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May 12, 2014

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Re: Joint Legislative Committee Studying the Virginia Public Procurement Act

Dear Maria and Amigo:

It was nice seeing you at the first meeting of Workgroup 1. I thought the discussion got off to a good start. I wanted to follow-up on a couple of points that were discussed by the workgroup after the close of public comment, and I would appreciate it if you could share this letter with the members of the workgroup.

Steve Vermillion, CEO of the Virginia Associated General Contractors, suggested the workgroup consider the implementation of a public procurement oversight/enforcement body/process. Discussion on this concept then ensued. Two of the workgroup members indicated a prior body of a similar function ceased in existences as a result of underutilization. One inference some in the room seemed to have drawn from this was that a new oversight/enforcement board would suffer the same fate. I suggest the opposite is likely true.

Since the first body was dissolved, public procurement of construction in Virginia has become much more complicated. This is especially true given the rise of alternative forms of procurement. Construction in Virginia is now procured through competitive negotiation, PPTA and PPEA solicitation/proposals, design-build solicitations/proposals, job order contracting, and cooperative procurement. Given the development of alternative methods of procurement, outside of the traditional and safe design-bid-build method, I believe there is significant need for an oversight/enforcement function to address problems in public procurement compliance, and to assist public entities in understanding their obligations and in maintaining compliance.

Several of the workgroup members who represent public owner interests took the position that public entities are capable of self-policing compliance with public procurement laws. This was offered to indicate a lack of need for any independent oversight/enforcement function. My experience has been that many public entities, in fact, do a poor job of self-policing compliance in these respects. We often see examples where public bodies do not comply with applicable public

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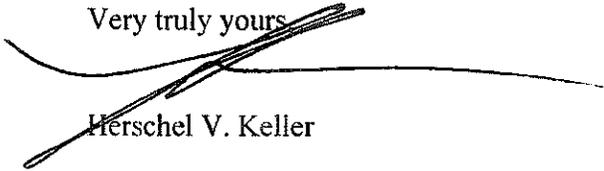
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procurement laws, either because: (i) they are unaware of their obligations, (ii) they do not understand their obligations, or (iii) the procurement decision maker inappropriately rationalizes a decision that is not in compliance with the law, but he or she feels is in the best interest of the public entity. In some, unfortunate, case, procurement officials have failed to comply with the law out of self-interest. I have previously provided you specific examples of the negative outcomes of some of these circumstances.

Checks and balances are a basic tenet of good governance. They are necessary given the weakness of human nature and the potential for those with governmental power to exceed their authority or to engage in abuse, whether knowingly or not. The failure of the workgroup to acknowledge early in its deliberations this ugly potential is likely to result in an unsatisfactory outcome from a public policy perspective. "The truth is that all men having power ought to be mistrusted." – James Madison. For the workgroup's discussions to result in good and effective public policy, this unfortunate fact must be recognized and addressed. An independent public procurement oversight/enforcement mechanism is a good means to provide a necessary check, while avoiding an across the board set of cumbersome rules that will challenge not only the procurement officials prone to excesses, but the competent and compliant ones as well.

As always, I appreciate the collective experience you bring to this process. If there is anything I can do to assist you, please let me know.

Very truly yours


Herschel V. Keller