

Public Body Procurement Workgroup

Report of the Public Body Procurement Workgroup on the Virginia Public Procurement Act; Preference for Products made or Manufactured in Virginia (SB 1115)

November 1, 2023

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I. Introduction

During the 2023 General Assembly session, the Senate Finance and Appropriations Committee voted to pass-by-indefinitely SB 1115 patroned by Senator Bill DeSteph and refer it to the Department of General Services' (DGS') Public Body Procurement Workgroup (Workgroup) for study. The Workgroup was directed to study SB 1115, which would (i) require state public bodies to decrease the price of any bid offered by (a) seven percent for a "Virginia end product" and (b) two percent for a "U.S. end product;" (ii) require that when the lowest responsive and responsible bidder, after price preferences have been taken into account, who is a resident of Virginia is within five percent or \$10,000, whichever is less, of the lowest responsive and responsible bidder who is a resident of another state, the bidder who is a resident of Virginia be given the opportunity to match the price of the bidder who is a resident of another state; and (iii) provide that if a state public body receives three or more bids from manufacturers that use materials or product components made in Virginia or in the U.S., such public body may only select from among such bids. The letter directing the study of SB 1115 set a deadline of November 1, 2023, for the Workgroup to submit a report with its findings and recommendations to the co-chairs of the Senate Committee on Finance and Appropriations and Senator DeSteph.

In response to this directive, stakeholders were identified, and six Workgroup meetings were held at which SB 1115 was discussed. This report summarizes the information presented to the Workgroup by stakeholders and subject matter experts and the Workgroup's findings and recommendations.

II. Background

Overview of Public Body Procurement Workgroup Authority and Duties

Item 85 of the 2022 Appropriations Act directs DGS to lead, provide administrative support to, and convene an annual public body procurement workgroup to review and study proposed changes to the Code of Virginia in the areas of non-technology goods and services, technology goods and services, construction, transportation, and professional services procurements. The Appropriations Act language specifies that Workgroup's membership is composed of the following individuals or their designees:

- Director of the Department of Small Business and Supplier Diversity
- Director of the Department of General Services
- Chief Information Officer of the Virginia Information Technologies Agency
- Commissioner of the Virginia Department of Transportation
- Director of the Department of Planning and Budget
- President of the Virginia Association of State Colleges and University Purchasing Professionals
- President of the Virginia Association of Governmental Procurement

Additionally, the Appropriations Act language requires that a representative from each of the following provide technical assistance to the Workgroup:

- Office of the Attorney General’s Government Operations and Transactions Division
- Staff of the House Appropriations Committee
- Staff of the Senate Committee on Finance and Appropriations
- Division of Legislative Services

The Appropriations Act language outlines two avenues by which bills may be referred to the Workgroup for study. First, the Chairs of the House Committees on Rules, General Laws, and Appropriations, as well as the Senate Committees on Rules, General Laws and Technology, and Finance and Appropriations, can refer legislation by letter to the Workgroup for study. Second, the Chairs of the House Committees on Rules and Appropriations, as well as the Senate Committees on Rules and Finance and Appropriations, can request that the Workgroup review procurement-related proposals in advance of an upcoming legislative session in order to obtain a better understanding of the legislation’s potential impacts. Additionally, the General Assembly can pass a bill that includes an enactment clause directing the Workgroup to study a particular topic.

Overview of SB 1115

As introduced, SB 1115 would amend §2.2-4324 which would (i) require state public bodies to decrease the price of any bid offered by (a) seven percent for a “Virginia end product” and (b) two percent for a “U.S. end product;” (ii) require that when the lowest responsive and responsible bidder, after price preferences have been taken into account, who is a resident of Virginia is within five percent or \$10,000, whichever is less, of the lowest responsive and responsible bidder who is a resident of another state, the bidder who is a resident of Virginia be given the opportunity to match the price of the bidder who is a resident of another state; and (iii) provide that if a state public body receives three or more bids from manufacturers that use materials or product components made in Virginia or in the U.S., such public body may only select from among such bids.

The bill was passed by indefinitely¹ in the Senate Finance and Appropriations Committee with a letter² directing the Workgroup to study it.

Study Participants/Stakeholders

The Workgroup’s Appropriations Act language directs it to hear from stakeholders identified by the patron of referred legislation and other interested individuals. As such, the Workgroup’s staff (Staff) contacted Senator DeSteph, the patron of SB 1115; Senator Adam Ebbin, Chair of the Senate Committee on General Laws and Technology; and Senator Janet Howell and Senator George Barker, Co-Chairs of the Senate Committee on Finance and Appropriations, to solicit their input regarding stakeholders they would like included in the Workgroup’s review of SB 1115. Staff compiled the names of the stakeholders identified into a stakeholder email distribution list, which it used to communicate information about the Workgroup’s study of SB

¹ The Senate Finance and Appropriations Committee passed the bill by indefinitely with a letter by a vote of 11Y, 4N

² Appendix A

1115 and opportunities for public comment to the identified stakeholders. Staff also added any interested individual to the stakeholder email distribution list upon request by such individual.

The stakeholder email distribution list was composed of the following individuals:

- The Honorable Bill DeSteph – Senate of Virginia
- The Honorable Jeremy S. McPike – Senate of Virginia
- Kara Alley – Spottsfain Consulting
- Bill Hefty – Hefty & Wiley
- Courtney Mustin – Small Business and Supplier Diversity
- Robert Bohannon – Hunton Andrews Kurth LLP
- Christopher McDonald – Williams Mullen

III. Workgroup Meetings on SB 1115

The Workgroup held six meetings at which it discussed SB 1115. At its May 2, 2023, meeting, Staff gave an overview of the proposed 2023 work plan for the Workgroup highlighting the four bills that were referred to the Workgroup by the General Assembly during the 2023 session, which included SB 1115. At its second meeting held on June 6, 2023, Staff provided an introduction and overview of SB 1115 to the Workgroup followed by the opportunity for public comment on SB 1115.

At its third meeting on SB 1115, held on June 27, 2023, the Workgroup heard from Senator DeSteph, followed by two presentations, and then public comment. Senator DeSteph shared that his goal is to do what other states are doing by providing preferential treatment for Virginia owned-businesses. Senator DeSteph explained that Maryland, West Virginia, and many other states around Virginia currently have in-state preferences for businesses. In addition to pushing for a preference for products made in Virginia, he also is promoting products made in America. After Senator DeSteph's remarks, the Director of the DGS Division of Purchases and Supply, Pete Stamps, gave a presentation to the Workgroup on current procurement preferences in the Code of Virginia and in state procurement policy.

Next, Randy Wintory with the Virginia Department of Transportation (VDOT) presented on the impact SB 1115 would have on VDOT, specifically its federally funded transportation projects. Wintory noted that the bill creates geographical preferences and discriminates on the basis of the locality, which is of concern for VDOT as federal law prohibits use of such in-state preferences in order to obtain federal aid for highway projects. Wintory concluded his presentation sharing concerns regarding ambiguities in the SB 1115 language, pointing out terms that are unclear or undefined.

At the conclusion of the two presentations, the meeting allowed for public comment. Trenton Clarke, President of the Virginia Asphalt Association, was the only stakeholder to speak. Clarke shared the overall support of buying Virginia products but expressed concern over the impact of preferences to federal funded projects.

Next, the Workgroup moved into discussion, findings and recommendations. Damico asked Staff to confirm if the bill as written would apply to institutions of higher education and/or local public bodies. Staff stated that the bill as written would not apply to institutions of higher education operating under management agreements, nor would it apply to local public bodies that are exempt from the Virginia Public Procurement Act (VPPA). The third meeting concluded with allowing the Workgroup additional time to consider the information that has been discussed.

At its fourth meeting, held on July 18, 2023, Damico provided a brief update to the Workgroup stating that further discussion of the bill will be held at the next meeting. The Workgroup held its fifth meeting on August 8, 2023, which began with public comment on SB 1115. Dillion Bishop on behalf of the Heavy Construction Contractors Association was the only stakeholder to speak, sharing the group's support for the bill. After public comment, the Workgroup continued discussion on findings and recommendations for SB 1115. Damico asked the Workgroup for recommendations and after hearing none, Damico offered two recommendations for the Workgroup's consideration.

At its sixth and final meeting for SB 1115 held on August 22, 2023, the Workgroup began by allowing public comment on the draft recommendations made at the last meeting for SB 1115. There was no public comment on the draft recommendations. Next, the Workgroup finalized the recommendations for SB 1115 and before doing so, Senator DeSteph was provided an opportunity to address the Workgroup. The Senator introduced Brett Vassey, President and CEO of the Virginia Manufacturers Association, to speak. Vassey began by thanking the Workgroup for its continued work on competitiveness of state procurement policy as it pertains to manufactured goods and stated that the two recommendations for consideration will get the manufacturers where they want to be. Senator DeSteph provided final remarks to the Workgroup, stating that all states around Virginia have preferences for companies within their states and he wants to give preference to Virginia companies. The Workgroup voted to approve the language of the final recommendations that it had developed at its previous meeting by a vote of 6-0-0³

See Appendices B, C, D, E, F, and G for the meeting materials, including meeting minutes for each of the four meetings.

