

Report on the review of
current construction
procurement processes
by public bodies and
oversight of
subcontractors.

Authority: Virginia Acts of Assembly, 2021 Special Session I, Chapter 552, Item 82

Report to the Chairs of the House Rules, General Laws, and Appropriations Committees, and Chairs of the Senate Rules, General Laws and Technology, and Finance and Appropriations Committees

Review of current construction procurement processes by state agencies and covered institutions with recommendations to incentivize positive business behavior by prime contractors that support achieving the Commonwealth's discretionary spend goals for small, women-, and minority-owned businesses through subcontracting, and oversight of prime contractors' subcontracts to include reporting requirements for payroll records, contracts and payments to other businesses, including individuals classified as independent contractors

Public Body Procurement Workgroup (PWG):

The Public Body Procurement Workgroup reviews and studies proposed changes to the Code of Virginia in areas of non-technology goods and services, technology goods and services, construction, transportation, and professional services procurements for the Commonwealth of Virginia.

The workgroup is charged with hearing legislation referred by letter from the Chairs of the House Rules, General Laws, and Appropriations Committees, and Chairs of the Senate Rules, General Laws and Technology, and Finance and Appropriations Committees.

<https://budget.lis.virginia.gov/item/2021/2/HB1800/Chapter/1/82/>
<https://dgs.virginia.gov/dgs/directors-office/procurement-workgroup/>

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Acknowledgement:

The Public Body Procurement Work Group expresses its appreciation to all of its members, the Department of Labor and Industry, Department of Taxation, Virginia Employment Commission, other state and local government public bodies, and the private sector community involved in the collection and reporting of survey data and participation throughout this process.



COMMONWEALTH *of* VIRGINIA

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October 21, 2021

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Chair David L. Bulova, House General Laws
Chair Luke E. Torian, House Appropriations Committee
Chair Mamie E. Locke, Senate Rules
Chair George L. Barker, Senate General Laws and Technology
Chair Janet D. Howell, Senate Finance and Appropriations Committees

Dear Chairs:

In 2021, the General Assembly established the Public Body Procurement Work Group (PWG) and charged it with (i) hearing legislation referred by letter from the Chairmen of the House Committees on Rules, General Laws, and Appropriations and the Senate Committees on Rules, General Laws and Technology, and Finance and Appropriations and (ii) reviewing procurement-related proposals at the request of such Chairmen in advance of upcoming legislative sessions in order to better understand potential impacts prior to their consideration by the General Assembly.

As an initial assignment, the General Assembly tasked the PWG with (a) reviewing current construction procurement processes used by state agencies and covered institutions and providing recommendations to incentivize positive business behavior by prime contractors that supports achieving the Commonwealth's discretionary spend goals for small, women-owned, and minority-owned businesses through subcontracting and (b) providing best practices associated with oversight of prime contractors' subcontracts to include reporting requirements for payroll records, contracts, and payments to other businesses, including individuals classified as independent contractors.

The PWG has completed its initial assignment Please see the attached report.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Damico", written over a horizontal line.

Joseph F. Damico

OBJECTIVE 7

BACKGROUND 7

I. Agencies with Procurement Authority: 7

II. Agencies with Certification Authority..... 9

III. Agencies with Oversight Authority 9

IV. Procurement and Capital Outlay Code Sections and Acts of Assembly: 10

V. Procurement Polices: State Agencies, Covered Institutions and Their Vendors 11

VI. Systems 12

VII. What We Found 13

VIII. Data..... 17

RECOMMENDATIONS 20

CONCLUSION..... 23

APPENDIXES 24

OBJECTIVE

Review of current construction procurement processes by state agencies and covered institutions with recommendations to incentivize positive business behavior by prime contractors that support achieving the Commonwealth's discretionary spend goals for small, women-, and minority-owned businesses through subcontracting, and oversight of prime contractors' subcontracts to include reporting requirements for payroll records, contracts and payments to other businesses, including individuals classified as independent contractors

BACKGROUND

I. Agencies with Procurement Authority:

A. Department of General Services (DGS)

DGS, through its Division of Purchases and Supply (DPS), as authorized in §2.2-1110, serves as the centralized procurement authority for every authority, department, division, institution, officer, agency, and other unit of state government, unless otherwise exempted, for all non-technology and non-professional goods and services. DGS, in creation of procurement policies, procedures and regulations, adheres to the Virginia Public Procurement Act (VPPA) and publishes the Agency Procurement and Surplus Property Manual (APSPM).

DGS, through its Division of Engineering and Buildings (DEB), does not have centralized procurement authority for construction; however, DEB is directed to establish standards, policies, terms, conditions, and procedures which are to be followed by state agencies. DEB, as authorized in §2.2-1132, publishes the Construction and Professional Services Manual (CPSM).

