

**Special General Laws Joint Subcommittee
Studying the Virginia Public Procurement Act
Work Group 2
Information Technology, Goods and Other Professional Services
June 19, 2014, at 1:30 p.m.
House Room 1, The Capitol, Richmond
Meeting Summary**

Members present: Eugene Anderson, Mike Bacile, Ashley Colvin (for Eric Link), Micah Dalton (for Brian Epley), Joe Damico, Eric Denby, Phyllis Errico, Keith Gagnon, Robert Gleason, Kelly Hellams (for Phil Pippert), Mary Helmick, Patti Innocenti, Tom Kaloupek, William Lindsey, Ida McPherson (for Angela Chiang), Nicole Riley, Ridge Schulyer, Lem C. Stewart, Jr., John Westrick.

Members absent: Lee Brazzell and Gwendolyn Davis.

Work Group 2 of the Special General Laws Joint Subcommittee Studying the Virginia Public Procurement Act (VPPA) met Thursday, June 19, 2014, at 1:30 p.m. in House Room 1 at the Capitol, Richmond. After a brief recap of the points of consensus reached at the May 8, 2014, meeting, the work group proceeded to discuss items previously designated as manageable issues.

I. Equal footing for competitive negotiation and competitive sealed bidding

The first issue for discussion by the work group concerned the Virginia Public Procurement Act's (VPPA) preference for the use of competitive sealed bidding. Kelly Hellams, Legal and Legislative Services, Virginia Information Technologies Agency (VITA), noted that currently a written determination is required when a public body decides to use competitive negotiation rather than competitive sealed bidding. Eugene Anderson, Director, Procurement Management, Norfolk State University, stated that the requirement for a written determination is an additional bureaucratic step that does not improve the process. Tom Kaloupek, Director of Materials Management, Virginia Polytechnic Institute and State University, maintained that advances in the procurement process have made the written determination unnecessary and that it should be eliminated. Joe Damico, Deputy Director, Department of General Services (DGS), indicated that it would be important to hear from the vendor community on the issue. Ida McPherson, Director, Department of Small Business and Supplier Diversity, asserted that competitive sealed bidding no longer provides the best protection for small businesses because such businesses may not be able to compete with larger contractors on the basis of price alone. The larger firm would be able to submit a "lowball" bid and, unless the public body is able to look beyond price and consider best value, the low bid would prevail. Lem Stuart, Executive Vice President, Advantus Strategies, LLC, asserted that competitive negotiation is the standard for IT procurement and that the distinction between the two methods no longer exists.

Mary Helmick, Director of Procurement Services, James Madison University, recommended that both the requirement for the written determination and the statement in the VPPA providing that competitive sealed bidding is the preferred method of procurement should

be removed. Eric Denby, Director of Procurement and Supplier Diversity Services, University of Virginia, noted that competitive negotiation necessarily includes consideration of small, women-owned, and minority-owned business (SWaM) programs. Mr. Anderson added that under competitive sealed bidding no negotiation is allowed, which prevents the public body from being able to more thoroughly review a responder's submission.

Keith Gagnon, Director of Procurement for the Virginia Community College System (VCCS), stated that the determination for using competitive negotiation is self-evident in the public body's statement of need. The public body would essentially be saying the same thing in its determination that it has already included in the Request for Proposals. John Westrick, Senior Assistant Attorney General, observed that if the determination and the general preference are removed there would be no way for the vendor to dispute or the public body to vindicate the decision. He recommended removing the determination but keeping the general preference.

After additional discussion, the work group reached consensus that both the preference for competitive sealed bidding and the requirement for the written determination be removed.

II. Publication of Notice; competitive negotiation

The work group then moved to discuss the requirement for procurements using competitive negotiation to be published in a local newspaper. Mr. Denby recommended that the decision to publish the notices be left up to the individual agency or institution and that eVA, the state's electronic procurement site, be used to disseminate information. Mr. Kaloupek added that the costs associated with publishing the notices are high and that the value of publishing notices is less when the newspaper is in a small market. Mr. Damico noted that the vendor community may not have equal access to the internet and that he also recognized the need for citizens to be able to inform themselves about their government in terms of procurement. He recommended that the work group look for a gradual transition away from the publishing requirement to avoid an abrupt change in the status quo. Ms. McPherson stated that because Internet access is not available in all areas of the state, it would not be appropriate to move immediately to an entirely electronic process. She also noted that the smaller newspapers depend on publication revenue and reminded the work group that many newspapers are also small businesses.