IV. Summary of Information Presented to the Workgroup

The Workgroup was directed to study SB 1115 and report its findings and recommendations to the co-chairs of the Senate Committee on Finance and Appropriations and Senator Bill DeSteph by November 1, 2023. Below is a summary of the testimony and presentations that the Workgroup received pertaining to this task.

Virginia Procurement Preferences

At the Workgroup's third meeting, held on June 27, 2023, Stamps, the Director of DGS's Division of Purchases and Supply, gave a presentation on current procurement preferences in the

³ Recommendation 1 and 2: Yes: Innocenti, Morris, Heslinga, McHugh, Bates, Damico

Code of Virginia and in policy through the Agency Procurement and Surplus Property Manual (APSPM). Stamps provided an overview of the following preferences in the Virginia Public Procurement Act (VPPA): tie bid, absolute, percentage, and price-matching. Stamps explained that in the instance of a tie bid, preference shall be given to goods produced in Virginia, or goods, services or construction provided by Virginia persons, firms or corporations. Next, he explained that an absolute preference is when a state will only consider bids from resident contractors residing within that state. In the instance of an absolute preference the lowest bidder who is a resident contractor of another state, where the resident contractors state has an absolute preference in place, the bid shall not be considered by the public body. Stamps shared that a percentage preference is when the lowest responsive and responsible bidder is a resident of any other state and such state under its laws allows a resident contractor a percentage preference, a like preference shall be allowed to the lowest responsive and responsible bidder who is a resident of Virginia and is the next lowest bidder. The last preference that Stamps explained was price matching. A price matching preference states when the lowest responsive and responsible bidder is a resident of any other state whose laws allow a resident contractor a price-matching preference, a like preference shall be allowed to bidders who are residents of Virginia, and if the lowest responsive and responsible Virginia bidder is unable to match the price, the preference shall be given to other Virginia bidders in ascending price order.

Next, Stamps provided the Workgroup with an overview of other preferences in the Code. He noted that in DGS' enabling legislation, DGS/DPS is required to establish procurement preferences for recycled oil, recycled antifreeze, and biodiesel fuel. Stamps concluded his presentation sharing that the APSPM and the Construction and Professional Services Manual (CPSM) provide guidance to executive branch agencies on preferences. John McHugh asked how executive orders fit into preferences, specifically Executive Order 35 (EO-35), the small business directive. Stamps stated that EO-35 is another preference in addition to the existing preferences in the Code. Joe Damico asked if institutions of higher education and local governments are subject to the sections of the Code referenced in the presentation, to which Stamps replied that institutions of higher education are not subject to those sections of the Code. Patti Innocenti shared that local governments, depending on their ordinances, also may not be required to follow these sections of the Code.

Procurement Preferences and Federally Funded Projects

The Virginia Department of Transportation (VDOT) presented to the Workgroup on SB 1115 and the impact it would have to VDOT, specifically its federally funded transportation projects. Wintory shared concerns about the proposed in-state preferences that SB 1115 would create, explaining that federal laws prohibit state departments of transportation that receive federal aid from using in-state preferences. He explained that SB 1115 would put VDOT at risk of losing its federal aid for its federally funded highway projects.

Next, Wintory provided an overview of VDOT funding programs, focusing on the highway construction funding. He stated that in FY22, VDOT allocated \$3.3 billion to highway construction projects. VDOT awarded 353 construction contracts and 85% of those were awarded to Virginia contractors. Wintory provided the Workgroup with federal law and regulation citations that prohibit the use of preferences on federally funded projects and shared a

listing of other states that exclude federally funded projects from preference requirements, such as South Carolina, Texas, and West Virginia.

Damico asked if a price match preference would impact federally funded projects. Wintory replied that he believes it would because the award would not initially be made to the lowest bidder. Lisa Pride stated that this preference could be applied to state-funded projects; however, she is unsure how that would impact competition overall. Morris asked for an explanation on the difference between resident of Virginia versus Virginia business in SB 1115. Wintory replied that the terminology used in subsection C of the bill is confusing because of the use of the undefined term “resident of Virginia” instead of using the defined term “Virginia businesses.” Damico asked if federal money going to other state agencies would be impacted by this bill, to which Wintory explained that Virginia should be clear about the application of preferences and funding sources. Innocenti shared that based on her research with Federal Emergency Management Agency (FEMA) grants, there is a prohibition of using preferences with FEMA funds.

Public Comments on SB 1115

Trenton Clarke, President of the Virginia Asphalt Association, shared overall support for buying Virginia products but expressed concern over the impact of preferences on federally funded projects. Clarke explained the process of recyclable materials in the asphalt process and focused his comments on the second enactment clause of SB 1115, speaking to Virginia’s recyclable materials tax credit. Clarke asked that consideration be given to expanding the recyclable materials tax credit. He further explained that allowing the use of more recyclable materials reduces costs and helps asphalt plants reduce their carbon footprint. Clarke shared that the current tax credit applies only to asphalt recycling done at a fixed facility and does not account for the evolution of equipment which allows recycled material use in asphalt at project sites.

Dillon Bishop spoke to the Workgroup on behalf of the Heavy Construction Contractors Association, sharing its support for the bill.

V. Workgroup Findings and Recommendations

At its third meeting the Workgroup heard from Senator DeSteph, received presentations from DGS/DPS and VDOT, and heard public comment regarding SB 1115. The Workgroup was informed that the bill would not apply to institutions of higher education that operate under management agreements, nor would it apply to local public bodies that are exempt from the VPPA. Josh Heslinga shared with the Workgroup that preferences generally are not a part of VITA’s information technology procurements, as most of these procurements involve a large amount of services and require awarding based on more than just price; therefore VITA utilizes the competitive negotiation procurement process most often. Heslinga shared that many information technology goods involve a lot of components, and depending on how preference language is structured and applied, there is a possibility of more protests on these types of procurements because not all components may come from Virginia or the USA.

Innocenti stated that the VAGP believes local preference policies are in conflict with the principles of the VPPA and prevent full and open competition. Innocenti noted that the VPPA has a provision for best value and, depending on the procurement, the locality could introduce a preference as a best value concept.

Damico stated that the VPPA has a procurement preference in the case of a tie bid, explaining that in the case of a tie bid, the award would go to a Virginia business. Damico stated that with the existing tie bid language, Senator DeSteph's interest in providing opportunities to Virginia businesses, and the desire to ensure public bodies obtain the best price for goods being procured, the Workgroup should consider something that would address the interests stated while ensuring the Commonwealth gets the best value. Damico said that while preferences could impact price, he asked if there could be an approach whereby if a state agency issues a bid for a good and an out-of-state business is the lowest responsive and responsible bidder, the Virginia business could have the opportunity to price match the low bid of the out-of-state business.

After discussion among the Workgroup, Damico asked for recommendations for SB 1115. Hearing none, Damico shared that §2.2-4324 allows that in the event of a tie bid that preference shall be given to goods produced in Virginia or goods, services, and construction provided by Virginia persons, firms or corporations. Damico noted that the patron of the bill expressed interest in providing additional preference opportunities for Virginia businesses and products produced in the United States. Damico shared two recommendations for the Workgroup to consider. The first recommendation amends §2.2-4324 to allow in the instance of a tie bid for goods, as long as the Virginia tie bid requirements are not met, that an award preference shall be given to goods that are manufactured in the United States. Hearing no questions or concerns on the recommendation, Heslinga made a motion to move the recommendation forward. Morris seconded the motion and it carried by a unanimous vote.

Damico offered a second recommendation that amends §2.2-4324 to allow, in the case of bids for goods that a Virginia resident or Virginia company has the opportunity to match the price of the lowest responsive and responsible bidder who is a resident of another state. Hearing no questions or concerns on the second recommendation, Heslinga made a motion to move the recommendation forward. Morris seconded the motion, and it carried by a unanimous vote. No other recommendations were offered, and Staff were instructed to draft the recommendations for a final vote at the next meeting.

At its final meeting of SB 1115, Damico presented the two draft recommendations for SB 1115 for discussion and a final vote by the Workgroup. The first recommendation before the Workgroup for consideration:

The Workgroup recommends that the General Assembly consider amending subsection (A) of §2.2-4324 to allow in the instance of a tie bid for goods when there is not a resident of Virginia that an award preference shall then be given to goods that are manufactured in the United States.

Hearing no comments on the first recommendation, Heslinga made a motion to approve the recommendation. Innocenti seconded the motion and it carried by a vote of 6-0⁴.

Next, Damico read the second recommendation before the Workgroup for discussion and a final vote. The second recommendation before the Workgroup for consideration:

The Workgroup recommends that the General Assembly consider amending §2.2-4324 to allow the next lowest responsive and responsible bidder who is a resident of Virginia, or a Virginia company, be given the option to match the price of the lowest responsive and responsible bidder in a procurement for goods who is a resident of another state.

Hearing no comments on the second recommendation, Morris made a motion to approve the recommendation. Heslinga seconded the motion and it carried by a vote of 6-0⁵.