Each manual is revised at a minimum annually to incorporate changes as new laws are passed and existing laws are amended. Both DPS and DEB offer training and certification opportunities, teaching and educating others on procurement policies and procedures as articulated in the respective manuals.

DGS does not have authority over local government procurement or Institutions of Higher Education that operate under Management Agreements and Memoranda of Understanding in the areas of procurement or construction.

B. [Covered Institutions](#)

Currently there are six (6) Covered Institutions that have been granted additional operational authority through Management Agreements, also referred to as Level III or Tier III. These institutions have autonomy in various areas of operation, to include procurement of goods and services and construction.

There are eight (8) Covered Institutions that have additional operational authority through Memoranda of Understanding (see Appendix), also referred to as Level II or Tier II. These institutions have autonomy in two to three areas. Those areas are: procurement, capital outlay, information technology. Covered institutions operating with additional operational authority follow the Rules Governing Procurement established under the Restructured Higher Education Financial and Administrative Operations Act rather than the Virginia Public Procurement Act (VPPA).

C. [Virginia Department of Transportation \(VDOT\)](#)

VDOT is responsible for building, maintaining and operating the state's roads, bridges and tunnels and has authority to establish policies and procedures for construction of roads, bridges and tunnels. Often referred to as horizontal construction.

D. [Local Public Bodies](#)

Local public bodies are granted the option to follow the VPPA or exempt themselves from it. Currently, about half of the local governments follow the VPPA while the other half has exempted themselves by adopting, by ordinance or resolution, alternative policies and procedures.

II. Agencies with Certification Authority

A. Department of Small Business and Supplier Diversity (DSBSD)

The Code of Virginia §2.2-1605 authorizes DSBSD to establish a process for the establishment, preservation, and strengthening of small, women-, and minority-owned businesses. DSBSD, as authorized in § 2.2-1606.8, has adopted regulations for certification programs for small, women-owned, and minority-owned businesses and employment services organizations.

III. Agencies with Oversight Authority

A. Department of Labor and Industry (DOLI)

DOLI works with Virginia employers and employees to develop strong occupational safety and health programs. The agency's compliance efforts address safety and health hazards in general industry construction, and increase workplace safety awareness. DOLI also administers the child labor, minimum wage, and prevailing wage laws.

B. Department of Taxation (Tax)

The Department of Taxation serves citizens and businesses in Virginia by establishing and enforcing tax laws. Tax is tasked with exposing violations of law, corruption, and does not condone acts of fraud, theft, or waste. Tax, as authorized in §2.2-4321.1, is to determine whether a source is prohibited due to failure to collect and remit tax on sales delivered within the Commonwealth. Tax is required to notify DGS of its determination that a source is prohibited. Tax also shall determine if worker misclassification has occurred by an employer that failed to properly classify an individual as an employee under the provisions of § 58.1-1900, the Department shall notify all public bodies and covered institutions of the name of the employer.

C. [Virginia Employment Commission \(VEC\)](#)

The Virginia Employment Commission conducts random audits of employers as part of the unemployment insurance program. It also has a team of special investigators who investigate complaints of alleged misclassification that are often reported by competitor businesses, worker advocacy groups or employees. The VEC performs interagency investigations and supplies suspected tax fraud information to the Department of Taxation.

D. [Office of the Attorney General, Worker Protection Unit \(OAG\)](#)

The OAG Worker Protection Unit is a multidisciplinary team of prosecutors and attorneys focused on educating Virginia workers on their rights, and investigating, stopping, and prosecuting exploitation of Virginia workers, including wage theft and worker misclassification, which cheats workers out of pay and the Commonwealth out of revenue. This unit was established in March 2021 by Attorney General Mark Herring.

IV. [Procurement and Capital Outlay Code Sections and Acts of Assembly:](#)

Public procurement is addressed in various sections of the Code and Acts of Assemblies. Below are links to the Virginia Public Procurement Act, which governs state agencies and some local governments; the Rules Governing Procurement for Higher Education, which governs Higher Education Institutions that have procurement authority; the Appropriation Act section that outlines capital outlay projects; and the section of the Appropriation Act that authorizes the higher education restructuring that allows some institutions to be exempt from the VPPA by following the Rules Governing Procurement.

- A. [Virginia Public Procurement Act \(VPPA\) and Construction Management and Design-build](#)
- B. [Rules Governing Procurement of Goods, Services, Insurance, and Construction by a Public Institution of Higher Education](#)
- C. [Appropriation Act – Capital Outlay](#)
- D. [Appropriation Act – Higher Education Restructuring](#)

V. Procurement Policies: State Agencies, Covered Institutions and Their Vendors

Different policies and procedures govern public body vertical construction projects. State agencies and select covered institutions follow the Construction and Professional Services Manual (CPSM) that is authored by DGS; however, DGS does not have authority over the entities that utilize the CPSM. Covered institutions with procurement authority have institution-specific construction procurement manuals that can be accessed at the links below.

