

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

**Work Group 1: Construction and Design Professionals**

**October 15, 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; Joseph Damico (for Richard Sliwoski); Elizabeth Dooley; Mike Halvorson (for Thomas Julian, Jr., P.E.); William H. Hefty, Esq.; Tracey Jeter; Bert Jones; Chris Lloyd, Esq.; Hunter Merrill; Steve Owens; Jeff Southard; Chris Stone, P.E.; Cecelia Stowe; Steve Vermillion; and Uwe Weindel, P.E.

**Members absent:** Lee Brazzell, Gary Mitchell, and Bernice Travers.

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The fifth meeting of Work Group 1 of the General Laws Special Joint Subcommittee Studying the Virginia Public Procurement Act (Special Joint Subcommittee) was held on Wednesday, October 15, at 9:30 a.m. in House Room 1 at the Capitol.

After the call to order, the work group proceeded to review the omnibus draft containing provisions pertaining to cooperative procurement, job order contracting (JOC), small purchase procedures, and term contracts for architectural and engineering (A/E) services. The objective was to reach final consensus points on these areas for recommendation to the Special Joint Subcommittee. Initial discussion centered on the limitations for the use of cooperative procurement. The omnibus draft prohibited the use of cooperative procurement for new capital construction and included a definition of that term. Hunter Merrill, Virginia Association of Roofing Professionals, Steve Vermillion, Associated General Contractors of Virginia (AGC), and Patrick Cushing, Williams Mullen, did not approve of the definition. Mr. Merrill suggested returning to the existing language, which prohibits the use of cooperative procurement for construction in excess of \$200,000 by a local body under a contract negotiated by another local public body located more than a straight-line distance of 75 miles away. After additional discussion, the work group reached the following consensus regarding cooperative procurement:

- Specify the difference between joint procurement and cooperative procurement;
- Continue to prohibit the purchase of A/E services under a cooperative procurement contract;
- Make no changes to the existing language limiting the use of cooperative procurement for certain construction.

The discussion then moved to provisions of the omnibus draft pertaining to JOC. Chris Stone, P.E., Clark Nexsen, offered language to address concerns from the design professionals community that would (i) prevent a public body from issuing a JOC solely for the purpose of providing professional architectural and engineering services; (ii) allow incidental A/E services,

provided the services do not require the seal of an architect or professional engineer; and (iii) require the public body to select or designate the architect or engineer to perform the services. Mr. Stone asserted that the public body should not allow the JOC contractor to make design decisions. Mr. Cushing noted that if a public body did not have an existing A/E services term contract, it could use the \$60,000 small purchase exemption to secure A/E services in a timely manner and avoid project delays. Steve Owens, Senior Assistant Attorney General, offered language that would limit incidental A/E services to no more than 25 percent of the total project, not to exceed \$60,000. Mike Halvorson, Centennial Contractors Enterprises, Inc., expressed support for the language, stating that JOC providers did not want to engage in providing A/E services. William H. Hefty, Esq., Hefty & Wiley, P.C., stated that the \$60,000 small purchase exemption represented 12 percent of the \$500,000 total project threshold. After additional discussion, the work group reached consensus on the following provisions relating to JOC:

- Limit the term of a JOC to one year, renewable for two additional one-year terms;
- Limit the sum of all jobs in a one-year term to \$5 million;
- Limit individual job orders to \$500,000;
- Prohibit the use of JOC for construction, maintenance, or asset management services for a highway, bridge, tunnel, or overpass;
- Prohibit the issuance of a job order solely for providing A/E services;
- Limit incidental professional services to 25 percent of the total costs, not to exceed \$60,000;
- Require an individual job order to result in a stand-alone construction project;
- Prohibit "job splitting," or the manipulation of job orders with the intent of keeping a specific job order under statutory thresholds;
- Prohibit any unused amounts from one contract term to be carried forward to any additional term; and
- Establish a reporting mechanism for participating public bodies to relate their respective experiences and findings regarding the appropriateness or sufficiency of the JOC project cost limitations.

