

# WILLIAMS MULLEN

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October 4, 2013

The Honorable S. Chris Jones  
Virginia House of Delegates  
Post Office Box 5059  
Suffolk, Virginia 23435

RE: Special Joint General Laws Subcommittee Studying the Virginia Public Procurement Act

Dear Delegate Jones:

During the July 9, 2013 meeting of the above-referenced special joint subcommittee, the Virginia Society of the American Institute for Architects (VSAIA) and the American Council of Engineering Companies of Virginia (ACEC/VA) provided comments regarding the strengths and weaknesses of the Virginia Public Procurement Act (VPPA). Included in that presentation were several general recommendations for improving the VPPA and the procurement of professional services. For the convenience of the subcommittee, we have repeated those earlier general comments in the attachment to this letter. In addition, and also via said attachment, we take this opportunity to provide a number of more specific recommendations for improvements to the VPPA that we believe will assist public bodies in procuring high-quality, cost-effective professional services.

The key message we want to deliver to the special joint subcommittee is that the VPPA works well in most situations and the procurement of professional services through competitive negotiation is a core element that must be preserved. Competitive negotiation is founded upon federal procurement law (the Brooks Act, Public Law 92-582) and a system commonly referred to as "qualification-based selection" (QBS), which requires public bodies to evaluate proposals based on the professionals' qualifications, and then to negotiate a price with the best qualified offeror. This process relieves public bodies from the undue influence of price and places the focus where it should be: on securing the best value.

Both the VSAIA and ACEC-VA look forward to continue working with you and the members of the special joint subcommittee in reviewing the VPPA and identifying opportunities for improvement.

Sincerely,

  
Reginald N. Jones

  
Patrick A. Cushing

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## Virginia Public Procurement Act Recommendations

Virginia Society of the American Institute for Architects and the American Council of Engineering Companies of Virginia

**Preserve and Strengthen Competitive Negotiation: The VPPA has a solid foundation and the use of competitive negotiation for the procurement of professional services is in the public interest. This study should focus on ways to clarify existing law and making minor edits that strengthen the integrity of the public procurement process.**

- **Proposed solution: Preserve the competitive negotiation process.** Competitive negotiation (i.e., qualifications-based selection or “QBS”) for the procurement of professional services is defined in Va. Code Section 2.2-4301, “Competitive negotiation,” 3.a. This process must be retained and, in fact, strengthened to protect the public’s largest investment, i.e., the design and construction of the public infrastructure, both vertical (e.g., schools, jails, and courthouses) and horizontal (e.g., roads and bridges, and water and sewer lines). Empirical data regarding the procurement of professional services at all levels of government through a low-bid process reveal both malfeasance and waste. All decisions concerning the procurement of professional services must be contingent upon first identifying those most qualified to provide the required services, without regard to price. Unfortunately, here in the Commonwealth, too many localities either do not understand their obligations under the VPPA with respect to the procurement of professional services or, regrettably, transparently seek to skirt these VPPA-mandated obligations. Negotiating with the professionals deemed most qualified is in the best interest of the public and avoids the practice of selection based on price instead of qualification.
- **Proposed solution: Clarify that public bodies may not ask for scope and fee proposals from multiple firms holding current term contracts with the public body.** Public bodies should be required to negotiate first with the firm determined to be most qualified for a specific task from among the group of term contract holders, and then go to the second most qualified firm if, and only if, the most qualified firm declines the opportunity or the parties are unable to agree on a mutually-acceptable fee for the specific task. The current practice of a number of local governments is to ask for scope and fee proposals from firms currently holding a term contract with the locality, thereby effectively engaging in competitive bidding for the procurement of professional services.
- **Proposed solution: Eliminate the use of nonbinding or good faith estimates of price for services.** It has become commonplace for some public bodies to request an estimate for the advertised scope of services during the competitive negotiation process. Unfortunately, often times a firm’s estimate is thereafter treated by the public body as if it were a “bid” to be compared with similar estimates provided by other firms. In fact, these estimates are meaningless because neither the public entity nor any of the responders have established an understanding of the project’s scope. At worst, they could mislead the public entity entirely. The preferred approach is to select one firm

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based on qualifications, understanding of the needs and approach to the work and negotiate in good faith with that firm, either reaching an agreement or deciding to terminate the negotiations and go to the second ranked firm.

- **Proposed solution: Add enforcement and accountability provisions to ensure compliance:** The VPPA should include a mechanism for holding public bodies accountable for violations of the VPPA-mandated QBS process. While the enforcement and accountability do not have to be heavy-handed, there should be a process for appealing or identifying blatant violations without relying on litigation that would be costly to all parties. Several states incorporate accountability measures in their procurement acts or professional practice statutes and these could serve as a model for Virginia.

## **Comments on the PPEA, PPTA, and other forms of procurement.**

- While we understand the primary intent of the joint subcommittee is to study the VPPA, we also believe that other forms of procurement (e.g. PPEA and PPTA) that involve professional services should incorporate more elements of qualification-based selection during the evaluation/scoring process. The scoring or ranking of offerors should incorporate a qualifications-based analysis of the professional services offered in the proposal. If QBS provides assurance that public projects will be designed by qualified professionals, then it follows that public-private procurement projects should receive the same assurance.