A. State Agencies and Select Covered Institutions

[Construction and Professional Services Manual \(CPSM\)](#)

B. Higher Education Capital Construction Manuals:

University of Virginia:

<https://www.fm.virginia.edu/depts/fpc/hecomanual.html>

Virginia Tech:

https://www.facilities.vt.edu/content/dam/facilities_vt_edu/design-and-construction-standards/Maroon%20Manual%20January%202020.pdf

William & Mary:

<https://www.wm.edu/offices/facilities/departments-directors/fpdc/references/dcmanual.pdf>

VCU: https://fmd.vcu.edu/media/fmd/documents/construction-planning-and-design/VCU_HECO_Manual.pdf

JMU: <https://www.jmu.edu/hecom/index.shtml>

GMU: <https://facilities.gmu.edu/wp-content/uploads/2019/11/Mason-HECO-Manual-06-19-2017.pdf>

VI. Systems

There are various systems used throughout the Commonwealth for procurement and contract management activities. State agencies are required by the Code of Virginia to utilize the Commonwealth's central electronic procurement system, also known as eVA.

- A. DGS: Statewide Electronic Procurement System (eVA)
- B. UVA: Market Place
- C. VA Tech: HokieMart
- D. VCU: RealSource
- E. W&M: BuyW&M
- F. DSBSD Vendor Certification portal
- G. DSBSD Agency Dashboard and reporting

VII. What We Found

In April, DGS began the process of collaborating with the procurement workgroup members. A total of nine (9) meetings were held between May 2021 and August 2021 in order to discuss the tasks assigned and ensure adequate input and discussion could take place. The meetings included assigning subject matter experts to various categories and having the experts research and report their findings, review and analyzation of the survey data, and further exploring suggestions discussed within the workgroup meetings.

The PWG engaged public and private stakeholder groups to better understand the current perception of achieving the Commonwealth's discretionary spend goals for small, women-, and minority-owned businesses, and subcontractor oversight. Stakeholders included local government public bodies, state public bodies, institutions of higher education, contractors, architects and engineers, companies that provide non-technology goods and services to the Commonwealth, companies that provide technology goods and services to the Commonwealth, and industry representatives.

Together, the workgroup developed a survey with 45 questions for stakeholders, both public and private. The survey solicited response regarding types of services or goods provided to the Commonwealth and sought input on the current small, women-, and minority-owned certification process and utilization in procurements. Various avenues were used to solicit over 100,000 individuals, and the workgroup received 1,158 responses. Of that total, 996 responses were from private sector and 162 were from public entities.

The stakeholders who responded to the survey presented varying opinions on the current small business certification process and utilization of certified businesses. Of the respondents, 236 indicated they are not currently DSBSD certified and 159 indicated they are DSBSD certified.

Through the survey responses and discussing the objectives of PWG within the member group, we identified areas throughout the procurement process where changes could be made and areas that should be further explored. The following information and resulting recommendations would impact the pre-solicitation phase, during solicitation, and contract

award/administration phase of capital outlay vertical construction procurements over \$3 million.

Survey responses showed that prime contractors indicated they cannot find enough qualified certified subcontractors at the time of solicitation or during the performance of the contract. To help facilitate prime contractors' ability to find certified subcontractors, DSBSD with DGS and covered institutions, agreed to evaluate the current DSBSD vendor search functionality and identify potential enhancements to facilitate prime contractors' selection of DSBSD certified subcontractors. Facilitating the ability for prime contractors to more easily find certified subcontractors is a step in the right direction.

Another issue that was brought to the PWG members' attention is the challenge that prime contractors face during the solicitation phase and at the time of construction. The survey responses indicate that prime contractors struggle to find qualified certified vendors to utilize as subcontractors. Currently, at the time of bid submission, the prime contractor indicates the percentage of work they will subcontract to certified small businesses. The PWG members sought to find a way to allow prime contractors to communicate all work that is to be subcontracted, including to non-certified subcontractors. The goal of this is to bring awareness to the portions of the subcontracted work that is not going to certified subcontractors, thus allowing DSBSD to identify areas and trades that may be lacking certified subcontractors.

The PWG recommends that DGS and covered institutions develop a standard policy in collaboration with DSBSD requiring the bidder/offeror to identify the percentage of cost that will be subcontracted and categorize that by business type: DSBSD-certified small, women-, minority-owned businesses, and non-certified businesses. This will allow early awareness in the procurement process if there are not many qualified subcontractors available. In solicitations, state agencies and institutions of higher education will include information on how bidders and offerors can request assistance from DSBSD if the prime contractor believes there is an insufficient number of certified SWaM businesses available in the geographical area in which the work will be performed. This information sharing will allow DSBSD to proactively work to bring certified SWaM

businesses on board or determine challenges that the geographical area may be facing in regard to having certified SWaM businesses.