Mr. Damico suggested that DGS use eVA as a conduit to disseminate procurement information to newspapers and then allow individual newspapers to determine what to publish. Ms. McPherson suggested that the procurement information also be provided to the Department of Small Business and Supplier Diversity, which has a small business advocacy role. Mr. Gagnon recommended a transition period of one to two years that would include a public notification component alerting readers that procurement information would be available on eVA at the end of the transition period.

Mr. Stuart suggested that instead of requiring the posting in every instance, give public bodies the option to post when it will insure maximum competition. A requirement could be added providing for a public body to make a written determination relative to the value of publishing a notice in the newspaper. Mike Bacile, Purchasing Director for Chesterfield County, stated that he did not think a new determination was warranted or that all public bodies should be

required to use eVA. He recommended localities use their own website to disseminate the information. Nicole Riley, Virginia State Director, National Federation of Independent Businesses (NFIB), stated that it is important to develop data on the use of technology by small businesses. She noted that according to member surveys conducted by NFIB about 50 percent are technology-based in terms of their business operations. She stressed that there are still small business owners who perform all of the administrative functions for their business and that those individuals tend to continue practices with which they are familiar.

The work group then moved to receive public comment on the publication requirement.

Ginger Stanley, Executive Director, Virginia Press Association

Ms. Stanley stated that the publication requirement continues to have great value to the procurement process and should remain. She asserted that the cost for such notices amounts to one tenth of one percent of a locality's budget. Ms. Stanley further asserted that newspapers are being read more than ever and remain a viable and important way to disseminate information.

Andrew Sinclair, Virginia Association of Governmental Purchasing

Mr. Sinclair asserted that the publication of the notices should be left up to each individual public body.

Sharon Lewis, Purchasing Manager, City of Roanoke

Ms. Lewis maintained that the decision regarding not only whether to publish the notice but also which newspapers to publish should be left to the discretion of the locality.

Patrick Cushing, Williams Mullen

Mr. Cushing stated that the position of the design professionals that he represents has changed from initial opposition to removal of the publication requirement to the current position supporting the removal with a provision for a transition period.

At the conclusion of the public comment, it was the consensus of the work group to prepare discussion drafts incorporating the options that had been discussed. As a part of the drafting process, work group members and interested parties were asked to provide any suggestions and/or proposed language to staff by 5:00 p.m. on July 3, 2014.

III. Oversight and Enforcement Options

Staff offered the following options for discussion purposes:

- (1) Maintain status quo (appeal process remains optional);
- (2) Require each agency to establish an appeal process;

- (3) Establish equality among all satellites of public bodies with procurement authority;
- (4) Provide for an appeal to a Board with authority over all public bodies;
- (5) Establish a Procurement Council similar to existing FOIA Council (located in the legislative branch, advisory in nature).

Ms. McPherson indicated that she favored option (4), emphasizing that the appeal must be made to a neutral body and not remain within the same agency. She noted that two recent disparity studies recommended the establishment of a compliance entity. Robert Gleason, Director, Division of Purchases & Supply, DGS, stated that he believed DGS could craft a process to satisfy an adequate appeal mechanism. Mr. Anderson stated that in light of his experience dealing with appeals processes in both state and local government, it will be important for the appeal entity to be composed of disinterested persons. He recommended option (2), asserting that it would be difficult to have one body overseeing all public bodies. Mr. Westrick noted that the work group must take into account the very limited remedies that the VPPA provides.

Mr. Damico suggested that the work group consider having the Office of the Inspector General (OSIG) investigate claims of abuse related to the procurement process. Ashley Colvin, Legal and Legislative Services, VITA, indicated his support for the suggestion. Ms. McPherson expressed concern, citing the amount of time that such an investigation may take and the possible lack of expertise to investigate procurement-related claims. Mr. Gleason asserted that OSIG had been building expertise in the area and should be able to handle such investigations. Mr. Anderson noted that to be successful adequate resources must accompany the increased responsibility.

It was the consensus of the work group that staff would prepare a wider array of enforcement/oversight options based on the work group's discussion.

IV. 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 3:40 p.m.