

SPECIAL JOINT GENERAL LAWS SUBCOMMITTEE STUDYING THE VPPA

VPPA ISSUES IDENTIFIED

AT MAY 14, 2013, JULY 9, 2013, and October 9, 2013 MEETINGS

NOTE: Based on comments received at meetings held on May 14, 2013, July 9, 2013, and October 9, 2013 this document was created to facilitate future discussions of the Special Joint General Laws Subcommittee by organizing the issues raised into the following broad categories of the VPPA, identified under the heading General Issue Category: Applicability/Exemptions, Vendor Eligibility, Cooperative Procurement, Technology/Business Practice Outdated, and Enforcement/Oversight. Certain subcategories also have been identified. Additional categories and subcategories may be added depending on the issue(s) raised. See Appendix A at the end of this document for a complete list of categories and subcategories to date.

GENERAL ISSUE CATEGORY	SOURCE	COMMENT	NOTES
1. APPLICABILITY/EXEMPTIONS			
Applicability/Exemptions <i>Subcategory: Nature of public body</i>	Department of General Services (DGS)	Balkanization of state procurement <ul style="list-style-type: none"> • Increased resource costs and complexity of contracts for agencies and vendors; • Duplication of contracts resulting in less aggregated spending leading to higher prices and increased contract award and administration costs. 	
Applicability/Exemptions <i>Subcategory: Nature of public body</i>	DGS	Confusion for vendors due to multiple and disparate rules resulting in less friendly environment for conducting Commonwealth business.	

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<p>Applicability/Exemptions <i>Subcategory: Goods, services, construction</i></p>	<p>Virginia Information Technologies Agency (VITA)</p>	<p>Consider statutory clarifications that produce benefits. <i>(Example: Prequalification of vendors; does the topic pertain to all goods and services or just to construction? (§ 2.2-4317))</i></p>	
<p>Applicability/Exemptions <i>Subcategory: Method of procurement</i></p>	<p>VITA</p>	<p>Put competitive negotiation on equal footing with competitive sealed bidding.</p>	
<p>Applicability/Exemptions <i>Subcategory: Nature of public body</i></p>	<p>Level 3 Higher Ed. <i>(University of Virginia)</i></p>	<p>Maintain current procurement and capital outlay authority provided to Level 3 Public Institutions of Higher Education.</p>	
<p>Applicability/Exemptions <i>Subcategory: Nature of public body</i></p>	<p>Large Locality <i>(Fairfax Co.)</i></p>	<p>Change the one-size-fits-all amendments that are made to the VPPA. Large and small localities have different needs.</p>	
<p>Applicability/Exemptions <i>Subcategory: Method of procurement</i></p>	<p>Large Locality <i>(Fairfax Co.)</i></p>	<p>Avoid proposed changes that are in conflict with the intent of the VPPA. <i>(Example: Changes based on (i) an Attorney General Opinion stating that a public body cannot consider factors that are not related to the goods or services being procured, (ii) enforcement of documented worker status, and (iii) preferences)</i></p>	
<p>Applicability/Exemptions <i>Subcategory: Readability/Internal consistency</i></p>	<p>Large Locality <i>(Fairfax Co.)</i></p>	<p>Review the cumulative effect of changes over several sessions. As a whole, these changes have adversely affected readability and created conflicting provisions.</p>	

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Applicability/Exemptions	Small Locality (Gloucester Co.)	Avoid the one-size-fits-all approach; localities have different needs. <i>(Example: Gloucester County's Purchasing Department must answer to its County Board of Supervisors and the local school board.)</i>	
Applicability/Exemptions <i>Subcategory: Nature of public body</i>	Small Locality (Gloucester Co.)	Avoid legislative actions directed at all because of the noncompliance of one.	
Applicability/Exemptions <i>Subcategory: Nature of public body</i>	Small Locality (Gloucester Co.)	Clarify confusion regarding lines of defined authority contained in the VPPA. <i>(Example: Public bodies, state local bodies, and local bodies)</i>	
Applicability/Exemptions <i>Subcategory: Nature of public body</i>	Small Locality (Gloucester Co.)	Review use of population thresholds associated with application of the VPPA.	
Applicability/Exemptions <i>Subcategory: Readability</i>	Small Locality (Gloucester Co.)	Variety of exceptions and exemptions to the Act make it difficult to read, follow, and interpret.	
Applicability/Exemptions <i>Subcategory: Method of procurement</i>	Small Locality (Gloucester Co.)	Methods of procurement have become disjointed and difficult to observe.	
Applicability/Exemptions <i>Subcategory: Method of procurement</i>	Design Professionals (VSAIA, ACEC)	Public bodies would benefit from clarification regarding the use of term contracts. In particular how the selected professions are used after the term contract has been established.	