By Executive Order 35, state agencies are required to identify a SWaM champion. The SWaM champion is to ensure equity in the solicitation process and awarding of contracts. A SWaM champion should assist in identifying and encouraging businesses to become SWaM certified through DSBSD. In consideration of the importance of prime contractors utilizing certified SWaM subcontractors, it was suggested that prime contractors on construction projects identify a SWaM champion for each awarded project. The prime contractors' SWaM champion will help ensure the contractors meet or exceed the contractually agreed upon use of certified SWaM subcontractors. DGS and covered institutions, in collaboration with DSBSD, should develop a policy outlining the purpose and expectations of a prime contractor's SWaM champion.

In an ideal situation, prime contractors would use DSBSD certified businesses for their subcontracting needs. The survey responses indicate that some businesses felt the certification process was challenging, or were unaware of opportunities and what is required on construction projects. The PWG suggested that prime contractors identify which subcontractors they plan to utilize would meet the criteria to be certified by DSBSD. For those subcontractors identified as meeting the certification criteria, a declaration of eligibility and intent to certify will be completed. This declaration will be provided to DSBSD and DSBSD will then prioritize those businesses and guide them through the certification process. It is recommended that DSBSD develop policies and procedures in collaboration with DGS and covered institutions. This recommendation does contain a fiscal impact for DSBSD to implement and is identified in greater detail later in the report.

The PWG members identified the importance of collaborating with other agencies to assist with their mission of auditing and enforcing worker misclassification, prevailing wage laws, and payment of taxes. This collaboration would include inputting specific data from subcontractors utilized by prime contractors on projects into a central reporting system. The members discussed and agreed upon the importance of having a centralized reporting system in which the oversight audit and enforcement agencies could access data and information in a secure location. The

system and data would be protected and only viewable by approved persons. In order to achieve the intent of this recommendation, the following audit agencies will need to assist state agencies and covered institutions to determine the requirements: DSBSD, DOLI, Tax, VEC, and OAG.

Recently an Interagency Taskforce was created, which is comprised of the Secretary of Commerce and Trade, Secretary of Administration, Secretary of Finance and the Secretary of Labor. This taskforce meets regularly to discuss worker misclassification and wage theft issues and also was tasked with recommending measures to improve transparency for construction contractors. The PWG recommends that the interagency taskforce oversee the agencies with audit and enforcement responsibilities to ensure that audits of contractors are being conducted routinely and communicated to the appropriate parties, to include the owner agency, DGS or the appropriate covered institution, and to the interagency taskforce.

DGS has authority to debar and enjoin vendors for violating contract terms. The DGS Construction Debarment and Enjoinment Committee consists of members from DGS and OAG. The members suggest that DGS expand the committee to include representatives from VDOT and covered institutions. The committee will receive the findings from the oversight agency audits, as explained above, and determine if a contractor should be debarred from doing business with the Commonwealth and for what amount of time.

VIII. Data

A. Purchase Order Data July 1, 2019 – June 30, 2021 (FY20 and FY21)

A total of 2,020 purchase orders (POs) were identified as construction in eVA over the two-year period totaling \$1,134,028,008

1. 1,712 POs were less than \$200,000 each for a total of \$50,885,918, 991 of those were awarded to a certified SWaM business and 721 we awarded to a non-SWaM
 - a. Limited subcontracting associated with this level of procurement
2. 271 POs were between \$200,000 up to \$3 million for a total of \$173,300,245
 - a. Subcontractor estimate per project: 20
3. 37 POs were greater than \$3 million for a total of \$910,141,844
 - a. Subcontractor Estimate per project:
 - I. Of the 37 there were 14 projects between \$3 million and \$10-20 million
 - II. Of the 37 there were 17 projects between \$10 million and \$50-40 million
 - III. Of the 37 there were 6 projects were greater than \$50-60 million

