

**General Laws Special Joint Subcommittee  
Studying the Virginia Public Procurement Act**

**Work Group 1: Construction and Design Professionals**

**September 17, 2014, at 9:30 a.m.**

**House Room 1, The Capitol, Richmond**

**Meeting Summary**

**Members present:** Anthony Arnold, P.E., Patrick Cushing, Esq. (for Reginald M. Jones, Esq.), Annette Cyphers, Elizabeth Dooley, Mike Halvorson (for Thomas Julian, Jr., P.E.), William H. Hefty, Esq., Tracey Jeter, Bert Jones, Chris Lloyd, Esq., Hunter Merrill, Steve Owens, Richard Sliwoski, Jeff Southard, Chris Stone, P.E., Cecelia Stowe, Steve Vermillion, and Uwe Weindel, P.E.

**Members absent:** Lee Brazzell, Gary Mitchell, and Bernice Travers.

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Work Group 1 of the General Laws Special Joint Subcommittee Studying the Virginia Public Procurement Act (VPPA) held its fourth meeting of the 2014 interim on Wednesday, September 17, at 9:30 a.m. in House Room 1 at the Capitol. The meeting began with a review of the actions taken by the General Laws Special Joint Subcommittee on legislation referred by the 2014 session of the General Assembly and a progress report on the activities and consensus items of Work Group 2. After overview and progress report, Julie Whitlock of the Department of General Services (DGS) presented a package of changes sponsored by the agency. The package, hereinafter referred to as the omnibus draft, includes consensus language as well as suggested provisions to move the work group toward more final consensus in the areas of architectural and engineering services (A/E) term contracts, job order contracting (JOC), and cooperative procurement. Ms. Whitlock provided a brief overview of the changes as follows:

***A/E term contracts:***

- Prohibit price-shopping among A/E contractors on term contracts
- Preserve current A/E term limits

***JOC:***

- Increase JOC limits from \$2 million per term to \$5 million per term
- Increase JOC limits from \$400,000 to \$500,000 per project
- Decrease the number of renewable one-year terms for JOC from four additional terms to two additional terms
- Allow ancillary A/E services up to \$60,000 per order on JOC projects

***Cooperative Procurement:***

- Make no changes to joint purchasing authority
- Continue to prohibit the purchase of A/E services under a cooperative procurement contract where the public body was not a party to the initial contract ("piggybacking")
- Expand the prohibition against construction piggybacking to all contracts

In addition, Ms. Whitlock noted that the draft included miscellaneous provisions (i) clarifying that small purchase procedures may be used for construction, provided the Uniform Statewide Building Code is followed; and (ii) raising the limit on the state's ability to procure A/E services non-competitively from \$50,000 to \$60,000, to match the current limit for localities.

After presentation of the package, work group members provided comments. Jeff Southard, Executive Vice President, Virginia Transportation Construction Alliance, asserted that the omnibus draft did not include the exemption for certain transportation projects from JOC or the removal of all construction from cooperative procurement. He believed that consensus had been reached on both of these items. It was agreed that the exemption for transportation projects was a consensus item. Chris Lloyd, McGuire Woods Consulting, asked if the joint procurement provision under cooperative procurement also applied to localities. Rich Sliwoski, Director, DGS, stated that the Department would pursue separate legislation regarding its statewide contract authority. The inclusion of localities, added Mr. Sliwoski, depended on the level of resistance. Steve Vermillion, CEO, Associated General Contractors of Virginia, did not support allowing localities to use statewide contracts, as suggested by Mr. Lloyd. Mr. Lloyd also noted that there should be a provision in the omnibus draft to grandfather contracts that were entered into prior to the effective date of the changes to the law. Uwe Weindel, P.E., Director, Frederick County Sanitation Authority, agreed with the prohibition on new construction under cooperative procurement, but added that the prohibition of all construction would not meet the needs of many water authorities and other utilities. Mr. Vermillion stated that while the DGS omnibus draft provided a good starting point, a key component missing from the draft was an independent review board. Mr. Vermillion strongly suggested that the work group establish such a board at the beginning of the process and enable it to make quick decisions to avoid project delays.

