

**Special Joint General Laws Subcommittee Studying  
the Virginia Public Procurement Act  
July 14, 2014, 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) met on July 14, 2014, in Richmond, Virginia, in House Room C of the General Assembly Building to review legislation referred by the General Assembly from the 2014 regular session.

The first order of business was the election of chair and vice-chair. Delegate C. Todd Gilbert was elected chair and Senator Frank Ruff, Jr., was elected vice-chair.

**I. Progress report on Work Groups 1 and 2**

The Special Subcommittee received a staff briefing on the status of two work groups established to assist the Special Subcommittee in its review of the Virginia Public Procurement Act (VPPA) by developing consensus on recommendations. The work groups comprise representatives from state and local government, higher education and the vendor community. Work Group 1 is focused on issues related to construction and related design professionals, and Work Group 2 is focused on information technology, goods, other professional services, and nonprofessional services. Each work group has been assigned a scope of work document (SOW) consisting of issues developed during the first year of study. The membership of the work groups and the full schedule of meetings may be found at:

[http://dls.virginia.gov/interim\\_studies\\_procurement.html](http://dls.virginia.gov/interim_studies_procurement.html).

**II. Review of legislation referred by the General Assembly**

The Special Subcommittee proceeded to review the referred legislation, beginning with the bills of patrons who were in attendance.

*House Bill 223 (Dance)*

House Bill 223 would require the Department of General Services and the Virginia Information Technologies Agency to develop procurement regulations for the utilization of small businesses located in historically underutilized business zones (HUB zones). Under the bill, a HUB zone is defined as an area in Virginia so designated by the U.S. Small Business Administration pursuant to relevant federal law. Delegate Rosalyn C. Dance, patron, stated that the legislation would assist urban, economically depressed areas by encouraging the state to establish procurement relationships with small businesses in those areas. Delegate Dance further stated that she wanted to do additional work on the legislation and bring an amended version to the next meeting of the Special Subcommittee. After discussion, the Special Subcommittee voted to defer action on the legislation to its next meeting.

*House Bill 1223 (Yancey)*

House Bill 1223 consists of two components. The first component would expand the definition of "minority-owned business" to include historically Black colleges and universities (HBCUs). The second component would require small, women-owned, and minority-owned business (SWaM) programs to include a provision for the fair and equitable evaluation of opportunities for small businesses and all businesses owned by women, minorities, or service-disabled veterans. Regarding the first component of the bill, patron Delegate David A. Yancey stated that federal law included HBCUs under its disadvantaged business program. Testimony in favor of the first component of the bill was provided by William Thomas of Hampton University. Mr. Thomas related how a program at the University lost a contract bid to an Oklahoma company to provide parenting skills training even though the Hampton program was the low bid. Also speaking in favor of this component of the legislation was Rodney Thomas of Richmond, Virginia.

Arlene Kleindenst, Esq., spoke in favor of the second component of the bill on behalf of Top Guard Security, a women-owned business based in Virginia. She asserted that while Top Guard Security meets the definition of a women-owned business, because it has over 400 employees it does not meet the current definition of a small business, which sets a limit of 250 employees. The second component of the bill would allow full participation in SWaM programs for women-owned and minority-owned businesses that did not also meet the current definition of a small business.

After discussion, the Special Subcommittee voted to defer action on the legislation to its next meeting.

#### *House Bill 793 (Lopez)*

House Bill 793 would change the definition of small business to require a qualifying business to have both 250 or fewer employees and average annual gross receipts of \$10 million or less averaged over the previous three years. Under current law, a business must meet either the employee limit or the average gross receipts condition to be classified as a small business. The patron of the legislation, Delegate Alphonso H. Lopez, stated that 95 percent of Virginia businesses fit the current definition and that the change was needed to more directly assist truly small businesses. According to Delegate Lopez, the change would cause 3.6 percent of Virginia firms, or 765 total firms, and 2,228 non-Virginia firms to lose their certification as a small business. Testimony in support of the bill was provided by Bernice Travers, President, Travers Corporation; Lee Brazzell, President of Transformation Consulting LLC; Bruce Williams, Hampton Roads Committee of 200+ Men, Inc.; Gwen Davis, Chair, Equipping Businesses for Success Institute; William Thomas; Marty Jewel; Earl Bradley; and Willie Lee.

After some additional discussion, the Special Subcommittee voted to report the bill favorably to the General Assembly.

The Special Subcommittee then proceeded to review the remaining legislation.

#### *House Bill 289 (Albo)*

House Bill 289 (HB 289) would prohibit the use of cooperative procurement for construction. Currently the law only prohibits the use of cooperative procurement in the case

of construction in excess of \$200,000 by a local public body from the contract of another local public body that is more than a straight line distance of 75 miles from the territorial limits of the local public body procuring the construction. Lee Brazzell, President and CEO of Transformation Consulting LLC Brazzell, expressed concern that procuring construction using cooperative procurement would significantly limit the ability of small businesses to compete for the work. Cindy Shelor, owner of John T. Morgan Roofing and Sheet Metal of Roanoke, Virginia, told the Special Subcommittee that when cooperative procurement was used to re-roof three Roanoke City public schools, her company and other local contractors were not able to participate. She asserted that cooperative procurement should not be used for procuring construction. The Special Subcommittee voted to refer HB 289 to Work Group 1.

