases contract amounts for job order contracting and provides that (i) order splitting with the intent of keeping a job order under the maximum dollar amounts prescribed is prohibited, that no public body shall issue or use a job order solely for the purpose of providing professional architectural or engineering services that constitute the practice of architecture or the practice of engineering, and that, however, professional architectural or engineering services may be included on a job order where such professional services are (a) incidental and directly related to the job and (b) no more than 25 percent of the construction cost, not to exceed \$60,000, and (ii) job order contracting shall not be used for construction, maintenance, or asset management services for a highway, bridge, tunnel, or overpass. The bill also clarifies the provisions of the VPPA related to cooperative procurement and requires that by October 1, 2017, the Department of Small Business and Supplier Diversity, public institutions of higher education having level 2 or 3 authority under the Restructured Higher Education Financial and Administrative Operations Act of 2005, any state agency utilizing job order contracting, and the Virginia Association of Counties, the Virginia Municipal League, and the Virginia Association of Governmental Purchasing on behalf of local public bodies working cooperatively report their respective experiences and findings relating to the appropriateness and effectiveness of job order contracting in general, the project cost limitations set forth in subsections B and C of § 2.2-4303.1, as added by this bill, and the architectural and professional engineering term contract limits set forth in § 2.2-4303.1 to the Chairmen of the House Committee on General Laws and the Senate Committee on General Laws and Technology. The bill further provides that its provisions shall not apply to any solicitation issued or contract awarded before July 1, 2015, except that the provisions of subsection B of § 2.2-4303.2, as added by this bill, shall apply to any renewal of a job order contract. The bill contains numerous technical amendments.

BILL TEXT:

A BILL to amend and reenact §§ 2.2-2012, 2.2-4301, 2.2-4302.2, 2.2-4303, 2.2-4304, 2.2-4343, 23-38.110, and 33.2-283 of the Code of Virginia and to amend the Code of Virginia by adding sections numbered 2.2-4303.1 and 2.2-4303.2, relating to the Virginia Public Procurement Act; methods of procurement; job order contracting and cooperative procurement.

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-2012, 2.2-4301, 2.2-4302.2, 2.2-4303, 2.2-4304, 2.2-4343, 23-38.110, and 33.2-283 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding sections numbered 2.2-4303.1 and 2.2-4303.2 as follows:

§ 2.2-2012. Procurement of information technology and telecommunications goods and services; computer equipment to be based on performance-based specifications.

A. Information technology and telecommunications goods and services of every description shall be procured by (i) VITA for its own benefit or on behalf of other state agencies and institutions or (ii) such other agencies or institutions to the extent authorized by VITA. Such procurements shall be made in accordance with the Virginia Public Procurement Act (§ 2.2-4300 et seq.), regulations that implement the electronic and information technology accessibility standards of the Rehabilitation Act of 1973 (29 U.S.C. § 794d), as amended, and any regulations as may be prescribed by VITA. In no case shall such procurements exceed the requirements of the regulations that implement the electronic and information technology accessibility standards of the Rehabilitation Act of 1973, as amended.

The CIO shall disapprove any procurement that does not conform to the Commonwealth strategic plan for information technology developed and

approved pursuant to § 2.2-2007 or to the individual strategic plans of state agencies or public institutions of higher education.

B. All statewide contracts and agreements made and entered into by VITA for the purchase of communications services, telecommunications facilities, and information technology goods and services shall provide for the inclusion of counties, cities, and towns in such contracts and agreements. Notwithstanding the provisions of § 2.2-4301, 2.2-4302.1, ~~or 2.2-4302.2~~, 2.2-4303.1, or 2.2-4303.2, VITA may enter into multiple vendor contracts for the referenced services, facilities, and goods and services.

C. VITA may establish contracts for the purchase of personal computers and related devices by licensed teachers employed in a full-time teaching capacity in Virginia public schools or in state educational facilities for use outside the classroom. The computers and related devices shall not be purchased with public funds, but shall be paid for and owned by teachers individually provided that no more than one such computer and related device per year shall be so purchased.

D. If VITA, or any agency or institution authorized by VITA, elects to procure personal computers and related peripheral equipment pursuant to any type of blanket purchasing arrangement under which public bodies, as defined in § 2.2-4301, may purchase such goods from any vendor following competitive procurement but without the conduct of an individual procurement by or for the using agency or institution, it shall establish performance-based specifications for the selection of equipment. Establishment of such contracts shall emphasize performance criteria including price, quality, and delivery without regard to "brand name." All vendors meeting the Commonwealth's performance requirements shall be afforded the opportunity to compete for such contracts.

E. VITA shall allow private institutions of higher education chartered in Virginia and granted tax-exempt status under § 501(c)(3) of the Internal Revenue Code to purchase directly from contracts established for state agencies and public bodies by VITA.

F. This section shall not be construed or applied so as to infringe upon, in any manner, the responsibilities for accounting systems assigned to the Comptroller under § 2.2-803.

§ 2.2-4301. Definitions.

As used in this chapter:

"Affiliate" means an individual or business that controls, is controlled by, or is under common control with another individual or business. A person controls an entity if the person owns, directly or indirectly, more than 10 percent of the voting securities of the entity. For the purposes of this definition "voting security" means a security that (i) confers upon the holder the right to vote for the election of members of the board of directors or similar governing body of the business or (ii) is convertible into, or entitles the holder to receive, upon its exercise, a security that confers such a right to vote. A general partnership interest shall be deemed to be a voting security.

"Best value," as predetermined in the solicitation, means the overall combination of quality, price, and various elements of required services that in total are optimal relative to a public body's needs.

"Business" means any type of corporation, partnership, limited liability company, association, or sole proprietorship operated for profit.

"Competitive negotiation" is the method of contractor selection set forth in § 2.2-4302.2.

"Competitive sealed bidding" is the method of contractor selection set forth in § 2.2-4302.1.

"Construction" means building, altering, repairing, improving or demolishing any structure, building or highway, and any draining, dredging, excavation, grading or similar work upon real property.

"Construction management contract" means a contract in which a party is retained by the owner to coordinate and administer contracts for construction services for the benefit of the owner, and may also include, if provided in the contract, the furnishing of construction services to the owner.

"Design-build contract" means a contract between a public body and another party in which the party contracting with the public body agrees to both design and build the structure, roadway or other item specified in the contract.

"Employment services organization" means an organization that provides employment services to individuals with disabilities that is an approved Commission on the Accreditation of Rehabilitation Facilities (CARF) accredited vendor of the Department for Aging and Rehabilitative Services.

"Goods" means all material, equipment, supplies, printing, and automated data processing hardware and software.

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

"Job order contracting" means a method of procuring construction services by establishing a book of unit prices and then obtaining a contractor to perform work as needed using the prices, quantities, and specifications in the book as the basis of its pricing. The contractor may be selected through either competitive sealed bidding or competitive negotiation depending on the needs of the public body procuring the construction services. A minimum amount of

work may be specified in the contract. The contract term and the project amount shall not exceed the limitations specified in ~~§ 2.2-4302.2 or 2.2-4303.2-4303.2~~.

"Multiphase professional services contract" means a contract for the providing of professional services where the total scope of work of the second or subsequent phase of the contract cannot be specified without the results of the first or prior phase of the contract.

"Nonprofessional services" means any services not specifically identified as professional services in the definition of professional services.

"Potential bidder or offeror," for the purposes of §§ 2.2-4360 and 2.2-4364, means a person who, at the time a public body negotiates and awards or proposes to award a contract, is engaged in the sale or lease of goods, or the sale of services, insurance or construction, of the type to be procured under the contract, and who at such time is eligible and qualified in all respects to perform that contract, and who would have been eligible and qualified to submit a bid or proposal had the contract been procured through competitive sealed bidding or competitive negotiation.

"Professional services" means work performed by an independent contractor within the scope of the practice of accounting, actuarial services, architecture, land surveying, landscape architecture, law, dentistry, medicine, optometry, pharmacy or professional engineering. "Professional services" shall also include the services of an economist procured by the State Corporation Commission.

"Public body" means any legislative, executive or judicial body, agency, office, department, authority, post, commission, committee, institution, board or political subdivision created by law to exercise some sovereign power or to perform some governmental duty, and empowered by law to undertake the

activities described in this chapter. "Public body" shall include any metropolitan planning organization or planning district commission which operates exclusively within the Commonwealth of Virginia.

"Public contract" means an agreement between a public body and a nongovernmental source that is enforceable in a court of law.

"Responsible bidder" or "offeror" means a person who has the capability, in all respects, to perform fully the contract requirements and the moral and business integrity and reliability that will assure good faith performance, and who has been prequalified, if required.

"Responsive bidder" means a person who has submitted a bid that conforms in all material respects to the Invitation to Bid.

"Reverse auctioning" means a procurement method wherein bidders are invited to bid on specified goods or nonprofessional services through real-time electronic bidding, with the award being made to the lowest responsive and responsible bidder. During the bidding process, bidders' prices are revealed and bidders shall have the opportunity to modify their bid prices for the duration of the time period established for bid opening.

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

§ 2.2-4302.2. Process for competitive negotiation.

A. The process for competitive negotiation shall include the following:

1. Issuance of a written Request for Proposal indicating in general terms that which is sought to be procured, specifying the factors that will be used in evaluating the proposal and containing or incorporating by reference the other applicable contractual terms and conditions, including any unique capabilities, specifications or qualifications that will be required;

2. Public notice of the Request for Proposal at least 10 days prior to the date set for receipt of proposals by posting on the Department of General Services' central electronic procurement website or other appropriate websites. Additionally, public bodies shall publish in a newspaper of general circulation in the area in which the contract is to be performed so as to provide reasonable notice to the maximum number of offerors that can be reasonably anticipated to submit proposals in response to the particular request. Posting on the Department of General Services' central electronic procurement website shall be required of any state public body. Local public bodies are encouraged to utilize the Department of General Services' central electronic procurement website to provide the public with centralized visibility and access to the Commonwealth's procurement opportunities. In addition, proposals may be solicited directly from potential contractors. Any additional solicitations shall include certified businesses selected from a list made available by the Department of Small Business and Supplier Diversity; and

3. For goods, nonprofessional services, and insurance, selection shall be made of two or more offerors deemed to be fully qualified and best suited among those submitting proposals, on the basis of the factors involved in the Request for Proposal, including price if so stated in the Request for Proposal. Negotiations shall then be conducted with each of the offerors so selected. Price shall be considered, but need not be the sole or primary determining factor. After negotiations have been conducted with each offeror so selected, the public body shall select the offeror which, in its opinion, has made the best proposal and provides the best value, and shall award the contract to that offeror. When the terms and conditions of multiple awards are so provided in the Request for Proposal, awards may be made to more than one offeror. Should the public body determine in writing and in its sole discretion that only

one offeror is fully qualified, or that one offeror is clearly more highly qualified than the others under consideration, a contract may be negotiated and awarded to that offeror; or

4. For professional services, the public body shall engage in individual discussions with two or more offerors deemed fully qualified, responsible and suitable on the basis of initial responses and with emphasis on professional competence, to provide the required services. Repetitive informal interviews shall be permissible. The offerors shall be encouraged to elaborate on their qualifications and performance data or staff expertise pertinent to the proposed project, as well as alternative concepts. In addition, offerors shall be informed of any ranking criteria that will be used by the public body in addition to the review of the professional competence of the offeror. The Request for Proposal shall not, however, request that offerors furnish estimates of man-hours or cost for services. At the discussion stage, the public body may discuss nonbinding estimates of total project costs, including, but not limited to, life-cycle costing, and where appropriate, nonbinding estimates of price for services. In accordance with § 2.2-4342, proprietary information from competing offerors shall not be disclosed to the public or to competitors. At the conclusion of discussion, outlined in this subdivision, on the basis of evaluation factors published in the Request for Proposal and all information developed in the selection process to this point, the public body shall select in the order of preference two or more offerors whose professional qualifications and proposed services are deemed most meritorious.

Negotiations shall then be conducted, beginning with the offeror ranked first. If a contract satisfactory and advantageous to the public body can be negotiated at a price considered fair and reasonable, the award shall be made to that offeror. Otherwise, negotiations with the offeror ranked first shall be

formally terminated and negotiations conducted with the offeror ranked second, and so on until such a contract can be negotiated at a fair and reasonable price.

Notwithstanding the foregoing, if the terms and conditions for multiple awards are included in the Request for Proposal, a public body may award contracts to more than one offeror.

Should the public body determine in writing and in its sole discretion that only one offeror is fully qualified or that one offeror is clearly more highly qualified and suitable than the others under consideration, a contract may be negotiated and awarded to that offeror.

