

Special Joint General Laws Subcommittee Studying the Virginia Public Procurement Act

Meeting Summary

July 9, 2013, 10:00 a.m.

House Room C, General Assembly Building, Richmond, Virginia

The Special Joint General Laws Subcommittee Studying the Virginia Public Procurement Act (Special Subcommittee) held its second meeting of the 2013 interim on July 9, 2013, in House Room C of the General Assembly Building in Richmond.

After opening remarks from Chairman S. Chris Jones, the Special Subcommittee received a presentation from Chris D. Lloyd on procurement procedures using public-private partnerships, namely the Public-Private Transportation Act of 1995 (PPTA) and the Public-Private Educational Facilities and Infrastructure Act of 2002 (PPEA).

***Presentation: Public-Private Partnerships and Procurement in Virginia
Christopher D. Lloyd, McGuire Woods Consulting***

Mr. Lloyd explained that the PPTA and PPEA are alternative procurement tools existing outside of the Virginia Public Procurement Act (VPPA) available to a wide variety of public entities at the state, local, and regional levels. From the perspective of the private sector, the legislative framework that has been established for both the PPTA and PPEA creates an alternative project delivery process that is consistent, repeatable, and predictable. He noted that these alternative procurement tools allow the bundling of procurement and financing mechanisms to make the project delivery process easier and more timely. In general, the public-private partnership differs from a VPPA process in several important ways, including (i) selection based on qualifications and best value and not just price, (ii) the use of both solicited and unsolicited proposals, (iii) encouragement of open exchange of ideas between public and private sectors, (iv) public entity recoupment of review and transaction costs, (v) enhanced transparency and public access to proposals and contracts, and (vi) the use of interim agreements.

Responding to comments from members of the Special Subcommittee concerning transparency and openness of the process under the PPTA and PPEA procurement processes, Mr. Lloyd stated that the level of transparency has evolved since the inception of both acts. In particular, amendments to the PPTA and PPEA in 2005 significantly expanded public access and transparency.

After the presentation, the Special Subcommittee received comment from representatives of the vendor community who registered to speak. Speakers were instructed to (i) identify the specific public procurement issue or topic to be addressed, (ii) describe the problem or concern associated with the issue or topic, and (iii) provide a recommendation to resolve the problem. A total of eleven speakers registered to deliver comments.

Patrick Cushing, Williams Mullen

James Gehman, Virginia Society of the American Institute of Architects (VSAIA)

Glenn W. Rehberger, American Council of Engineering Companies of Virginia (ACEC)

Patrick Cushing introduced James Gehman, Virginia Society of the American Institute of Architects (VSAIA), and Glenn W. Rehberger, American Council of Engineering Companies of Virginia (ACEC). The topic of their discussion was the procurement of professional services.

Mr. Cushing noted that the procurement of professional services worked well under the current VPPA but expressed concern on behalf of the design community regarding the lack of an enforcement mechanism to address violations or divergences from the required procedures. Under current law, the only remedy is litigation. Mr. Cushing further stated that the design community also supported the continued importance of qualifications in procurement under alternative procurement procedures, including the PPTA, PPEA, design-build, and construction manager at risk. Mr. Gehman echoed the need for a more effective enforcement mechanism, citing the ineffectiveness of relying upon litigation by a losing bidder to enforce the law. Mr. Rehberger noted that while the VPPA is generally clear and understandable, public bodies would benefit from clarification regarding the use of term contracts. He suggested more clarification of how the selected professionals are used after the term contract has been established. Regarding procurements under the PPTA and PPEA, Mr. Rehberger stressed the need to emphasize qualifications in the selection criteria and to ensure that public bodies that are receiving the proposals have the appropriately skilled personnel to guarantee a good selection process.