*House Bill 290 (Albo)*

House Bill 290 would make several technical changes to the job order contracting (JOC) provisions that became effective on July 1, 2014. Legislation passed during the 2013 legislative session with a one-year delayed effective date established a definition for JOC as well as limitations on the total contract and project fee amounts and the length and number of renewable terms such contract arrangement may extend. Staff noted that interested parties had indicated several areas of concern regarding the definition and the limitations and the effect that the new provisions would have on current procurement practices. The Special Subcommittee voted to refer the legislation to Work Group 1.

*House Bill 421 (Minchew) and Senate Bill 174 (Black)*

Identical bills HB 421 and SB 174 would increase the term contract limits for architectural and engineering services from \$1 million to \$2.5 million per project for state agencies and from \$5 million to \$10 million per contract term. The Special Subcommittee voted to refer both bills to Work Group 1.

*House Bill 549 (Filler-Corn) and Senate Bill 645 (McEachin)*

House Bill 549 and Senate Bill 645 provide that when awarding transportation construction projects, the procuring entity may consider certain specified factors other than price. An additional provision in SB 645 would allow any locality to use design-build or construction management delivery methods for construction, provided the locality had the personnel, expertise, and procedures for engaging in such contracts. Currently, the procurement methods are available to localities with a population in excess of 100,000. Richard Thomas of the Design Build Institute spoke in favor of the bills. He asserted that the bills would authorize state and local governments to use the design-build delivery method while still allowing the use of traditional delivery methods. Mr. Thomas stated that like traditional projects, design-build projects would be competitively bid. He noted that 78 percent of the states have fully authorized local governments to use design-build. According to Mr. Thomas, the delivery method resulted in lower costs, faster construction time, higher quality, and greater owner satisfaction.

Several individuals spoke in opposition to the legislation. Bruce Williams, Hampton Roads Committee of 200+ Men, Inc., expressed concern that design-build construction contracts may not adequately provide for the participation of minority-owned businesses.

Myles Louria, Senior Director of Governmental Affairs, Hunton & Williams, stated that injecting subjective criteria would be extremely problematic. Andrew Sinclair, Virginia Association of Governmental Purchasing, expressed concern regarding both of the bills and further noted that he believed public bodies could already do most of what the bills propose to accomplish, with the exception of the removal of the population threshold. Herschel Keller stated that overuse of design-build by public bodies adversely affected small contractors. Reginald Jones, Williams Mullen, noted that as a construction procurement method, design-build is an exception. He further stated that originally a locality had to come to the General Assembly to get authorization to use the method. The 200,000 population threshold, stated Mr. Jones, was put in place as a means to ensure that the locality using the delivery method was large enough to have appropriate staff in place to advise the locality because under the method the design professional would not be responsible to the buyer. Steve Vermillion, Associated General Contractors, stated that the issues encompassed in the bill needed more study. The Special Subcommittee voted to table both bills.

*House Bill 769 (Hugo)*

House Bill 769 provides, under certain conditions, that when engaged in procuring products or services or awarding contracts for construction, manufacture, maintenance, or operation of any state funded project, neither the Commonwealth Transportation Board nor any state transportation agency, may in the bid specifications, project agreements, or other controlling documents, provide an incentive in the scoring of bids that favors entities entering into project labor agreements.

Staff noted that legislation passed by the 2011 legislative session established that state entities may not require adherence to labor agreements nor discriminate based on adherence to such agreements. HB 769 would establish a more restrictive policy for transportation projects. Staff further noted that the need to establish a different, more stringent policy for transportation projects had not been raised as an issue during the first year of the study. The Special Subcommittee voted to refer the legislation back to the House of Delegates with no recommendation.

*House Bill 1159 (Rasoul)*

House Bill 1159 would add several local government officials to the current prohibition against certain state officials from knowingly soliciting or accepting a contribution, gift, or other item with a value greater than \$50 from any bidder, offeror, or private entity who has submitted a bid or proposal pursuant to the Virginia Public Procurement Act, the Public-Private Transportation Act, or the Public-Private Education Facilities and Infrastructure Act during the bidding period.

The Special Subcommittee voted to refer the legislation to the Virginia Conflict of Interest and Ethics Advisory Council.

*House Bill 1194 (James) and Senate Bill 632 (Lucas)*

Identical bills House Bill 1194 and Senate Bill 632 would require the Department of Small Business and Supplier Diversity, in conjunction with the Department of General Services,

the Virginia Information Technologies Agency, and the Department of Transportation, to develop a program establishing a requirement that at least 15 percent of all state purchases be made from minority-owned or women-owned businesses that are also certified as small businesses. Several individuals provided testimony in support of the bills. Lawrence Wright, who indicated that he was previously employed by the former Department of Minority Business Enterprise, asserted that the current purchasing goals are aspirational and of less value to women-owned and minority-owned businesses. Ms. Davis, of the Equipping Businesses for Success Institute, asserted that disparity studies conducted in 2004, 2010, and 2011 clearly indicated that the race-neutral and gender-neutral programs currently in use were not working. She further noted that while training regarding how to access the state's procurement system is always good for small businesses, training does not compensate for the fact that certified and capable minority-owned and women-owned businesses that do know how to access the system are still not being awarded state contracts.

