

**Special General Laws Joint Subcommittee
Studying the Virginia Public Procurement Act
Work Group 1: Construction and Design Professionals
June 19, 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, William H. Hefty, Esq., Bert Jones, Thomas Julian, Jr., P.E., Ida McPherson, Hunter Merrill, Steve Owens, Rich Sliwoski, Chris Stone, P.E., Cecelia Stowe, Steve Vermillion, and Uwe Wiendal, P.E.

Members absent: Lee Brazzell, Chris Lloyd, Esq., and Gary Mitchell.

Work Group 1 of the Special General Laws Joint Subcommittee Studying the Virginia Public Procurement Act (VPPA) met Monday, June 16, 2014, at 9:30 a.m. in House Room 1 at the Capitol, Richmond. After a brief recap of the items from the May 8, 2014, meeting, the work group members proceeded to review three discussion drafts prepared by staff.

I. Job Order Contracting Discussion Draft

Initial discussion focus on the definition of "job order contracting" (JOC) included in the discussion draft prepared by staff and disseminated to members of the work group prior to the meeting. Patrick Cushing, Williams Mullen, noted that the term "construction services," as used in the JOC definition, is itself not defined under the Virginia Public Procurement Act (VPPA) and recommended striking the word "services" on lines 39 and 196 of the draft. Steve Owens, Senior Assistant Attorney General, added that there is a need to clarify whether "construction" as currently defined in the VPPA includes services. Cecelia Stowe, Purchasing Director for Henrico County, noted that a definition for "construction" may be used by the Department of Professional and Occupational Regulation, which licenses contractors. Bert Jones, Associate Vice Chancellor for Facilities Management Services, Virginia Community College System, stated that JOC was essentially a small design-build contract rather than a design-bid-build contract, citing that JOC agreements are reached using a Request for Proposal and not an Invitation for Bid. Ms. Stowe stated that the public body may not know, and often does not know, in advance whether or to what extent a JOC will involve architectural or engineering services. She suggested including language providing that any subsequent architectural or engineering services be limited to a certain percentage of the total project cost. Chris Stone, President, Clark Nexsen Architectural & Engineering, agreed that "services" should be removed from the term "construction services" and suggested further that the language be tightened to specifically exclude architectural and design services.

Ida McPherson, Director, Department of Small Business and Supplier Diversity, asserted that overuse of JOC may lower the number of contracts available for small businesses. Richard Sliwoski, Director, Department of General Services, stated that in his experience large contractors depended upon local subcontractors to fulfill obligations under a JOC agreement.

Thomas Julian, Jr., Centennial Contractors Enterprises, Inc., added that over 90 percent of the JOC work taken by his company is subcontracted to small businesses.

The discussion then moved to limitations on the use of JOC contracting. The discussion draft provided that JOC agreements would be limited to a one-year term that would be renewable for four additional one-year terms at the option of the public body. The draft also included a \$400,000 limit for any single task order under a JOC agreement and a limitation on the sum of all projects performed in a one-year contract term to \$2 million.

Mr. Sliwoski stated there is a need to have different limits for state and local entities. He recommended changing the single task order limit to \$500,000 to mirror VPPA provisions for other term contracts. He further offered that there should be either no overall limit on JOC contracts during a contract term or allow unused limits during a given contract term to roll over to subsequent contract terms. Elizabeth Dooley, Assistant Purchasing Agent, Arlington County, stated that there should be no limitations for localities or state entities. She asserted that such limits would be arbitrary and hard to apply and that each locality had different business needs. Jeff Southard, Executive Vice President, Virginia Transportation Construction Alliance, and Hunter Merrill, Virginia Association of Roofing Professionals, maintained that there should be some monetary caps. Mr. Merrill further noted that JOC should be used only for smaller projects.

Steve Vermillion, Chief Executive Officer, Associated General Contractors of Virginia, expressed concern that JOC without limits would take a large number of construction projects off of the open market making the opportunities unavailable to a wider number of contractors. He suggested caps provided in the way that the VPPA provides caps for other types of term contracts with larger localities having higher limits. Mr. Owens suggested that it would be better to have the limit focus on the type of projects rather than on spending caps. Annette Cyphers, Director of Facilities Planning and Construction, University of Virginia, stated that prohibiting the use of JOC for new capital construction projects may be a feasible option. Mr. Stone asserted that a cap would be better and suggested a cap of between \$3 million and \$5 million. Mr. Sliwoski added that any cap should be per agency and not per contract. Mr. Jones offered a cap of \$20 million with the suggestion that the current limitations for term contracts contained in the VPPA be reviewed to determine the value of the limitations and whether any adjustment is needed. Mr. Stone added that any revision to the discussion draft should prohibit the use of JOC for professional services or for new capital construction projects.

Jeff Gore, Hefty & Wiley PC, recommended that the work group first tighten the definition of JOC contracting and then focus on whether limits are necessary and, if so, at what level the limits should be set. Mr. Merrill continued to assert that there is a need to include overall dollar limitations as well as limitations for localities based on population. Uwe Wiendal, Director of the Frederick County Sanitation Authority, maintained that the draft should follow the model for design services already included in the VPPA. He suggested that the limits be revisited and adjusted to more accurately reflect the reality of current construction costs.

