Special Joint General Laws Subcommittee Studying the Virginia Public Procurement Act

November 12, 2013, 1:00 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 November 12, 2013, in House Room C of the General Assembly Building. The meeting was called to order at 1:05 p.m. After opening remarks by Chairman S. Chris Jones, the Special Subcommittee moved to the agenda for scheduled presentations.

Richard Sliwoski, Director, Department of General Services

Mr. Sliwoski provided the Special Subcommittee with an overview of selected methods of construction procurement. He stated that prior to 2005, all state agencies followed the construction procurement policies established by the Department of General Services (the Department) in the Construction and Professional Services Manual (CPSM). As of 2005, several changes limited the application of the manual. In terms of public institutions of higher education, Tier 3 institutions and Tier 2 institutions with capital authority may create their own version of the CPSM and have different requirements for approval. Tier 1 and Tier 2 institutions follow the CPSM, but have different requirements for approval in a nongeneral fund construction project. In addition, as of 2005, the General Assembly authorized the Department of Corrections to use design-build procurements without the approval of the Department.

The top three construction procurement methods used by public bodies are Design-Build-Build (DBB), Construction Management at Risk (CM), and Design-Build (DB). Under the DBB method, the owner engages a designer under an architectural or engineering services contract to design the facility. The owner separately engages a contractor to build the facility, and contractors' bids are based on the design specifications. The advantages of the DBB method are that it allows maximum competition and, if the design and specifications are complete, can be extremely cost efficient. The method is also ideal for projects that do not require specialized expertise. Problems related to this method include a higher probability of litigation and the potential for change orders to increase the cost of project.

Under the CM method, the designer and construction manager are separately contracted. The owner's architect or engineer designs the project, but in contrast to the DBB method, the construction manager is hired early in the design process to assist with the system selection, schedule, and budget. The construction manager provides a guaranteed maximum price before design documents are complete. Benefits of the CM method include (i) the selection of the construction manager or general contractor is both qualifications-based and cost-based, (ii) the construction manager is engaged early to review documents, which reduces conflict and helps keep the project within budget,

and (iii) the construction manager is responsible to the owner to finish on time and within the guaranteed maximum price. A major problem associated with the method is its potential for overuse. The method should only be used where specialized expertise or skills are required and should not be used for small projects. Mr. Sliwoski reviewed a recent a survey of state agencies conducted by the Department covering the five-year period between September 1, 2008, and September 1, 2013. Of the 108 CM projects reported during this period, 52 percent had a total cost greater than $20 million, 27 percent had a total cost between $10 and $20 million, and 21 percent had a total cost of less than $10 million. These numbers appear to indicate that the tendency to use the CM method increases with the overall costs and size of the project.

The DB method consists of the agency and the design professional preparing the Request for Qualifications (RFQ) and the Request for Proposal (RFP). Under this method, each proposer submits a technical proposal and a separately sealed cost proposal on the basis of the RFQ and RFP. The technical proposals are evaluated and then the cost proposals are opened. A DB contractor is then selected for award of the contract. Problems can occur with this method if the scope of work and project requirements are not adequately defined in the RFP. Also, since the prequalification selection criteria are not customized to the specific project, the RFP may be unclear to potential responders. In addition, the owner does not have the benefit of the design professional's independent oversight of the work.

John Westrick, Senior Assistant Attorney General

Mr. Westrick provided a review of public procurement enforcement and oversight provisions. Mr. Westrick noted that generally sovereign immunity protects government from disruptive lawsuits except where the legislature has authorized lawsuits. In the case of procurements, the General Assembly has authorized five vendor remedies in the Virginia Public Procurement Act (VPPA). Mr. Westrick indicated that his presentation would focus on the remedy allowing the vendor to protest a contract award or decision to award a contract.

Mr. Westrick then proceeded to review with the Special Subcommittee the steps involved in the protest and appeal process:

> **Step 1: Notice of award or decision to award.** At this step, the bid or proposal records are available for vendor inspection.
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> **Step 2: Written protest within 10 days.**
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> **Step 3: Written response within 10 days.** If the agency deems the protest meritorious, the options that are available depend on the status of the contract. If the contract has not been awarded, the public body may rescind or revise the proposed award or cancel the procurement altogether. If the contract has been awarded but performance has not begun, the public body may enjoin performance, which is equivalent to canceling the contract. If performance has begun, the public body may void the contract if it finds that it is in the public interest.

