

**Special Joint General Laws Subcommittee Studying the
Virginia Public Procurement Act
Initial Meeting, May 14, 2013, 2:00 p.m.
House Room C, General Assembly Building
Meeting Summary**

The Special Joint General Laws Subcommittee Studying the Virginia Public Procurement Act (Special Subcommittee) held its initial meeting on May 14, 2013, in Richmond, Virginia, in House Room C of the General Assembly Building. The meeting was called to order at 2:05 p.m.

The first order of business was the election of the chair and vice-chair. The Special Subcommittee elected Delegate S. Chris Jones as chair and Senator Richard H. Stuart as vice-chair. Chairman Jones discussed the proposed direction of the study, including an initial work plan. He emphasized that the charge of the Special Subcommittee will involve an extensive and comprehensive review of all aspects of the Virginia Public Procurement Act (VPPA) and that effectively performing this task will be a two-year process.

The first year of the study will be devoted to fact-finding and providing interested parties with the opportunity to share information and identify concerns related to the public procurement process. The information developed during this period will assist the Special Subcommittee in identifying the key areas where improvements may be made. Chairman Jones indicated that three additional meetings are anticipated for the first year. The second and third meetings will be focused on the receipt of public comment from interested parties. The fourth meeting of the first year will be held to identify those issues or concerns for which there is a general consensus that a problem exists and needs to be addressed.

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

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

***Overview of the Virginia Public Procurement Act
Maria Everett, Senior Attorney, Division of Legislative Services***

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

The VPPA is based on the American Bar Association's Model Procurement Code. In 1982 Virginia became the tenth state to consolidate its procurement statutes based on the model code. The VPPA consolidates the state's policies, including purchasing methods, remedies in the event of controversy, and ethical standards governing procurement. The VPPA applies to all state entities and political subdivisions, except that counties, cities, and towns that adopt "alternative procurement policy based on competitive principles" are exempted from most of the provisions of the VPPA. Briefly stated, the VPPA seeks to ensure that (i) public bodies obtain high-quality goods and services at reasonable costs, (ii) public procurement is administered in a fair and impartial manner, and (iii) qualified vendors have access to the public's business. To achieve these purposes, the VPPA establishes a procedure for awarding public contracts based on competitive principles and provides that all public contracts with nongovernmental contractors for the purchase or lease of goods, for the purchase of services, or for construction be awarded after either competitive sealed bidding or competitive negotiation, unless otherwise provided by law. As originally conceived, competitive sealed bidding was and remains the preferred method of public procurement.

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

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

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

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

Outlay Manual (HECO), which provided a wider range of construction procurement options and flexibility. Ms. Sheehy provided examples of how the University had used the flexibility in procurement authority to successfully complete contract purchases and capital outlay projects.

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

***Richard Sliwoski, Director
Department of General Services***

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

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

increased contract award and administration costs. Mr. Sliwoski then reviewed the procurement process under the VPPA for construction, professional services, and nonprofessional services.

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

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

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

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

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

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

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

(iv) Provision of explicit enforcement authority.

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

***Ida McPherson, Director
Department of Minority Business Enterprise***

Ms. McPherson began by briefly describing the certification programs administered by the Department. The SWaM program is designed to promote access and to enhance procurement opportunities for businesses participating in state-funded projects. Currently certification numbers for this program are as follows: 20,926 small businesses, 5,383 women-owned businesses, and 6,775 minority-owned businesses. The Service Disabled Veteran-owned Business Program, which consists of 224 certified businesses, allows veterans who are classified as "service disabled" by the Virginia Department of Veterans Services to include such certification in the SWaM vendor base. The Department also administers a certification program for nonprofit employment services organizations (ESO) that have been accredited by both the Commission on Accreditation of Rehabilitation Facilities (CARF) and the Department for Aging and Rehabilitative Services. Only one business has been certified as an ESO. Finally, the Department administers a component of the federal Disadvantaged Business Enterprise Program designed to increase the participation of such business enterprises in projects funded by the United States Department of Transportation and other federal organizations. There are 1,435 disadvantaged businesses certified in the state.

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

the procurement documents were structured to include such firms. Director McPherson replied that there are over 20,000 certified small businesses in the state, 90 percent of which are Virginia firms. She further stated that eVA allowed for the inclusion of all businesses.

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

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

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

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

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

Mr. Lindsey provided the Special Subcommittee with a small-county perspective on the VPPA. He explained that the procurement office for Gloucester County consists of three employees who are responsible for \$69.8 million in total expenditures, including 108 term contracts. The office services the procurement needs of both the county government and the public school system. Mr. Lindsey noted that the advantages of the VPPA include the authority for local governments to establish

alternative procurement procedures. He further noted that Gloucester County has adopted a 37-page Procurement Ordinance.

Mr. Lindsey also cited several problems with the VPPA, including:

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

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

Conclusion

Chairman Jones, noting the time, decided to move the two remaining presentations to the next meeting of the Special Subcommittee. The members will be polled for the schedule of the next meeting, with initial target dates in the last week of June 2013.

The meeting was adjourned at 5:10 p.m.