VI. Conclusion

The Workgroup would like to thank the stakeholders and interested parties for their participation, as well as thank the subject matter experts from VDOT and DGS who provided presentations and technical expertise to assist the Workgroup in its deliberations.

⁴ Yes: Innocenti, Morris, Heslinga, McHugh, Bates, Damico

⁵ Yes: Innocenti, Morris, Heslinga, McHugh, Bates, Damico

Appendix A: Letter Directing Study and Text of SB 1115

—
This appendix contains the letter from the Senate directing the Workgroup to study SB 1115 and the text of SB 1115.

COMMONWEALTH OF VIRGINIA

SUSAN CLARKE SCHAAR
CLERK OF THE SENATE
POST OFFICE BOX 396
RICHMOND, VIRGINIA 23218



SENATE

March 24, 2023

Mr. Joseph F. Damico
Director, Department of General Services
1100 Bank Street, Suite 420
Richmond, Virginia 23219

Dear Joe:

This is to inform you that, pursuant to Rule 20 (o) of the Rules of the Senate of Virginia, the Senate Committee on Finance and Appropriations has referred the subject matters contained in Senate Bill 912, Senate Bill 954, and Senate Bill 1115 to the Procurement Workgroup for study. It is requested that the appropriate committee co-chairs and bill patrons receive written reports, with copies to this office, by November 1, 2023.

With kind regards, I am

Sincerely yours,

Susan Clarke Schaar

SCS:gc

cc: Sen. Janet D. Howell, Co-Chair, Senate Committee on Finance and Appropriations
Sen. George L. Barker, Co-Chair, Senate Committee on Finance and Appropriations
Sen. Frank M. Ruff, Jr., Patron of SB 912
Sen. J. Chapman Petersen, Patron of SB 954
Sen. Bill DeSteph, Patron of SB 1115
Amigo Wade, Director, Division of Legislative Services
April Kees, Director, Senate Finance and Appropriations Committee

2023 SESSION

SB 1115 Virginia Public Procurement Act; preference for products made or manufactured in Virginia.

Introduced by: [Bill DeSteph](#) | [all patrons](#) ... [notes](#) | [add to my profiles](#)

SUMMARY AS INTRODUCED:

Virginia Public Procurement Act; preference for products made or manufactured in Virginia and the U.S.; recyclable content; report. Provides preference for a bidder who is a resident of Virginia over a bidder who is a resident of any other state in determining the award for any contract for goods, services, or construction under the Virginia Public Procurement Act. The bill requires a state agency to decrease by seven percent the price of any offer for a Virginia end product, defined in the bill, and to decrease by two percent the price of any offer for a U.S. end product, defined in the bill, when evaluating bids for purposes of making an award determination. When the lowest responsive and responsible bidder, after price preferences have been taken into account, is a resident of Virginia and the offer price is within \$10,000 or five percent, whichever is less, of the lowest responsive and responsible bidder who is a resident of another state, the Virginia resident shall be given the option to match the price of the nonresident bidder. Current allowance for granting price preferences to Virginia residents is made mandatory by the bill. The bill directs the Secretary of Commerce and Trade to convene a stakeholder work group to recommend revisions to the recyclable materials tax credit and report on the work group's recommendations by November 1, 2023. This bill is a recommendation of the Manufacturing Development Commission.

FULL TEXT

[01/10/23 Senate: Prefiled and ordered printed; offered 01/11/23 23103895D](#) [pdf](#) | [impact statement](#)

[02/01/23 Senate: Committee substitute printed 23106208D-S1](#) [pdf](#) | [impact statement](#)

AMENDMENTS

[Senate committee, floor amendments and substitutes offered](#)

HISTORY

01/10/23 Senate: Prefiled and ordered printed; offered 01/11/23 23103895D

[01/10/23 Senate: Referred to Committee on General Laws and Technology](#)

[02/01/23 Senate: Reported from General Laws and Technology with substitute \(13-Y 0-N 2-A\)](#)

[02/01/23 Senate: Incorporates SB1176 \(McPike\)](#)

02/01/23 Senate: Committee substitute printed 23106208D-S1

[02/01/23 Senate: Rerferred to Finance and Appropriations](#)

[02/02/23 Senate: Passed by indefinitely in Finance and Appropriations with letter \(11-Y 4-N\)](#)

23103895D

SENATE BILL NO. 1115

Offered January 11, 2023

Prefiled January 10, 2023

1 A *BILL to amend and reenact § 2.2-4324 of the Code of Virginia, relating to Virginia Public*
 2 *Procurement Act; preference for products made or manufactured in Virginia and the U.S.; recyclable*
 3 *content report.*

4
 5
 6
 7 Patrons—DeSteph, Cosgrove, McPike and Reeves

8
 9 Referred to Committee on General Laws and Technology

10
 11 Be it enacted by the General Assembly of Virginia:

12 1. That § 2.2-4324 of the Code of Virginia is amended and reenacted as follows:

13 § 2.2-4324. Preference for products made or manufactured in Virginia and the U.S.; recyclable
 14 content.

15 A. In the case of a tie bid, preference shall be given to goods produced in Virginia and goods,
 16 services, or construction provided by Virginia persons, firms, or corporations; otherwise the tie shall be
 17 decided by lot. *For the purposes of this section:*

18 "End product" means the tangible product described in a solicitation for bids, including its
 19 component parts and its final form.

20 "Grown" means locally derived from any timber, agricultural product, aquaculture product, or
 21 livestock that is produced, cultivated, raised, or harvested upon the land or from the water.

22 "Made" or "manufactured" means assembled, fabricated, or processed into an end product, the price
 23 of which is substantially related to the cost of such assemblage, fabrication, or processing.

24 "Principal place of business" means the physical business location where the natural persons who
 25 direct, control, and manage the business's day-to-day operations are located.

26 "U.S. end product" means an end product made, manufactured, or grown in the United States.

27 "Virginia business" means a business that maintains a principal place of business within Virginia.

28 "Virginia end product" means an end product made, manufactured, or grown in Virginia.

29 B. In determining the award of any contract for goods, services, or construction, preference shall be
 30 given to Virginia end products and to Virginia businesses or Virginia residents, as applicable, in
 31 accordance with this section.

32 C. When evaluating bids for purposes of making an award determination, a state public body shall
 33 decrease the price of any bid offered (i) for a Virginia end product, by seven percent and (ii) for a U.S.
 34 end product, by two percent. If the lowest responsive and responsible bidder, after price preferences
 35 have been taken into account, who is a resident of Virginia is within five percent or \$10,000, whichever
 36 is less, of the lowest responsive and responsible bidder who is a resident of another state, then the
 37 bidder who is a resident of Virginia shall be granted the option to match the price of the bidder who is
 38 a resident of another state.

39 D. Whenever the lowest responsive and responsible bidder is a resident of any other state and such
 40 state under its laws allows a resident contractor of that state a percentage preference, a like preference
 41 shall be allowed granted to the lowest responsive and responsible bidder who is a resident of Virginia
 42 and is the next lowest bidder. If the lowest responsive and responsible bidder is a resident of any other
 43 state and such state under its laws allows a resident contractor of that state a price-matching preference,
 44 a like preference shall be allowed granted to responsive and responsible bidders who are residents of
 45 Virginia. If the lowest bidder is a resident contractor of a state with an absolute preference, the bid shall
 46 not be considered. The Department of General Services shall post and maintain an updated list on its
 47 website of all states with an absolute preference for their resident contractors and those states that allow
 48 their resident contractors a percentage preference, including the respective percentage amounts. For
 49 purposes of compliance with this section, all public bodies may rely upon the accuracy of the
 50 information posted on this website.

51 C. Notwithstanding the provisions of subsections B and C, in E. In the case of a tie bid in instances
 52 where goods are being offered, and existing price preferences have already been taken into account,
 53 preference shall be given to the bidder whose goods contain the greatest amount of recycled content,
 54 including waste tires and materials manufactured by advanced recycling factories.

55 D. For the purposes of this section, a Virginia person, firm or corporation shall be deemed to be a
 56 resident of Virginia if such person, firm or corporation has been organized pursuant to Virginia law or
 57 maintains a principal place of business within Virginia.

58 F. If a state public body receives three or more bids from a manufacturers that use materials or

INTRODUCED

SB1115

59 *product components made in Virginia or in the United States, such body may only select from among*
60 *those bids.*

61 2. That the Secretary of Commerce and Trade and the Department of Taxation shall establish a
62 work group of stakeholders, including representatives from the Virginia Manufacturers
63 Association, the Virginia Asphalt Association, the Virginia Transportation Construction Alliance,
64 the Virginia Recycling Association, and the Virginia Economic Development Partnership, to
65 recommend revisions to the recyclable materials tax credit, established pursuant to § 58.1-439.7 of
66 the Code of Virginia, that will contribute to an increase in recycled materials and the growth of
67 recyclable materials businesses to fulfill the expectations outlined in Executive Order 17 (2022).
68 The Secretary of Commerce and Trade shall submit an executive summary of the work group's
69 recommendations to the General Assembly and the Governor by November 1, 2023.