Step 4: Appeal within 10 days of protest denial. This step involves the protestor filing an appeal with the appropriate court. To succeed, the protestor must show that the award or proposed award is arbitrary or capricious or not in accordance with law or solicitation. If a court finds the appeal meritorious, it may reverse the award or enjoin the agency from proceeding. Mr. Westrick noted that injunctions are rarely granted.

Mr. Westrick then discussed alternatives to litigation. The VPPA authorizes public bodies to establish an administrative appeal panel to hear disputes. This neutral panel would be outside of the procuring agency's management chain. According to Mr. Westrick, the usefulness of this option depends on how the panel is set up. Another alternative to civil litigation is through the establishment of an oversight authority. He noted that this avenue would not allow the vendor to enforce his rights, but rather would serve to alert the oversight authority to the procurement problem. The General Assembly has assigned oversight responsibilities to officers outside of the procurement agency's management. The more general oversight of procurement is through the powers of the two central purchasing agencies, DGS and the Virginia Information Technologies Agency (VITA). The most important oversight authority is the ability to grant or withdraw contracting authority. Mr. Westrick stated that while contracts violating the VPPA are voidable, contracts signed without authority are void.

The Special Subcommittee then proceeded to receive the following public comment:

Steve Ballard, S.G. Ballard Construction Company

Mr. Ballard asserted that the CM method is that best value for the state and that state agencies are currently doing a good job using CM projects. He discussed examples of successful projects at Norfolk State University, Old Dominion University, and Radford University. Mr. Ballard stated that it is difficult to successfully bid CM contracts, citing his company's experience of submitting between 15 to 20 CM proposals before actually being awarded a contract. He emphasized that companies have to be flexible and willing to change.

Tom Evans, Southwood Builders, Inc.

Mr. Evans stated that smaller businesses are not given an adequate opportunity to bid on CM projects. He cited rules that require successful bidders to have completed at least three CM projects as a major reason for the lack of opportunity. Delegate Nick Rush asked if a possible cause could be the upfront costs that are involved, which many smaller companies are not able to handle. Mr. Evans replied that that was a probable cause, in combination with other factors. Senator J. Chapman Petersen noted that the position taken by Mr. Evans regarding the usefulness of CM projects was in contrast to that of Mr. Ballard's. Mr. Evans responded that he preferred competitive sealed bidding for projects to ensure that smaller contractors are able to compete. Delegate David Albo asked what prevented a smaller contractor from getting a CM project. Mr. Evans replied that the main reason was that contractors are being told that they need more experience in terms of putting together a management team. He suggested that a contractor is not inclined to protest the award because the likelihood of success is so

low. Mr. Herschel Keller added that one of the problems with the protest process is that in order to have standing the contractor has to be a bidder or offeror, not a potential bidder or offeror. He asserted that the main issue is the use of unwarranted preconditions, such as the experience requirement.

Discussion; Review of Special Subcommittee Work Plan

The Special Subcommittee proceeded to discuss a legislative proposal related to job order contracting. House Bill 2079, passed during the 2013 Session, included provisions that (i) added a definition of job order contracting, (ii) specified procedures to be used by public bodies when utilizing job order contracting, and (iii) established a per project limit of $400,000 for such projects and a one-year contract term limitation of $2 million. These provisions have a delayed effective date of July 1, 2014. Over the course of the Special Subcommittee's review of job order contracting and related issues, concern was raised regarding these provisions, chiefly the adequacy of the amounts established for the per project and contract term limitations. Several options were discussed. Delegate Albo requested interested parties to submit proposals for amending the limits directly to Chairman Jones for consideration for possible legislative changes.

Discussion then centered on developing a work plan for the Special Subcommittee to complete its charge. Staff recommended establishing work groups consisting of interested parties to develop recommendations for legislative changes to the Virginia Public Procurement Act. The objective of the work groups would be to develop consensus on as many measures as possible. Any issues where consensus could not be attained would be turned over to the Special Subcommittee for disposition. The members agreed to establish the following three work groups:

1. **Construction, including Design Professional Services**
2. **IT Procurement and Other Professional Services**
3. **Goods and Nonprofessional Services**

Delegate Albo stated that any individual desiring to serve on one of the work groups would have to notify staff by letter or email no later than Monday, December 2, 2013. Delegate Albo stated that the final composition of the work groups will be decided by the Special Subcommittee. He also noted that the Special Subcommittee plans to meet during the 2014 Session to announce the members of the work groups and to provide additional guidance on the process.

The meeting adjourned at 3:20 p.m.