~~B. For multiple projects, a contract for architectural or professional engineering services relating to construction projects, or a contract for job order contracting, may be negotiated by a public body, provided (i) the projects require similar experience and expertise, (ii) the nature of the projects is clearly identified in the Request for Proposal, and (iii) the contract is limited to a one-year term or when the cumulative total project fees reach the maximum cost authorized in this subsection, whichever occurs first.~~

~~Such contracts may be renewable for four additional one-year terms at the option of the public body. The fair and reasonable prices as negotiated shall be used in determining the cost of each project performed and the sum of all projects performed in a one-year contract term shall not exceed \$500,000, except that for:~~

~~1. A state agency, as defined in § 2.2-4347, the sum of all projects performed in a one-year contract term shall not exceed \$1 million as may be determined by the Director of the Department of General Services;~~

~~2. Any locality or any authority, sanitation district, metropolitan planning organization or planning district commission with a population in excess of~~

~~80,000, or any city within Planning District 8, the sum of all projects performed in a one-year contract term shall not exceed \$5 million and those awarded for any airport as defined in § 5.1-1 and aviation transportation projects, the sum of all such projects shall not exceed \$1.5 million;~~

~~3. Architectural and engineering services for rail and public transportation projects by the Director of the Department of Rail and Public Transportation, the sum of all projects in a one-year contract term shall not exceed \$2 million. Such contract may be renewable for two additional one-year terms at the option of the Director;~~

~~4. Environmental location, design and inspection work regarding highways and bridges by the Commissioner of Highways, the initial contract term shall be limited to two years or when the cumulative total project fees reach \$5 million, whichever occurs first. Such contract may be renewable for two additional one-year terms at the option of the Commissioner, and the sum of all projects in each one-year contract term shall not exceed \$5 million; and~~

~~5. Job order contracting, the sum of all projects performed in a one-year contract term shall not exceed \$2 million.~~

~~Competitive negotiations for such contracts may result in awards to more than one offeror provided (i) the Request for Proposal so states and (ii) the public body has established procedures for distributing multiple projects among the selected contractors during the contract term.~~

~~C. For any single project, for (i) architectural or professional engineering services relating to construction projects, or (ii) job order contracting, the project fee shall not exceed \$100,000, or for architectural or engineering services for airports as defined in § 5.1-1 and aviation transportation projects, the project fee of any single project shall not exceed \$500,000, except that for:~~

~~1. A state agency as defined in § 2.2-4347, the project fee shall not exceed \$200,000, as may be determined by the Director of the Department of General Services;~~

~~2. Any locality or any authority or sanitation district with a population in excess of 80,000, or any city within Planning District 8, the project fee shall not exceed \$2 million; and~~

~~3. Job order contracting, the project fee shall not exceed \$400,000.~~

~~D. For the purposes of subsections B and C, any unused amounts from the first contract term shall not be carried forward to the additional term.~~

E.—Multiphase professional services contracts satisfactory and advantageous to the completion of large, phased, or ~~long term~~ long-term projects may be negotiated and awarded based on a fair and reasonable price for the first phase only, where the completion of the earlier phases is necessary to provide information critical to the negotiation of a fair and reasonable price for succeeding phases. Prior to ~~the~~ entering into any such contract, the public body shall (i) state the anticipated intended total scope of the project and (ii) determine in writing that the nature of the work is such that the best interests of the public body require awarding the contract.

§ 2.2-4303. Methods of procurement.

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

B. Professional services shall be procured by competitive negotiation.

C. Upon a determination made in advance by the public body and set forth in writing that competitive sealed bidding is either not practicable or not fiscally advantageous to the public, goods, services, or insurance may be

procured by competitive negotiation. The writing shall document the basis for this determination.

Upon a written determination made in advance by (i) the Governor or his designee in the case of a procurement by the Commonwealth or by a department, agency or institution thereof or (ii) the local governing body in the case of a procurement by a political subdivision of the Commonwealth, that competitive negotiation is either not practicable or not fiscally advantageous, insurance may be procured through a licensed agent or broker selected in the manner provided for the procurement of things other than professional services set forth in § 2.2-4302.2. The basis for this determination shall be documented in writing.

D. Construction may be procured only by competitive sealed bidding, except that competitive negotiation may be used in the following instances upon a determination made in advance by the public body and set forth in writing that competitive sealed bidding is either not practicable or not fiscally advantageous to the public, which writing shall document the basis for this determination:

1. By the Commonwealth, its departments, agencies and institutions on a fixed price design-build basis or construction management basis under § 2.2-4306;

2. By any public body for the construction of highways and any draining, dredging, excavation, grading or similar work upon real property;

3. By any governing body of a locality with a population in excess of 100,000, provided that the locality has the personnel, procedures, and expertise to enter into a contract for construction on a fixed price or not-to-exceed price design-build or construction management basis and shall otherwise be in compliance with the provisions of this section, § 2.2-4308, and other applicable

law governing design-build or construction management contracts for public bodies other than the Commonwealth. The procedures of the local governing body shall be consistent with the two-step competitive negotiation process established in § 2.2-4302.2; or

4. As otherwise provided in § 2.2-4308.

E. 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. The public body shall issue a written notice stating that only one source was determined to be practicably available, and identifying that which is being procured, the contractor selected, and the date on which the contract was or will be awarded. This notice shall be posted on the Department of General Services' central electronic procurement website or other appropriate websites, and in addition, public bodies may publish in a newspaper of general circulation on the day the public body awards or announces its decision to award the contract, whichever occurs first. Posting on the Department of General Services' central electronic procurement website shall be required of any state public body. Local public bodies are encouraged to utilize the Department of General Services' central electronic procurement website to provide the public with centralized visibility and access to the Commonwealth's procurement opportunities.

F. In case of emergency, a contract may be awarded without competitive sealed bidding or competitive negotiation; however, such procurement shall be made with such competition as is practicable under the circumstances. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file. The public body

shall issue a written notice stating that the contract is being awarded on an emergency basis, and identifying that which is being procured, the contractor selected, and the date on which the contract was or will be awarded. This notice shall be posted on the Department of General Services' central electronic procurement website or other appropriate websites, and in addition, public bodies may publish in a newspaper of general circulation on the day the public body awards or announces its decision to award the contract, whichever occurs first, or as soon thereafter as is practicable. Posting on the Department of General Services' central electronic procurement website shall be required of any state public body. Local public bodies are encouraged to utilize the Department of General Services' central electronic procurement website to provide the public with centralized visibility and access to the Commonwealth's procurement opportunities.

G. A public body may establish purchase procedures, if adopted in writing, not requiring competitive sealed bids or competitive negotiation for single or term contracts for (i) goods and services other than professional services, and (ii) construction, if the aggregate or the sum of all phases is not expected to exceed \$100,000; however, such small purchase procedures shall provide for competition wherever practicable. ~~For local public bodies, such~~ Such purchase procedures may allow for single or term contracts for professional services without requiring competitive negotiation, provided the aggregate or the sum of all phases is not expected to exceed \$60,000. Where small purchase procedures are adopted for construction, the procedures shall not waive compliance with the Uniform State Building Code.

For state public bodies, purchases under this subsection that are expected to exceed \$30,000 shall require the (i) written informal solicitation of a minimum of four bidders or offerors and (ii) posting of a public notice on the

Department of General Services' central electronic procurement website or other appropriate websites. Posting on the Department of General Services' central electronic procurement website shall be required of any state public body. Local public bodies are encouraged to utilize the Department of General Services' central electronic procurement website to provide the public with centralized visibility and access to the Commonwealth's procurement opportunities.

~~H. A state public body may establish purchase procedures, if adopted in writing, not requiring competitive negotiation for single or term contracts for professional services if the aggregate or the sum of all phases is not expected to exceed \$50,000; however such small purchase procedures shall provide for competition wherever practicable.~~

~~†~~ Upon a determination made in advance by a public body and set forth in writing that the purchase of goods, products or commodities from a public auction sale is in the best interests of the public, such items may be purchased at the auction, including online public auctions. Purchase of information technology and telecommunications goods and nonprofessional services from a public auction sale shall be permitted by any authority, department, agency, or institution of the Commonwealth if approved by the Chief Information Officer of the Commonwealth. The writing shall document the basis for this determination. However, bulk purchases of commodities used in road and highway construction and maintenance, and aggregates shall not be made by online public auctions.

~~‡~~ I. The purchase of goods or nonprofessional services, but not construction or professional services, may be made by reverse auctioning. However, bulk purchases of commodities used in road and highway

construction and maintenance, and aggregates shall not be made by reverse auctioning.

§ 2.2-4303.1. Architectural and professional engineering term contracting: limitations.

A. A contract for architectural or professional engineering services relating to multiple construction projects may be awarded by a public body, provided (i) the projects require similar experience and expertise, (ii) the nature of the projects is clearly identified in the Request for Proposal, and (iii) the contract is limited to a term of one year or when the cumulative total project fees reach the maximum authorized in this subsection, whichever occurs first.

Such contracts may be renewable for four additional one-year terms at the option of the public body. The fair and reasonable prices as negotiated shall be used in determining the cost of each project performed.

B. The sum of all projects performed in a one-year contract term shall not exceed \$500,000, except that for:

1. A state agency, as defined in § 2.2-4347, the sum of all projects performed in a one-year contract term shall not exceed \$1 million;

2. Any locality or any authority, sanitation district, metropolitan planning organization or planning district commission with a population in excess of 80,000, or any city within Planning District 8, the sum of all projects performed in a one-year contract term shall not exceed \$5 million and those awarded for any airport as defined in § 5.1-1 and aviation transportation projects, the sum of all such projects shall not exceed \$1.5 million;

3. Architectural and engineering services for rail and public transportation projects by the Director of the Department of Rail and Public Transportation, the sum of all projects in a one-year contract term shall not

exceed \$2 million. Such contract may be renewable for two additional one-year terms at the option of the Director; and

4. Environmental location, design, and inspection work regarding highways and bridges by the Commissioner of Highways, the initial contract term shall be limited to two years or when the cumulative total project fees reach \$5 million, whichever occurs first. Such contract may be renewable for two additional one-year terms at the option of the Commissioner, and the sum of all projects in each one-year contract term shall not exceed \$5 million.

C. Competitive negotiations for such architectural or professional engineering services contracts may result in awards to more than one offeror, provided (i) the Request for Proposal so states and (ii) the public body has established procedures for distributing multiple projects among the selected contractors during the contract term. Such procedures shall prohibit requiring the selected contractors to compete for individual projects based on price.

D. The fee for any single project shall not exceed \$100,000; however for architectural or engineering services for airports as defined in § 5.1-1 and aviation transportation projects, the project fee of any single project shall not exceed \$500,000, except that for:

1. A state agency as defined in § 2.2-4347, the project fee shall not exceed \$200,000, as may be determined by the Director of the Department of General Services or as otherwise provided by the Restructured Higher Education Financial and Administrative Operations Act (§ 23-38.88 et seq.); and

2. Any locality or any authority or sanitation district with a population in excess of 80,000, or any city within Planning District 8, the project fee shall not exceed \$2 million.

The limitations imposed upon single-project fees pursuant to this subsection shall not apply to environmental, location, design, and inspection

work regarding highways and bridges by the Commissioner of Highways or architectural and engineering services for rail and public transportation projects by the Director of the Department of Rail and Public Transportation.

E. For the purposes of subsection B, any unused amounts from one contract term shall not be carried forward to any additional term, except as otherwise provided by the Restructured Higher Education Financial and Administrative Operations Act (§ 23-38.88 et seq.).

§ 2.2-4303.2. Job order contracting; limitations.

A. A job order contract may be awarded by a public body for multiple jobs, provided (i) the jobs require similar experience and expertise, (ii) the nature of the jobs is clearly identified in the solicitation, and (iii) the contract is limited to a term of one year or when the cumulative total project fees reach the maximum authorized in this section, whichever occurs first. Contractors may be selected through either competitive sealed bidding or competitive negotiation.

B. Such contracts may be renewable for two additional one-year terms at the option of the public body. The fair and reasonable prices as negotiated shall be used in determining the cost of each job performed, and the sum of all jobs performed in a one-year contract term shall not exceed \$5 million. Individual job orders shall not exceed \$500,000.

C. For the purposes of this section, any unused amounts from one contract term shall not be carried forward to any additional term.

D. Order splitting with the intent of keeping a job order under the maximum dollar amounts prescribed in subsection B is prohibited.

E. No public body shall issue or use a job order solely for the purpose of providing professional architectural or engineering services that constitute the practice of architecture or the practice of engineering as those terms are

defined in § 54.1-100. Professional architectural or engineering services, however, may be included on a job order where such professional services are (i) incidental and directly related to the job and (ii) no more than 25 percent of the construction cost, not to exceed \$60,000.

F. Job order contracting shall not be used for construction, maintenance, or asset management services for a highway, bridge, tunnel, or overpass.

§ 2.2-4304. Joint and cooperative procurement.

A. Any public body may participate in, sponsor, conduct, or administer a cooperative joint procurement agreement ~~on behalf of or~~ in conjunction with one or more other public bodies, or public agencies or institutions or localities of the several states, of the United States or its territories, the District of Columbia, or the U.S. General Services Administration, for the purpose of combining requirements to increase efficiency or reduce administrative expenses in any acquisition of goods ~~and~~ services, or construction.

~~A-B.~~ In addition, a public body may purchase from another public body's contract even if it did not participate in the request for proposal or invitation to bid, if the request for proposal or invitation to bid specified that the procurement was a cooperative procurement being conducted on behalf of other public bodies, except for:

1. Contracts for architectural or engineering services; or
2. Construction in excess of \$200,000 by a local public body from the contract of another local public body that is more than a straight line distance of 75 miles from the territorial limits of the local public body procuring the construction. The installation of artificial turf or other athletic surfaces shall not be subject to the limitations prescribed in this subdivision. Nothing in this subdivision shall be construed to prohibit sole source or emergency procurements awarded pursuant to subsections E and F of § 2.2-4303.

In instances where any authority, department, agency, or institution of the Commonwealth desires to purchase information technology and telecommunications goods and services from another public body's contract and the procurement was conducted on behalf of other public bodies, such purchase shall be permitted if approved by the Chief Information Officer of the Commonwealth. Any public body that enters into a cooperative procurement agreement with a county, city, or town whose governing body has adopted alternative policies and procedures pursuant to subdivisions A 9 and A 10 of § 2.2-4343 shall comply with the alternative policies and procedures adopted by the governing body of such county, city, or town.

~~B.~~ C. Subject to the provisions of §§ 2.2-1110, 2.2-1111, 2.2-1120 and 2.2-2012, any authority, department, agency, or institution of the Commonwealth may participate in, sponsor, conduct, or administer a ~~cooperative~~ joint procurement arrangement ~~on behalf of or~~ in conjunction with public bodies, private health or educational institutions or with public agencies or institutions of the several states, territories of the United States, or the District of Columbia, for the purpose of combining requirements to effect cost savings or reduce administrative expense in any acquisition of goods and services, other than professional services. A public body may purchase from any authority, department, agency or institution of the Commonwealth's contract even if it did not participate in the request for proposal or invitation to bid, if the request for proposal or invitation to bid specified that the procurement was a cooperative procurement being conducted on behalf of other public bodies. In such instances, deviation from the procurement procedures set forth in this chapter and the administrative policies and procedures established to implement this chapter shall be permitted, if approved by the Director of the Division of Purchases and Supply.

Pursuant to § 2.2-2012, such approval is not required if the procurement arrangement is for telecommunications and information technology goods and services of every description. In instances where the procurement arrangement is for telecommunications and information technology goods and services, such arrangement shall be permitted if approved by the Chief Information Officer of the Commonwealth. However, such acquisitions shall be procured competitively.