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<p>Applicability/Exemptions <i>Subcategory: Method of procurement</i></p>	<p>Design Professionals (VSAIA, ACEC)</p>	<p>All decisions concerning procurement of professional services should be contingent upon first identifying those most qualified to provide the required services without regard to price.</p>	
<p>Applicability/Exemptions <i>Subcategory: Method of procurement</i></p>	<p>Design Professionals (VSAIA, ACEC)</p>	<p>The VPPA should clarify that public bodies may not ask for scope and fee proposals from multiple firms holding current term contracts with the public body.</p> <p><i>(Public bodies should be required to negotiate first with the firm determined to be the most qualified for a specific task from among the group of term contract holders, and then go to the second qualified firm, if, and only if the most qualified firm declines the opportunities or the parties are unable to agree on a mutually-acceptable fee.)</i></p>	
<p>Applicability/Exemptions <i>Subcategory: Method of procurement</i></p>	<p>Design Professionals (VSAIA, ACEC)</p>	<p>Eliminate the use of nonbinding or good faith estimates of price for services. Often a firm's estimate is treated by the public body as if it were a bid to be compared with similar estimates provided by other firms.</p> <p><i>(The preferred approach is to select one firm based on qualifications then either reaching an agreement or deciding to termination negotiations and move to the second ranked firm.)</i></p>	

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<p>Applicability/Exemptions <i>Subcategory: Method of procurement</i></p>	<p>Design Professionals (VSAIA, ACEC)</p>	<p>Procurements under the PPEA and PPTA need to emphasize qualifications in the selection criteria. More elements of qualification based selection criteria should be included during the evaluation /scoring process.</p>	
<p>Applicability/Exemptions <i>Subcategory: Method of procurement</i></p>	<p>Dan Cook, <i>(The Gordian Group)</i></p>	<p>The \$2 million per term limit on Job Order Contracting (JOC) programs should be raised and the \$400,000 project fee limit should be eliminated.</p>	
<p>Applicability/Exemptions <i>Subcategory: Definitions</i></p>	<p>Dan Cook, <i>(The Gordian Group)</i></p>	<p>The definition of JOC programs that is included in the VPPA should encompass all types of indefinite quantity contracts and not be limited to describing JOC programs.</p>	
<p>Applicability/Exemptions <i>Subcategory: Readability</i></p>	<p>Dan Cook, <i>(The Gordian Group)</i></p>	<p>The VPPA is unclear regarding whether performance and payment bonds are required for JOC contracts; this should be clarified.</p>	
<p>Applicability/Exemptions <i>Subcategory: Method of procurement</i></p>	<p>Tonya Matthews <i>(TMG Constr. Co.)</i></p>	<p>Instead of the \$2 million hard cap on JOC programs consider a cap connected to the percentage of the public body's total portfolio.</p>	
<p>Applicability/Exemptions <i>Subcategory: Method of procurement</i></p>	<p>Tonya Matthews <i>(TMG Constr. Co.)</i></p>	<p>Requiring a public body to adopt JOC contracting procedures prior to allowing such contracts or exempting a public body that has adopted such procedures.</p> <p><i>(This approach is similar to the approach currently taken in the VPPA authorizing public bodies to use construction management and design-build methods.)</i></p>	

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<p>Applicability/Exemptions <i>Subcategory: Goods, services , construction</i></p>	<p>Michael O'Neill, Sr. <i>(Centennial Contr. Enterprises, Inc.)</i></p>	<p>The limit for JOC programs should be increased from \$2 million to at least \$5 million.</p>	
<p>Applicability/Exemptions <i>Subcategory: Method of procurement</i></p>	<p>Michael O'Neill, Sr. <i>(Centennial Contr. Enterprises, Inc.)</i></p>	<p>The language relating to project fee included in the version of § 2.2-4303.2 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.</p> <p><i>(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.)</i></p>	
<p>Applicability/Exemptions <i>Subcategory: Method of procurement</i></p>	<p>Michael Filipowicz <i>(HITT Contracting)</i></p>	<p>A statewide cap of \$2 million is not appropriate for the wide variety of contracts that JOC programs encompass; consider flexible and adaptable controls and guidelines for using this procurement method.</p>	