Dan Cook, Mid Atlantic Regional Manager

The Gordian Group

Mr. Cook spoke on the job order contracting (JOC) provision added to the VPPA by HB 2079, passed during the 2013 Session and scheduled to become effective on July 1, 2014. He asserted that independent studies have estimated the total cost savings from JOC programs to be between 8 and 15 percent. These savings are realized from increased efficiencies in procurement, design, construction, and post-construction. Mr. Cook suggested that amendments to the VPPA incorporating JOC programs that would enhance the use of such programs by all public bodies would be raise the \$2 million per term limit for JOC contracts and eliminate the \$400,000 project fee limit. In addition, he observed that the VPPA should include a definition that encompasses all types of indefinite quantity contracts and is not limited to JOC programs. Finally, Mr. Cook noted that the VPPA is unclear regarding whether performance and payment bonds are required for a JOC contract or for the individual projects that are included under the contract.

Tonya Matthews, President and Chairman

TMG Construction Company

Ms. Matthews also addressed the JOC contracting provision of the VPPA. She expressed concern that the \$2 million limit would adversely affect larger public bodies, many of which have substantial experience with JOC programs and have instituted policies and procedures to assure a competitive process when awarding such contracts. Ms. Matthews suggested that rather than a hard dollar cap on JOC contract term limits and project fees, the Special Subcommittee should consider a cap connected to the percentage of the public body's total portfolio. Ms. Matthews also suggested either requiring a public body to adopt JOC contracting procedures prior to allowing such contracts or exempting a public body that has adopted such procedures, an approach similar to the approach currently taken in the VPPA authorizing public bodies to use construction management and design-build methods.

Wanda Edwards
Coalition for Procurement Reform

The comments of Ms. Edwards focused on the use of professionals to manage construction projects and the potential for procurement irregularities under cooperative and sole source procedures. She noted that it was problematic for the design professional or contractor on a project to have any connection with the manufacturer of the materials that will be used for the same project. She also stated that group purchase entities were not subject to the same openness requirements as public bodies are when conducting procurement activities and that the lack of transparency could lead to inappropriate or illegal contract arrangements. Ms. Edwards provided copies of reports from other states citing price gouging and contract manipulation relating to unnecessary roofing repairs. She recommended that more controls be placed on the use of sole source contracts and that such contracts should be limited to \$50,000.

Hershel V. Keller, Esq.
Petty, Livingston & Richards, P.C.

Mr. Keller addressed what he described as the inappropriate use of competitive negotiation by some public bodies to procure construction. He stated that despite the VPPA's stated preference for using competitive sealed bidding to procure construction, certain public bodies were using competitive negotiation, which prevented all qualified contractors from having access to public business. Under the VPPA, the public body may decide to use competitive negotiation if doing so is the public body's best interests. Mr. Keller noted that under current law there is no effective means for an offeror to challenge that decision. He contended that the use of alternative procurement methods for construction projects rather than competitive sealed bidding has adversely affected both taxpayers, by increasing project costs for the public body, and small businesses in the state, because public bodies consistently awarded projects to large contractors, some which are not Virginia-based companies.

Mr. Keller offered several recommendations to the Special Subcommittee to alleviate the problem, including (i) requiring competitive sealed bidding if the project is expected to be less than \$10 million, (ii) restricting the use of the construction

management method of project delivery to only those projects for which the method is necessary due to the need for real time value engineering or constructability analysis, (iii) affording the offeror or potential offeror the right to appeal a public body's decision to use competitive negotiation, and (iv) removing the exemption from the VPPA for public institutions of higher education for construction projects not expected to exceed \$10 million in total cost.

***Jack Dyer, Gulfseaboard Construction
Chairman, Associated General Contractors of Virginia, Inc.***

Mr. Dyer focused his remarks on the use by public bodies of design-build, construction management, and construction manager at risk as alternative procurement methods. He asserted that VPPA should be strengthened to make these alternative procurement processes an exception to the normal procurement route for construction, in particular for projects that are not expected to exceed \$20 million in total costs. He noted that in the awarding of smaller public contracts, maximum competition yields the best value. When the method for participating in the procurement process becomes burdensome, asserted Mr. Dyer, then qualified contractors are excluded, thereby limiting the total pool of bidders. He noted that members of Associated General Contractors of Virginia, Inc., (AGC) were concerned about the use of construction manager at risk by public bodies with review criteria that preclude qualified firms from competing.