The work group then moved to review the language in the omnibus draft relating to A/E services term contracts. The initial objective of the draft was to remove the A/E services term contract provisions from the definitions section of the Virginia Public Procurement Act (VPPA) without making substantive language changes. Mr. Hefty stated that an additional cost threshold tier should be established for larger localities. He suggested that for localities with a population of more than 200,000, the limit should be raised from the current maximum of \$5 million to \$7.5 million. Several members of the work group, including Mr. Stone, Mr. Cushing, and Mr. Merrill, argued that another tier was unnecessary. Mr. Merrill did not support adding a tier because an

A/E services term contract is a relatively new mode of procurement. Without consensus, the resolution was to keep the current thresholds. Annette Cyphers, Director of Facilities Planning and Construction, University of Virginia, stated that language limiting project fees and prohibiting any unused amount from one contract term to be carried forward to any additional term did not apply to public institutions of higher education having level 2 or 3 authority under the Restructured Higher Education Financial and Administrative Operations Act of 2005 (§ 23-38.88 et seq. of the Code of Virginia). It was suggested that language be added to clarify this distinction. Concluding its review of the omnibus draft, the work group approved by consensus a provision in the draft clarifying that small purchase procedures may be used for construction, provided the work complies with the Uniform Statewide Building Code.

The focus of the work group then turned to the review of possible improvements to the administrative appeal process and options for increased enforcement and oversight. Mr. Vermillion offered a measure on behalf of the AGC that would establish a nine-member Independent Review Board for Construction. The Board would be staffed by the Department of General Services (DGS) and would have the authority to receive complaints of noncompliance with the VPPA by all public bodies. The Board also would have the authority to reach findings and either compel corrective action or refer the matter to a body that could compel the corrective action. Bert Jones, Associate Vice Chancellor for Facilities Management Services, the Virginia Community College System, asserted that the current focus should be on gathering empirical data rather than establishing a review board. Jeff Southard, Executive Vice President, Virginia Transportation Construction Alliance, suggested starting small and having the Office of the Inspector General or DGS provide advisory opinions.

As another option for consideration, staff developed language establishing an Advisory Procurement Council that would be located in the legislative branch of government. The purpose of the 13-member Council would be to encourage and facilitate compliance with the state's procurement laws. The powers and duties of the Council would be as follows:

1. Conduct training seminars and educational programs;
2. Publish educational materials;
3. Review written determinations of public bodies regarding methods of procurement and statutory waivers and related exemptions from the laws governing public procurement and collect data necessary to evaluate the effectiveness and appropriateness of such determinations, waivers and exemptions;
4. Provide a forum to address concerns regarding public procurement;
5. Monitor changes in state laws relating to public procurement and make recommendations for changes in such laws; and
6. Provide an annual report.

The work group discussed the possibility of establishing an advisory entity with limited powers, but could not reach an agreement. Some members wanted the entity to review complaints that a public body had not complied with the VPPA; make determinations; and

exercise authority to enforce its determinations. Areas of continued disagreement included the composition and size of the board, the powers it would exercise, the scope of its authority, and staffing. Due to the lack of a consensus, the work group did not advance any specific language or recommend any legislation for consideration.

### **Public Comment**

The work group opened the floor to receive public comment.

*Herschel V. Keller, Petty, Livingston, Dawson & Richards, Individual & Corporate Counsel*

Mr. Keller stated that the appeal entity must have the ability to review complaints and compel compliance with its decisions. He asserted that an advisory entity would not have the authority to do so and therefore could not successfully address or alleviate the pressing concerns of the small contractor community regarding the improper use of discretion by some public bodies when procuring construction.

### **Next Steps**

Staff informed the work group members that they were released from service. A report including the activities of the work group and consensus recommendations will be presented to the Special Joint Subcommittee at a meeting that will be scheduled prior to the commencement of the 2015 legislative session.