

**General Laws Special Joint Subcommittee
Studying the Virginia Public Procurement Act
Work Group 1: Construction and Design Professionals
July 23, 2014, at 9:30 a.m.
House Room 1, The Capitol, Richmond
Meeting Summary**

Members present: Lee Brazzell, Patrick Cushing, Esq. (for Reginald M. Jones, Esq.), Annette Cyphers, Joe Damico (for Richard Sliwoski) Elizabeth Dooley, Ed Gillikin (for Bert Jones), William H. Hefty, Esq., Thomas Julian, Jr., P.E., Chris Lloyd, Esq., Ida McPherson, Hunter Merrill, Steve Owens, Jeff Southard, Chris Stone, P.E., Steve Vermillion, and Uwe Wiendal, P.E.

Members absent: Anthony Arnold, P.E., Gary Mitchell, Cecelia Stowe, and Bernice Travers.

Work Group 1 of the General Laws Special Joint Subcommittee Studying the Virginia Public Procurement Act (VPPA) held its third meeting of the 2014 interim on Wednesday, July 23, 2014, at 9:30 a.m. in House Room 1 at the Capitol, Richmond. After opening the meeting, Richard Sliwoski, Director, Department of General Services, asked to make a brief statement before leaving for another meeting. He stated that Construction Management at Risk as a delivery method is being used improperly. Entities are in some cases paying more for the overall contract but not explaining why they are paying more. He added that procurement of architectural and engineering services (A/E) should be qualification-driven. The award of an A/E contract based on price is not fair to vendors and against the stated intent that the procurement of such services be qualification-driven rather than price-driven.

The work group members reviewed revised discussion drafts prepared by staff. After the June 19 work group meeting, members and interested parties were given the opportunity to submit comments and suggested amendments for consideration. The revised discussion drafts incorporated the suggestions that were submitted.

I. Term Contracts for Architectural and Engineering Services; Revised Discussion Draft

The initial objective of the draft was to remove the A/E term contract provisions from the definitions section without making substantive language changes. During the June 16 meeting, it was noted that multiphase contracts were not term contracts and therefore should not be included with the term contract language moved to the new section proposed by the discussion draft. The revised discussion draft accomplished this change.

Chris Stone, P.E., President, Clark Nexsen Architectural & Engineering, suggested that the language on page 2, line 45 of the draft be changed to take out what appeared to be a requirement for the submission of nonbinding estimates at the initial stage of consideration. William H. Hefty, Esq., Hefty & Wiley PC, stated that he thought the language should stay because it has been in place for a long time and has worked well. Elizabeth Dooley, Assistant Purchasing Agent, Arlington County, stated that she too would like to keep the language as currently written, noting that it was consistent with language included in the Model Procurement

Act. She asserted that price is a consideration but not the driving factor and therefore the public entity should have the information as a part of its overall consideration. Patrick Cushing, Williams Mullen, expressed support for the change suggested by Mr. Stone. Steve Owens, Senior Assistant Attorney General, stated that discussion of fees typically occurred after the selection of fully qualified offerors. Ms. Dooley asserted that that the process allows for the public body to ask for nonbinding estimates in order to take the proposed schedule in to consideration. Mr. Stone asserted that at that point the offeror was merely throwing out a figure because the project was not defined to the point that an accurate figure could be provided and that it was not appropriate to use such estimates; it is simply too early to discuss price. Uwe Wiendal, P. E., Director, Frederick County Sanitation Authority, added that architects and engineers have different viewpoints for attacking a project, which must also be considered during the selection process.

Mr. Hefty stated that the language was a compromise wherein the purchasing entity would not ask for the price upfront, but could do so when the vendor was short-listed. Ms. Dooley asserted that this process is a best practice used across the nation. Ida McPherson, Director, Department of Small Business and Supplier Diversity (SBSD), supported rewording the passage to make it clear that nonbinding estimates could not be required upfront. She maintained that considering price in any form at that stage would encourage an offeror to low-ball the initial estimate in order to get to the short list, and then adjust the price later. Maria Everett, Senior Attorney, Division of Legislative Services, suggested that staff develop for review at the next meeting language for clarifying when price may be considered. She added that the work group will also take a look at the current contract and project price limits for possible revision.

II. Cooperative Procurement; Revised Discussion Draft

Ms. Everett presented the draft by noting that the suggestion to allow the purchase of insurance by cooperative procurement be referred of Work Group 2. The draft contained several options submitted by work group members and interested parties. One suggestion submitted by Tray Adams, Esq., representing the Gordian Group, provided for new capital construction to be excluded from cooperative procurement and included a definition of “new capital construction.” Annette Cyphers, Director of Facilities Planning and Construction, University of Virginia, stated that major renovations are still a capital construction project. Another suggested version would remove all construction from cooperative procurement. Another suggested direction for the draft would remove maintenance and repair services from cooperative procurement. Steve Vermillion, CEO, Associated General Contractors of Virginia, supported the suggested changes asserting that when cooperative procurement began it was geared more toward commodities and things and construction is not a commodity or a thing. He further asserted that construction should not be cooperatively procured and that it was bad for small businesses. Lee Brazzell, President and CEO of Transformation Consulting LLC, Jeff Southard, Executive Vice President of Virginia Transportation Construction Alliance, Hunter Merrill of Virginia Association of Roofing Professionals, and Mr. Cushing also expressed support for removing construction altogether from cooperative procurement.