Nothing herein shall prohibit the payment by direct or indirect means of any administrative fee that will allow for participation in any such arrangement.

~~€.~~ D. As authorized by the United States Congress and consistent with applicable federal regulations, and provided the terms of the contract permit such purchases:

1. Any authority, department, agency, or institution of the Commonwealth may purchase goods and nonprofessional services, other than telecommunications and information technology, from a U.S. General Services Administration contract or a contract awarded by any other agency of the U.S. government, upon approval of the director of the Division of Purchases and Supply of the Department of General Services;

2. Any authority, department, agency, or institution of the Commonwealth may purchase telecommunications and information technology goods and nonprofessional services from a U.S. General Services Administration contract or a contract awarded by any other agency of the U.S. government, upon approval of the Chief Information Officer of the Commonwealth; and

3. Any county, city, town, or school board may purchase goods and nonprofessional services from a U.S. General Services Administration contract or a contract awarded by any other agency of the U.S. government.

§ 2.2-4343. Exemption from operation of chapter for certain transactions.

A. The provisions of this chapter shall not apply to:

1. The Virginia Port Authority in the exercise of any of its powers in accordance with Chapter 10 (§ 62.1-128 et seq.) of Title 62.1, provided the Authority implements, by policy or regulation adopted by the Board of Commissioners, procedures to ensure fairness and competitiveness in the procurement of goods and services and in the administration of its capital outlay program. This exemption shall be applicable only so long as such policies and procedures meeting the requirements remain in effect.

2. The Virginia Retirement System for selection of services related to the management, purchase or sale of authorized investments, actuarial services, and disability determination services. Selection of these services shall be governed by the standard set forth in § 51.1-124.30.

3. The State Treasurer in the selection of investment management services related to the external management of funds shall be governed by the standard set forth in § 2.2-4514, and shall be subject to competitive guidelines and policies that are set by the Commonwealth Treasury Board and approved by the Department of General Services.

4. The Department of Social Services or local departments of social services for the acquisition of motor vehicles for sale or transfer to Temporary Assistance to Needy Families (TANF) recipients.

5. The College of William and Mary in Virginia, Virginia Commonwealth University, the University of Virginia, and Virginia Polytechnic Institute and State University in the selection of services related to the management and investment of their endowment funds, endowment income, gifts, all other nongeneral fund reserves and balances, or local funds of or held by the College

or Universities pursuant to § 23-44.1, 23-50.10:01, 23-76.1, or 23-122.1. However, selection of these services shall be governed by the Uniform Prudent Management of Institutional Funds Act (§ 64.2-1100 et seq.) as required by §§ 23-44.1, 23-50.10:01, 23-76.1, and 23-122.1.

6. The Board of the Virginia College Savings Plan for the selection of services related to the operation and administration of the Plan, including, but not limited to, contracts or agreements for the management, purchase, or sale of authorized investments or actuarial, record keeping, or consulting services. However, such selection shall be governed by the standard set forth in § 23-38.80.

7. Public institutions of higher education for the purchase of items for resale at retail bookstores and similar retail outlets operated by such institutions. However, such purchase procedures shall provide for competition where practicable.

8. The purchase of goods and services by agencies of the legislative branch that may be specifically exempted therefrom by the Chairman of the Committee on Rules of either the House of Delegates or the Senate. Nor shall the contract review provisions of § 2.2-2011 apply to such procurements. The exemption shall be in writing and kept on file with the agency's disbursement records.

9. Any town with a population of less than 3,500, except as stipulated in the provisions of §§ 2.2-4305, 2.2-4308, 2.2-4311, 2.2-4315, 2.2-4330, 2.2-4333 through 2.2-4338, 2.2-4343.1, and 2.2-4367 through 2.2-4377.

10. Any county, city or town whose governing body has adopted, by ordinance or resolution, alternative policies and procedures which are (i) based on competitive principles and (ii) generally applicable to procurement of goods

and services by such governing body and its agencies, except as stipulated in subdivision 12.

This exemption shall be applicable only so long as such policies and procedures, or other policies and procedures meeting the requirements of § 2.2-4300, remain in effect in such county, city or town. Such policies and standards may provide for incentive contracting that offers a contractor whose bid is accepted the opportunity to share in any cost savings realized by the locality when project costs are reduced by such contractor, without affecting project quality, during construction of the project. The fee, if any, charged by the project engineer or architect for determining such cost savings shall be paid as a separate cost and shall not be calculated as part of any cost savings.

11. Any school division whose school board has adopted, by policy or regulation, alternative policies and procedures that are (i) based on competitive principles and (ii) generally applicable to procurement of goods and services by the school board, except as stipulated in subdivision 12.

This exemption shall be applicable only so long as such policies and procedures, or other policies or procedures meeting the requirements of § 2.2-4300, remain in effect in such school division. This provision shall not exempt any school division from any centralized purchasing ordinance duly adopted by a local governing body.

12. Notwithstanding the exemptions set forth in subdivisions 9 through 11, the provisions of subsections C and D of § 2.2-4303, and §§ 2.2-4305, 2.2-4308, 2.2-4311, 2.2-4315, 2.2-4317, 2.2-4330, 2.2-4333 through 2.2-4338, 2.2-4343.1, and 2.2-4367 through 2.2-4377 shall apply to all counties, cities and school divisions, and to all towns having a population greater than 3,500 in the Commonwealth.

The method for procurement of professional services through competitive negotiation set forth in subsection B of § ~~2.2-4302.2~~ 2.2-4303.1 shall also apply to all counties, cities and school divisions, and to all towns having a population greater than 3,500, where the cost of the professional service is expected to exceed \$60,000 in the aggregate or for the sum of all phases of a contract or project. A school board that makes purchases through its public school foundation or purchases educational technology through its educational technology foundation, either as may be established pursuant to § 22.1-212.2:2 shall be exempt from the provisions of this chapter, except, relative to such purchases, the school board shall comply with the provisions of §§ 2.2-4311 and 2.2-4367 through 2.2-4377.

13. A public body that is also a utility operator may purchase services through or participate in contracts awarded by one or more utility operators that are not public bodies for utility marking services as required by the Underground Utility Damage Prevention Act (§ 56-265.14 et seq.). A purchase of services under this subdivision may deviate from the procurement procedures set forth in this chapter upon a determination made in advance by the public body and set forth in writing that competitive sealed bidding is either not practicable or not fiscally advantageous to the public, and the contract is awarded based on competitive principles.

14. Procurement of any construction or planning and design services for construction by a Virginia nonprofit corporation or organization not otherwise specifically exempted when (i) the planning, design or construction is funded by state appropriations of \$10,000 or less or (ii) the Virginia nonprofit corporation or organization is obligated to conform to procurement procedures that are established by federal statutes or regulations, whether those federal procedures are in conformance with the provisions of this chapter.

15. Purchases, exchanges, gifts or sales by the Citizens' Advisory Council on Furnishing and Interpreting the Executive Mansion.

16. The Eastern Virginia Medical School in the selection of services related to the management and investment of its endowment and other institutional funds. The selection of these services shall, however, be governed by the Uniform Prudent Management of Institutional Funds Act (§ 64.2-1100 et seq.).

17. The Department of Corrections in the selection of pre-release and post-incarceration services.

18. The University of Virginia Medical Center to the extent provided by subdivision B 3 of § 23-77.4.

19. The purchase of goods and services by a local governing body or any authority, board, department, instrumentality, institution, agency or other unit of state government when such purchases are made under a remedial plan established by the Governor pursuant to subsection C of § 2.2-4310 or by a chief administrative officer of a county, city or town pursuant to § 15.2-965.1.

20. The contract by community services boards or behavioral health authorities with an administrator or management body pursuant to a joint agreement authorized by § 37.2-512 or 37.2-615.

21. [Expired].

B. Where a procurement transaction involves the expenditure of federal assistance or contract funds, the receipt of which is conditioned upon compliance with mandatory requirements in federal laws or regulations not in conformance with the provisions of this chapter, a public body may comply with such federal requirements, notwithstanding the provisions of this chapter, only upon the written determination of the Governor, in the case of state agencies, or the governing body, in the case of political subdivisions, that

acceptance of the grant or contract funds under the applicable conditions is in the public interest. Such determination shall state the specific provision of this chapter in conflict with the conditions of the grant or contract.

§ 23-38.110. Procurement; discrimination prohibited; participation of small, women-owned, and minority-owned business enterprises.

A. Subject to the express provisions of the management agreement described in § 23-38.88, covered institutions may be exempt from the provisions of the Virginia Public Procurement Act (§ 2.2-4300 et seq.), except for § 2.2-4342 (which section shall not be construed to require compliance with the prequalification application procedures of subsection B of § 2.2-4317); provided, however, that any deviations from the Virginia Public Procurement Act approved in a Management Agreement shall be uniform across all covered institutions; and provided further that the governing body of a covered institution shall adopt, and the covered institution shall comply with, policies for the procurement of goods and services, including professional services, that shall be based upon competitive principles and shall in each instance seek competition to the maximum practical degree. The policies shall implement a system of competitive negotiation for professional services pursuant to ~~subsections A, B, and E of § 2.2-4302.2, § 2.2-4303.1;~~ shall prohibit discrimination because of race, religion, color, sex or national origin of the bidder or offeror in the solicitation or award of contracts; shall incorporate the prompt payment principles of §§ 2.2-4350 and 2.2-4354; and shall consider the impact on correctional enterprises under § 53.1-47.

B. Such policies may, among other things, (i) provide for consideration of the dollar amount of the intended procurement, the term of the anticipated contract, and the likely extent of competition; (ii) implement a prequalification procedure for contractors or products; and (iii) include provisions for

cooperative arrangements with other covered institutions, other public or private educational institutions, other public or private organizations or entities, including public-private partnerships, public bodies, charitable organizations, health care provider alliances or purchasing organizations or entities, state agencies or institutions of the Commonwealth or the several states, the District of Columbia, the territories and the United States, and any combination thereof. Nothing in this section shall preclude a covered institution from requesting and utilizing, and covered institutions are hereby encouraged to utilize, the assistance of the Virginia Information Technologies Agency in information technology procurements.

C. In the solicitation and awarding of contracts, no covered institution shall discriminate against a bidder or offeror because of race, religion, color, sex, national origin, age, disability, or any other basis prohibited by state or federal law. The procurement policies of a covered institution shall provide that, whenever solicitations are made seeking competitive procurement of goods or services, it shall be a priority of the institution to provide for fair and reasonable consideration of small, women-owned, and minority-owned businesses and to promote and encourage a diversity of suppliers. The institution shall post on the Department of General Services' central electronic procurement website all Invitations to Bid, Requests for Proposal, sole source award notices, and emergency award notices to ensure visibility and access to the Commonwealth's procurement opportunities on one website.

D. As part of any procurement provisions of a management agreement, the governing board of a covered institution shall identify the public, educational, and operational interests served by any procurement rule or rules that deviate from those in the Virginia Public Procurement Act.

§ 33.2-283. (Effective October 1, 2014) Powers and duties of the Director of the Department of Rail and Public Transportation.

Except such powers as are conferred by law upon the Board, or such services as are performed by the Department of Transportation pursuant to law, the Director of the Department of Rail and Public Transportation shall have the power to do all acts necessary or convenient for establishing, maintaining, improving, and promoting public transportation, transportation demand management, ridesharing, and passenger and freight rail transportation in the Commonwealth and to procure architectural and engineering services for rail and public transportation projects as specified in ~~§ 2.2-4302.2~~ 2.2-4303.1.

2. That by October 1, 2017, the Department of Small Business and Supplier Diversity, public institutions of higher education having level 2 or 3 authority under the Restructured Higher Education Financial and Administrative Operations Act of 2005 (§ 23-38.88 et seq. of the Code of Virginia), state agencies utilizing job order contracting, and the Virginia Association of Counties, the Virginia Municipal League, and the Virginia Association of Governmental Purchasing on behalf of local public bodies working cooperatively, shall report their respective experiences and findings relating to the appropriateness and effectiveness of (i) job order contracting in general, (ii) the project cost limitations set forth in subsections B and C of § 2.2-4303.1, as added by this act, and (iii) the architectural and professional engineering term contract limits set forth in § 2.2-4303.1, as added by this act, to the Chairmen of the House Committee on General Laws and the Senate Committee on General Laws and Technology.

3. That the provisions of this act shall not apply to any solicitation issued or contract awarded before July 1, 2015, except that the provisions of

subsection B of § 2.2-4303.2, as added by this act, shall apply to any renewal of a job order contract.