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<p>Applicability/Exemptions <i>Subcategory: Method of procurement</i></p>	<p>Wanda Edwards <i>(Coalition for Procurement Reform)</i></p>	<p>Additional controls should be placed on the use of sole source contracts; such contracts should be limited to \$50,000.</p>	
<p>Applicability/Exemptions <i>Subcategory: Method of procurement</i></p>	<p>Hershel Keller <i>(Petty, Livingston & Richards, P.C.)</i></p>	<p>Should require competitive sealed bidding if the project is expected to be less than \$10 million.</p>	
<p>Applicability/Exemptions <i>Subcategory: Method of procurement</i></p>	<p>Hershel Keller <i>(Petty, Livingston & Richards, P.C.)</i></p>	<p>The use of the construction management method of project delivery should be restricted to only those projects for which the method is necessary due to the need for real time value engineering or constructability analysis.</p>	
<p>Applicability/Exemptions <i>Subcategory: Goods, services , construction</i></p>	<p>Hershel Keller <i>(Petty, Livingston & Richards, P.C.)</i></p>	<p>The exemption from the VPPA for public institutions of higher education granted Level III or II status should be removed for construction projects not expected to exceed \$10 million in total cost.</p>	
<p>Applicability/Exemptions <i>Subcategory: Method of procurement</i></p>	<p>Jack Dyer <i>Gulfseaboard Constr.</i></p>	<p>The VPPA should be strengthened to make the use of alternative procurement processes an exception, in particular for projects that are not expected to exceed \$20 million in total costs.</p>	<p>HB 2078 (Peace)</p>

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<p>Applicability/Exemptions <i>Subcategory: Method of procurement</i></p>	<p>Bill Lindsey (VA <i>Association of Governmental Purchasing- VAGP</i>)</p>	<p>The threshold for job order contracting should be raised to \$10 million. There appears to be broad agreement from all parties that the current threshold is not sufficient.</p>	
<p>2. COOPERATIVE PROCUREMENT</p>			
<p>Cooperative Procurement</p>	<p>DGS</p>	<p>Fractured efficiency of cooperative contracting such that one public body cannot use another public body's contract without expending resources to bring it into compliance with laws.</p>	
<p>Cooperative Procurement</p>	<p>VITA</p>	<p>Modify cooperative procurement language; current language effectively creates a de facto "statewide" contract, which dilutes competition and leverage.</p>	
<p>3. ENFORCEMENT/OVERSIGHT</p>			
<p>Enforcement/Oversight</p>	<p>DGS</p>	<p>No consequences for violations.</p>	

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Enforcement/Oversight	DGS	No central procurement oversight, thus making achievement of enterprise cost savings and efficiencies difficult.	
Enforcement/Oversight	Hershel Keller <i>(Petty, Livingston & Richards, P.C.)</i>	An offeror or potential offeror should have the right to appeal a public body's decision to use competitive negotiation	
Enforcement/Oversight	Steve Vermillion <i>(Associated General Contractors of VA)</i>	A public body should be required to conduct a debriefing and full disclosure of results, including all associated documents, relating to a response for qualification and technical and fee price proposals.	HB 2078 (Peace)
Enforcement/Oversight	Steve Vermillion <i>(Associated General Contractors of VA)</i>	Prohibit a public body 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 previous 10 years.	HB 2078 (Peace)
Enforcement/Oversight	Steve Vermillion <i>(Associated General Contractors of VA)</i>	Require a public body to provide a written justification for using construction management or construction manager at risk in lieu of competitive sealed bidding.	HB 2078 (Peace)