The comments of Mr. Keller and Mr. Dyer elicited several responses and questions from the Special Subcommittee seeking clarification on how the use of the alternative procurement processes adversely affected smaller contractors and were not ultimately beneficial to the public body. In response to these concerns, it was asserted that the issue was not whether a small contractor was qualified to complete the project, but rather whether that small contractor could afford to add layers of overhead for marketing and other costs that were not needed for the project, in order to compete with larger contracting firms.

***Steve Vermillion, Chief Executive Officer
Associated General Contractors of Virginia, Inc.***

Mr. Vermillion also focused on the use of the alternative procurement methods to procure construction, in particular construction manager at risk. He stated that the AGC was not opposed to the method in general, but was concerned that the increased use of the process was not giving many small- and medium sized contractors an opportunity to compete. Delegate David Albo asked why a small contractor would be unable to compete, and Mr. Vermillion responded that the process favors contractors with construction manager at risk experience. Mr. Vermillion presented several recommendations for changes to the VPPA that had been approved by the AGC Board of Directors to serve as best practices for the use of construction management by public bodies. These changes included (i) requiring the public body to conduct a debriefing and provide full disclosure of results, including all associated documents relating to a response for qualifications and technical expertise and fee price proposals, (ii)

prohibiting public bodies 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 past 10 years, and (iii) requiring the public body to provide a written justification for using construction management or construction manager at risk in lieu of competitive sealed bidding.

Michael O'Neill, Sr.
Centennial Contractors Enterprises, Inc.

The topic of Mr. O'Neill's comments was the term and project fee limitations on JOC contracts. He asserted that the \$2 million limit was too low and would reduce the cost effectiveness and potential benefit of JOC programs to public bodies. He suggested that a limit of at least \$5 million would help meet the unique needs of larger localities. The higher limit would also increase the potential savings to the public body by establishing a lower overall price per project and increasing contractor efficiency. In addition, Mr. O'Neill stated that the language relating to project fee included in the version of § 2.2-4303.2 of the Code of Virginia 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. He explained that 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. Mr. O'Neill suggested examining the language to alleviate the uncertainty.

Michael J. Filipowicz, Vice President
HITT Contracting

Mr. Filipowicz, the final speaker of the day, also addressed the \$2 million JOC contracting limit. He stated that a statewide flat cap was not appropriate for the wide variety of contracts that JOC contracts encompass. He suggested that instead of a flat cap, the Special Subcommittee should consider flexible and adaptable controls and guidelines for using the procurement method.

Special Subcommittee Review

At the close of the vendor community presentations, there was discussion among Special Subcommittee members on how to proceed. Delegate Albo requested additional information detailing the procedures for procurement using design-build, construction management, and construction manager at risk. Delegate Matthew James stated that among the issues that the Special Subcommittee needs to consider are components of procurement process that may cause small and medium sized firms to make the strategic decision not to compete. Chairman Jones added that a major area of inquiry will be the possibility of developing controls governing when and how a public body may

use one of the alternative procurement methods. Chairman Jones also noted that it will be important to determine if the alternative methods ultimately resulted in the best value for the public body by providing measurable cost savings. He directed staff to contact the appropriate agency to determine the cost per square foot for a structure that is built using competitive sealed bidding as opposed to one of the alternative processes. Delegate Nick Rush added that it would also be helpful to review how many construction projects under \$20 million were procured using one of the alternative methods as opposed to competitive sealed bidding and, in those instances where an alternative method was used, how many contractors actually bid on the project.

The Special Subcommittee will continue receiving comments at its next meeting. Chairman Jones indicated that the members will be polled for the date and time of that meeting.