APPENDIX E

MEMBERSHIP--WORK GROUP NO. 2 IT, GOODS, OTHER PROFESSIONAL SERVICES, AND NONPROFESSIONAL SERVICES

Higher Education

1. Keith Gagnon, Director of Procurement, VCCS (LEVEL 2)
2. Mary Helmick, Director of Procurement Services, James Madison University (LEVEL 2)
3. Eric Denby, Director of Procurement and Supplier Diversity Services, University of Virginia (LEVEL 3)
4. Tom Kaloupek, Director of Materials Management, Virginia Tech (LEVEL 3)
5. Eugene Anderson, Director, Procurement Management, Norfolk State University (LEVEL1)

State Entities

6. Eric Link, Director, Legal & Legislative Services, Virginia Information Technologies Agency (VITA)
7. Phil Pippert, Director, Supply Chain Management, VITA
8. Joe Damico, Deputy Director, DGS
9. Robert Gleason, Director, Division of Purchases & Supply, DGS
10. John Westrick, Senior Assistant Attorney General
11. Angela Chiang, Director of Operations, Department of Small Business and Supplier Diversity

Local Government

12. Patti Innocenti, Deputy Director, Purchasing and Supply Management, Fairfax County; VAGP
13. William Lindsey, Purchasing Agent, Gloucester County; VAGP
14. Phyllis Errico, General Counsel, Virginia Association of Counties
15. Mike Bacile, Purchasing Director, Chesterfield County

Vendor Community

16. Lem C. Stewart, Jr. Executive Vice President, Advantus Strategies, LLC

17. Micah Dalton, Northhighland Consulting (*Replaced Brian Epley, Northhighland Consulting*)
18. Nicole Riley, Virginia State Director, National Federal of Independent Businesses
19. Ridge Schulyer, Vice President, Charlottesville Works Initiative, Greater Charlottesville Area Dev. Corp.
20. Lee Brazzell, President & CEO of Transformation Consulting LLC
21. Gwendolyn Davis, Chair, Equipping Businesses for Success Institute

APPENDIX F

WORK GROUP NO. 2--SCOPE OF WORK

2014

	GENERAL ISSUE CATEGORY	SOURCE	COMMENT
1	Applicability/Exemptions <i>Subcategory: Goods, services, construction</i>	Virginia Information Technologies Agency (VITA)	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>
2	Applicability/Exemptions <i>Subcategory: Method of procurement</i>	VITA	Put competitive negotiation on equal footing with competitive sealed bidding.
3	Applicability/Exemptions <i>Subcategory: Method of procurement</i>	Large Locality (Fairfax Co.)	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>

	GENERAL ISSUE CATEGORY	SOURCE	COMMENT
4	Applicability/Exemptions <i>Subcategory: Readability/Internal consistency</i>	Large Locality (Fairfax Co.)	Review the cumulative effect of changes over several sessions. As a whole, these changes have adversely affected readability and created conflicting provisions.
5	Applicability/Exemptions <i>Subcategory: Nature of public body</i>	Small Locality (Gloucester Co.)	Review use of population thresholds associated with application of the VPPA.
6	Applicability/Exemptions <i>Subcategory: Readability</i>	Small Locality (Gloucester Co.)	Variety of exceptions and exemptions to the Act make it difficult to read, follow, and interpret.
7	Applicability/Exemptions <i>Subcategory: Method of procurement</i>	Design Professionals (VSAIA, ACEC)	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.
8	Applicability/Exemptions <i>Subcategory: Method of procurement</i>	Wanda Edwards (Coalition for Procurement Reform)	Additional controls should be placed on the use of sole source contracts; such contracts should be limited to \$50,000.

	GENERAL ISSUE CATEGORY	SOURCE	COMMENT
9	Applicability/Exemptions <i>Subcategory: Definitions</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>
10	Cooperative Procurement	DGS	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.
11	Cooperative Procurement	VITA	Modify cooperative procurement language; current language effectively creates a de facto "statewide" contract, which dilutes competition and leverage.
12	Enforcement/Oversight	DGS	No consequences for violations.
13	Enforcement/Oversight	DGS	No central procurement oversight, thus making achievement of enterprise cost savings and efficiencies difficult.

	GENERAL ISSUE CATEGORY	SOURCE	COMMENT
14	Enforcement/Oversight	VITA	Improper use of sole sourcing as a procurement method without clear justification or because of prior work by a specific vendor.
15	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.
16	Vendor Eligibility <i>Subcategories: Preferences, Qualification to contract</i>	Large Locality <i>(Fairfax Co.)</i>	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>

	GENERAL ISSUE CATEGORY	SOURCE	COMMENT
17	Vendor Eligibility <i>Subcategory: Qualification to contract</i>	Small Locality <i>(Gloucester Co.)</i>	Avoid legislative actions that seek to make the procurement function a regulatory program. <i>(Example: SCC registration and E-Verify requirements)</i>
18	Vendor Eligibility <i>Subcategory: SWaM</i>	DGS	Small business set-aside preference should be examined for improvement
19	Technology/Business Practice Outdated	Large Locality <i>(Fairfax Co.)</i>	Adapt the VPPA to current technology and business practices. Consider using changes made to the Model Procurement Code as a guide.

	BILLS REFERRED FROM 2014 GENERAL ASSEMBLY		
	GENERAL ISSUE CATEGORY	SOURCE	COMMENT
20	Vendor Eligibility <i>Subcategory: SWaM</i>	HB 223 Dance	Virginia Public Procurement Act; establishment of historically underutilized business zones (HUB zones). Requires the Department of General Services and the Virginia Information Technologies Agency to develop procurement regulations for the utilization of small businesses located in historically underutilized business zones (HUB zones). The bill also authorizes public bodies to establish programs to facilitate the participation of small businesses in HUB zones. Such programs must be in writing and comply with any enhancement or remedial measures authorized by the Governor in the case of state agencies or the chief executive of a local governing body in the case of local agencies.

	GENERAL ISSUE CATEGORY	SOURCE	COMMENT
21	<p>Vendor Eligibility <i>Subcategory: Qualification to contract</i></p>	<p>HB 769 Hugo</p>	<p>Virginia Public Procurement Act; project labor agreements by certain state agencies. Provides, under certain conditions, that when engaged in procuring products or services or letting contracts for construction, manufacture, maintenance, or operation of any project paid for in whole or in part by state funds, or when overseeing or administering such procurement, neither the Commonwealth Transportation Board nor any state transportation agency nor any construction manager acting on behalf of such entities shall, in their bid specifications, project agreements, or other controlling documents, provide an incentive in the scoring of such bids that favors entities entering into project labor agreements. The bill sets out exceptions to this requirement.</p>

	GENERAL ISSUE CATEGORY	SOURCE	COMMENT
22	Vendor Eligibility <i>Subcategory: SWaM</i>	HB 797 Lopez	Department of Small Business and Supplier Diversity; definition of small business. Changes the definition of small business to require the business to have 250 or fewer employees and average annual gross receipts of \$10 million or less averaged over the previous three years. Currently, a small business is required to meet one or the other of these conditions.

	GENERAL ISSUE CATEGORY	SOURCE	COMMENT
23	Enforcement/Oversight	HB 1159 Rasoul	<p>COIA: Political contributions; prohibitions during procurement process. Includes the mayor or chief executive officer of a locality, school superintendent, and any member of a local governing body, planning commission, or school board in the current prohibition against knowingly soliciting or accepting a contribution, gift, or other item with a value greater than \$50 from any bidder, offeror, or private entity who has submitted a bid or proposal pursuant to the Virginia Public Procurement Act, the Public-Private Transportation Act, or the Public-Private Education Facilities and Infrastructure Act during the bidding period. The restrictions only apply if the stated or expected value of the contract is \$5 million or more and do not apply to contracts awarded as the result of competitive sealed bidding. Furthermore, no bidder, offeror, or private entity who has submitted a bid or proposal under such acts shall offer or promise to make such a gift to the mayor or chief executive officer of a locality, school superintendent, or any member of a local governing body, planning commission, or school board. Any violation shall be subject to a civil penalty of \$500 or up to two times the amount of the contribution or gift, whichever is greater.</p>

	GENERAL ISSUE CATEGORY	SOURCE	COMMENT
24	Vendor Eligibility <i>Subcategory: SWaM</i>	HB 1194/SB 632 James/Lucas	Department of Small Business and Supplier Diversity; establishment of minority-owned and women-owned state purchasing program. Provides for the Department of Small Business and Supplier Diversity, in conjunction with the Department of General Services, the Virginia Information Technologies Agency, and the Department of Transportation, to develop a program establishing a requirement that at least 15 percent of all state purchases be made from minority-owned or women-owned businesses that are also certified as small businesses.

	GENERAL ISSUE CATEGORY	SOURCE	COMMENT
25	Enforcement/Oversight	HB 1208 Albo	<p>Virginia Public Procurement Act; consideration of early payment discounts. Prohibits the consideration of discounts for early payment of invoices offered by any bidder in the determination of the lowest priced bid on any contract awarded using competitive sealed bidding. The bill also provides that no bidder shall be required to offer discounts for early payment of invoices as a condition of any Invitation to Bid, and no bidder shall be declared nonresponsive for failure to offer a discount for early payment of invoices. With respect to competitive negotiation, the bill provides that any offer submitted in response to a Request for Proposal may contain offers for discounts for the early payment of invoices by public bodies; but that, if offered, such discounts shall not be considered in the selection of qualified offerors or in the evaluation of prices submitted by any such offeror. Finally, the bill provides that discounts for prompt payment shall not be considered in the evaluation or made a condition of offers or bids by any state agency or local public body. However, any offered discount may form a part of the award and shall be taken if payment is made within the discount period indicated in the offer or bid by the offeror or bidder. As an alternative to offering a prompt payment discount in conjunction with the offer or bid, offerors or bidders who are awarded contracts may include prompt payment discounts on individual invoices. In connection with any discount offered for prompt payment, time shall be computed from the date of the submission of the invoice by the contractor or supplier.</p>

	GENERAL ISSUE CATEGORY	SOURCE	COMMENT
26	Vendor Eligibility <i>Subcategory: SWaM</i>	HB 1223 Yancey	Virginia Public Procurement Act; small, women, and minority-owned businesses. Defines "historically Black colleges and universities" and provides that the term "minority-owned business" includes historically Black colleges and universities, regardless of the percentage ownership by minority individuals or, in the case of a corporation, partnership, or limited liability company or other entity, the equity ownership interest in the corporation, partnership, or limited liability company or other entity. The bill also requires that programs to facilitate the participation of small businesses and all businesses owned by women, minorities, or service disabled veterans in procurement transactions include a provision for fair and equitable evaluations and opportunities for small businesses and all businesses owned by women, minorities, or service disabled veterans
27	Applicability/Exemptions <i>Subcategory: Method of procurement</i>	HB 1238 Gilbert	Virginia Public Procurement Act; disclosure of cost estimates in solicitations prohibited. Provides that no Invitation to Bid or Request for Proposal shall contain the public body's cost estimate for that which is sought to be procured.
28	Vendor Eligibility <i>Subcategory: SWaM</i>	SB 616 Alexander	Department of Small Business and Supplier Diversity; creation of Department of Minority Business Enterprise and the Department of Business Assistance. Eliminates the Department of Small Business and Supplier Diversity and re-creates the Department of Minority Business Enterprise and the Department of Business Assistance as those two departments existed prior to January 1, 2014. As such, the bill reassigns the former powers and duties of the Department of Small Business and Supplier Diversity to the Department of Minority Business Enterprise and the Department of Business Assistance. The bill contains numerous technical amendments.

GENERAL ISSUE CATEGORIES AND SUBCATEGORIES

APPLICABILITY/EXEMPTIONS

Nature/Identity of public body

Goods, services, construction- nature of what is being procured

Definitions

Method of procurement

Readability/Internal consistency

VENDOR ELIGIBILITY

SWaM

Preferences

Qualification to contract (E-Verify, etc.)

COOPERATIVE PROCUREMENT

ENFORCEMENT/OVERSIGHT

TECHNOLOGY/BUSINESS PRACTICE OUTDATED

APPENDIX G

WORKGROUP NO. 2 IT, GOODS, OTHER PROFESSIONAL SERVICES, AND NONPROFESSIONAL SERVICES

Meeting Summaries and Consensus Draft Recommendations

May 8, 2014, at 1:30 p.m.
House Room 1, The Capitol, Richmond
Meeting Summary

Members present: Eugene Anderson, Mike Bacile, Lee Brazzell, Angela Chiang, Ashley Colvin (for Eric Link), Joe Damico, Gwendolyn Davis, Eric Denby, Brian Epley, Phyllis Errico, Keith Gagnon, Robert Gleason, Mary Helmick, Patti Innocenti, Tom Kaloupek, Phil Pippert, Nicole Riley, Lem C. Stewart, Jr., Ridge Schulyer, John Westrick.

Member absent: William Lindsey.

Maria Everett, Senior Attorney, Division of Legislative Services, began the meeting by reviewing the status of the work group under the Virginia Freedom of Information Act (FOIA). The work group is a public body under FOIA and provisions regarding meetings and records generated by the by the group are applicable. Amigo Wade, Senior Attorney, Division of Legislative Services, provided an overview of the activities of the Special General Laws Joint Subcommittee during the 2013 interim and reviewed the work group's study plan. A total of four additional meetings have been scheduled:

Thursday, June 19, 2014 1:30 p.m., House Room 1, The Capitol Richmond, Virginia	Wednesday, September 17, 2014 1:30 p.m., House Room 1, The Capitol Richmond, Virginia
Wednesday, July 23, 2014 1:30 p.m., House Room 1, The Capitol Richmond, Virginia	Wednesday, October 15, 2014 1:30 p.m., House Room 1, The Capitol Richmond, Virginia

Mr. Wade noted that the goal over the course of the meetings is to seek consensus on as many issues as possible. Any issues or matters upon which consensus cannot be reached will be referred to the Special General Laws Joint Subcommittee for final resolution.

Each member of the work group then made brief introductory remarks including a statement of issues of greatest importance to their community of interest and the goals the member wishes to achieve. Dominant themes included ensuring appropriate use of cooperative procurement, flexibility, clarity, streamlining the procurement process, consistency and standardization, equal opportunity to participate in the procurement process, and incorporating disparity study goals for women-owned and minority-owned businesses.

The work group then proceeded to review the Scope of Work document (SOW) to determine which issues were manageable or where consensus could be reached relatively easily.¹³ Staff first offered issues related to the sole source provision of the VPPA that would place a \$50,000 cap on the use of the procurement method and establish additional guidelines for the appropriate use of the method (SOW Items 8 and 14). In addition, staff offered that the suggestion to prevent the passage of legislation that conflicted with the intent

¹³ The SOW consists of the issues matrix compiled by staff in the first year of study and the legislation referred to the Special Joint Subcommittee from the 2014 Session of the General Assembly.

of the VPPA was aspirational (SOW Items 3 and 16). There was agreement that the two grouping of issues would not be recommended for any further action.

Points of Consensus

Item No.	Issue	Recommendation
3, 16	Avoid proposed changes that are in conflict with the intent of the VPPA.	No action warranted; these items are aspirational in nature.
8	Additional controls should be placed on the use of sole source contracts; such contracts should be limited to \$50,000.	A cap on the total amount of a given sole source contract is not feasible. Current statutory language provides sufficient direction to the procurement official.
14	Improper use of sole sourcing as a procurement method without clear justification or because of prior work by a specific vendor.	Additional language establishing conditions for using the method are not warranted. Overall resolution should be included in review of oversight and enforcement provisions.

