

**General Laws Special Joint Subcommittee Studying
the Virginia Public Procurement Act
November 24, 2014, 2:30 p.m.
House Room D, General Assembly Building
Meeting Summary**

The General Laws Special Joint Subcommittee Studying the Virginia Public Procurement Act (Special Joint Subcommittee) met on November 24, 2014, in Richmond, Virginia, in House Room D of the General Assembly Building to receive recommendations from Work Groups 1 and 2 and to complete its review of legislation referred by the General Assembly from the 2014 regular session.

Amigo Wade, Senior Attorney, Division of Legislative Services, provided background on the work groups as well as an overview of the activities of each work group. Two work groups were established to further examine the Virginia Public Procurement Act (VPPA) in the context of issues and concerns raised during the first year of the study. Work Group 1 focused on items pertaining to construction and design professionals, while Work Group 2 focused on issues pertaining to information technology, goods, and other professional services. Each work group was assigned a Scope of Work document (SOW) containing the issues that related to their subject matter areas and each held a total of five meetings. The work groups agreed to proceed by beginning with issues on which it appeared easier to reach consensus. Extensive, substantive discussion on these initial issues prevented both work groups from being able to address all of the issues in their respective SOWs. Each work group was able, however, to reach consensus on some issues, with Work Group 1 recommending a single omnibus consensus draft and Work Group 2 recommending two consensus drafts for consideration by the Special Joint Subcommittee. Maria Everett, Senior Attorney, Division of Legislative Services, then proceeded to present each of the consensus drafts.

I. Work Group 1. Omnibus Consensus Draft

Ms. Everett reviewed the technical and substantive provisions of the draft from Work Group 1, which contained provisions relating to, among other things, job order contracting (JOC), cooperative procurement, and professional design services term contracts. Highlights of the substantive provisions include:

- Clarification that construction may be procured using small-purchase procedures;
- Relocation of the architectural and engineering term contracts from the definitions section of the VPPA to a separate section within the act;
- Establishment of a separate section for job order contracting (JOC) that (i) increases the maximum sum of all jobs performed in a one-year contract term from \$2 million to \$5

million; (ii) decreases the number of renewable one-year terms from four to two; (iii) increases the limit on individual job orders from \$400,000 to \$500,000; (iv) prohibits the splitting of orders with the intent of keeping a job order under the maximum dollar thresholds; (v) prohibits the use of JOC solely for the purpose of procuring architectural and engineering services, but allows for such services that are incidental and directly related to a job, with a limit of 25 percent of total construction costs and not to exceed \$60,000; and (vi) prohibits JOC for the construction, maintenance, or asset management services for highway, bridge, tunnel, or overpass;

- Distinguishing between joint procurement and cooperative procurement;
- Maintaining the current prohibition on a locality from using cooperative procurement to purchase construction over \$200,000 from another locality more than 75 miles from its territorial limits;
- Requiring for all public bodies to report their respective experiences and findings relating to the appropriateness and effectiveness of job order contracting in general and more specifically, the project cost limitations and architectural and professional engineering term contract limits.

Regarding the JOC provisions, Delegate C. Todd Gilbert, Chairman, stated that the term "order splitting" may not be clear and should be a defined term. Senator Frank Ruff, Jr., noted that the draft did not specify who would decide if the requisite intent to circumvent the threshold was present.

Chairman Gilbert then requested public comment on the draft. Initial comment centered on the provisions dealing with cooperative procurement. Matthew D. Benka, Coalition for Procurement Reform, expressed opposition to the use of cooperative procurement to purchase construction and suggested amending the draft to absolutely prohibit this practice. He asserted that cooperative procurement should be limited to the procurement of goods. Bert Jones, Associate Vice Chancellor for Facilities Management Services, Virginia Community College System (VCCS) and member of Work Group 1, noted that ultimately the consensus of the work group was not to change the current law. He further asserted that The Virginia Association of State College and University Purchasing Professionals (VASCUPP) provides opportunities for Virginia's public colleges and universities to routinely utilize cooperative procurement to purchase construction in a very cost effective manner. Mark Flynn, Virginia Municipal League, pointed out that cooperative procurement allows small localities to take advantage of a larger locality's ability to use economies of scale. W. Earl Bradley, Bradley Construction, asserted that localities should be given enough flexibility to customize procurement to suit the unique needs of their jurisdictions. Senator J. Chapman Petersen noted that the seventy-five mile limitation in current law would still allow several localities surrounding Fairfax County to take advantage of the county's contracts and asked if the concern could be alleviated by making the limitation tighter. Delegate David Albo moved to prohibit the purchase of any construction using

cooperative procurement. The Special Joint Subcommittee approved the motion by a vote of 5-1.

The discussion then moved to the JOC provisions of the draft. Patrick Cushing, Williams Mullen, stated that JOC should not be used to procure architectural and engineering services (A/E services). He offered an amendment to accomplish this objective. Delegate Albo asked why he did not agree with the work group's compromise. Mr. Cushing responded that when JOC was initially authorized in 2012, it was intended for jobs installing windows and doors, painting, or replacing carpet, and A/E services were not included. He asserted that the draft creates what amounts to another exception from the requirement that A/E services be procured using competitive negotiation. He further stated that if A/E services were required during the course of a job order, a public body could use either its existing A/E services term contract or the small-purchase exception to procure such services. Delegate Albo voiced his surprise that the opposing sides could not get better language. Senator Petersen noted that some of the language in the draft was problematic.