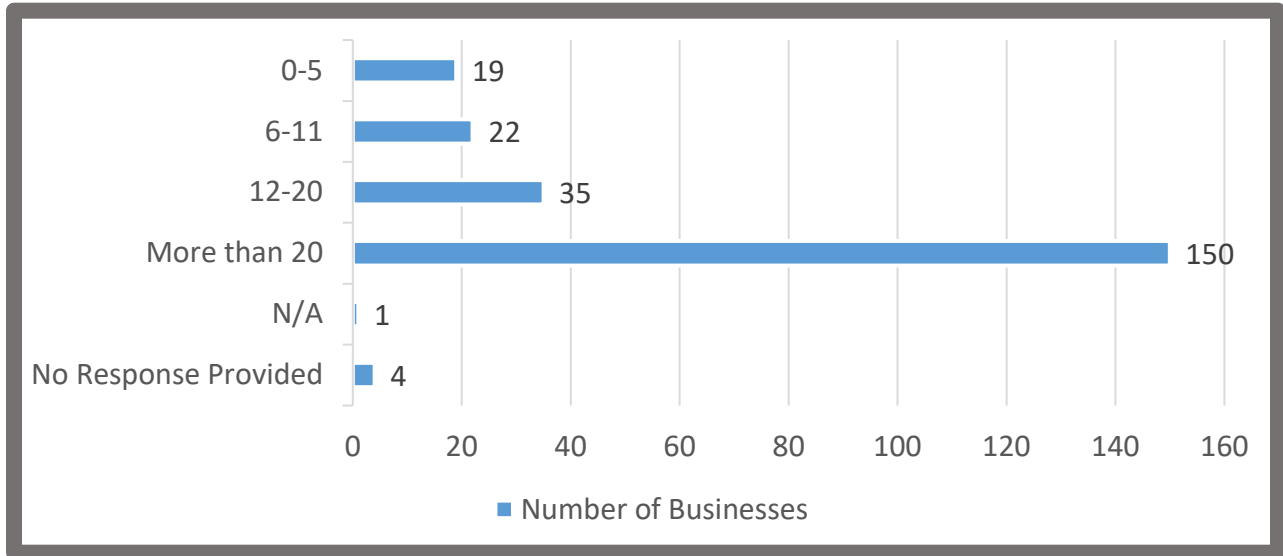
Source: eVA

B. Survey:

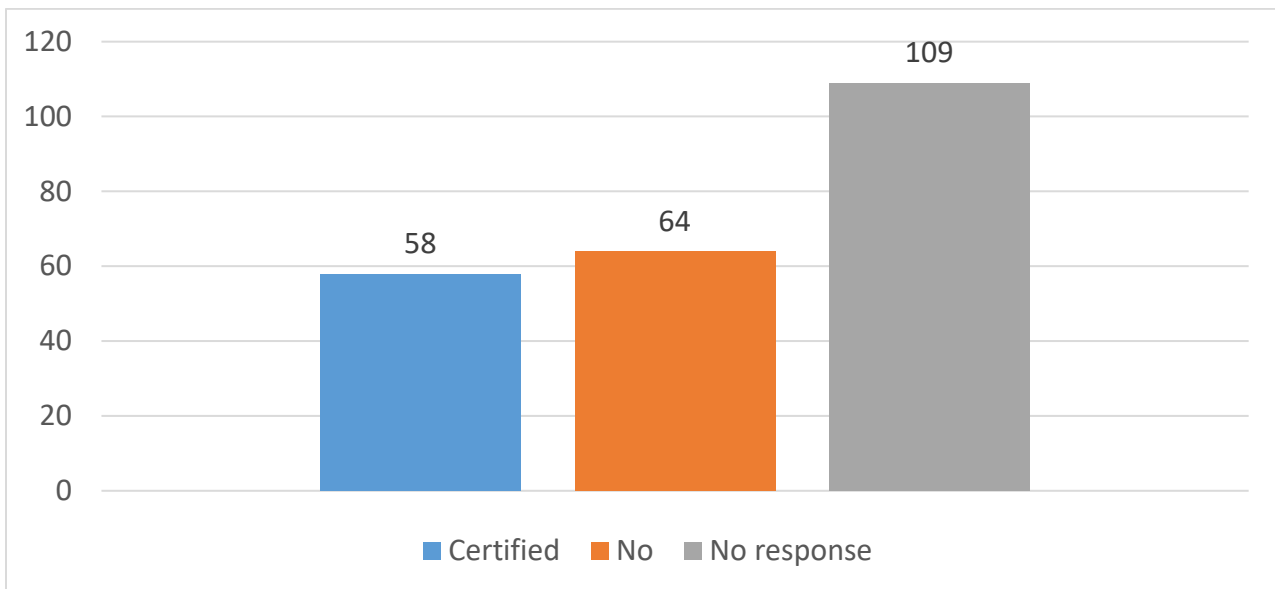
1. 1158 responses received
 - a. 160 from public bodies
 - b. 998 from private sector business
2. Questions were not mandatory and could be skipped when completing the survey
3. Many questions allowed for selection of all that applied

The following charts reflect the responses by the 231 private sector businesses that identified as providing construction.