Patrick Cushing, Williams Mullen, expressed support for the omnibus draft but asserted the need for more clarification that JOC may not be used to procure A/E services. Mr. Chris Stone, P.E., President, Clark Nexen (an A/E design firm), supported the need for an independent review entity. He also offered a language change under the definition of "new capital construction" to remove the word "addition." It was noted that the omnibus draft prohibited JOC from being used to procure A/E services alone. Michael Halvorson added that JOC should not be used solely to procure A/E services and that any A/E services acquired should be incidental to the overall contract work. William Hefty, Esq., Hefty & Wiley, P.C., pointed out the need to clarify that decisions to procure A/E term contracts cannot be based entirely on price and suggested adding the word "solely." There was disagreement among the work group over this suggested change. Anthony Arnold, P. E., Director of Facilities Planning and Construction, Virginia Beach Public Schools, noted that the process used by his public body for A/E term contracts involved choosing two or three professionals and then equally distributing the work among them based on expertise, without any further consideration of price. Mr. Hefty offered the following changes: (i) increasing the A/E term contract limits for localities with populations of more than 200,000 from the current \$5 million to \$10 million, and (ii) prohibiting the procurement of new construction using cooperative procurement, but allowing an exception for public works projects.

It was agreed that the DGS omnibus draft would serve as the vehicle for achieving future consensus. Staff was instructed to make several changes to the draft for final review at the next meeting of the work group.

The work group then proceeded to discuss options for increased enforcement and oversight of the public procurement process. Amigo Wade, Division of Legislative Services, proposed several changes intended to clarify procurement processes in the following areas: (i) the choice by public bodies to use a Notice of Intent to Award or a Notice of Award, (ii) the application of the automatic stay provisions, and (iii) the administrative process for protest appeals. After considerable discussion, the work group decided not to move forward with any of the proposals. The discussion then centered on developing appropriate oversight to ensure that the procurement process works as intended by the legislature. Mr. Hefty noted that he will not support the notion that the current system does not work. Steve Owens, Senior Assistant Attorney General, stated that an appeals entity used to exist within the DGS but that it had been discontinued. He cited that the former appeals board was not frequently used, possibly because vendors feared retaliation, and that the process was costly. Mr. Sliwoski noted that the domain of the previous appeal entity had been limited to goods and nonprofessional services. Mr. Cushing maintained the need for a level of review of certain procurement decisions, and he offered to provide data on the number of protests registered over the past five years. Elizabeth Dooley, Assistant Purchasing Agent, Arlington County, and Cecelia Stowe, Purchasing Director, Henrico County, both pointed out that not all of the protests may have involved a violation of the VPPA, but rather a misunderstanding of the process. They suggested that it might be necessary to mandate education and training. Mr. Vermilion strongly reaffirmed the need for an independent review board and offered to outline a proposed independent review entity.

Mr. Wade noted additional options for discussion, including increased roles for the State Comptroller and the State Inspector General and the establishment of an public procurement advisory council. No consensus could be reached on the first point. Regarding the option to establish an advisory council, Ms. Stowe noted that if the current Freedom of Information Act (FOIA) Council is the intended model, it is important to understand that while FOIA covers all public bodies across the state at all levels, the VPPA does not. Mr. Lloyd felt that thresholds should be considered to determine which procurement disputes would be heard by the advisory council. Mr. Weindel urged the work group not to give up on the current process, even if the final consensus is to establish an advisory body. Mr. Wade agreed to provide proposed language for an advisory entity for discussion at the work group's next meeting.

## **Public Comment**

The work group opened the floor to receive public comment.

*Michael Locaby, Esq., County Attorney for Louisa County; Local Government Attorneys of Virginia*

Mr. Locaby stated that many localities have very limited staff and that the current VPPA was already extremely difficult for smaller localities to navigate. He submitted that the work group should not do anything to make the VPPA more complicated; rather, the focus should be on the original intent of the VPPA and its objective of providing general rules with some flexibility. Regarding oversight, Mr. Locaby felt that there was no need for another level of state bureaucracy.

*Reginald Jones, Williams Mullen*

Mr. Jones noted that he worked on the original VPPA, and the intent was to create a fair and open process and to ensure the best use of taxpayer money. He supported the idea of a VPPA advisory council to provide an independent look at the process, but cautioned that it would be critical to keep the entity simple and advisory in nature.

### **Next Meeting**

The next meeting of the work group is scheduled for October 15, 2014, at 9:30 a.m. The meeting adjourned at 12:15 p.m.