A version of the redraft provided by Herschel Keller, a non-work group member, would remove maintenance and repair services from cooperative procurement. The version included a definition of maintenance to consist of work that did not require the issuance of a building permit or a Department of General Services annual permit. Chris Lloyd, McGuire Woods Consulting,

expressed concern that whether a specific job required the issuance of a building permit varied and could cause confusion. Mr. Hefty and Ed Gillikin, Virginia Community College System (VCCS), agreed. Mr. Wiendal asserted that this was especially the case when it came to utility projects.

Ms. McPherson maintained that the issue is whether maintenance or construction should be cooperatively procured, and she asserted that they should not. Ms. Dooley stated that while the use of cooperative procurement in general may have gotten out of control, there were still instances where cooperative procurement was necessary. She offered the example of the cooperation that is needed when the District of Columbia, Arlington, Fairfax, and other entities have to ensure that equipment, such as radio towers, are capable of interoperability. Removing construction from cooperative procurement altogether would eliminate a tool for localities that have to make sure that systems were interoperable among jurisdictions.

Mr. Hefty explained that there were two types of procurement going on under this Code provision. One type involves when a public body conducts or administers a cooperative procurement agreement on behalf or in conjunction with another public body. This is the type of procurement that is contemplated by the first paragraph of subsection A, beginning at line 6. It includes some involvement by the public body at the time that the Request for Proposals (RFP) or Invitation to Bid (ITB) is issued. The second type of procurement is when a public body purchases from another public body's contract even though it did not participate in the RFP or ITB. This possibility is contemplated by the second paragraph of subsection A, beginning on line 12. The result is that it allows one public body to "piggyback" on to another public body's contract. It is this situation that appears to be the source of the problems that are being complained of when it comes to construction.

Joe Damico, Deputy Director, Department of General Services (DGS), stated that a number of state agencies do not have the ability to do a construction project so they look to DGS for assistance. This is not the same situation as when DGS uses its authority to establish state contracts, which is limited to its Division of Purchasing and Supply. Ms. McPherson asserted that cooperative procurement should not be used for construction or goods and services and further that DGS's ability to procure on behalf of state agencies should not be located in the cooperative procurement section. Mr. Wiendal argued that under the proposed definitions the type of work that is done by water and sewer authorities would be adversely affected. Such entities, he asserted, often comprise two or three members who do not have the ability in every case to administer a full bid process. In addition, because of the nature of some of the work, such as repairing manhole covers, water and sewer authorities could not perform the work under the first paragraph of subsection A because of issues related to timing. Therefore, Mr. Wiendal maintained, if construction is removed from cooperative procurement, then maintenance work must be allowed under the provision. Mr. Hefty stated that the problem is related in part to an overly broad definition of construction. He suggested not changing the definition but rather including provisions for a subset of construction that will be allowed. Ms. Everett suggested the consideration of an exception for water and sewer authorities. Mr. Gilliken added that the VCCS uses a VASCUP contract to purchase lab equipment and that light construction may be involved. Mr. Merrill asserted that such procurements should be put on eVA to be bid out.

Mr. Stone recommended allowing construction up to \$200,000. Mr. Wiendal suggested a limit of \$300,000 and prohibiting cooperative procurement for new construction. Mr. Merrill objected, stating that he thought the discussion was leading to the elimination of construction

from cooperative procurement rather than establishing a list of exceptions and conditions allowing for its use for construction. Ms. Cyphers maintained that cooperative procurement has been successful for small projects. Mr. Damico added that if a public body does the proper research before endeavoring to bid a cooperative procurement, including a review of potential contractors and taking on the responsibility of looking at what other public bodies need, then the use of cooperative procurement should be acceptable. The key is for the public body to perform the requisite research regarding the availability of contractors and the need on the part of other potential public bodies. Citing that the parties were not that far apart, Mr. Hefty suggested that staff draft something encompassing the concepts that had been discussed. He further suggested that (i) the definition of construction not be changed, (ii) cooperative procurement generally not be allowed for procuring construction, and (iii) cooperative procurement be allowed for some limited situations or circumstances or entities.

III. Job Order Contracting: Revised Discussion Draft

With regard to the Job Order Contracting (JOC) draft, Mr. Southard maintained that highway maintenance and asset management procured by the Virginia Department of Transportation (VDOT) should be excluded from JOC. He noted that VDOT used a prequalification process and that other provisions in the Code of Virginia required such contracts to be procured by competitive sealed bidding. The exclusion could be accomplished by including a reference to the definition of “highway” found in Title 33.2 of the Code of Virginia.