Appendix B: May 2, 2023 Meeting Materials

This appendix contains the meeting materials from the May 2, 2023 Workgroup meeting.

1. Agenda
2. Meeting Materials
 - a. Public Body Procurement Workgroup 2023 Proposed Work Plan
3. Approved Meeting Minutes

Public Body Procurement Workgroup

<http://dgs.virginia.gov/dgs/directors-office/procurement-workgroup/>

Meeting # 1

Tuesday, May 2, 2023, 1:00 p.m.

House Room 1

The Virginia State Capitol

1000 Bank Street, Richmond, Virginia 23218

AGENDA

- I. **Call to Order; Remarks by Chair**
- II. **Introduction of Workgroup Members, Representatives, and Staff**
- III. **Approval of Meeting Minutes from the November 28, 2022 Workgroup Meeting**
- IV. **Recap of 2022 Work and Overview of Proposed 2023 Work Plan**
- V. **Consideration and Discussion of Public Comment, Presentations, and Other Information Received by the Workgroup on SB 272**
- VI. **Findings and Recommendations on SB 272**
- VII. **Public Comment**
- VIII. **Discussion**
- IX. **Adjournment**

Members

Department of General Services
Virginia Information Technologies Agency
Department of Planning and Budget
Virginia Association of State Colleges and
University Purchasing Professionals

Department of Small Business and Supplier Diversity
Virginia Department of Transportation
Virginia Association of Government Purchasing

Representatives

Office of the Attorney General
Senate Finance Committee

House Appropriations Committee
Division of Legislative Services

Staff

Jessica Budd, Legal Policy Analyst, DGS
Jessica Hendrickson, Director of Policy and Legislative Affairs, DGS

Public Body Procurement Workgroup

<http://dgs.virginia.gov/dgs/directors-office/procurement-workgroup/>

2023 PROPOSED WORK PLAN

Meeting #1 – May 2, 2023 at 1:00 p.m.

1. Introduction of Workgroup Members, Representatives, and Staff
2. Recap of 2022 Work and Overview of Proposed 2023 Work Plan

During the 2023 Session, the General Assembly unanimously passed two bills that implemented the recommendations from the Workgroup's study of SB 550 (2022) [Sen. Bell] – SB 1313, patroned by Sen. Bell, and SB 2500, patroned by Del. Wiley.

The Workgroup began studying SB 272 (2022) [Sen. Hashmi] at its last meeting on November 28, 2022. The Workgroup must complete this study and report its findings and recommendations by December 1, 2023.

Additionally, during the 2023 Session, the General Assembly referred the following four new bills to the Workgroup for study:

- *SB 859 (2023), patroned by Senator Cosgrove, which would remove the requirement that local public bodies publish notice of a Request for Proposal on DGS' central electronic procurement website (eVA) if they elect not to publish notice of the Request for Proposal in a newspaper of general circulation in the area in which the contract is to be performed. Currently, local public bodies must publish notice of a Request for Proposal either on eVA or in a newspaper of general circulation in the area in which the contract is to be performed. They may choose to also post such notice on an "appropriate website." The bill would allow local public bodies to satisfy the VPPA's notice requirements for a Request for Proposal by simply posting notice of the Request for Proposal on an "appropriate website."*
- *SB 912 (2023), patroned by Senator Ruff, which would prohibit public bodies, in the case of proposals for information technology, from requiring offerors to state in their proposal any exceptions they may have to any of the contractual terms and conditions, including any liability conditions, contained in the Request for Proposal. The bill would require such offerors to instead state any such exceptions in writing at the beginning of negotiations, and require public bodies to consider such exceptions during negotiation.*
- *SB 954 (2023), patroned by Senator Petersen, which appears to (i) narrow the definition of "complex project" such that projects would be required to meet stricter criteria in order to be deemed complex and therefore appropriate for utilizing construction management and design-build (CM/DB) procurement methods; (ii) prohibit the use of CM/DB procurement methods for projects totaling less than \$5*

million; and (iii) for projects totaling between \$5 million and \$125 million, require public bodies to (a) obtain approval from the Secretary of Administration to use CM/DB procurement methods and (b) conduct a two-step procurement process in which the public body must first award a contract for preconstruction services, and, upon completion of such contract, award a second contract for construction services using competitive sealed bidding.

- *SB 1115 (2023), patroned by Senator DeSteph, which would (i) require state public bodies to decrease the price of any bid offered by (a) seven percent for a “Virginia end product” and (b) two percent for a “U.S. end product”; (ii) require that when the lowest responsive and responsible bidder, after price preferences have been taken into account, who is a resident of Virginia is within five percent or \$10,000, whichever is less, of the lowest responsive and responsible bidder who is a resident of another state, the bidder who is a resident of Virginia be given the opportunity to match the price of the bidder who is a resident of another state; and (iii) provide that if a state public body receives three or more bids from manufacturers that use materials or product components made in Virginia or in the U.S., such public body may only select from among such bids.*

The Workgroup must complete its studies of each of these bills and report its findings and recommendations to the bills’ patrons and the appropriate committee chairmen by November 1, 2023.

3. SB 272 – Make preliminary findings and recommendations.

Meeting #2 – May 16, 2023 at 1:00 p.m.

1. SB 272 – Finalize findings and recommendations.
2. SB 859 –
 - a. Hear presentations and public comment.
 - b. Make preliminary findings and recommendations.
3. SB 912
 - a. Hear presentations and public comment.
 - b. Make preliminary findings and recommendations.

Meeting #3 – June 6, 2023 at 1:00 p.m.

1. SB 859 – Finalize findings and recommendations.
2. SB 912 – Finalize findings and recommendations.
3. SB 1115 –
 - a. Hear presentations and public comment.

Meeting #4 – June 27, 2023 at 1:00 p.m.

1. SB 1115 –
 - a. Review information received at previous meeting and receive any additional information.
 - b. Make preliminary findings and recommendations.

Meeting #5 – July 18, 2023 at 9:30 a.m.

4. SB 1115 – Finalize findings and recommendations.
5. SB 954 –
 - a. Hear presentations and public comment.

Meeting #6 – August 8, 2023 at 1:00 p.m.

2. SB 954 –
 - a. Review information received at previous meeting and receive any additional information.
 - b. Make preliminary findings and recommendations.

Meeting #7 – August 22, 2023 at 1:00 p.m.

1. SB 954 – Finalize findings and recommendations.

November 1, 2023

1. Reports on the Workgroup's findings and recommendations on SB 859, SB 912, SB 954, and SB 1115 due to the bills' patrons and committee chairmen.

December 1, 2023

1. Reports on the Workgroup's findings and recommendations on SB 272 due to the General Assembly.

Approved Meeting Minutes

Public Body Procurement Workgroup

Meeting # 1

**Tuesday, May 2, 2023, 1:00 p.m.
House Room 1
The Virginia State Capitol
1000 Bank Street, Richmond, Virginia 23218**

<http://dgs.virginia.gov/dgs/directors-office/procurement-workgroup/>

The Public Body Procurement Workgroup (the Workgroup) met in-person in House Room 1 in the Capitol in Richmond, Virginia, with Joe Damico, Director of the Department of General Services (DGS), presiding. The meeting began with remarks from Mr. Damico, followed by discussion and recommendations for SB 272, public comment, and further discussion by the Workgroup members. Materials presented at the meeting are available through the [Workgroup's website](#).

Workgroup members and representatives present at the meeting included Joe Damico (Department of General Services), Willis Morris (Department of Small Business and Supplier Diversity), Joshua Heslinga (Virginia Information Technologies Agency), Lisa Pride (Virginia Department of Transportation), Jonathan Howe (Department of Planning and Budget), Patricia Innocenti (Virginia Association of Governmental Procurement), John McHugh (Virginia Association of State Colleges and University Purchasing Professionals), Leslie Haley (Office of the Attorney General), Andrea Peeks (House Appropriations Committee), and Mike Tweedy (Senate Finance and Appropriations Committee), and Joanne Frye, representing the Division of Legislative Services.

I. Call to Order; Remarks by Chair

Joe Damico, Director
Department of General Services

Mr. Damico called the meeting to order and thanked the House Clerk's Office for allowing the Workgroup to hold its meetings in House Room 1 in the Capital Building. He informed the Workgroup that this year he and Sandra Gill, Deputy Director of the Department of General Services, will alternate as Chair of the Workgroup.

II. Introduction of Workgroup Members, Representatives, and Staff

III. Approval of Meeting Minutes from the November 28, 2022 Workgroup Meeting

Mr. Tweedy made a motion to approve the meeting minutes from the November 28, 2022 meeting of the Workgroup. The motion was seconded by Ms. Pride and unanimously approved by the Workgroup.

IV. Recap of 2022 Work and Overview of Proposed 2023 Work Plan

Next, Mr. Damico asked Ms. Gill to present a recap of the work accomplished by the Workgroup in 2022, as well as the proposed workplan for the Workgroup's 2023 studies.