Mr. Jones stated that the issue was discussed thoroughly and the consensus that was reached is reflected in the draft. He further asserted that while JOC is new to Virginia, it is not new in the country. Delegate Gilbert asked how fixed costs are applied to A/E services under a JOC. Mr. Jones replied that an hourly rate is built into the contract. Mr. Chris Stone, P.E., President, Clark Nexsen, and member of Work Group 1, noted that other states either do not allow JOC for A/E services or, if they do, find the practice subject to abuse. Rich Sliwoski, Director, Department of General Services (DGS), and member of Work Group 1, stated that JOC is in reality a mini design/build contract and that there is limited impact on A/E services because JOC is used primarily for carpet replacement and painting. Steve Vermillion, CEO, Associated General Contractors of Virginia, contended that while an independent review panel did not make it into the consensus draft, the establishment of such a panel would be extremely critical to addressing important issues related to compliance with the VPPA. Senator Ruff agreed that a review panel established in the DGS should be a part of the package. Rodney Thomas, Central Virginia Business and Construction Association, stated that any review panel should include minority representation including the state's major HBCUs.

Delegate Albo moved to amend the draft to strike from line 378 after "§ 54.1-100" through the end of line 380. Senator Petersen offered a substitute motion to use the language offered by Mr. Cushing. Delegate Albo then withdrew his amendment. Senator Petersen's amendment passed unanimously. The Special Joint Subcommittee voted unanimously to proceed with the bill as amended.

II. Work Group 2. Consensus Draft #1. Use of competitive sealed bidding or competitive negotiation for the procurement of goods, certain services, and insurance

Ms. Everett presented the first consensus draft removing the requirement that a determination be made in advance by a public body and set forth in writing that competitive sealed bidding (CSB) is either not practicable or not fiscally advantageous to the public, in order for goods,

services, or insurance to be procured by competitive negotiation (CN). Ms. Everett noted that the draft does not affect the current preference for procuring construction through CSB or the requirement for using CN to procure professional services.

The Special Joint Subcommittee voted unanimously to accept the recommendation of the work group.

III. Work Group 2. Consensus Draft #2. Publication of Notices of Requests for Proposals

Ms. Everett proceeded to review the second draft recommended by Work Group 2. The draft requires DGS to (i) provide an electronic data file of all agencies' business opportunities posted on the DGS's central electronic procurement website at no charge to any requesting newspaper or other print publication with circulation in Virginia and (ii) send the data file automatically via electronic mail on a daily, weekly, or monthly basis as agreed to by the parties. Local public bodies would have the option to either post all business opportunities on the DGS's central electronic procurement website or provide an electronic data file of all business opportunities to any requesting newspaper or other print publication with circulation in Virginia.

The draft also establishes a two-year transition period from July 1, 2015, to June 30, 2017, with regard to the required publication in newspapers of all Requests for Proposals (RFP), after which time newspaper publication of RFPs will be discretionary. During the transition period, public bodies that issue an RFP will continue to publish a public notice of the RFP in a newspaper of general circulation; however, the notice must include a statement indicating the website, either DGS's central electronic procurement website or the public body's public government or other appropriate website, where all public notices for RFPs issued from the public body are located. In addition, the draft establishes a reporting requirement for all public bodies issuing RFPs on or after July 1, 2015, through June 30, 2016, to ascertain the method by which an offeror submitting a proposal in response to the RFP became aware of the solicitation, whether by newspaper publication, website posting, other method, or combination of the above. After review of the contents of the draft, Delegate Gilbert opened the floor for public comment.

Ginger Stanley, Executive Director, Virginia Press Association (VPA), stated that removing the publication requirement will adversely affect citizens who have limited internet access and will also limit government transparency. Delegate Albo noted that newspapers certify that the notice has been published, which provides an assurance that the public body is complying with that component of the VPPA. Delegate Richard Anderson supported the position of the VPA, stating that he represents Prince William County, which is still a very rural area. Delegate Gilbert acknowledged that some citizens continue to read the newspaper to keep abreast with the activities of their government.

The Special Joint Subcommittee voted 6-2 to lay on the table.

IV. House Bill 1223 (Yancey)

House Bill 1223 consists of two components: The first component would expand the definition of "minority-owned business" to include historically black colleges and universities (HBCUs). The second component would require small, women-owned, and minority-owned (SWaM) business programs to include a provision for the fair and equitable evaluation of opportunities for small businesses and all businesses owned by women, minorities, or service-disabled veterans. Delegate David A. Yancey, the bill's patron, indicated that he only wanted to proceed with the first component of the bill. The Special Joint Subcommittee accepted his proposal and voted unanimously to recommend the bill as amended.

V. Future Study Plan

Delegate Gilbert stated that the work group would not be continued unless the Special Joint Subcommittee determined they were needed. Delegate Albo asserted that the Joint Subcommittee and the work groups had done what they could, but the issue of the use of design-build or construction management by public bodies had not been resolved. He stated that it may be feasible to reconstitute a Design-Build Board in some form as a means of addressing the problem.

There being no further business before the Special Joint Subcommittee, Delegate Gilbert adjourned the meeting.