The work group then proceeded to discuss additional SOW items and related issues for consideration. These items included (i) placing competitive negotiation and competitive sealed bidding on equal footing (SOW Item 2); (ii) reviewing options for ensuring flexibility regarding the disclosure of cost

estimates in solicitations (SOW Item 27); and (iii) the viability of requiring some procurements to be noticed in newspapers.

Public Comment

The work group next received public comment.

Ida McPherson, Director, Department of Small Business and Supplier Diversity

Ms. McPherson noted that because sole source contracts involve a closed process, there is potential for abuse. She also noted that cooperative contracting may also lead to abuses and have negative impacts on SWaM programs when large cooperative contracts do not provide opportunities for smaller suppliers or vendors to participate through subcontracting.

Andrew Sinclair, Virginia Association of Governmental Purchasing.

Mr. Sinclair stated that he supported placing competitive negotiation and competitive sealed bidding on equal footing. He further noted that the procurements made using competitive negotiation are required to be published in a local newspaper while procurements using competitive sealed bidding do not have a publication requirement. He asserted that in order for the two procurement methods to be placed on equal footing, the mandatory publication requirement must be eliminated.

June 19, 2014, at 1:30 p.m. House Room 1, The Capitol, Richmond Meeting Summary

Members present: Eugene Anderson, Mike Bacile, Ashley Colvin (for Eric Link), Micah Dalton (for Brian Epley), Joe Damico, Eric Denby, Phyllis Errico, Keith Gagnon, Robert Gleason, Kelly Hellams (for Phil Pippert), Mary Helmick, Patti Innocenti, Tom Kaloupek, William Lindsey, Ida McPherson (for Angela Chiang), Nicole Riley, Ridge Schulyer, Lem C. Stewart, Jr., John Westrick.

Members absent: Lee Brazzell and Gwendolyn Davis.

Work Group No. 2 of the Special General Laws Joint Subcommittee Studying the Virginia Public Procurement Act (VPPA) met Thursday, June 19, 2014, at 1:30 p.m. in House Room 1 at the Capitol, Richmond. After a brief recap of the points of consensus reached at the May 8, 2014, meeting, the work group proceeded to discuss items previously designated as manageable issues.

I. Equal footing for competitive negotiation and competitive sealed bidding

The first issue for discussion by the work group concerned the Virginia Public Procurement Act's (VPPA) preference for the use of competitive sealed bidding. Kelly Hellams, Legal and Legislative Services, Virginia Information Technologies Agency (VITA), noted that currently a written determination is required when a public body decides to use competitive negotiation rather than competitive sealed bidding. Eugene Anderson, Director, Procurement Management, Norfolk State University, stated that the requirement for a written determination is an additional bureaucratic step that does not improve the process. Tom Kaloupek, Director of Materials Management, Virginia Polytechnic Institute and State University, maintained that advances in the procurement process have made the written determination unnecessary and that it should be eliminated. Joe Damico, Deputy Director, Department of General Services (DGS), indicated that it would be important to hear from the vendor community on the issue. Ida McPherson, Director, Department of Small Business and Supplier Diversity, asserted that competitive sealed bidding no longer provides the best protection for small businesses because such businesses may not be able to compete with larger contractors on the basis of price alone. The larger firm would be able to submit a "lowball" bid and, unless the public body is able to look beyond price and consider best value, the low bid would prevail. Lem Stuart, Executive Vice President, Advantus Strategies, LLC, asserted that competitive negotiation is the standard for IT procurement and that the distinction between the two methods no longer exists.

Mary Helmick, Director of Procurement Services, James Madison University, recommended that both the requirement for the written determination and the statement in the VPPA providing that competitive sealed bidding is the preferred method of procurement should be removed. Eric Denby, Director of Procurement and Supplier Diversity Services, University of Virginia, noted that competitive negotiation necessarily includes consideration of small, women-owned, and minority-owned business (SWaM) programs. Mr. Anderson added that under competitive sealed bidding no negotiation is

allowed, which prevents the public body from being able to more thoroughly review a responder's submission.

Keith Gagnon, Director of Procurement for the Virginia Community College System (VCCS), stated that the determination for using competitive negotiation is self-evident in the public body's statement of need. The public body would essentially be saying the same thing in its determination that it has already included in the Request for Proposals. John Westrick, Senior Assistant Attorney General, observed that if the determination and the general preference are removed there would be no way for the vendor to dispute or the public body to vindicate the decision. He recommended removing the determination but keeping the general preference.

After additional discussion, the work group reached consensus that both the preference for competitive sealed bidding and the requirement for the written determination be removed.

II. Publication of Notice; competitive negotiation

The work group then moved to discuss the requirement for procurements using competitive negotiation to be published in a local newspaper. Mr. Denby recommended that the decision to publish the notices be left up to the individual agency or institution and that eVA, the state's electronic procurement site, be used to disseminate information. Mr. Kaloupek added that the costs associated with publishing the notices are high and that the value of publishing notices in is less when the newspaper is in a small market. Mr. Damico noted that the vendor community may not have equal access to the internet and that he also recognized the need for citizens to be able to inform themselves about their government in terms of procurement. He recommended that the work group look for a gradual transition away from the publishing requirement to avoid an abrupt change in the status quo. Ms. McPherson stated that because Internet access is not available in all areas of the state, it would not be appropriate to move immediately to an entirely electronic process. She also noted that the smaller newspapers depend on publication revenue and reminded the work group that many newspapers are also small businesses.

Mr. Damico suggested that DGS use eVA as a conduit to disseminate procurement information to newspapers and then allow individual newspapers to determine what to publish. Ms. McPherson suggested that the procurement information also be provided to the Department of Small Business and Supplier Diversity, which has a small business advocacy role. Mr. Gagnon recommended a transition period of one to two years that would include a public notification component alerting readers that procurement information would be available on eVA at the end of the transition period.

Mr. Stuart suggested that instead of requiring the posting in every instance, give public bodies the option to post when it will insure maximum competition. A requirement could be added providing for a public body to make a written determination relative to the value of publishing a notice in the newspaper. Mike Bacile, Purchasing Director for Chesterfield County, stated that he did not think a new determination was warranted or that all public bodies should be required to use eVA. He recommended localities use their own website to disseminate the information. Nicole Riley, Virginia State Director, National Federation of Independent Businesses (NFIB), stated that it is important to develop data on the use of technology by small businesses. She noted that according to member surveys conducted by NFIB about 50 percent are technology-based in terms of their business operations. She stressed that there are still small business owners who perform all of the administrative functions for their business and that those individuals tend to continue practices with which they are familiar.

The work group then moved to receive public comment on the publication requirement.

Ginger Stanley, Executive Director, Virginia Press Association

Ms. Stanley stated that the publication requirement continues to have great value to the procurement process and should remain. She asserted that the cost for such notices amounts to one tenth of one percent of a locality's budget. Ms. Stanley further asserted that newspapers are being read more than ever and remain a viable and important way to disseminate information.

Andrew Sinclair, Virginia Association of Governmental Purchasing

Mr. Sinclair asserted that the publication of the notices should be left up to each individual public body.

Sharon Lewis, Purchasing Manager, City of Roanoke

Ms. Lewis maintained that the decision regarding not only whether to publish the notice but also which newspapers to publish should be left to the discretion of the locality.

Patrick Cushing, Williams Mullen

Mr. Cushing stated that the position of the design professionals that he represents has changed from initial opposition to removal of the publication requirement to the current position supporting the removal with a provision for a transition period.

At the conclusion of the public comment, it was the consensus of the work group to prepare discussion drafts incorporating the options that had been discussed. As a part of the drafting process, work group members and interested parties were asked to provide any suggestions and/or proposed language to staff by 5:00 p.m. on July 3, 2014.

III. Oversight and Enforcement Options

Staff offered the following options for discussion purposes:

- (1) Maintain status quo (appeal process remains optional);
- (2) Require each agency to establish an appeal process;
- (3) Establish equality among all satellites of public bodies with procurement authority;
- (4) Provide for an appeal to a Board with authority over all public bodies;
- (5) Establish a Procurement Council similar to existing FOIA Council (located in the legislative branch, advisory in nature).

Ms. McPherson indicated that she favored option (4), emphasizing that the appeal must be made to a neutral body and not remain within the same agency. She noted that two recent disparity studies recommended the establishment of a compliance entity. Robert Gleason, Director, Division of Purchases & Supply, DGS, stated that he believed DGS could craft a process to satisfy an adequate appeal mechanism. Mr. Anderson stated that in light of his experience dealing with appeals processes in both state and local government, it will be important for the appeal entity to be composed of disinterested persons. He recommended option (2), asserting that it would be difficult to have one body overseeing all public bodies. Mr. Westrick noted that the work group must take into account the very limited remedies that the VPPA provides.

Mr. Damico suggested that the work group consider having the Office of the Inspector General (OSIG) investigate claims of abuse related to the procurement process. Ashley Colvin, Legal and Legislative Services, VITA, indicated his support for the suggestion. Ms. McPherson expressed concern, citing the amount of time that such an investigation may take and the possible lack of expertise to investigate procurement-related claims. Mr. Gleason asserted that OSIG had been building expertise in the area and should be able to handle such investigations. Mr. Anderson noted that to be successful adequate resources must accompany the increased responsibility.

It was the consensus of the work group that staff would prepare a wider array of enforcement/oversight options based on the work group's discussion.

IV. Special General Laws Joint Subcommittee meeting

Staff informed the work group members that the Special General Laws Joint Subcommittee Studying the Virginia Public Procurement Act will meet at 2:00 p.m. on Monday, July 14, 2014, in House Room C of the General Assembly Building for the purpose of reviewing the legislation referred from the 2014 Session .

July 23, 2014, at 1:30 p.m.
House Room 1, The Capitol, Richmond
Meeting Summary

Members present: Eugene Anderson, Mike Bacile, Rick Berry (for Mary Helmick), Chester Brazzell (for Lee Brazzell), Angela Chiang, Joe Damico, Gwendolyn Davis, Eric Denby, Brian Epley, Phyllis Errico, Keith Gagnon, Robert Gleason, Patti Innocenti, Tom Kaloupek, William Lindsey, Eric Link, Steve Owens (for John Westrick), Phil Pippert, Nicole Riley, Lem C. Stewart, Jr.

Members absent: Lee Brazzell, Mary Helmick, Ridge Schulyer, and John Westrick.

Work Group No. 2 of the General Laws Special Joint Subcommittee Studying the Virginia Public Procurement Act (VPPA) held its third meeting of the 2014 interim on Wednesday, July 23, 2014, at 1:30 p.m. in House Room 1 at the Capitol, Richmond. The meeting began with the review of staff-prepared discussion drafts reflecting the various proposals offered by work group members and interested parties. The objective of the review was to facilitate consensus on specific language regarding (i) establishing equal footing for competitive negotiations and competitive sealed bidding and (ii) revising the requirement for the publication of notice for competitive negotiation.

I. Equal Footing for Competitive Negotiation and Competitive Sealed Bidding; Discussion Draft

Staff conveyed that the objective of the discussion draft is to remove the preference for the use of competitive sealed bidding as the method for procurement under the Virginia Public Procurement Act (VPPA). The work group reached consensus that both the preference for competitive sealed bidding and the requirement for the written determination be removed. Mike Bacile, Purchasing Director, Chesterfield County, stated that the language does **not belong in a public body's Request for Proposals because it still** connotes a preference for competitive sealed bidding. He suggested removing the language amending § 2.2-4302.2 on page 1, lines 11 through 13. Eugene Anderson, Director of Procurement Management at Norfolk State University, added that under current practice establishing a justification for using competitive negotiation is extremely easy and does not add value to the process. After

additional discussion, it was the consensus of the group to approve the draft as amended.

II. Publication of Notice; Competitive Negotiation; Discussion Draft

The work group reviewed the discussion draft amending provisions in the Code relating to the requirement for procurements using competitive negotiation to be published in a local newspaper. The draft consists of three components. The first component provides for the Department of General Services to provide to any requesting newspaper or print publication with circulation in Virginia, free of charge, an electronic data file containing all active business opportunity notices **posted on the agency's central electronic procurement website**. The second component of the draft provides for the elimination of the publication requirement effective July 1, 2018, effectively establishing a transition period of three years. The third component requires all public bodies to report annually the method by which between July 1, 2015, and July 1, 2018, an offeror submitting a proposal in response to a request for proposal (RFP) became aware of the solicitation.

Joe Damico, Deputy Director, Department of General Services, stated that the first component of the draft is predicated on all local public bodies publishing business opportunities on Virginia Business Opportunities/eVA. Without localities doing so, the information provided by DGS will not have any local data. Mr. Bacile stated that he did not think localities should be required to post on Virginia Business Opportunities/eVA. Phyllis Errico, General Counsel, Virginia Association of Counties, suggested a shorter transition period of two years rather than three years. Mr. Bacile agreed with the shorter reporting period and questioned why the information was being gathered if the desire is to transition to elimination of the requirement.

Staff solicited remarks on the draft from the work group members. Gwen Davis, Chair, Equipping Businesses for Success Institute, expressed support for the approach taken by the draft citing the importance of having a transition period. Lem C. Stewart, Jr., Executive Vice President, Advantus Strategies, LLC, stated that a reporting form is necessary to ensure that the information provided from the various public bodies is consistent. Tom Kaloupek, Director of Materials Management, Virginia Tech, said that he did not support including the reporting requirement because with the large number of RFPs his agency and some other agencies solicit, it will be difficult to meet the requirement. Mr. Damico agreed that the reporting is burdensome, but explained that the data is needed. Angela Chiang, Director of Operations, Department of Small Business

and Supplier Diversity (SBSD), maintained that the transition period is needed to allow all involved to prepare for elimination of the newspaper publication requirement and for the general public to be adequately informed on how to access business opportunities. Mr. Anderson stated that he supported a two-year transition but that he was willing to accept the longer three-year transition for the long-term benefit of eliminating the publication requirement. Nicole Riley, Virginia State Director, National Federal of Independent Businesses, asserted that at least two years is needed to allow adequate time for the education of small businesses.