Mr. Gill reminded the group that two bills were originally referred to the Workgroup by the General Assembly in 2022 (SB 550 and SB 575), and that a third bill was referred to the Workgroup later in the year (SB 272). Ms. Gill provided a summary of the work undertaken by the Workgroup related to SB 575 (which pertained to the use of a total cost of ownership calculator for medium-duty and heavy-duty vehicles) and SB 550 (which pertained to payment of subcontractors). Ms. Gill noted that two bills (SB 1313 and SB 2500) were introduced and passed by the General Assembly during the 2023 Session that implemented the Workgroup's recommendations on SB 550.

Moving to the proposed 2023 work plan, Ms. Gill provided an overview of the four new bills that were referred to the Workgroup by the General Assembly during the 2023 Session: SB 859, patroned by Senator Cosgrove; SB 912, patroned by Senator Ruff; SB 954, patroned by Senator Petersen; and SB 1115, patroned by Senator DeSteph. She stated that the proposed work plan includes tentative dates for six additional meetings for the workgroup to complete its studies of these four bills.

V. Consideration and Discussion of Public Comment, Presentations, and Other Information Received by the Workgroup on SB 272

Ms. Gill noted that workgroup began its study of SB 272 at its last meeting on November 28, 2022. She provided the Workgroup with an overview of the information that was shared with the Workgroup on SB 272 at that meeting by stakeholders and subject matter experts. She also noted that since the last meeting DGS staff conducted a survey of local governments to determine the amount of concrete they use, but only six responses to the survey were received.

She then presented the Workgroup with several considerations for it to discuss as possible recommendations on SB 272. Those consideration were: (1) codify procurement preferences and initiatives in the bill for low carbon concrete, (2) address the issue with policy through preferences or incentives, (3) not make changes to the law or implement

policy because the industry is already moving towards low carbon concrete, (4) create tax incentives for the industry to move towards low carbon concrete, or (5) consider whether the Virginia Department of Environmental Quality should regulate CO₂ emissions for cement and concrete.

Mr. Damico asked Ms. Gill to clarify which agencies would be impacted by the bill as introduced. She stated that the bill amends the DGS code section, therefore agencies under DGS purview would be impacted and it would be DGS' responsibility to establish policy. Mr. Damico asked Ms. Gill for clarification as to how the Virginia Department of Transportation (VDOT) would be impacted by the bill, and she responded that the bill does not specifically exclude roads and bridges, however based on DGS' enabling legislation there could be an interpretation that roads and bridges are not under DGS' authority. Mr. Damico then confirmed with Ms. Gill that testimony provided to the Workgroup at its previous meeting indicated that VDOT uses approximately six percent of the total amount of concrete used in Virginia each year, and that DGS uses approximately one-half of one percent of the total amount of concrete used in Virginia each year.

Mr. Damico asked the Workgroup if they have any thoughts or comments. Ms. Pride stated that VDOT has been working diligently for several years to allow the use of lower carbon concrete in its specifications and to work with the industry to continue to lower the amount of carbon associated with the concrete it uses in its projects. She indicated that she would like the Workgroup to move forward with the third recommendation presented by Ms. Gill, which was to not impose additional requirements on the industry because they are already making progress on this issue and VDOT has also been moving in the right direction. She also reiterated how small the amount of concrete used by state agencies is compared to the private sector.

Mr. Damico asked Ms. Gill about DEQ's testimony at the previous meeting and whether they stated that they currently monitor CO₂ emissions from the production of cement and concrete. She stated that DEQ testified that they do not currently regulate CO₂ emissions from the production of cement and concrete. He then asked if there was any indication in the previous meeting as to whether DEQ is in a position to monitor the industry's commitment to move toward a CO₂ emissions-free cement and concrete manufacturing process. Ms. Gill stated that DEQ did not testify that they have any intent to regulate, monitor, or track CO₂ emissions from the production of cement and concrete. Mr. Damico asked the Workgroup members whether they feel that it would be appropriate to ask DEQ if they could monitor and report on the CO₂ emissions from the production of cement and concrete in order to track the industry's progress toward moving towards lower carbon concrete. Mr. Heslinga sought clarification as to whether Mr. Damico is contemplating asking DEQ to monitor the industry's progress as opposed to affirmatively regulating the industry's CO₂ emissions. Mr. Damico answered in the affirmative.

VI. Findings and Recommendations on SB 272

Mr. Damico asked Ms. Pride to restate her recommendation. Ms. Pride stated that she recommends that the Workgroup allow VDOT to continue the work that has done regarding permitting the use of lower carbon concrete in its specifications and allow the industry to continue the progress that it has made in reducing the amount of carbon in concrete, allow those two things to be the drivers of the reduction of carbon in concrete. Mr. Heslinga stated he would second the recommendation and sought clarification on the process of finalizing the recommendation. Mr. Damico called for a vote of the Workgroup. Prior to the voting Mr. Morris asked for clarification as to whether there would be voluntary reporting by VDOT and/or the industry on progress towards this initiative. Ms. Pride stated VDOT does not currently do such reporting, but they keep track of their specifications and could report on those changes. The Workgroup voted in favor of the recommendation made by Ms. Pride¹. Next, Mr. Damico asked the Workgroup for approval to engage DEQ regarding its capacity to monitor the industry's progress towards producing emissions-free cement. The Workgroup unanimously approved his request.

VII. Public Comment

The first stakeholder to comment was Walton Shephard with the Natural Resources Defense Council. Mr. Shephard stated that he wanted to clarify that the bill never contemplated imposing any requirements and that it only contemplated rewarding voluntary actions that the industry is indeed already taking. He asked the state to recognize those actions by codifying provisions that would use the state's purchasing power to show a preference for cleaner concrete or cement similar to provisions implemented in New Jersey. He acknowledged that Virginia does allow the use of cleaner cement and concrete but stressed that he would like the state proactively encourage its use.

Mr. Morris asked Mr. Shelton for clarification regarding the voluntary rewards system. Mr. Shephard responded that when bids come in and a particular bidder's concrete is verified to be cleaner than average, such bidder would receive a slight bonus in the bid stack. Mr. Damico asked for clarification as to how such a preference would work if there is one cement manufacturer in Virginia, and further asked about the potential cost impacts of bringing in lower carbon concrete from manufacturers located outside of Virginia. Mr. Shelton responded that he is not sure of the answers to such questions, but that he assumes that theoretically such procurement preference would still incentivize Virginia's one manufacturer to clean up its production process because the state could purchase cement from a producer in Maryland or North Carolina instead of the one manufacturer in Virginia.

¹ The votes on recommendation the recommendation were as follows: Yes – Patricia Innocenti, John McHugh, Jonathan Howe, Joe Damico, Lisa Pride, and Joshua Heslinga, Willis Morris; Abstain – Andrea Peeks, Mike Tweedy, Leslie Haley, and Joanne Frye

The second stakeholder to comment was Kisnia Kimmons, a technical services manager with Roanoke Cement. Ms. Kimmons confirmed that Roanoke Cement is the only cement manufacturer in Virginia, but there are also several producers from outside of the state that deliver product within the state that also provide lower carbon cement products. She stated that such other products come from places such as South Carolina and various locations in the North East, and that some are imported.

Mr. McHugh asked whether low carbon concrete is more expensive than traditional concrete. Ms. Kimmons responded that typically in many markets Type II cement has cost the same as traditional Type I/II concrete and that it has been a one-to-one replacement. Ms. Frye asked whether the low carbon cement produced by Roanoke Cement is lower in carbon than the other low carbon cement products on the market. Ms. Kimmons responded that it can vary depending on the product. Mr. Heslinga asked if there are existing reporting on the adoption of lower carbon cement. Ms. Kimmons stated that she is not aware of any required reporting, however from a manufacturing perspective it is not difficult for them to provide replacement factor information. Mr. Morris asked Ms. Kimmons for clarification that Roanoke Cement is the only cement manufacturer in Virginia, which she confirmed, and asked whether they have experienced any supply chain challenges. Ms. Kimmons responded that they are not experiencing any such challenges at this time, and reiterated that the state has resources from other facilities as well that feed into this market.

The third stakeholder to comment was Phil Abraham with the Vectre Corporation. Mr. Abraham spoke to the Workgroup concerning its study of SB 550 last year and the legislation subsequently passed by the General Assembly during the 2023 Session (SB 1313 and HB 2500) implementing recommendations made by the Workgroup on SB 550. He expressed concern that SB 1313 and SB 2500 require contractors on public construction contracts to make payment to their subcontractors within 60 days of completion of their work regardless of whether such a contractor has received payment from the state or local government, as applicable, for such work. He shared that general contractors are concerned about how this requirement would impact them in situations in which they have not been paid by the state or local government and in which there has been no fault on the part of the contractor that would justify the state or local government to withhold such payment. Mr. Abraham stated that he would like to work with the Workgroup on a tweak to the law to address this concern.

Ms. Peeks asked Mr. Abraham whether the issue he described has occurred, or whether he is looking to address this potential situation in the event that it might occur. He stated that it is rare, but it has occurred.

Mr. Shephard, the first stakeholder to comment, spoke to the Workgroup again to clarify that cement is a component of concrete, so while the concrete used on a specific project is usually made locally to a project's location, the cement used in such concrete does not necessarily have to have been produced locally to the project's location.