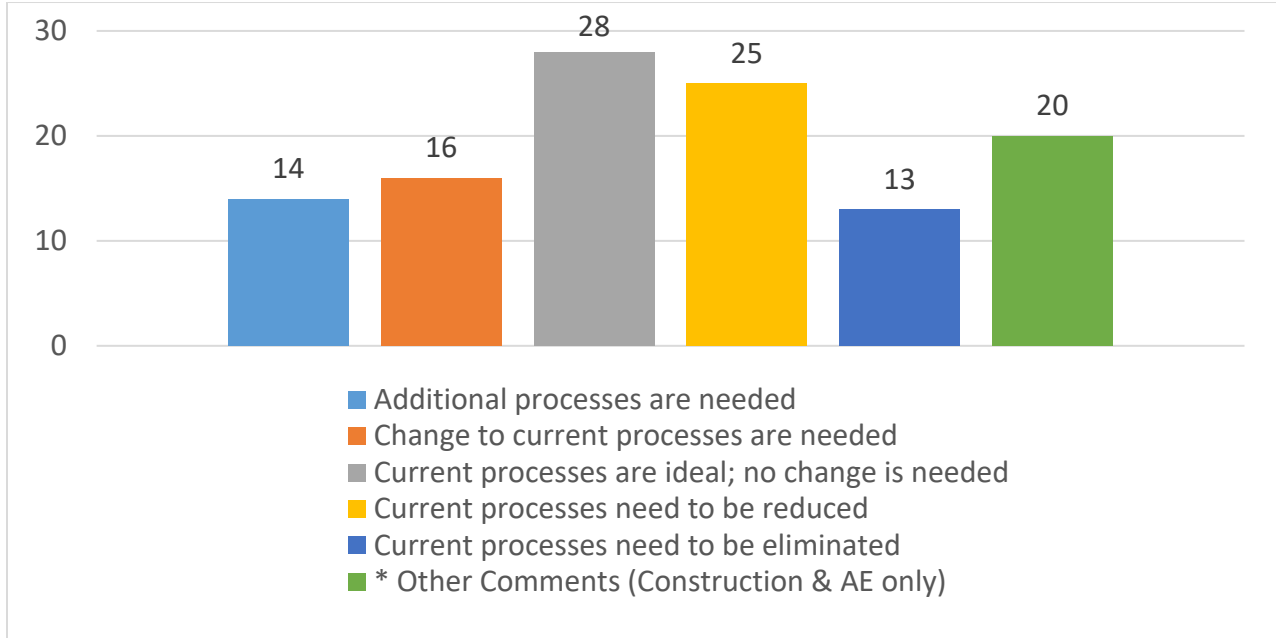
Years in Business



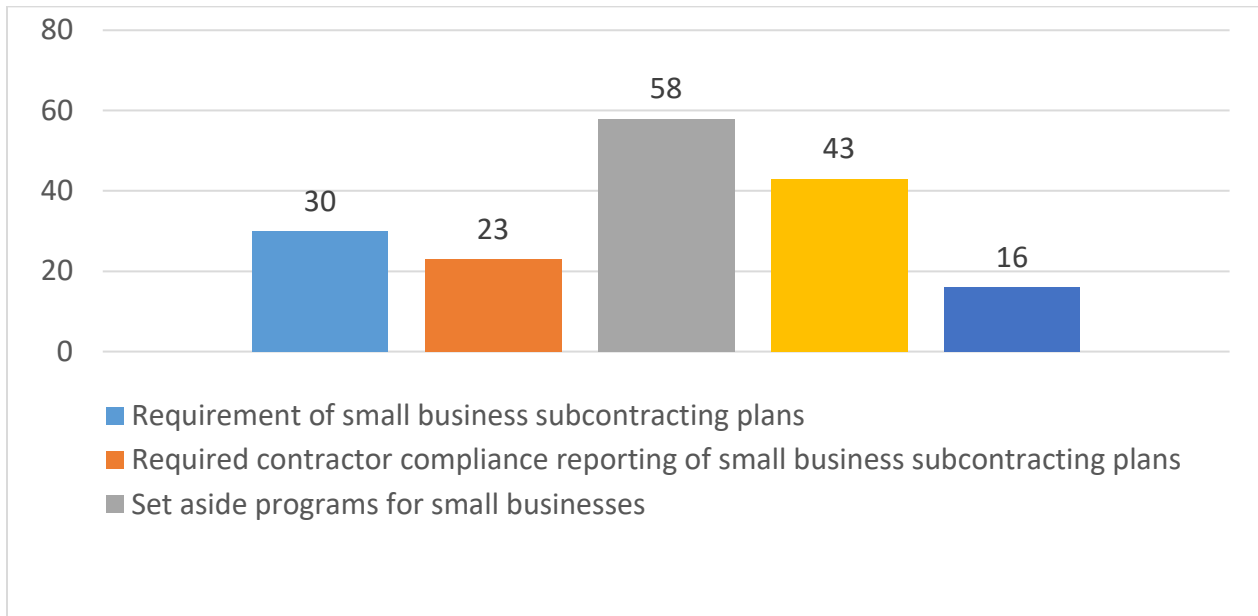
SWaM Certification



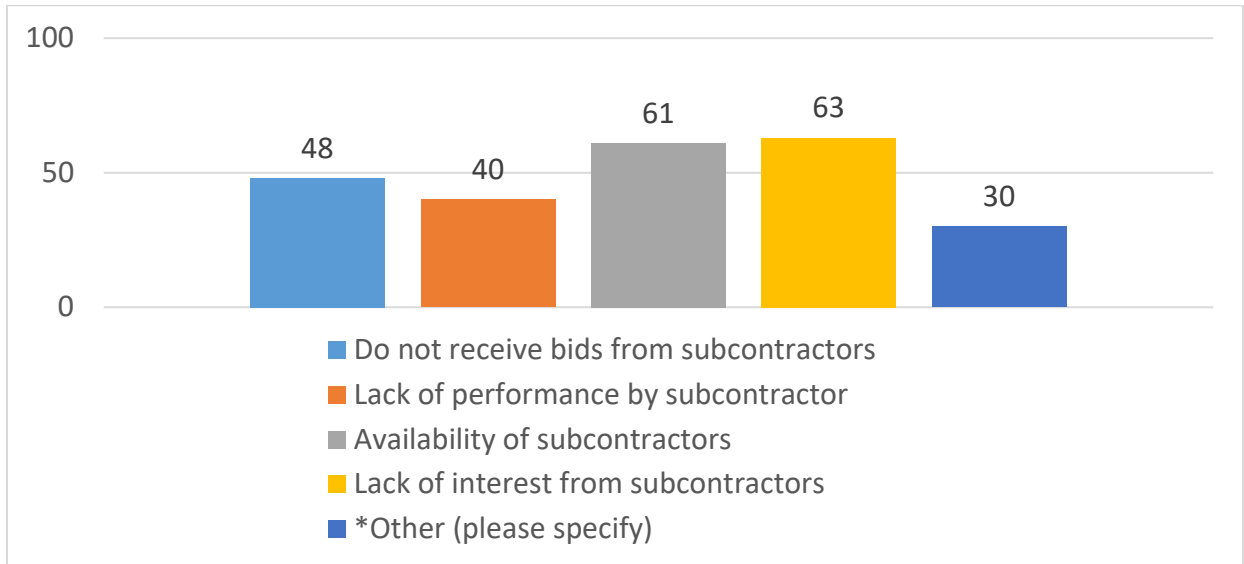
When asked about their experience with the current processes in place to improve prime contractor utilization of SWaM businesses, what actions they feel are needed, it was distributed across all options with the majority of responses split between identifying additional processes are needed or the processes currently in place are ideal.



When asked what aspects of SWaM procurements are most effective at promoting SWaM participation, those who responded indicated set asides for small businesses.



When asked about the biggest challenges their companies face when subcontracting work to SWaM businesses, construction contractors indicted the availability and lack of interest.



Source: Stakeholder and public body survey

RECOMMENDATIONS

In order to incentivize prime construction contractors on capital outlay projects to assist the Commonwealth in meeting the small, women-, and minority-owned business goals, we recommend the following apply to vertical construction of capital outlay projects as defined by §2.2-1515 and by the threshold established in the Appropriation Act (currently projects \$3 million and above).

Recommendation 1: The Department of General Services and Covered Institutions should develop a standard policy in collaboration with DSBSD to require bidders and offerors in all capital outlay solicitations to identify in their bid or offer the total percentage of cost that will be subcontracted categorized by business type: DSBSD certified small, women, minority owned businesses, and non-certified businesses.

Recommendation 2: The Department of Small Business and Supplier Diversity in collaboration with the Department of General Services and Covered Institutions shall evaluate the current DSBSD vendor search capability to identify any potential enhancements to facilitate prime contractors selection of DSBSD

certified subcontractors. DDSBSD should report these findings to the General Assembly no later than November 1, 2022.

Recommendation 3: Solicitations for capital outlay should include information on how bidders and offerors can request assistance from DSBSD (i) in areas and trades that they consider to have an insufficient number of certified SWaM businesses, and (ii) in geographical areas where work will be performed.

Recommendation 4: The Department of General Services and Covered Institutions in collaboration with DSBSD should develop a standard policy that require prime contractors after award to identify a SWaM champion on each project that will help ensure utilization of DSBSD-certified SWaM businesses in their subcontracting. Such policy may permit exceptions based on established criteria.

