

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

Work Group 2

Information Technology, Goods, and Other Professional Services

September 17, 2014, at 1:30 p.m.

House Room 1, The Capitol, Richmond

Meeting Summary

Members present: Eugene Anderson, Mike Bacile, Lee Brazzell, Angela Chiang, Ashley Colvin (for Eric Link), Micah Dalton (for Brian Epley), Joe Damico, Gwendolyn Davis, Eric Denby, Phyllis Errico, Keith Gagnon, Sandra Gill (for Robert Gleason), Gary Guilliksen (for Tom Kaloupek), Mary Helmick, Patti Innocenti, William Lindsey, Phil Pippert, Nicole Riley, Ridge Schulyer, and John Westrick.

Members absent: Lem C. Stewart

Work Group 2 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, 2014, at 1:30 p.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 1.

Maria Everett, Division of Legislative Services (DLS), presented two consensus drafts: One places competitive negotiation and competitive sealed bidding on equal footing as methods of procurement for goods and nonprofessional services; the second relates to the publication of notices of competitive negotiation. After brief discussion, it was decided that the final decision on the drafts would be made at the last meeting of the work group.

The work group then turned its attention to reviewing suggested improvements to the procurement process. Amigo Wade, DLS, presented several suggested changes intended to clarify the procurement processes (i) the choice between a Notice of Intent to Award or a Notice of Award, (ii) the application of automatic stay provisions, (iii) the "sole relief" language under the VPPA, and (iv) the clarification of the administrative process for protest appeals. Joe Damico, Deputy Director, Department of General Services (DGS), noted that it was important to hear from the vendor community regarding the status of the current process. He further noted that if a vendor has a concern about compliance with state law or procurement regulations, a possible avenue of complaint would be through the Office of the Inspector General (OSIG). Nicole Riley, Virginia State Director, National Federation of Independent Business, asserted that what vendors want is an independent review of the process; if that review occurs at the front end of the procurement process, there would be no need for review by OSIG. Ms. Riley further stated that vendors' biggest concern is the lack of a remedy for their protest. Gwendolyn Davis, Chair, Equipping Businesses for Success Institute, noted that vendors who lodged a protest were

concerned that the public body would retaliate by withholding future work. Lee Brazzell, President and CEO of Transformation Consulting LLC, added that women-owned and minority-owned businesses were not being treated fairly, and disparity studies have found that such businesses fear retaliation. Eric Denby, Director of Procurement and Supplier Diversity Services, University of Virginia, noted that small, women-owned, and minority-owned (SWaM) businesses tended to participate in quick quotes on eVA and did not participate in large contracts. After discussion, the consensus of the work group was to not to proceed with any of the changes listed under item (i) and to maintain the status quo.

The work group then moved to discuss the provisions under item (iii), regarding clarification of the sole relief language of the VPPA. Code provisions for appealing decisions regarding ineligibility, withdrawal of a bid, and responsibility clearly prescribe what the sole relief will be if the action is appealed to the court system. Section 2.2-4360, which pertains to protests of award or decisions to award, does not expressly state that its remedies are the sole relief upon appeal. The result is that the sole relief language has been interpreted to apply to the public body in the administrative appeal process, but not to the court when the action is appealed. Eugene Anderson, Director, Department of Procurement Services, Norfolk State University, and William Lindsey, Purchasing Agent, Gloucester County, asserted the need for consistency between administrative and judicial remedies. Ms. Riley, Ms. Davis and Ms. Brazzell countered that the courts should be able to fashion a remedy appropriate to the specific facts in a given appeal. Keith Gagnon, Procurement Director, Virginia Community College System (VCCS), asserted that keeping the remedies the same would not be changing the process. No consensus could be reached on this point. Staff suggested that work group members submit specific language for consideration at the next meeting.

Discussion then focused on the options for improved oversight and enforcement of the procurement process. Ms. Davis supported the option of requiring all public bodies to have administrative review procedures and establishing an independent agency to review and enforce the VPPA. Mary Helmick, Director, Procurement Services, James Madison University, stated the all public bodies should not be required to establish an administrative appeals procedure because it would prolong the process. Mr. Anderson expressed support for the establishment of an advisory council, which would serve as a forum for stakeholders to discuss and resolve procurement issues apart from the review of specific proposals during the legislative session. Several work group members expressed support for an advisory council with a chief issue being its jurisdiction. Mr. Gagnon suggested that in order to resolve the issues that had been raised, there may need to be both a central appeal body, which would address the specifics of the procurement process, and a separate body to focus on broader areas such as education and training. It was the consensus of the work group to have staff prepare a draft of an advisory entity for review at the next work group meeting. In addition, staff was asked to provide to the work group prior to the next meeting a copy of the enabling language for the appeal entity previously used by DGS. Mr. Damico and Micah Dalton Northhighland Consulting added that it would be helpful to the process if work group members and interested parties provided the staff with more information regarding vendor issues and examples denoting some of the problems.

Public Comment

The work group opened the floor to receive public comment.

Michael Locaby, Esq., County Attorney for Louisa County; Local Government Attorney's Association

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.

Next Meeting

The next meeting of the work group is scheduled for October 15, 2014, at 1:30 p.m. The meeting adjourned at 3:20 p.m.