VIII. Discussion

Mr. Tweedy asked if either VDOT or DGS track how much low carbon concrete they use. Both DGS and VDOT stated that they do not currently track this information.

IX. Adjournment

Mr. Damico adjourned the meeting at 1:53 p.m. and noted that the Workgroup's next meeting is tentatively scheduled for May 23, 2023. He stated, however, that this date may change and that once staff has finalized the meeting date and location such information will be announced to the Workgroup members and stakeholders.

For more information, see the [Workgroup's website](#) or contact that Workgroup's staff at pwg@dgs.virginia.gov.

Appendix C: June 6, 2023 Meeting Materials

This appendix contains the meeting materials from the June 6, 2023 Workgroup meeting.

1. Agenda
2. Approved Meeting Minutes

Public Body Procurement Workgroup

<http://dgs.virginia.gov/dgs/directors-office/procurement-workgroup/>

Meeting # 3

Tuesday, June 6, 2023, 9:30 a.m.

House Room 1

The Virginia State Capitol

1000 Bank Street, Richmond, Virginia 23218

AGENDA

- I. **Call to Order; Remarks by Chair**
- II. **Approval of Meeting Minutes from the May 16, 2023 Workgroup Meeting**
- III. **Update on SB 859**
- IV. **Presentation of Recommendation Options for SB 912**
- V. **Public Comment on Draft Recommendation Options for SB 912**
- VI. **Finalize Recommendation on SB 912**
- VII. **Introduction of the Study of SB 1115 – Procurement Preferences**
- VIII. **Public Comment on SB 1115**
- IX. **Public Comment**
- X. **Discussion**
- XI. **Adjournment**

Members

Department of General Services
Virginia Information Technologies Agency
Department of Planning and Budget
Virginia Association of State Colleges and
University Purchasing Professionals

Department of Small Business and Supplier Diversity
Virginia Department of Transportation
Virginia Association of Governmental Procurement

Representatives

Office of the Attorney General
Senate Finance Committee

House Appropriations Committee
Division of Legislative Services

Staff

Sandra Gill, Deputy Director, DGS
Jessica Hendrickson, Director of Policy and Legislative Affairs, DGS

Approved Meeting Minutes

Public Body Procurement Workgroup

Meeting # 3

**Tuesday, June 6, 2023, 9:30 a.m.
House Room 1
The Virginia State Capitol
1000 Bank Street, Richmond, Virginia 23218**

<http://dgs.virginia.gov/dgs/directors-office/procurement-workgroup/>

The Public Body Procurement Workgroup (the Workgroup) met in-person in House Room 1 in the Capitol in Richmond, Virginia, with Joe Damico, Director of the Department of General Services (DGS), presiding. The meeting began with remarks from Mr. Damico, followed by an update on SB 859, then a review and discussion of recommendations for SB 912, and concluded with the introduction of SB 1115. Materials presented at the meeting are available through the [Workgroup's website](#). A recording of the meeting is available on the [House of Delegates video streaming site](#).

Workgroup members and representatives present at the meeting included Joe Damico (Department of General Services), Joshua Heslinga (Virginia Information Technologies Agency), Lisa Pride (Virginia Department of Transportation), Patricia Innocenti (Virginia Association of Governmental Procurement), John McHugh (Virginia Association of State Colleges and University Purchasing Professionals), Leslie Haley (Office of the Attorney General), Mike Tweedy (Senate Finance and Appropriations Committee), Andrea Peeks (House Appropriations Committee) and Joanne Frye (the Division of Legislative Services). Members from the Department of Small Business and Supplier Diversity and Department of Planning and Budget did not attend.

I. Call to Order; Remarks by Chair

Joe Damico, Director
Department of General Services

Mr. Damico called the meeting to order and shared that members with the Department of Small Business and Supplier Diversity and Department of Planning and Budget are not in attendance.

II. Approval of Meeting Minutes from the May 16, 2023 Workgroup Meeting

Ms. Peeks requested an amendment to the bottom of page six, citing that it appears the last sentence is incomplete. Mr. Heslinga stated that the end of that sentence should include "...questions about scope.". Mr. Heslinga made a motion to approve the meeting minutes from the May 16, 2023 meeting of the Workgroup as amended. The motion was seconded by Mr. Tweedy and unanimously approved by the Workgroup.

III. Update on SB 859

Next, Mr. Damico asked Staff to provide an update on SB 859. Jessica Hendrickson shared with the Workgroup that the Senate provided a letter redirecting the study of SB 859 to the Virginia Code Commission.

IV. Presentation of Recommendation Options for SB 912

Mr. Damico asked Staff to present the two draft conceptual recommendations for SB 912 as a result of the previous meeting. Ms. Hendrickson presented the following two options to the Workgroup.

Draft of Conceptual Recommendation Options for SB 912

Option 1 (specific to information technology)

The Workgroup recommends that the General Assembly consider amending subsection (A)(3) of § 2.2-4302.2 to (i) include language for information technology procurements that prohibits public bodies from basing the scoring or evaluation of which offerors are selected for negotiations on exceptions stated in a proposal to any contractual terms or conditions and that such exceptions shall be considered during negotiation; and (ii) remove existing language for information technology procurements that prohibits public bodies from requiring an offeror to state in a proposal response exceptions to liability provisions in the Request for Proposal.

Option 2 (across the statutory category of goods, nonprofessional services, and insurance, including information technology)

The Workgroup recommends that the General Assembly consider amending subsection (A)(3) of § 2.2-4302.2 to (i) insert language that prohibits public bodies from basing the scoring or evaluation of which offerors are selected for negotiations on exceptions stated in a proposal to any contractual terms or conditions and that such exceptions shall be considered during negotiation; and (ii) remove existing language for information technology procurements that prohibits public bodies from requiring an offeror to state in a proposal response exceptions to liability provisions in the Request for Proposal.

V. Public Comment on Draft Recommendation Options for SB 912

The first and only person to speak was Andrew Lamar, on behalf of the Richmond Technology Council. Mr. Lamar thanked the Workgroup for a very thoughtful and deliberate conversation at the last meeting and expressed his support of the two options presented for SB 912.

VI. Finalize Recommendation on SB 912

Mr. Damico began by asking the Workgroup for comments and feedback on option one as presented to the Workgroup by Staff. Mr. Heslinga stated that this is the one option that received consensus from the Workgroup at the last meeting. John McHugh made a motion to accept option one and Mr. Heslinga seconded the motion. The motion carried by a vote of 5-0¹.

Next, Mr. Damico asked the Workgroup for comments and feedback on option two as presented to the Workgroup, noting that at the last meeting this option was not supported by two members. He asked if the Workgroup would like to discuss moving this option forward. Ms. Pride shared that it is beneficial to be consistent in the Code and this option does that. Ms. Peeks asked if there is concern over how this option would impact other procurements if it were not specific to information technology. Mr. Damico shared that at the last meeting, DGS/DPS presented that requests for proposal procurements do not score on exceptions to terms and conditions, therefore DGS has no concerns if option two were to move forward. Mr. Heslinga shared that the Workgroup has not heard any opposition or concern of negative impacts from option two and shared there is no harm in supporting both options as the patron would determine which one to move forward. Mr. Heslinga made a motion to accept option two in addition to option one and Ms. Pride seconded the motion. The motion carried by a vote of 4-1².

VII. Introduction of the Study of SB 1115 – Procurement Preferences

Ms. Hendrickson provided an introduction to SB 1115 that is before the Workgroup.

VIII. Public Comment on SB 1115

None.

¹ Yes: Ms. Innocenti, Mr. McHugh, Mr. Heslinga, Ms. Pride, Mr. Damico

² Yes: Ms. Innocenti, Mr. Heslinga, Ms. Pride, Mr. Damico; No: Mr. McHugh

IX. Public Comment

None.

X. Discussion

Mr. McHugh confirmed that the review for SB 1115, the Workgroup should review the substitute version. Staff shared that the substitution version incorporated Senator McPike's SB 1176.

XI. Adjournment

Mr. Damico adjourned the meeting at 9:53 a.m. and noted that the Workgroup's next meeting is scheduled for June 27, 2023.

For more information, see the [Workgroup's website](#) or contact that Workgroup's staff at pwg@dgs.virginia.gov.

Appendix D: June 27, 2023 Meeting Materials

This appendix contains the meeting materials from the June 27, 2023 Workgroup meeting.

1. Agenda
2. Meeting Materials
 - a. Presentation by the Department of General Services on Virginia Procurement Preferences
 - b. Presentation by the Virginia Department of Transportation on SB 1115 Conflicts with Federal Law and Impacts on VDOT's Construction Program
3. Approved Meeting Minutes

Public Body Procurement Workgroup

<http://dgs.virginia.gov/dgs/directors-office/procurement-workgroup/>

Meeting # 4

Tuesday, June 27, 2023, 1:00 p.m.