Carmen Taylor, President of the Virginia State Conference of the National Association for the Advancement of Colored People, asserted that 15 percent is not a large amount and that the pursuit of fairness and equity in the state's purchasing activities was an appropriate objective. Rodney Thomas stated that Virginia has never reached its SWaM goals. He contrasted the state's program to the program used in neighboring North Carolina, which he asserted has a mandatory set aside of 23 percent. Mr. Thomas maintained that program implementation is also a problem in Virginia. Members of the Special Subcommittee expressed concern that the 15 percent figure may be arbitrary. Ms. Brazzell responded that the disparity study completed in 2012 documented availability, defined as minority-owned or women-owned businesses that were able, willing, and capable of performing. Chris Williams added that the completed disparity studies consistently and clearly indicated disparity that the state was severely underutilizing minority-owned businesses in comparison with availability as documented by the studies, and that addressing the disparity will help establish an economic ecosystem in depressed communities. Vivian Blaze, who indicated that she had been a business owner since 2003, stated that the 15 percent figure is not high considering the discriminatory practices that have caused much more money to be lost by minority-owned and women-owned businesses over the centuries. Speaking against the bills, Andrew Sinclair asserted that the state's SWaM program needed reform and that the VPPA should not be used to advance social measures.

Discussion among the Special Subcommittee members centered on the need to address programmatic issues related to SWaM and whether it was appropriate to recommend the establishment of the program provided by the bills without first addressing those issues. The Special Subcommittee took no action on the bills.

#### *House Bill 1208 (Albo)*

This legislation prohibits the consideration of discounts for early payment of invoices offered by any bidder in the determination of the lowest priced bid on any contract awarded using competitive sealed bidding. The Special Subcommittee voted to table the legislation.

#### *House Bill 1238 (Gilbert)*

House Bill 1238 would prohibit an Invitation to Bid or Request for Proposal from containing the procuring public body's cost estimate for the work or goods that are being procured. The Special Joint Subcommittee voted to refer the bill to Work Group 1.

*Senate Bill 616 (Alexander)*

Senate Bill 616 would eliminate the Department of Small Business and Supplier Diversity and recreate the Department of Minority Business Enterprise and the Department of Business Assistance as those two departments existed prior to January 1, 2014. Several individuals provided testimony in support of the bill. Gwen Davis asserted that the focus of efforts to increase the utilization of minority-owned businesses had been blurred by the combining of the two agencies. She further noted that the recent disparity studies did not support combining the two agencies. Rodney Thomas maintained that a separate agency devoted to increasing the utilization by the state of minority-owned and women-owned businesses is needed and should be restored. Delegate Thomas Greason noted that despite the existence of a single devoted agency for several years, the disparity numbers continue to be low. Mr. Thomas replied that the problem was in the implementation of the programs. Delegate Albo suggested that noted that it would also be appropriate for those concerned about the merger of the two agencies to request the Governor to appoint an advocate for women-owned and minority-owned businesses to ensure that the interests of such businesses were adequately supported.

Ida McPherson, Director of the Department of Small Business and Supplier Diversity, stated that in many instances, the merger resulted with the same staff performing the same functions as they did with the previous agency. She further stated that the commitment of the agency has not been diluted and cited the need for a procurement compliance division to assist in the enforcement of the state's procurement policies relative to minority-owned businesses and women-owned businesses. Mr. Wright noted that the focus of the agency must be on educating the vendor, which should be a significant part of the agency's mission. He also asserted that the agency needs the ability to enforce procurement policies. A representative of TSI Technology, an information technology company, stated that she stood as an example of a qualified minority-owned and women-owned business and that her company has been unable to secure a contract award in Virginia.

At the end of the testimony, the Special Subcommittee voted to pass the bill by indefinitely.

**III. Public comment**

*Bruce Tyler, Baskervill*

Mr. Tyler stated that he was a principal with Baskervill, an architectural, engineering, and design firm. He expressed concerned about the implementation of the Virginia Public Private Education Facilities and Infrastructure Act (PPEA). He asserted that the PPEA was an important statute, but that he feared that the implementation of the PPEA has not been fair and equitable. He provided copies of a chart that, he asserted, detailed a skewed procurement process. Mr. Tyler urged the Special Subcommittee to take the time to study the PPEA.

Delegate Greason suggested that Mr. Tyler discuss his concerns with staff for review at a future meeting.

No further public comment was presented.

#### **IV. Next meeting**

Chairman Gilbert indicated that the next meeting of the Special Subcommittee will be scheduled after the last meetings of the work groups. The meeting was adjourned the meeting at 4:45 p.m.