When asked generally what may be acceptable to localities that opposed placing any limits on the use of JOC, Ms. Dooley replied that there may be support for (i) limiting JOC for maintenance and smaller construction projects, (ii) prohibiting JOC for new capital construction

projects, and (iii) placing limits on architectural and engineering services based on the equivalent for a total project. Ms. Stowe stated that the key will be in the definitions, including the definitions of "capital project," "renovation," and "repairs." Mr. Gore observed that by definition a JOC is limited to one year and that essentially a JOC is a term contract. He asserted that the work group should consider asking contractors what limits they are able to work with. Mr. Cushing added that in his view part of the problem is that JOC does not require competitive negotiation. Mr. Julian noted that a \$2 million cap does not allow for public body to perform enough construction or renovation to achieve any benefit. He recommended looking at a \$4 million to \$5 million cap and allowing the cap to go up on an annual basis.

At this point the work group decided to receive public comment on the JOC discussion draft.

Phil Abraham, Old Dominion Highway Contractors Association

Mr. Abraham stated that competitive sealed bidding should continue to be required for highway maintenance and assessment management administered by the Virginia Department of Transportation. He noted that the Public-Private Transportation Act of 1995 requires that procurements for maintenance or asset management services for a transportation facility as defined by the Act, must be procured using competitive sealed bidding.

Andrew Sinclair, Virginia Association of Governmental Purchasing

Mr. Sinclair stated that JOC is in fact a competitive process and that competitive sealed bidding should be left as an option for the public body. He further asserted that the references to architectural and engineering services were a red herring. He stated that JOC should not be used for procuring architectural and engineering services or for new construction.

C. Scott Shufflebarger, Hertless Brothers Roofing, (Coalition for Procurement Reform)

Mr. Shufflebarger stated that JOC should be limited to repair and maintenance projects and should not be used for capital improvements. A better definition is needed to more clearly define the projects for which the method may be used. Some dollar limits are necessary to prevent abuse, and each agency should be required to have its own JOC agreement. He further stated that the use of JOC going forward would benefit from the establishment of a reporting mechanism to develop a record of how the method was being used.

II. Term Contract Discussion Draft

The work group then moved to review the term contract discussion draft. The goal of the draft was to remove the term contract provisions from the definitions section without making substantive language changes. Mr. Cushing noted that multiphase contracts are not term contracts and therefore should not be included with the term contract language moved to the new section proposed by the discussion draft. He recommended that the language stricken on lines 105 through 111 of the discussion draft be unstricken and remain in § 2.2-4302.2, which

describes the process used to procure professional services that are multiphase in nature. The consensus of the work group was to accept the recommendation.

The work group opened the floor to receive public comment on the term contract discussion draft. No comments were offered.

III. Cooperative Procurement Discussion Draft

Staff then presented the cooperative procurement discussion draft. The draft prohibits the use of cooperative procurement to procure contracts for architectural and engineering services and construction.

Mr. Sliwoski stated that JOC should be exempted from the prohibition. Mr. Jones added that in his view there should be no restrictions on the use of cooperative procurement. Mr. Owens noted that cooperative contracts can be large and that an entity could conceivably buy all of its procurements using a cooperative contract. Mr. Sliwoski stated that while DGS is the only public body authorized to have statewide contracts, in reality multiple cooperative procurement contracts are available to state and local entities. He further noted that state agencies and localities may share the use of cooperative procurement among themselves.

Mr. Vermillion stated that cooperative procurement should not be used for construction at all. Ms. Stowe recommended limiting the prohibition to new capital construction rather than all construction. Mr. Owens asserted that the definitions of "construction" and "public body" should also be reviewed.

Ms. McPherson stated that cooperative procurement should also be limited in other areas. She recommended that Department of Small Business and Supplier Diversity approval of all cooperative procurement contracts be required.

The work group then received public comment on the cooperative procurement discussion draft.

C. Scott Shufflebarger, Hertless Brothers Roofing, (Coalition for Procurement Reform)

Mr. Shufflebarger stated that cooperative procurement should not be used for construction. He also noted that reporting on the use of cooperative procurement should be emphasized going forward.

Reginald M. Jones, Williams Mullen

Mr. Jones asserted that there has always been a natural tension between the ease of procurement and fairness to the vendor community. There is a duty to ensure that there is fairness in procurement, and it is not fair to contractors when they are not given a reasonable opportunity to compete for such contracts. He stated that cooperative procurement should not overemphasize ease of procurement at the expense of fairness to potential vendors.

Sharon Lewis, Purchasing Manager, City of Roanoke

Ms. Lewis stated that her office is bombarded by cooperative contract brokers and that there is a need to scale down the use of procurement method. She also noted that some cooperative procurement contracts are governed by the laws of jurisdiction where the contract was initially procured and may contain provisions that are not appropriate for Virginia localities and other public bodies.

IV. Work Group Actions

At the conclusion of the review of the three discussion drafts, staff suggested the following as a plan for going forward:

1) The JOC discussion draft will be revised in consideration of the comments made by work group members. As a part of the redrafting process, work group members and interested parties should provide suggestions and/or proposed language for a definition of "JOC" and for the limits or tiering of limits regarding the use of JOC. The revised discussion draft will be reviewed at the next meeting of the work group scheduled for July 23, 2014.

2) Work group members and interested parties should provide suggestions for revisions to definitions of "construction," "public body," "and capital project."

3) All suggestions and proposals should be submitted by 5:00 p.m. on July 3, 2014.

By consensus the work group agreed with the staff suggestions.

V. Special General Laws Joint Subcommittee meeting

Staff informed the work group members that the Special General Laws Joint Subcommittee Studying the Virginia Public Procurement Act will meet at 2:00 p.m. on Monday, July 14, 2014, in House Room C of the General Assembly Building for the purpose of reviewing the legislation referred from the 2014 Session.

The meeting adjourned at 11:50 a.m.