House Room 1

The Virginia State Capitol

1000 Bank Street, Richmond, Virginia 23218

AGENDA

- I. **Call to Order; Remarks by Chair**
- II. **Approval of Meeting Minutes from the June 6, 2023 Workgroup Meeting**
- III. **Presentations by Public Body Stakeholders on Preferences**
DGS, Divisions of Purchases and Supply

Virginia Department of Transportation
- IV. **Public Comment on SB 1115**
- V. **Findings and Recommendations on SB 1115**
- VI. **Public Comment**
- VII. **Discussion**
- VIII. **Adjournment**

Members

Department of General Services

Virginia Information Technologies Agency

Department of Planning and Budget

Virginia Association of State Colleges and
University Purchasing Professionals

Department of Small Business and Supplier Diversity

Virginia Department of Transportation

Virginia Association of Governmental Procurement

Representatives

Office of the Attorney General

Senate Finance Committee

House Appropriations Committee

Division of Legislative Services

Staff

Sandra Gill, Deputy Director, DGS

Jessica Hendrickson, Director of Policy and Legislative Affairs, DGS



Department of **General Services**



Virginia Procurement Preferences

June 27, 2023



Preferences

Virginia Public Procurement Act

- § 2.2-4324: Preference for Virginia in case of tie bid and reciprocal preferences
- § 2.2-4325: Virginia coal in state facilities
- § 2.2-4326: Recycled paper and paper products
- § 2.2-4328: Local products and firms (for localities)
- § 2.2-4328.1: Energy-efficient/water efficient goods
- § 2.2-4328.2: Personal protective equipment



Types of Preferences

Tie Bid Preference

- In the instance of a tie bid – Preference shall be given to goods produced in Virginia, or goods, services or construction provided by Virginia persons, firms or corporations.



Types of Preferences

Absolute Preference

- If the lowest bidder is a resident contractor of another state with an absolute preference, the bid shall not be considered.
- Absolute preference is defined as a state that will only consider bids from resident contractors residing within that state.



Types of Preferences

Percentage Preference

- Whenever the lowest responsive and responsible bidder is a resident of any other state and such state under its laws allows a resident contractor of that state a percentage preference, a like preference shall be allowed to the lowest responsive and responsible bidder who is a resident of Virginia and is the next lowest bidder.



Types of Preferences

Price Matching Preference

- If the lowest responsive and responsible bidder is a resident of any other state and such state under its laws allows a resident contractor of that state a price-matching preference, a like preference shall be allowed to bidders who are residents of Virginia.
- If the lowest responsive and responsible Virginia bidder is unable to match the price, the preference shall be given to other Virginia bidders in ascending price order.



§ 2.2-1111 Preferences

Requires DGS/DPS to establish procurement preferences for:

- Products containing recycled oil and recycled antifreeze (APSPM 3.15.e)
- Biodiesel fuel for use in on-road internal combustion engines and #2 fuel burned in a boiler, furnace, or stove for heating (APSPM 3.15.h)



Policies on Preferences

The DGS/DPS Agency Procurement and Surplus Property Manual (APSPM) provides guidance to executive branch agencies under its purview on preferences in Chapter 3 for the procurement of non-IT goods and non-professional services.

The DGS/DEB Construction and Professional Services Manual (CPSM) provides guidance to executive branch agencies on preferences in Chapter 7 for the procurement of professional services and construction.



SB 1115 - CONFLICTS WITH FEDERAL LAW AND IMPACTS ON VDOT'S CONSTRUCTION PROGRAM

Public Body Procurement Work Group - Meeting # 4
House Room #1, The Virginia State Capitol

| Randy Wintory, Claims & Legal Affairs Manager
VDOT Construction Division

June 27, 2023

Proposed In-State Preferences

- **Virginia Products:**
 - Applies a 7% decrease in the price bid for Virginia products.
 - Limits selection to bids received from manufacturers using materials or components made in VA or US when there are 3 or more such bids.
- **Virginia Bidders:** Allows Virginia bidders to match the actual low bid from out-of-state bidder if bids are within 5% or \$10,000, whichever is less.

Concerns About the Proposed In-State Preferences

- Federal laws prohibit State DOTs that receive Federal Aid from using In-State Preferences.
- Compliance with SB 1115 would put VDOT at risk of losing its Federal Aid for its federally-funded highway projects.
- SB 1115 needs to exclude VDOT from application of the In-State Preferences provided for in SB 1115.
- In addition, clarifications are needed regarding certain other terms and provisions of SB 1115.

Virginia has the 3rd largest state-maintained road system in the U.S.

- 129,500 lane miles of roads consisting of:
 - 5,593 lane miles of Interstate highways,
 - 22,515 lane miles of Primary highways, and
 - 101,392 lane miles of Secondary roads.
- > 21,000 bridges / large culverts
- 4 Underwater / 2 Mountain Tunnels
- 3 ferry services
- 5 Traffic Operations Centers
- 41 Safety Rest Areas and Welcome Centers

VDOT Program Funding

- **The Federal Aid Highway Program (FAHP) is a major source of funding.**
 - FAHP provides financial assistance (Federal Aid) to State DOTs for construction, maintenance and operation of the interstate, primary highways and secondary local roads.
 - The Federal Highway Administration (FHWA) is charged with implementing and administering FAHP.

VDOT Programs Funded With Federal Aid Funds

PROGRAMS

Ground Transportation Planning & Research (602)

Highway Construction Programs (603)

Highway System Maintenance (604)

Financial Assistance to Localities (607)

Non-Toll Supported Transportation Debt Service (612)

Significance of Federal Aid Funding for Highway Construction

FY 2022 Highway Construction Programs

- **\$3.3 Billion** - Allocated to Highway Construction Programs
- **353** – Number of Construction Contracts Awarded
 - 299 (85%) awarded to VA contractors
- **\$1.5 Billion** – Value of Contracts Awarded
 - **278** – Federally Eligible Contracts
 - **\$1.3 Billion** – Value of Federally Eligible Contracts

Note: FY 2022 was a typical year

Federal Law & Regulations on Preferences

- **23 U.S.C. 112 – Letting of contracts** – Construction contracts must be awarded on the basis of the lowest responsive bid.
- **23 CFR 1.36 - Compliance with Federal Laws & Regulations** – Authorizes FHWA to withhold funds if they determine that a State has violated or failed to comply with the Federal Aid laws or regulations.
- **23 CFR 635.112 - Letting of contracts** - Bidding procedures must be non-discriminatory regardless of National, State or local boundaries. Contrary State laws are not applicable to Federal Aid projects.
- **23 CFR 635.114 - Award of contract & concurrence in award** - Federal-aid contracts must be awarded only on the basis of the lowest responsive bid.
- **23 CFR 635.409 - Restrictions upon materials** – Prohibits the use of price differentials in favor of In-State articles or materials produced, or discrimination against Out-of-State articles or materials.

In-State Preferences are Prohibited on Federal Aid Contracts

FHWA Guidance on State Preferences

Applicability: All Federal Aid highway construction projects.

Background: In order to maximize competition for projects, FHWA prohibits the use of in-State preferences in the selection of contractors, materials, or labor.

Guidance: The [State DOT] shall not impose any requirement or enforce any procedure which requires the use of, or provides a price differential in favor of contractors, labor, articles or materials produced within the State. This includes requirements that prohibit, restrict, or discriminate against the use of articles or materials shipped from or prepared, made, or produced in any State, territory, or possession of the U.S.

Basically, labor and materials produced within a State shall not be favored to the exclusion of comparable labor and materials produced outside of the State. State preference clauses give particular advantage to the designated source and thus restrict competition. Therefore, State preference provisions shall not be used on any Federal-aid construction projects.

In-State Preferences are Prohibited on Federal Aid Contracts

FHWA has made clear that State Preferences are contrary to the Federal Aid Program and sufficient to cause Federal Aid funding to be withheld:

- A Montana legislator proposed legislation that would restrict Canadian contractors from bidding on Federal Aid highway projects.
- Responding to an inquiry about it, FHWA issued a memorandum stating:
“Should the draft legislative proposal be enacted ... and such language be included in future Federal-aid contract provisions, [FHWA] would consider Montana to be in violation of [applicable Federal] law and regulations ... This would give the FHWA no option but to suspend Montana's authority to obligate Federal-aid funds, until such time as compliance with Title 23 has been reestablished. ...

FHWA Memorandum re Montana/Canadian Contract Issues, Ref. HNG-22 (Feb. 9, 1999)

Compliance with SB 1115

- **VDOT would be at risk of losing \$1 Billion or more annually in Federal Aid unless its Federally-funded highway projects are excluded from application of the preferences provided for in SB 1115.**
- **Other States with In-State Preferences have such exclusions.**

EXAMPLES OF EXCLUSIONS

SOUTH CAROLINA:

- ***“(3) Compliance with Federal Requirements. ... except to the extent such action would render the governmental body ineligible to receive federal funds whose receipt is conditioned on compliance with mandatorily applicable federal law. ...” S.C. Consolidated Procurement Code Section 11-35-40.***

TEXAS:

- ***“CONTRACT INVOLVING FEDERAL FUNDS. This subchapter [regarding non-resident bidders on contracts with governmental entities] does not apply to a contract involving federal funds.”***
TX Govt. Code § 2252.004.