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Enforcement/Oversight	Bill Lindsey <i>(VAGP)</i>	It would be beneficial to have the Joint Legislative Audit and Review Commission (JLARC) to study the use of construction management. Many of the concerns and reports about the use of construction management were based on loose anecdotes and perception. Actual data on the use and practices will be beneficial.	
Enforcement/Oversight	Bill Lindsey <i>(VAGP)</i>	The JLARC study should also include a review of available enforcement mechanisms for ensuring compliance with procurement standards.	
Enforcement/Oversight	Design Professionals <i>(VSAIA, ACEC)</i>	Lack of an enforcement mechanism to address violations or divergences from required procedures. There should be a process for appealing or identifying blatant violations without relying upon litigation that would be costly to all parties.	
Enforcement/Oversight	Design Professionals <i>(VSAIA, ACEC)</i>	Ensure that public bodies receiving proposals under the PPEA and PPTA have appropriately skilled personnel to guarantee a good selection process.	
Enforcement/Oversight	VITA	Provide explicit enforcement authority.	
Enforcement/Oversight	VITA	Improper use of sole sourcing as a procurement method without clear justification or because of prior work by a specific vendor.	

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Enforcement/Oversight	VITA	Requests for Proposals that are essentially non-competitive because the RFPs are include overly prescriptive mandatory requirements. This produces a perception of favoritism and discourages vendor participation.	
Enforcement/Oversight	VITA	Improper use of contract change orders that significantly expand the scope and cost of an existing contract. Change orders may not be subject to the same level of review as original contract	
Enforcement/Oversight	VITA	Unauthorized procurements involving (i) state agencies that procure information technology without approval or delegation from VITA and (ii) using an existing contract to purchase information technology that are not in the scope of the contract.	
Enforcement/Oversight	VITA	Expand VITA's oversight tools to achieve higher compliance and accountability.	
4. VENDOR ELIGIBILITY			

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<p align="center">Vendor Eligibility <i>Subcategory: SWAM</i></p>	<p align="center">Department of Minority Business Enterprise</p>	<p>Consider changing the definition of small business to more adequately target small businesses.</p> <p><i>(Current language provides 250 or fewer employees or average gross receipts of \$10 million or less averaged over the previous three years.)</i></p>	
<p align="center">Vendor Eligibility <i>Subcategories: Preferences, Qualification to contract</i></p>	<p align="center">Large Locality (Fairfax Co.)</p>	<p>Avoid proposed changes that are in conflict with the intent of the VPPA.</p> <p><i>(Example: Changes based on (i) an Attorney General Opinion stating that a public body cannot consider factors that are not related to the goods or services being procured, (ii) enforcement of documented worker status, and (iii) preferences)</i></p>	
<p align="center">Vendor Eligibility <i>Subcategories: SWAM, Preferences</i></p>	<p align="center">Small Locality (Gloucester Co.)</p>	<p>Avoid legislative actions that do not champion competition at the highest degree (e.g. state preferences and local preferences).</p>	
<p align="center">Vendor Eligibility <i>Subcategory: Qualification to contract</i></p>	<p align="center">Small Locality (Gloucester Co.)</p>	<p>Avoid legislative actions that seek to make the procurement function a regulatory program.</p> <p><i>(Example: SCC registration and E-Verify requirements)</i></p>	

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Vendor Eligibility	Wanda Edwards <i>(Coalition for Procurement Reform)</i>	The design professional or contractor on a project should not have any connection with the manufacturer of the materials for the same project.	
Vendor Eligibility <i>Subcategories: SWAM, Preferences</i>	DGS	Small business set-aside preference should be examined for improvement.	
5. TECHNOLOGY/BUSINESS PRACTICE OUTDATED			
Technology/Business Practice Outdated	Large Locality <i>(Fairfax Co.)</i>	Adapt the VPPA to current technology and business practices. Consider using changes made to the Model Procurement Code as a guide.	

APPENDIX A
GENERAL ISSUE CATEGORIES AND SUBCATEGORIES

1. APPLICABILITY/EXEMPTIONS

- Nature/Identity of public body
- Goods, services, construction- nature of what is being procured
- Definitions
- Method of procurement
- Readability/Internal consistency

2. VENDOR ELIGIBILITY

- SWAM
- Preferences
- Qualification to contract (E-Verify, etc.)

3. COOPERATIVE PROCUREMENT

4. ENFORCEMENT/OVERSIGHT

5. TECHNOLOGY/BUSINESS PRACTICE OUTDATED