

Department of Planning and Budget

2015 Fiscal Impact Statement

1. Bill Number: SB1371-S1

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|------------------------|---------------------------------------|--|------------------------------------|
| House of Origin | <input type="checkbox"/> Introduced | <input checked="" type="checkbox"/> Substitute | <input type="checkbox"/> Engrossed |
| Second House | <input type="checkbox"/> In Committee | <input type="checkbox"/> Substitute | <input type="checkbox"/> Enrolled |

2. Patron: Ruff

3. Committee: General Laws and Technology

4. Title: Virginia Public Procurement Act (VPPA); methods of procurement; job order contracting and cooperative procurement.

- 5. Summary:** Clarifies that small purchase procedures include the procurement of construction and that any such procedures shall not waive compliance with the Uniform State Building Code. The bill also increases contract amounts for job order contracting and provides that (i) order splitting with the intent of keeping a job order under the maximum dollar amounts prescribed is prohibited, (ii) no public body shall procure architectural or engineering services through a job order contract, and (iii) job order contracting shall not be used for construction, maintenance, or asset management services for a highway, bridge, tunnel, or overpass. In addition, the bill removes the requirement that a determination be made in advance by a public body and set forth in writing that competitive sealed bidding is either not practicable or not fiscally advantageous to the public, in order for goods, services, or insurance to be procured by competitive negotiation. The bill clarifies the provisions of the VPPA related to cooperative procurement and requires that by October 1, 2017, the Department of Small Business and Supplier Diversity, public institutions of higher education having level 2 or 3 authority under the Restructured Higher Education Financial and Administrative Operations Act of 2005, any state agency utilizing job order contracting, and the Virginia Association of Counties, the Virginia Municipal League, and the Virginia Association of Governmental Purchasing on behalf of local public bodies working cooperatively report their respective experiences and findings relating to the appropriateness and effectiveness of job order contracting in general, the job order project cost limitations as added by this bill, and the architectural and professional engineering term contract limits to the Chairmen of the House Committee on General Laws and the Senate Committee on General Laws and Technology. The bill further provides that its provisions shall not apply to any solicitation issued or contract awarded before July 1, 2015, except that the provisions of subsection B of § 2.2-4303.2, as added by this bill, shall apply to any renewal of a job order contract. The bill contains numerous technical amendments and is a recommendation of the General Laws Special Joint Subcommittee Studying the Virginia Public Procurement Act.

The Senate substitute version also provides certain construction procurement reporting requirements and authority for the Director of the Department of General Services to issue advisory opinions regarding public bodies' construction procurement compliance with state and local laws and regulations, which both expire July 1, 2017.

The substitute also provides that no public body shall issue or use a job order contract solely for the purpose of receiving professional architectural or engineering services; however, such services may be included in a job order if they are incidental and directly related to the job and do not exceed \$25,000 per job order or \$75,000 per contract term. This is a change from the introduced version of the bill, prohibited procurement of architectural or engineering services through a job order contract.

6. Budget Amendment Necessary: Yes

7. Fiscal Impact Estimates: Fiscal impact estimates are preliminary. See Item 8.

7a. Expenditure Impact:

| <i>Fiscal Year</i> | <i>Dollars</i> | <i>Positions</i> | <i>Fund</i> |
|--------------------|----------------|------------------|-------------|
| 2015 | 0 | 0 | |
| 2016 | \$214,174 | 2 | GF |
| 2017 | \$214,174 | 2 | GF |
| 2018 | 0 | 0 | |
| 2018 | 0 | 0 | |
| 2020 | 0 | 0 | |
| 2021 | 0 | 0 | |

8. Fiscal Implications: SB1371-S1 provides multiple changes to construction and professional services procurement requirements in the Virginia Public Procurement Act (VPPA). It also contains three enactment clauses providing reporting requirements and authority for the Director of the Department of General Services to issue advisory opinions on pending construction contracts' compliance with laws and regulations, which apply to public bodies regardless of VPPA exemption status.