Keith Gagnon, Director of Procurement, Virginia Community College System (VCCS) noted that Invitations for Bid (IFB) are not required to be published and his agency has had no problems getting bids. Ms. Errico stated that she could accept the two-year transition period if there is no reporting requirement. Ms. Chiang interjected that the reporting requirement is needed to develop data to assist legislators in determining the proper policy. Both Ms. Errico and William Lindsey, Purchasing Agent, Gloucester County, noted that surveys have been conducted that indicate there is no support for continued publication of RFPs. Ms. Riley asserted that she had not seen the data from such studies and maintained there is a need to make sure that elimination of the publication requirement is the correct policy path.

The work group opened the floor to receive public comment on the publication of notice; competitive negotiation discussion draft.

Matt Paxton, Virginia News Gazette

Mr. Paxton stated that his newspaper has been in business for over 213 years. He voiced concern that the Internet is not available in all parts of the state, which would have an adverse effect on both the citizens and local contractors in those areas. Mr. Paxton also asserted that the publication costs **amount to a miniscule percentage of a local public body's total budget.**

Ginger Stanley, Virginia Press Association (VPA)

Ms. Stanley asserted that RFPs published in local newspapers reach a broad pool of local businesses and also serve as notices of proposed government actions to local residents. By contrast, RFPs published on a government website reach fewer potential bidders, including small businesses, minority businesses, and businesses in rural areas. In addition, Ms. Stanley maintained that not all Virginia businesses have easy or immediate access to online requests for proposals, with some communities having no access to the

Internet at all. Ms. Stanley provided the work group with the results of a recent survey conducted by DecideSmart for the VPA examining the views of 500 adult Virginians about **the principle of the public's right to know and the placement** of public notices. According to the survey, 97% of the respondents said that the **principle of the public's right to know what their government is doing and** planning is either very important or somewhat important. The survey also found that 94% of respondents thought that keeping the citizens informed of public notices/legal advertisements in newspapers is an important function of government agencies. Ms. Stanley added that she has worked on this issue for over 10 years and has never seen a survey conducted by the Virginia Municipal League or the Virginia Association of Counties.

No other comment other public comment on the publication issue was offered and the work group continued its discussion.

Eric Denby, Director of Procurement and Supplier Diversity Services, University of Virginia, stated that small businesses are interested in the type of small purchases that are found on eVA and that are not included in the RFPs that are required to be published in newspapers. He further asserted that every advertisement is different in terms of the information that is contained and that often a potential bidder may have to go to two or three places to get full information. Ms. Errico offered as a compromise to have a two-year transition with a one-year reporting period.

Mr. Stewart stated that he favors leaving the decision to publish up to the locality. Mr. Damico suggested as a compromise that DGS could provide the information to the newspapers and if localities did not want to submit opportunities to Virginia Business Opportunities/eVA, then they could submit the information themselves directly to the relevant newspaper. William Lindsey, Purchasing Agent, Gloucester County, suggested that localities be given the option of providing the information directly to the newspapers or, in the alternative, to DGS for inclusion in what the agency provides in its submission to newspapers.

The consensus of the work group was to have a two-year transition period and a reporting period of one year. In addition, it was agreed that DGS and localities would provide an electronic data file containing all active business opportunities to any requesting newspaper free of charge. Localities would, however, have the option of providing procurement information directly to the newspapers or providing it to DGS to be included in what it submits to newspapers.

III. Enforcement and Oversight

Staff provided an array of items for consideration regarding enforcement and oversight relating to the procurement process. The items covered three general areas: (i) enforcement, procurement process; (ii) enforcement, administrative appeal alternative; and (iii) general oversight.

Mr. Owens stated that there used to be a procurement appeals board located within the Secretary of Administration, but that it was limited to procurements concerning goods. He further stated that the option to appeal to the board was infrequently used. Ms. Chiang maintained that an effective appeals process is necessary in order to keep everyone in line with the requirements of the process. Mr. Kaloupek asserted that Virginia Tech has an appeals process that is not being used. Mr. Denby added that the problem is that vendors do not want to protest because it may adversely affect future procurement opportunities with that agency. Robert Gleason, Director, Division of Purchases & Supply, DGS, remarked that SBSD had a role in advocating for small, women-owned, and minority-owned businesses (SWaM). Mr. Chiang noted that the agency has only advisory authority and cannot impose sanctions.

Mr. Damico suggested that the work group consider providing a role for the Office of the Inspector General (OSIG). He asserted that OSIG is responsible for looking into waste, fraud, and abuse and that it already has a structure at the state level for reviewing the activities of state agencies. In addition, at OSIG the process is confidential. Ms. Chiang asserted that there must be an administrative remedy with each step clearly set out. Ms. Davis indicated her support for such a process. Mr. Anderson maintained that any process must first require the vendor or bidder to protest the award before being allowed to appeal. Mr. Gagnon added that whatever the work group did it needed to be in concert with what work group #1 may be considering. Mr. Owens agreed that the work groups should stay in sync on these issues, noting that the construction discussion will have different concerns, chiefly the selection of method of procurement. Mr. Gagnon also offered that an administrative appeals process may be better suited for construction-related procurement than for goods and services. Mr. Berry stated that, in terms of enforcement or oversight options, there needs to be a distinction made between project delivery method and method of procurement.

Chester Brazzell stated that he supported requiring all public bodies to establish an administrative appeals procedure. Ms. Errico maintained that procurement is about relationships and that adding another level of

administrative review will not necessarily help the process. She suggested that establishing an advisory council similar to the Freedom of Information Advisory Council may be a good idea. Mr. Anderson noted that often contractors just want to vent and that there should be an entity available to respond. He further noted that training and education are key issues that could be addressed by an advisory entity. Ms. Chiang reasserted that there needs to be a formal appeals process. Patti Innocenti, Deputy Director, Purchasing and Supply Management, Fairfax County, stated that the county awards 550 contracts per year and there are few protests. Mr. Gleason added that the supplier manual used by DGS includes an appeals process that is applicable to executive branch agencies.

It was the consensus of the work group to continue discussion of the issue at future meetings.

September 17, 2014, at 1:30 p.m.
House Room 1, The Capitol, Richmond
Meeting Summary

Members present: Eugene Anderson, Mike Bacile, Lee Brazzell, Angela Chiang, Ashley Colvin (for Eric Link), Micah Dalton (for Brian Epley), Joe Damico, Gwendolyn Davis, Eric Denby, Phyllis Errico, Keith Gagnon, Sandra Gill (for Robert Gleason), Gary Guilliksen (for Tom Kaloupek), Mary Helmick, Patti Innocenti, William Lindsey, Phil Pippert, Nicole Riley, Ridge Schulyer, and John Westrick.

Members absent: Lem C. Stewart

Work Group No. 2 of the General Laws Special Joint Subcommittee Studying the Virginia Public Procurement Act (VPPA) held its fourth meeting of the 2014 interim on Wednesday, September 17, 2014, at 1:30 p.m. in House Room 1 at the Capitol. The meeting began with a review of the actions taken by the General Laws Special Joint Subcommittee on legislation referred by the 2014 session of the General Assembly and a progress report on the activities and consensus items of Work Group No. 1.

Maria Everett, Division of Legislative Services (DLS), presented two consensus drafts: One places competitive negotiation and competitive sealed

bidding on equal footing as methods of procurement for goods and nonprofessional services; the second relates to the publication of notices of competitive negotiation. After brief discussion, it was decided that the final decision on the drafts would be made at the last meeting of the work group.

The work group then turned its attention to reviewing suggested improvements to the procurement process. Amigo Wade, DLS, presented several suggested changes intended to clarify the procurement processes (i) the choice between a Notice of Intent to Award or a Notice of Award, (ii) the application of automatic stay provisions, (iii) the "sole relief" language under the VPPA, and (iv) the clarification of the administrative process for protest appeals. Joe Damico, Deputy Director, Department of General Services (DGS), noted that it was important to hear from the vendor community regarding the status of the current process. He further noted that if a vendor has a concern about compliance with state law or procurement regulations, a possible avenue of complaint would be through the Office of the Inspector General (OSIG). Nicole Riley, Virginia State Director, National Federation of Independent Business, asserted that what vendors want is an independent review of the process; if that review occurs at the front end of the procurement process, there would be no need for review by OSIG. Ms. Riley further stated that vendors' biggest concern is the lack of a remedy for their protest. Gwendolyn Davis, Chair, Equipping Businesses for Success Institute, noted that vendors who lodged a protest were concerned that the public body would retaliate by withholding future work. Lee Brazzell, President and CEO of Transformation Consulting LLC, added that women-owned and minority-owned businesses were not being treated fairly, and disparity studies have found that such businesses fear retaliation. Eric Denby, Director of Procurement and Supplier Diversity Services, University of Virginia, noted that small, women-owned, and minority-owned (SWaM) businesses tended to participate in quick quotes on eVA and did not participate in large contracts. After discussion, the consensus of the work group was to not to proceed with any of the changes listed under item (i) and to maintain the status quo.

The work group then moved to discuss the provisions under item (iii), regarding clarification of the sole relief language of the VPPA. Code provisions for appealing decisions regarding ineligibility, withdrawal of a bid, and responsibility clearly prescribe what the sole relief will be if the action is

appealed to the court system. Section 2.2-4360, which pertains to protests of award or decisions to award, does not expressly state that its remedies are the sole relief upon appeal. The result is that the sole relief language has been interpreted to apply to the public body in the administrative appeal process, but not to the court when the action is appealed. Eugene Anderson, Director, Department of Procurement Services, Norfolk State University, and William Lindsey, Purchasing Agent, Gloucester County, asserted the need for consistency between administrative and judicial remedies. Ms. Riley, Ms. Davis and Ms. Brazzell countered that the courts should be able to fashion a remedy appropriate to the specific facts in a given appeal. Keith Gagnon, Procurement Director, Virginia Community College System (VCCS), asserted that keeping the remedies the same would not be changing the process. No consensus could be reached on this point. Staff suggested that work group members submit specific language for consideration at the next meeting.

Discussion then focused on the options for improved oversight and enforcement of the procurement process. Ms. Davis supported the option of requiring all public bodies to have administrative review procedures and establishing an independent agency to review and enforce the VPPA. Mary Helmick, Director, Procurement Services, James Madison University, stated the all public bodies should not be required to establish an administrative appeals procedure because it would prolong the process. Mr. Anderson expressed support for the establishment of an advisory council, which would serve as a forum for stakeholders to discuss and resolve procurement issues apart from the review of specific proposals during the legislative session. Several work group members expressed support for an advisory council with a chief issue being its jurisdiction. Mr. Gagnon suggested that in order to resolve the issues that had been raised, there may need to be both a central appeal body, which would address the specifics of the procurement process, and a separate body to focus on broader areas such as education and training. It was the consensus of the work group to have staff prepare a draft of an advisory entity for review at the next work group meeting. In addition, staff was asked to provide to the work group prior to the next meeting a copy of the enabling language for the appeal entity previously used by DGS. Mr. Damico and Micah Dalton Northhighland Consulting added that it would be helpful to the process if work group members and interested parties provided the staff with more

information regarding vendor issues and examples denoting some of the problems.

Public Comment

The work group opened the floor to receive public comment.

Michael Locaby, Esq., County Attorney for Louisa County; Local Government Attorney's Association

Mr. Locaby stated that many localities have very limited staff and that the current VPPA was already extremely difficult for smaller localities to navigate. He submitted that the work group should not do anything to make the VPPA more complicated; rather, the focus should be on the original intent of the VPPA and its objective of providing general rules with some flexibility. Regarding oversight, Mr. Locaby felt that there was no need for another level of state bureaucracy.

October 15, 2014, at 1:30 p.m. House Room 1, The Capitol, Richmond Meeting Summary

Members present: Eugene Anderson, Mike Bacile, Ashley Colvin (for Eric Link), Michael Dalton (for Brian Epley), Joe Damico, Gwendolyn Davis, Eric Denby, Phyllis Errico, Keith Gagnon, Robert Gleason, Mary Helmick, Patti Innocenti, Tom Kaloupek, William Lindsey, Phil Pippert, Ridge Schulyer, Lem C. Stewart and John Westrick.

Members absent: Lee Brazzell, Angela Chiang, and Nicole Riley

Work Group No. 2 of the General Laws Special Joint Subcommittee Studying the Virginia Public Procurement Act (Special Joint Subcommittee) held its fifth and final meeting of the 2014 interim on Wednesday, October 15, 2014, at 1:30 p.m. in House Room 1 at the Capitol. The meeting began with the review of two redrafts comprising (i) the efforts of the work group to establish equal footing for competitive negotiation and competitive sealed bidding, and (ii) the gradual removal of the requirement for the publication of notices of requests for proposals.

The first redraft removes preference for the procurement of goods, services, or insurance by competitive sealed bidding. The draft does not change

the requirement for professional services to be procured by competitive negotiation or the preference for construction to be procured by competitive sealed bidding. The work group unanimously approved the draft for recommendation to Special Joint Subcommittee. The second redraft removes the requirement for the publication of notices of requests for proposals by July 1, 2017. During the interim, the Department of General Services will provide an electronic data file of business opportunities to any requesting newspaper or other print publication with circulation in Virginia. Localities would have the option of doing the same or providing an electronic data file of all business opportunities to DGS's central electronic procurement website. Also during this period, public bodies issuing Requests for Proposals (RFPs) are required to ascertain the method by which an offeror submitting a proposal in response to the RFP became aware of the solicitation, whether by newspaper publication, website posting, or other method. Such findings will be reported by July 1, 2016, to the Chairmen of the House Committee on General Laws and the Senate Committee on General Laws and Technology.

Phyllis Errico, Virginia Association of Counties, stated that the draft should clarify that there will be no fee charged to localities providing the files to DGS. It was also noted that the redraft called for the publication of all business opportunities, while current law only requires the publication of RFPs. Joseph Damico, Deputy Director, DGS, supported allowing more transparency. The floor was opened to receive public comment on the redrafts. Ginger Stanley, Executive Director, Virginia Press Association, directed comments to the publication draft. She asserted that the public has a right to know how its money will be used and requested more time to consider the ramifications of the changes. After making a few technical changes, the work group unanimously approved the draft for recommendation to Special Joint Subcommittee.