Mr. Owens suggested that JOC include provision for some incidental A/E services if such services come up in the context of an installation project. He further suggested that any new construction be explicitly excluded from JOC. Ms. McPherson agreed that any A/E services should be limited to incidental work. Mr. Cushing indicated that he would oppose any apparently new category of services. He asserted that A/E services are required to be procured by competitive negotiation and JOC allows the public body to use either method of procurement. Using JOC could result in allowing A/E services to be procured by competitive bidding. Mr. Gilliken suggested tying any A/E work required by a JOC agreement to an existing A/E term contract. He asserted that the premise behind JOC was to provide a quick and nimble delivery method. Mr. Stone indicated his support for this approach. Thomas Julian, Jr., P.E., Centennial Contractors Enterprises, Inc., stated that very little A/E work is done during a typical JOC project. He asserted that tying the incidental work to an existing A/E term contract would be problematic because then you would have an architect or engineer who is tied to an owner and not the contractor. Mr. Hefty asked if it was possible to provide that JOC allow incidental A/E services only if the services are provided by the JOC contractor. Mr. Cushing replied that there is still a problem with using “incidental.” He suggested establishing a threshold of \$50,000. Mr. Owens countered that he thought a \$50,000 cap is high and suggested alternatively that a cap be linked to the percentage of a total project. Ms. McPherson added that that consideration must be made for how any changes are made to JOC provisions related to the Governor’s new Executive Order on state procurement from small businesses.

Discussion moved to other parts of the draft. Mr. Hefty asserted that JOC should be used for small projects and not capital projects. This could be addressed through limits. He indicated his preference for the approach taken by the JOC definition offered by DGS beginning on line 58 of the draft. Mr. Stone stated that JOC requires a book of values, which is conducive for maintenance and repairs but does not work for new construction. Ms. Dooley suggested that the work group continue to discuss monetary limits and then, if needed, move to carve-outs. Mr.

Gilliken asked what type of new construction would be excluded under the proposed definitions. Ms. Dooley suggested small projects such as a new small park, including the installation of benches and landscaping.

Regarding the single task order limitation of \$500,000, Ms. Dooley stated that while the current amount works, the current cap for A/E contracts is set at \$1 million. Mr. Vermillion indicated that the single task order be limited to \$400,000. Mr. Damico stated that DGS wanted a single task limit of \$500,000 and a total amount of \$50 million. He added that a different total cap should be provided for larger localities. Ms. McPherson asserted that any contemplated solution had to include language making the state's small, women-owned, and minority-owned business participation requirements applicable. Mr. Vermillion added that a \$50 million total cap would not allow smaller vendors to participate. Mr. Julian indicated that 80 percent of the work under JOC agreements with which his company is involved is given to small businesses that are located where the work is being done. Mr. Hefty suggested a limit of \$50 million for DGS and \$10 million for localities with a population of 200,000 or more, which would be the 13 largest localities in the state. Mr. Owens maintained that a \$5 million total cap suggested in some versions of the draft is very low. Ms. Dooley noted that the law was put into effect without consideration as to how it would affect public bodies. Regarding the term of the JOC agreements, Mr. Stone suggested a one-year initial contract term that is renewable for two additional terms rather than five. He further suggested that the single task amount be limited to \$500,000 and the total cap amount remain at \$5 million. Mr. Stone asserted that the real fear on the part of some in the contracting community is of bad actors improperly using JOC to do large projects in a piecemeal manner. Ms. Dooley indicated support for the anti-splitting language beginning on line 430, which might help to prevent such improper uses of JOC.

Mr. Merrill asserted that there is just not enough data to support changing the limits that became effective on July 1, 2014, and he urged the work group to wait and see what the experience is for the limits. Ms. Dooley replied that some public bodies were already having problems with the limitations and the new law has been effective for only a few weeks.

Public Comment

The work group opened the floor to receive public comment on the discussion draft.

Herschel V. Keller, Esq., Petty, Livingston, Dawson & Richards, P.C.

Mr. Keller stressed the need to establish an effective and meaningful enforcement mechanism as a means of reaching easier compromise on other more specific issues. He suggested that all discussions be tabled until the issues related to establishing meaningful enforcement and oversight mechanisms are resolved.

Phillip Abraham, Old Dominion Highway Contractors Association

Mr. Abraham stated that procurements for maintenance or asset management services that are administered by VDOT are unique and are required to be procured by competitive sealed bidding. He supported the position of Mr. Southward regarding the cooperative procurement and JOC discussion drafts with regard to excluding such procurements.

Jeff Gore, Hefty & Wiley, P.C.

Mr. Gore noted that Loudoun County has had success using JOC for HVAC maintenance and small construction projects, such as utility sheds. He stated that the county reaches out to

small contractors to make sure that they get some of the work; typically about 14 contractors are involved. He maintained that JOC works well for large localities and suggested a higher limit for localities with a population of 200,000 or more. He offered to provide information on Loudoun County's JOC agreements.

Next Meeting

The next meeting of the work group is scheduled for September 17, 2014. The meeting adjourned at 11:55 a.m.