1. Virginia Public Procurement Act Provisions:

Cooperative Construction Contracts with Other Public Bodies

The bill eliminates the ability for public bodies to participate in cooperative construction services contracts with other public bodies. Currently, the VPPA allows public bodies to use another public bodies' construction contract, except for local public bodies where the construction is in excess of \$200,000 and more than 75 miles from the procuring public body. This may result in a reduction of any administration efficiencies realized by public bodies utilizing cooperative construction contracts, as public bodies will need to conduct a separate procurement process for such construction projects.

Job Order Contract Procurement

The substitute bill provides that no public body shall issue or use a job order contract (JOC) solely for the purpose of receiving professional architectural or engineering (A/E) services; however, such services may be included in a job order if they are incidental and directly related to the job and do not exceed \$25,000 per job order or \$75,000 per contract term. This is a change from the introduced version of the bill, which prohibited procurement of architectural or engineering services through a job order contract. The Commonwealth has not yet implemented JOC; therefore, this restriction is not expected to impact current

procurement practices or costs. If JOC is implemented for construction services in the future, the A/E JOC restrictions could limit potential administrative efficiencies if the A/E services needed to complete the construction project exceed the \$25,000 cap per order or \$75,000 cap per contract term, in which case a separate A/E procurement process would be required.

JOC construction contract limits are increased from \$400,000 to \$500,000 for individual project fees and \$2 million to \$5 million cumulatively per one year term. Public bodies have the option to renew contracts for two additional one-year terms in comparison to the four additional one-year terms currently allowed. The impact of these changes is indeterminate, as JOC has not yet been implemented in the Commonwealth. JOC contracts could potentially create administrative efficiencies by eliminating the need for separate procurement processes for each construction project, but may also forego opportunities to procure individual projects at the lowest possible cost.

Small Purchase Procedures for Construction:

The bill clarifies that small purchase procedures may be used for construction if the total cost of construction is less than \$100,000. Small purchase procedures often require less formal procurement procedures. The bill also specifies that small purchase procedures shall not waive compliance with the Uniform Statewide Building Code. Small purchase procedures are currently used for construction under \$5,000. No fiscal impact is expected from this provision.

Written Determination Competitive Sealed Bidding not Practicable or Advantageous

The bill removes the requirement that a determination be made in advance and explained in writing for instances where competitive sealed bidding is not feasible or fiscally advantageous in order for goods, services, or insurance to be procured by competitive negotiation. Public bodies would no longer be required to document and maintain records to justify such determinations, which may provide some administrative efficiencies. No fiscal impact is expected from this provision.

Affected Entities

Changes to the VPPA apply to all public bodies, which includes all state and local entities, unless the body has received an exception to the VPPA in the operational area of procurement. Currently eleven institutions of higher education have operate under management agreements and memorandums of understanding in the operational area of procurement and are exempt as well as approximately 50 percent of local governments that have adopted their own procurement regulations as authorized by §2.2-4343.

2. Provisions outside of the Virginia Public Procurement Act:

Department of General Services Issuance of Advisory Opinions

The substitute bill includes an additional enactment clauses expiring July 1, 2017 providing authority for the Director of the Department of General Services (the Director) to issue advisory opinions regarding the compliance of public bodies' construction contracts with state and local laws and regulations. The Director is authorized to issue an advisory opinion

to any requesting contractor, contractor association, or organization on whether a specific pending construction contract complies with the requirements of any state or local laws or regulations for public procurement. The request must be received within 15 working days of the public posing of the construction contract and the Director's opinion must be issued within ten working days of the request. The Director's opinion may address the appropriateness of the method of procurement used or any relevant laws or regulations. Issuance of an advisory opinion is expected to require significant staff time to research state and local laws and regulations applicable to the specific contract in question and prepare a written opinion. The amount of staff needed will depend on the number of requested reviews and the complexity of projects and relevant laws and regulations.