The work group then moved to review a discussion draft establishing the Virginia Public Procurement Advisory Council (the Council). The draft was based on previous work group discussions and modeled to some degree on the Freedom of Information Advisory Council. The Council would be a legislative branch entity consisting of 13 members, including legislators and representatives of state and local government and the vendor community. The purpose of the Council would be to encourage and facilitate compliance with

the state's procurement laws. The Council would be authorized to hire an executive director and other employees as deemed necessary. The powers and duties of the Council would be as follows:

1. Conduct training seminars and educational programs;
2. Publish educational materials;
3. Review written determinations of public bodies regarding methods of procurement and statutory waivers and related exemptions from the laws governing public procurement and collect data necessary to evaluate the effectiveness and appropriateness of such determinations, waivers and exemptions;
4. Provide a forum to address concerns regarding public procurement;
5. Monitor changes in state laws relating to public procurement and make recommendations for changes in such laws; and
6. Provide an annual report.

Eric Denby, Director of Procurement and Supplier Diversity Services, University of Virginia, suggested removal of item three under the powers and duties because the work group had just approved a draft removing the requirement for written determinations to use competitive negotiations for the procurement of goods and services. It was noted that written determinations were still required to use competitive negotiation to procure construction. Tom Kaloupek, Director of Materials Management, Virginia Tech, did not support the Council having such authority. Mr. Damico agreed that item three should be deleted and that item five should be expanded to include the collection of data on the use of such waivers. Mr. Denby asserted that a 13-member Council would be too big and would create operational issues that could hold up procurements. Robert Gleason, Director, Division of Purchases & Supply, DGS, stated that he had not seen the number of issues rise to the point of supporting another level of oversight to the process. Gwendolyn Davis, Chair, Equipping

Businesses for Success Institute, maintained that the Council is needed and that recent disparity studies support the need for additional oversight to ensure compliance with the state's procurement laws and regulations.

Mr. Kaloupek stated that the entity should start out with a more limited focus and should serve as a resource. He maintained that a three-member entity limited to providing education, training, and a forum for discussion would be appropriate to start. Phil Pippert, Director, Supply Chain Management, Virginia Information Technologies Agency (VITA) suggested including the state's Chief Information Officer as a part of any proposed entity to gain the perspective of technology procurements. Mary Helmick, Director, Procurement Services, James Madison University, expressed support for an entity that would be truly advisory. She suggested the duties be pared down to (i) conducting training seminars and educational programs, (ii) publishing educational materials, (iii) providing a forum to address concerns regarding public procurement, and (iv) monitoring changes in state laws relating to public procurement and making recommendations for changes in such laws. Eugene Anderson, Director, Department of Procurement Services, Norfolk State University, added that item four is a key component because currently there is no forum for members of the vendor community to express their concerns. Mr. Anderson also stated the importance of ensuring that the entity was properly staffed, and he suggested the draft be changed to require the Council to hire an executive director.

While there was some degree of consensus reached on possibility of establishing an advisory entity, there remained substantial disagreement in several areas including composition and size, powers and duties, and appropriate staffing. The group could not reach a consensus to the point of advancing specific language or recommending legislation for consideration. The floor was opened for public comment on the establishment of an advisory council. No comment was offered.

A final issue for consideration before the work group pertained to the use of cooperative procurement to purchase insurance. The issue had been referred by Work Group No. 1 because it concerned the purchase of nonprofessional services, which was included in the scope of work for Work Group No. 2. After brief discussion, no action was recommended.

Next Steps

Staff informed the members that they were released from service. A report including the activities of the work group and consensus recommendations will be presented to the Special Joint Subcommittee at a meeting that will be scheduled prior to the commencement of the 2015 legislative session.

FINAL LEGISLATIVE RECOMMENDATIONS

WORK GROUP NO. 2

1. Equal Footing for Competitive Sealed Bidding and Competitive Negotiation.

BILL SUMMARY: Virginia Public Procurement Act; use of competitive sealed bidding or competitive negotiation for the procurement of goods, certain services, and insurance. Removes the requirement that a determination be made in advance by a public body and set forth in writing that competitive sealed bidding is either not practicable or not fiscally advantageous to the public, in order for goods, services, or insurance to be procured by competitive negotiation.

BILL TEXT:

A BILL to amend and reenact § 2.2-4303 of the Code of Virginia, relating to the Virginia Public Procurement Act; use of competitive sealed bidding or competitive negotiation for the procurement of goods, certain services, and insurance.

Be it enacted by the General Assembly of Virginia:

1. That § 2.2-4303 of the Code of Virginia is amended and reenacted as follows:

§ 2.2-4303. Methods of procurement.

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

B. Professional services shall be procured by competitive negotiation.

~~C. Upon a determination made in advance by the public body and set forth in writing that competitive sealed bidding is either not practicable or not fiscally advantageous to the public, goods, services, or insurance may be procured by competitive negotiation. The writing shall document the basis for this determination.~~

Upon a written determination made in advance by (i) the Governor or his designee in the case of a procurement by the Commonwealth or by a department, agency or institution thereof or (ii) the local governing body in the case of a procurement by a political subdivision of the Commonwealth, that competitive negotiation is either not practicable or not fiscally advantageous, insurance may be procured through a licensed agent or broker selected in the manner provided for the procurement of things other than professional services set forth in § 2.2-4302.2. The basis for this determination shall be documented in writing.

D. Construction may be procured only by competitive sealed bidding, except that competitive negotiation may be used in the following instances upon a determination made in advance by the public body and set forth in writing that competitive sealed bidding is either not practicable or not fiscally advantageous to the public, which writing shall document the basis for this determination:

1. By the Commonwealth, its departments, agencies and institutions on a fixed price design-build basis or construction management basis under § 2.2-4306;

2. By any public body for the construction of highways and any draining, dredging, excavation, grading or similar work upon real property;

3. By any governing body of a locality with a population in excess of 100,000, provided that the locality has the personnel, procedures, and expertise to enter into a contract for construction on a fixed price or not-to-exceed price design-build or construction management basis and shall otherwise be in compliance with the provisions of this section, § 2.2-4308, and other applicable law governing design-build or construction management contracts for public bodies other than the Commonwealth. The procedures of the local governing body shall be consistent with the two-step competitive negotiation process established in § 2.2-4302.2; or

4. As otherwise provided in § 2.2-4308.

E. 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. The public body shall issue a written notice stating that only one source was determined to be practicably available, and identifying that which is being procured, the contractor selected, and the date on which the contract was or will be awarded. This notice shall be posted on the Department of General Services' central electronic procurement website or other appropriate websites, and in addition, public bodies may publish in a newspaper of general circulation on the day the public body awards or announces its decision to award the contract, whichever occurs first. Posting on

the Department of General Services' central electronic procurement website shall be required of any state public body. Local public bodies are encouraged to utilize the Department of General Services' central electronic procurement website to provide the public with centralized visibility and access to the Commonwealth's procurement opportunities.

F. In case of emergency, a contract may be awarded without competitive sealed bidding or competitive negotiation; however, such procurement shall be made with such competition as is practicable under the circumstances. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file. The public body shall issue a written notice stating that the contract is being awarded on an emergency basis, and identifying that which is being procured, the contractor selected, and the date on which the contract was or will be awarded. This notice shall be posted on the Department of General Services' central electronic procurement website or other appropriate websites, and in addition, public bodies may publish in a newspaper of general circulation on the day the public body awards or announces its decision to award the contract, whichever occurs first, or as soon thereafter as is practicable. Posting on the Department of General Services' central electronic procurement website shall be required of any state public body. Local public bodies are encouraged to utilize the Department of General Services' central electronic procurement website to provide the public with centralized visibility and access to the Commonwealth's procurement opportunities.

G. A public body may establish purchase procedures, if adopted in writing, not requiring competitive sealed bids or competitive negotiation for single or term contracts for goods and services other than professional services if the aggregate or the sum of all phases is not expected to exceed \$100,000;

however, such small purchase procedures shall provide for competition wherever practicable. For local public bodies, such purchase procedures may allow for single or term contracts for professional services without requiring competitive negotiation, provided the aggregate or the sum of all phases is not expected to exceed \$60,000.

For state public bodies, purchases under this subsection that are expected to exceed \$30,000 shall require the (i) written informal solicitation of a minimum of four bidders or offerors and (ii) posting of a public notice on the Department of General Services' central electronic procurement website or other appropriate websites. Posting on the Department of General Services' central electronic procurement website shall be required of any state public body. Local public bodies are encouraged to utilize the Department of General Services' central electronic procurement website to provide the public with centralized visibility and access to the Commonwealth's procurement opportunities.

H. A state public body may establish purchase procedures, if adopted in writing, not requiring competitive negotiation for single or term contracts for professional services if the aggregate or the sum of all phases is not expected to exceed \$50,000; however such small purchase procedures shall provide for competition wherever practicable.

I. Upon a determination made in advance by a public body and set forth in writing that the purchase of goods, products or commodities from a public auction sale is in the best interests of the public, such items may be purchased at the auction, including online public auctions. Purchase of information technology and telecommunications goods and nonprofessional services from a public auction sale shall be permitted by any authority, department, agency, or institution of the Commonwealth if approved by the Chief Information Officer

of the Commonwealth. The writing shall document the basis for this determination. However, bulk purchases of commodities used in road and highway construction and maintenance, and aggregates shall not be made by online public auctions.

J. The purchase of goods or nonprofessional services, but not construction or professional services, may be made by reverse auctioning. However, bulk purchases of commodities used in road and highway construction and maintenance, and aggregates shall not be made by reverse auctioning.

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2. Newspaper publication for Requests for Proposals.

BILL SUMMARY: Virginia Public Procurement Act; competitive negotiation; newspaper publication of notices for requests for proposals. Requires the Department of General Services to (i) provide an electronic data file of all agencies' business opportunities posted on the Department's central electronic procurement website at no charge to any requesting newspaper or other print publication with circulation in Virginia using the comma-separated values (CSV) format, another available format used by the Department, or a file format as agreed to by the parties and (ii) send the data file automatically via electronic mail on a daily, weekly, or monthly basis as agreed to by the parties. Local public bodies have the option to either (a) post all business opportunities on the Department's central electronic procurement website or (b) provide an electronic data file of all business opportunities at no charge to any requesting newspaper or other print publication with circulation in Virginia. The bill also provides a two-year transition period with regard to the required publication in newspapers of all Requests for Proposals (RFP), after which time newspaper publication of RFPs will be discretionary. Specifically, the bill provides that from July 1, 2015, until June 30, 2017, public bodies that issue an RFP shall continue to publish a public notice of the RFP in a newspaper of general circulation; however, such notice shall include a statement indicating the website, either the Department of General Services' central electronic

procurement website (www.eva.virginia.gov) or the public body's public government or other appropriate website, where all public notices for RFPs issued from the public body are located. Finally, the bill requires that all public bodies issuing RFPs on or after July 1, 2015, through June 30, 2016, to ascertain the method by which an offeror submitting a proposal in response to the RFP became aware of the solicitation, whether by newspaper publication, website posting, other method, or combination of the above. Such public bodies shall report such findings by October 1, 2016, to the Chairmen of the House Committee on General Laws and the Senate Committee on General Laws and Technology.

BILL TEXT:

A BILL to amend and reenact § 2.2-4302.2 of the Code of Virginia and to require the Department of General Services and local public bodies to provide procurement data files to requesting newspapers, relating to the Virginia Public Procurement Act; competitive negotiation; newspaper publication of notices for requests for proposals.

Be it enacted by the General Assembly of Virginia:

1. That § 2.2-4302.2 of the Code of Virginia is amended and reenacted as follows:

§ 2.2-4302.2. Process for competitive negotiation.

A. The process for competitive negotiation shall include the following:

1. Issuance of a written Request for Proposal indicating in general terms that which is sought to be procured, specifying the factors that will be used in evaluating the proposal and containing or incorporating by reference the other applicable contractual terms and conditions, including any unique capabilities, specifications or qualifications that will be required;

2. Public notice of the Request for Proposal at least 10 days prior to the date set for receipt of proposals by posting on the Department of General

Services' central electronic procurement website or other appropriate websites. Additionally, public bodies shall publish in a newspaper of general circulation in the area in which the contract is to be performed so as to provide reasonable notice to the maximum number of offerors that can be reasonably anticipated to submit proposals in response to the particular request. From July 1, 2015, until June 30, 2017, public bodies that issue a Request for Proposal shall continue to publish a public notice of the Request for Proposal in a newspaper of general circulation in accordance with this subdivision; however, such notice shall include a statement indicating the Internet website address, either the Department of General Services' central electronic procurement website (www.eva.virginia.gov) or the public body's public government or other appropriate website, where all public notices for Requests for Proposals issued from the public body are located.

Posting on the Department of General Services' central electronic procurement website shall be required of any state public body. Local public bodies are encouraged to utilize the Department of General Services' central electronic procurement website to provide the public with centralized visibility and access to the Commonwealth's procurement opportunities.

In addition, proposals may be solicited directly from potential contractors. Any additional solicitations shall include certified businesses selected from a list made available by the Department of Small Business and Supplier Diversity; and

3. For goods, nonprofessional services, and insurance, selection shall be made of two or more offerors deemed to be fully qualified and best suited among those submitting proposals, on the basis of the factors involved in the Request for Proposal, including price if so stated in the Request for Proposal. Negotiations shall then be conducted with each of the offerors so selected.

Price shall be considered, but need not be the sole or primary determining factor. After negotiations have been conducted with each offeror so selected, the public body shall select the offeror which, in its opinion, has made the best proposal and provides the best value, and shall award the contract to that offeror. When the terms and conditions of multiple awards are so provided in the Request for Proposal, awards may be made to more than one offeror. Should the public body determine in writing and in its sole discretion that only one offeror is fully qualified, or that one offeror is clearly more highly qualified than the others under consideration, a contract may be negotiated and awarded to that offeror; or

4. For professional services, the public body shall engage in individual discussions with two or more offerors deemed fully qualified, responsible and suitable on the basis of initial responses and with emphasis on professional competence, to provide the required services. Repetitive informal interviews shall be permissible. The offerors shall be encouraged to elaborate on their qualifications and performance data or staff expertise pertinent to the proposed project, as well as alternative concepts. In addition, offerors shall be informed of any ranking criteria that will be used by the public body in addition to the review of the professional competence of the offeror. The Request for Proposal shall not, however, request that offerors furnish estimates of man-hours or cost for services. At the discussion stage, the public body may discuss nonbinding estimates of total project costs, including, but not limited to, life-cycle costing, and where appropriate, nonbinding estimates of price for services. In accordance with § 2.2-4342, proprietary information from competing offerors shall not be disclosed to the public or to competitors. At the conclusion of discussion, outlined in this subdivision, on the basis of evaluation factors published in the Request for Proposal and all information

developed in the selection process to this point, the public body shall select in the order of preference two or more offerors whose professional qualifications and proposed services are deemed most meritorious.