Recommendation 5: The Department of Small Business and Supplier Diversity should develop policies and procedures for prime contractors in the selection of subcontractors to identify those businesses that are eligible for certification and will complete a declaration of eligibility and intent to certify as a small, woman, or minority owned business. DSBSD will prioritize those businesses identified in the declaration process, engage them, and guide them through certification within 60 business days of receipt of all required documentation. The policy/contract should clearly indicate that subcontractors that complete a declaration of intent to certify would not count toward the required small business contract goal until certified. The Department of General Services and Covered Institutions should collaborate with DSBSD to develop the policy and procedures and include the requirement in capital outlay contracts. *Note: DSBSD has indicated that should this recommendation move forward, there will be a fiscal impact.*

In order to facilitate the Commonwealth's oversight of construction prime contractors' subcontracts, we recommend the following apply to construction of capital outlay projects as defined by §2.2-1515 and by the threshold established in the Appropriation Act (currently projects \$3 million and above).

Recommendation 6: Based on the recommendations from the Secretaries of Labor, Commerce and Trade, Administration, and Finance interagency taskforce, audit and enforcement agencies with authority to ensure compliance and oversight will perform an audit of selected contractor data. The selection of

contractors to be audited will be done in a manner prescribed and/or facilitated by the audit agency. Final audit findings, as determined by the audit agency, should be communicated to the owner agency, the Department of General Services or appropriate covered institution, and to the interagency taskforce.

Recommendation 7: DGS will expand their existing debarment/enjoinment committee use for construction. The committee will consist of representatives from DGS, VDOT, and Covered Institutions (VACUPP). The Committee will receive the oversight audit agency's findings and hear from the prime contractor. The Oversight and Audit Agencies should provide final audit findings as applicable to DGS' Division of Engineering and Buildings' debarment and enjoinment committee. DGS should develop procedures for agencies to report non- contract compliance to Division of Engineering and Buildings' debarment and enjoinment committee.

In order to both (i) incentivize prime construction contractors on capital outlay projects to assist the Commonwealth in meeting the small, women, and minority-owned business goals and (ii) facilitate the Commonwealth's oversight of construction prime contractors' subcontracts, we recommend the following apply to vertical construction capital outlay projects as defined by §2.2-1515 and by the threshold established in the Appropriation Act (currently \$3 million and above).

Recommendation 8: In order to facilitate the submission of subcontractor information by prime contractors, state agencies, and covered institutions should provide awarded capital outlay contracts in a centralized reporting system. Information requirements to achieve SWaM and oversight goals through centralized reporting should be determined by the following audit and enforcement agencies; the Department of Small Business and Supplier Diversity (DSBSD), Department of Labor and Industry (DOLI), Department of Taxation (Tax), Virginia Employment Commission (VEC), and the Office of the Attorney General Worker Protection Unit (OAG) in collaboration with state and covered institutions. The method for centralizing required information should be efficient and effective for state agencies, covered institutions, and contractors which may include building interfaces between purchasing systems.

CONCLUSION

The PWG agreed to all recommendations presented in this report. Please note that due to their roles as nonpartisan legislative and executive agency staff, the PWG members representing legislative committees and the Department of Planning and Budget abstained from voting on some recommendations. The PWG believes that all of the recommendations can be implemented through policy changes by those with procurement authority and with the continued collaboration of agencies with certification and oversight authority. The General Assembly may wish to include language in the Appropriation Act directing agencies with procurement authority to implement the recommendations contained in this report and take into consideration the identified fiscal implications.

APPENDIXES

Higher Education Authority Table

Institution	Tier I	Tier II - Memorandum of Understanding - Autonomy in 2 Up to 3 areas*	Tier III. Management Agreement - Complete Autonomy	Subject to the VPPA Chapter 43	Subject to Construction Management and Design-Build Contracting Chapter 43.1	Subject to the Higher Education Rules Governing Procurement
College of William & Mary			X		X	X
James Madison University			X		X	X
University of Virginia			X		X	X
Virginia Tech			X		X	X
Virginia Commonwealth University			X		X	X
George Mason University			X		X	X
Christopher Newport University		Capital Outlay & Technology, Currently Negotiating Procurement MOU with Administration			X	X
Old Dominion University		Procurement & Technology			X	X
Radford University		Procurement & Technology			X	X
Virginia Military Institute		Procurement & Technology			X	X
Longwood University		Procurement & Technology			X	X
University of Mary Washington		Procurement & Technology			X	X
Virginia Community College System and 23 community colleges		Capital Outlay & Technology (Elected to Follow the VPPA in their MOU)		X	X	
Norfolk State University		Currently Negotiating Procurement and Technology MOU with Administration		Unknown	X	Unknown
Richard Bland College	X			X	X	
Virginia State University	X			X	X	