The Department of General Services (DGS) estimates approximately forty hours of work will be needed for each review, which includes 24 hours to research relevant state and local laws and regulations and approximately 16 hours to write the advisory opinion and to clarify and research any additional information requested as the opinion is reviewed by the Director. Issuance of an opinion for each request will require research and analysis of applicable state and local laws and regulations, which depend on the specific details of each inquiry and the type of public body involved. DGS does not have experience with the variety of local laws and regulations at the local level. Additionally, DGS authority to issue advisory opinions applies to all public bodies regardless of whether they have exemptions from the VPPA. Applicable laws and regulations for bodies with VPPA exemptions vary, as such bodies adopt their own procurement procedures.

DGS projects approximately 10 to 25 percent of all construction contracts over \$1.0 million would be requested for review. There were 213 construction projects meeting this criteria for state bodies and institutions of higher education in the Commonwealth's electronic procurement system in FY 2014. Assuming an equal number of such projects at the local level, review of 25 percent of projects would mean 106 reviews annually and 4,240 staff hours, which would require two full time positions. Each position is estimated to cost a total of \$107,087 per year at a salary of \$80,000 after inclusion of benefits and overhead such as supplies, IT, and office space. The total cost of two positions would be \$214,174, which is presented in Item 7a above. Additionally, support from the Office of the Attorney General of up to approximately four hours is expected to be necessary for some requests; such support is provided on a fee-for-service basis at a rate of \$98.94 per hour.

The issuance of advisory opinions on the appropriateness of procurement methods and relevant state and local laws and regulations may have legal impacts or pose liability issues. Any such possible impacts are unknown at this time. The ramifications of contracts found to be non-compliant with relevant laws and regulations are unclear and the bill does not provide enforcement requirements for such. The fiscal impact of any potential project delays, legal actions, and liabilities related to non-compliant contracts is indeterminate. Currently, DGS helps to investigate procurement complaints and has some level of oversight during the procurement process for public bodies under DGS authority, which does not include higher education institutions and localities.

Construction Procurement Reporting Requirements:

The substitute bill includes an additional enactment clause expiring July 1, 2017, which requires the Director of the Department of General Services to report on construction projects procured by a means other than competitive sealed bidding. The bill requires all public bodies to report to the Director on any construction projects in excess of \$1.0 million that were procured by a means other than competitive sealed bidding and include justification for the procurement method chosen. The Director shall report such information quarterly and provide an annual evaluation of design-build and construction management at risk procurement methods, as well as any recommendations for construction procurement and the Virginia Public Procurement Act. No fiscal impact is currently expectedly from this provision.

Report of Job Order Contracting Appropriateness and Effectiveness:

The bill provides that certain entities including the Department of Small Business and Supplier Diversity, public institutions of higher education with level 2 or 3 authority under the Restructured Higher Education Financial and Administrative Operations Act of 2005, and state agencies utilizing job order contracting report on the appropriateness and effectiveness of job order contracting and architectural and professional engineering term contracting restrictions by October 1, 2017 to the Chairmen of the House Committee on General Laws and Senate Committee on General Laws and Technology. This requirement is expected to have minimal financial impact and should be able to be absorbed by affected agencies.

Affected Entities

Authority for DGS to issue advisory opinions on public bodies' construction contracts, required reporting of construction projects procured by a means other than competitive sealed bidding, and reporting of job order contracting applies to public bodies regardless of VPPA exempt status.

- 9. Specific Agency or Political Subdivisions Affected:** Department of General Services, all state agencies and other public bodies.
- 10. Technical Amendment Necessary:** There is no subsection C of §2.2-4302.2 in the substitute version of the bill, as referenced in line 567 on page 10 of the substitute version.
- 11. Other Comments:** The substitute bill provides authority for the Director of the Department of General Services to issue advisory opinions regarding public bodies' construction procurement compliance with state and local laws and regulations, which affects the expected fiscal impact of the bill.

SB1371-S1 is similar but not identical to HB1835-EH1, which was engrossed by the House.

Date: 2/16/2015

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