Negotiations shall then be conducted, beginning with the offeror ranked first. If a contract satisfactory and advantageous to the public body can be negotiated at a price considered fair and reasonable, the award shall be made to that offeror. Otherwise, negotiations with the offeror ranked first shall be formally terminated and negotiations conducted with the offeror ranked second, and so on until such a contract can be negotiated at a fair and reasonable price.

Notwithstanding the foregoing, if the terms and conditions for multiple awards are included in the Request for Proposal, a public body may award contracts to more than one offeror.

Should the public body determine in writing and in its sole discretion that only one offeror is fully qualified or that one offeror is clearly more highly qualified and suitable than the others under consideration, a contract may be negotiated and awarded to that offeror.

B. For multiple projects, a contract for architectural or professional engineering services relating to construction projects, or a contract for job order contracting, may be negotiated by a public body, provided (i) the projects require similar experience and expertise, (ii) the nature of the projects is clearly identified in the Request for Proposal, and (iii) the contract is limited to a one-year term or when the cumulative total project fees reach the maximum cost authorized in this subsection, whichever occurs first.

Such contracts may be renewable for four additional one-year terms at the option of the public body. The fair and reasonable prices as negotiated shall be used in determining the cost of each project performed and the sum of all

projects performed in a one-year contract term shall not exceed \$500,000, except that for:

1. A state agency, as defined in § 2.2-4347, the sum of all projects performed in a one-year contract term shall not exceed \$1 million as may be determined by the Director of the Department of General Services;

2. Any locality or any authority, sanitation district, metropolitan planning organization or planning district commission with a population in excess of 80,000, or any city within Planning District 8, the sum of all projects performed in a one-year contract term shall not exceed \$5 million and those awarded for any airport as defined in § 5.1-1 and aviation transportation projects, the sum of all such projects shall not exceed \$1.5 million;

3. Architectural and engineering services for rail and public transportation projects by the Director of the Department of Rail and Public Transportation, the sum of all projects in a one-year contract term shall not exceed \$2 million. Such contract may be renewable for two additional one-year terms at the option of the Director;

4. Environmental, location, design, and inspection work regarding highways and bridges by the Commissioner of Highways, the initial contract term shall be limited to two years or when the cumulative total project fees reach \$5 million, whichever occurs first. Such contract may be renewable for two additional one-year terms at the option of the Commissioner, and the sum of all projects in each one-year contract term shall not exceed \$5 million; and

5. Job order contracting, the sum of all projects performed in a one-year contract term shall not exceed \$2 million.

Competitive negotiations for such contracts may result in awards to more than one offeror provided (i) the Request for Proposal so states and (ii) the

public body has established procedures for distributing multiple projects among the selected contractors during the contract term.

C. For any single project, for (i) architectural or professional engineering services relating to construction projects, or (ii) job order contracting, the project fee shall not exceed \$100,000, or for architectural or engineering services for airports as defined in § 5.1-1 and aviation transportation projects, the project fee shall not exceed \$500,000, except that for:

1. A state agency as defined in § 2.2-4347, the project fee shall not exceed \$200,000, as may be determined by the Director of the Department of General Services;

2. Any locality or any authority or sanitation district with a population in excess of 80,000, or any city within Planning District 8, the project fee shall not exceed \$2 million; and

3. Job order contracting, the project fee shall not exceed \$400,000.

The limitations imposed upon single project fees pursuant to this subsection shall not apply to environmental, location, design, and inspection work regarding highways and bridges by the Commissioner of Highways or architectural and engineering services for rail and public transportation projects by the Director of the Department of Rail and Public Transportation.

D. For the purposes of subsections B and C, any unused amounts from the first contract term shall not be carried forward to the additional term.

E. Multiphase professional services contracts satisfactory and advantageous to the completion of large, phased, or long term projects may be negotiated and awarded based on a fair and reasonable price for the first phase only, where the completion of the earlier phases is necessary to provide information critical to the negotiation of a fair and reasonable price for succeeding phases. Prior to the entering into any such contract, the public body

shall (i) state the anticipated intended total scope of the project and (ii) determine in writing that the nature of the work is such that the best interests of the public body require awarding the contract.

2. That § 2.2-4302.2 of the Code of Virginia is amended and reenacted as follows:

§ 2.2-4302.2. Process for competitive negotiation.

A. The process for competitive negotiation shall include the following:

1. Issuance of a written Request for Proposal indicating in general terms that which is sought to be procured, specifying the factors that will be used in evaluating the proposal and containing or incorporating by reference the other applicable contractual terms and conditions, including any unique capabilities, specifications or qualifications that will be required;

2. Public notice of the Request for Proposal at least 10 days prior to the date set for receipt of proposals by posting on the Department of General Services' central electronic procurement website or other appropriate websites.

Additionally, public bodies ~~shall~~ may publish in a newspaper of general circulation in the area in which the contract is to be performed so as to provide reasonable notice to the maximum number of offerors that can be reasonably anticipated to submit proposals in response to the particular request. Posting on the Department of General Services' central electronic procurement website shall be required of any state public body. Local public bodies are encouraged to utilize the Department of General Services' central electronic procurement website to provide the public with centralized visibility and access to the Commonwealth's procurement opportunities. In addition, proposals may be solicited directly from potential contractors. Any additional solicitations shall include certified businesses selected from a list made available by the Department of Small Business and Supplier Diversity; and

3. For goods, nonprofessional services, and insurance, selection shall be made of two or more offerors deemed to be fully qualified and best suited among those submitting proposals, on the basis of the factors involved in the Request for Proposal, including price if so stated in the Request for Proposal. Negotiations shall then be conducted with each of the offerors so selected. Price shall be considered, but need not be the sole or primary determining factor. After negotiations have been conducted with each offeror so selected, the public body shall select the offeror which, in its opinion, has made the best proposal and provides the best value, and shall award the contract to that offeror. When the terms and conditions of multiple awards are so provided in the Request for Proposal, awards may be made to more than one offeror. Should the public body determine in writing and in its sole discretion that only one offeror is fully qualified, or that one offeror is clearly more highly qualified than the others under consideration, a contract may be negotiated and awarded to that offeror; or

4. For professional services, the public body shall engage in individual discussions with two or more offerors deemed fully qualified, responsible and suitable on the basis of initial responses and with emphasis on professional competence, to provide the required services. Repetitive informal interviews shall be permissible. The offerors shall be encouraged to elaborate on their qualifications and performance data or staff expertise pertinent to the proposed project, as well as alternative concepts. In addition, offerors shall be informed of any ranking criteria that will be used by the public body in addition to the review of the professional competence of the offeror. The Request for Proposal shall not, however, request that offerors furnish estimates of man-hours or cost for services. At the discussion stage, the public body may discuss nonbinding estimates of total project costs, including, but not limited to, life-

cycle costing, and where appropriate, nonbinding estimates of price for services. In accordance with § 2.2-4342, proprietary information from competing offerors shall not be disclosed to the public or to competitors. At the conclusion of discussion, outlined in this subdivision, on the basis of evaluation factors published in the Request for Proposal and all information developed in the selection process to this point, the public body shall select in the order of preference two or more offerors whose professional qualifications and proposed services are deemed most meritorious.

Negotiations shall then be conducted, beginning with the offeror ranked first. If a contract satisfactory and advantageous to the public body can be negotiated at a price considered fair and reasonable, the award shall be made to that offeror. Otherwise, negotiations with the offeror ranked first shall be formally terminated and negotiations conducted with the offeror ranked second, and so on until such a contract can be negotiated at a fair and reasonable price.

Notwithstanding the foregoing, if the terms and conditions for multiple awards are included in the Request for Proposal, a public body may award contracts to more than one offeror.

Should the public body determine in writing and in its sole discretion that only one offeror is fully qualified or that one offeror is clearly more highly qualified and suitable than the others under consideration, a contract may be negotiated and awarded to that offeror.

B. For multiple projects, a contract for architectural or professional engineering services relating to construction projects, or a contract for job order contracting, may be negotiated by a public body, provided (i) the projects require similar experience and expertise, (ii) the nature of the projects is clearly identified in the Request for Proposal, and (iii) the contract is limited to a one-

year term or when the cumulative total project fees reach the maximum cost authorized in this subsection, whichever occurs first.

Such contracts may be renewable for four additional one-year terms at the option of the public body. The fair and reasonable prices as negotiated shall be used in determining the cost of each project performed and the sum of all projects performed in a one-year contract term shall not exceed \$500,000, except that for:

1. A state agency, as defined in § 2.2-4347, the sum of all projects performed in a one-year contract term shall not exceed \$1 million as may be determined by the Director of the Department of General Services;

2. Any locality or any authority, sanitation district, metropolitan planning organization or planning district commission with a population in excess of 80,000, or any city within Planning District 8, the sum of all projects performed in a one-year contract term shall not exceed \$5 million and those awarded for any airport as defined in § 5.1-1 and aviation transportation projects, the sum of all such projects shall not exceed \$1.5 million;

3. Architectural and engineering services for rail and public transportation projects by the Director of the Department of Rail and Public Transportation, the sum of all projects in a one-year contract term shall not exceed \$2 million. Such contract may be renewable for two additional one-year terms at the option of the Director;

4. Environmental, location, design, and inspection work regarding highways and bridges by the Commissioner of Highways, the initial contract term shall be limited to two years or when the cumulative total project fees reach \$5 million, whichever occurs first. Such contract may be renewable for two additional one-year terms at the option of the Commissioner, and the sum of all projects in each one-year contract term shall not exceed \$5 million; and

5. Job order contracting, the sum of all projects performed in a one-year contract term shall not exceed \$2 million.

Competitive negotiations for such contracts may result in awards to more than one offeror provided (i) the Request for Proposal so states and (ii) the public body has established procedures for distributing multiple projects among the selected contractors during the contract term.

C. For any single project, for (i) architectural or professional engineering services relating to construction projects, or (ii) job order contracting, the project fee shall not exceed \$100,000, or for architectural or engineering services for airports as defined in § 5.1-1 and aviation transportation projects, the project fee shall not exceed \$500,000, except that for:

1. A state agency as defined in § 2.2-4347, the project fee shall not exceed \$200,000, as may be determined by the Director of the Department of General Services;

2. Any locality or any authority or sanitation district with a population in excess of 80,000, or any city within Planning District 8, the project fee shall not exceed \$2 million; and

3. Job order contracting, the project fee shall not exceed \$400,000.

The limitations imposed upon single project fees pursuant to this subsection shall not apply to environmental, location, design, and inspection work regarding highways and bridges by the Commissioner of Highways or architectural and engineering services for rail and public transportation projects by the Director of the Department of Rail and Public Transportation.

D. For the purposes of subsections B and C, any unused amounts from the first contract term shall not be carried forward to the additional term.

E. Multiphase professional services contracts satisfactory and advantageous to the completion of large, phased, or long term projects may be

negotiated and awarded based on a fair and reasonable price for the first phase only, where the completion of the earlier phases is necessary to provide information critical to the negotiation of a fair and reasonable price for succeeding phases. Prior to the entering into any such contract, the public body shall (i) state the anticipated intended total scope of the project and (ii) determine in writing that the nature of the work is such that the best interests of the public body require awarding the contract.

3. § 1. That the Department of General Services shall (i) provide an electronic data file of all agencies' business opportunities posted on the Department's central electronic procurement website at no charge to any requesting newspaper or other print publication with circulation in Virginia using the comma-separated values (CSV) format, another available format used by the Department, or a file format as agreed to by the parties and (ii) send the data file automatically via electronic mail on a daily, weekly, or monthly basis as agreed to by the parties. The data file shall contain all active business opportunity notices posted on the Department's central electronic procurement website in accordance with the requirements of the Virginia Public Procurement Act (§ 2.2-4300 et seq. of the Code of Virginia). The electronic business opportunity data shall include, at a minimum: (a) the name of the issuing agency, (b) a description of goods or services to be purchased, (c) the date the bid or proposal is due, and (d) the point of contact for the using agency, including the contact's name, phone number, and email address.

§ 2. Local public bodies shall either (i) post all business opportunities on the Department's central electronic procurement website or (ii) provide an electronic data file of all business opportunities at no charge to any requesting newspaper or other print publication with circulation in Virginia using the comma-separated values (CSV) format, another available format used by the

local public body, or a file format as agreed to by the parties and (ii) send the data file automatically via electronic mail on a daily, weekly, or monthly basis as agreed to by the parties. The data file shall contain all active business opportunity notices issued by the local public body in accordance with the requirements of the Virginia Public Procurement Act (§ 2.2-4300 et seq. of the Code of Virginia). The electronic business opportunity data shall include, at a minimum: (a) the name of the issuing local public body, (b) a description of goods or services to be purchased, (c) the date the bid or proposal is due, and (d) the point of contact for the local public body, including the contact's name, phone number, and email address.

4. That the provisions of the first and fifth enactments of this act shall become effective on July 1, 2015, and shall expire on July 1, 2017; the provisions of the second enactment of this act shall become effective July 1, 2017; and the provisions of the third enactment of this act shall become effective July 1, 2015.

5. That all public bodies issuing Requests for Proposals on or after July 1, 2015, through June 30, 2016, shall ascertain the method by which an offeror submitting a proposal in response to the Request for Proposal became aware of the solicitation, whether by newspaper publication, website posting, other method, or combination of the above. Such public bodies shall report such findings by October 1, 2016, to the Chairmen of the House Committee on General Laws and the Senate Committee on General Laws and Technology.

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