WEST VIRGINIA:

- ***“(3) If any of the requirements or provisions set forth in this section jeopardize the receipt of federal funds, then the requirement or provisions are void and of no force and effect for that specific project.”***
W. Va. Code 5A-3-37(c)(3).

OTHER STATES WITH EXCLUSIONS INCLUDE:

California, Colorado, Hawaii, Michigan, Missouri, Mississippi, Montana, Nebraska, Oklahoma, Vermont, and Wyoming

Additional Concerns

Ambiguities

15 "End product" means the tangible product described in a solicitation for bids, including its
16 component parts and its final form.
17 "Grown" means locally derived from any timber, agricultural product, aquaculture product, or
18 livestock that is produced, cultivated, raised, or harvested upon the land or from the water.
19 "Made" or "manufactured" means assembled, fabricated, or processed into an end product, the price
20 of which is substantially related to the cost of such assemblage, fabrication, or processing.
21 ["Principal place of business" means the physical business location where the natural persons who
22 direct, control, and manage the business's day-to-day operations are located.]
23 "U.S. end product" means an end product made, manufactured, or grown in the United States.
24 "Virginia business" means a business that maintains a principal place of business within Virginia.
25 "Virginia end product" means an end product made, manufactured, or grown in Virginia.
26 B. In determining the award of any contract for goods, services, or construction, preference shall be
27 given to Virginia end products and to Virginia businesses or Virginia residents, as applicable, in
28 accordance with this section.
29 C. When evaluating bids for purposes of making an award determination, a state public body shall
30 decrease the price of any bid offered (i) for a Virginia end product, by seven percent and (ii) for a U.S.
31 end product, by two percent. If the lowest responsive and responsible bidder, [after price preferences
32 have been taken into account,] who is a [resident of Virginia] is within five percent or \$10,000, whichever
33 is less, of the lowest responsive and responsible bidder who is a [resident of another state,] then the
34 bidder who is a [resident of Virginia] shall be granted the option to match the price of the bidder who is
35 a [resident of another state.]

1. Defined terms not clear – “principal place of business” could mean different things.
2. Combined In-State Preferences would not be feasible for procurement of State-funded construction contracts. Contract prices are for installation of products/material incl. labor, material, and equipment. Hundreds of products / materials could be used. For construction, only the in-state bidder preferences would be feasible.
3. Undefined terms – “resident of Virginia” and “resident of another state” are not defined in Subsection A (Lines 15-25). “Principal place of business” is defined, but not used.

CONCLUSION

The following are considerations that VDOT would offer:

- That SB 1115 be amended to ensure that the In-State Preferences do not apply to Federally-funded contracts or do not apply if Federal Aid for VDOT's Federally-funded programs would be jeopardized.
- That for State Funded construction contracts, the In-State Bidder Preference be the only preference applied to the award of construction contracts.
- That “resident of Virginia” be replaced with “Virginia business”
- That “principal place of business” be replaced with “principal office” per Va. Code Title 13.1.

QUESTIONS?

Randall Wintory

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Approved Meeting Minutes

Public Body Procurement Workgroup

Meeting # 4

Tuesday, June 27, 2023, 1:00 p.m.

House Room 1

The Virginia State Capitol

1000 Bank Street, Richmond, Virginia 23218

<http://dgs.virginia.gov/dgs/directors-office/procurement-workgroup/>

The Public Body Procurement Workgroup (the Workgroup) met in-person in House Room 1 in the Capitol in Richmond, Virginia, with Joe Damico, Director of the Department of General Services (DGS), presiding. The meeting began with remarks from Mr. Damico, followed by two presentations on preferences, public comment, and concluded with discussion among the Workgroup members. Materials presented at the meeting are available through the [Workgroup's website](#). A recording of the meeting is available on the [House of Delegates video streaming site](#).

Workgroup members and representatives present at the meeting included Joe Damico (Department of General Services), Joshua Heslinga (Virginia Information Technologies Agency), Lisa Pride (Virginia Department of Transportation), Patricia Innocenti (Virginia Association of Governmental Procurement), John McHugh (Virginia Association of State Colleges and University Purchasing Professionals), Leslie Haley (Office of the Attorney General), Jason Saunders (Department of Planning and Budget), Willis Morris (Department of Small Business and Supplier Diversity) and Rebecca Schultz (the Division of Legislative Services). Members from the Senate Finance and Appropriations Committee and House Appropriations Committee did not attend.

I. Call to Order; Remarks by Chair

Joe Damico, Director
Department of General Services

Mr. Damico called the meeting to order and shared that Rebecca Schultz is in attendance for the Division of Legislative Services and that members with the Senate Finance and Appropriations Committee and House Appropriations Committee are not in attendance.

II. Approval of Meeting Minutes from the June 6, 2023 Workgroup Meeting

Mr. Heslinga made a motion to approve the meeting minutes from the June 6, 2023 meeting of the Workgroup. The motion was seconded by Mr. Morris and unanimously approved by the Workgroup.

III. Presentations by Public Body Stakeholders on Preferences

As presentations began, Senator DeSteph joined the meeting and Mr. Damico invited him to speak to the Workgroup about SB 1115 before continuing with presentations. Senator DeSteph shared that his goal is to do what other states are doing by providing preferential treatment for Virginia owned-businesses. He stated that Maryland, West Virginia, and many other states around us currently have in-state preferences for businesses. He shared that in addition to pushing for products made in Virginia, he also is pushing for products made in America. He informed the Workgroup that his bill is a simple bill and everyone except one or two people support it.

Mr. Damico inquired about a possible amended version of SB 1115 and asked if Senator DeSteph planned to present such to the Workgroup. Senator DeSteph stated that he is aware of an amended version, however the Governor's team was supposed to send it for review and has not as of before this meeting started.

Next, Pete Stamps, the Director of DGS's Division of Purchases and Supply, gave a presentation to the Workgroup about current procurement preferences in the Code of Virginia and in policy. Mr. Stamps provided an overview of the following preferences in the Virginia Public Procurement Act (VPPA); tie bid, absolute, percentage, and price-matching. He continued his presentation noting that in DGS' enabling legislation, DGS/DPS is required to establish procurement preferences for recycled oil, recycled antifreeze, and biodiesel fuel. Mr. Stamps concluded his presentation sharing that the Agency Procurement and Surplus Property Manual (APSPM) and the Construction and Professional Services Manual (CPSM) provide guidance to executive branch agencies on preferences.

John McHugh asked how executive orders fit into preferences, specifically EO-35 the small business executive order. Mr. Stamps stated that EO-35 is another preference in addition to the existing preferences in the Code. Mr. Damico asked if institutions of higher education and local governments are subject to the sections of the Code that Mr. Stamps referenced in his presentation. Mr. Stamps responded by stating that institutions of higher education are not subject to those sections of the Code and Patti Innocenti shared that local governments, depending on their ordinances, may not be required to follow these sections of the Code.

Prior to moving to the second presentation, Senator DeSteph shared that he received the proposed amendments to SB 1115 and gave a brief overview, stating that he does not

have any major issues with the draft but would like time to more carefully review the draft prior to commenting.

Next, the Workgroup heard a presentation from Randy Wintory with the Virginia Department of Transportation (VDOT). Mr. Wintory presented on SB 1115 and the impact it would have to VDOT, specifically federally funded transportation projects. He noted that the bill creates geographical preferences and discriminates on the basis of the locality, which is concerning for VDOT because federal laws prohibits use of such in-state preferences in order to obtain Federal aid for highway projects.

Mr. Wintory continued his presentation with an overview of VDOT funding programs, focusing on highway construction funding. He stated that in FY22 VDOT allocated \$3.3 billion to highway construction projects and 85% of those were awarded to Virginia contractors. He added that each year VDOT receives approximately \$1 billion in federal funding to assist with highway construction projects that VDOT would be at risk of losing if SB 1115 were in place. Mr. Wintory provided federal law and regulation citations that prohibit the use of preferences on federally funded projects. He shared a brief listing of other states that exclude federal funded projects from preference requirements, such as South Carolina, Texas, and West Virginia. Mr. Wintory concluded his presentation with additional concerns regarding ambiguities in SB 1115 language, pointing out terms that are unclear or undefined.

Mr. Morris asked for explanation on the difference between resident of Virginia versus Virginia business in SB 1115. Mr. Wintory stated that the terminology used in subsection C of the bill is confusing because of the use of the undefined term “resident of Virginia” instead of using the defined term “Virginia businesses”. Mr. Damico asked if other federal money going to other agencies would be impacted by the bill? Mr. Wintory shared that other states statutes are broad and unclear on the application of preferences when using non-state funding and he would suggest that Virginia be clear about the application of preferences and funding sources. Ms. Innocenti shared that based on her research with FEMA grants, there is a prohibition of using preferences with FEMA funds.

IV. Public Comment on SB 1115

Trenton Clarke, President of the Virginia Asphalt Association, was the only stakeholder to speak. He shared that overall they are supportive of buying Virginia products but expressed concern over the impact of preferences to federal funded projects. Mr. Clarke explained the process of recyclable materials in the asphalt process and focused his comments on the second enactment clause of SB 1115, speaking to Virginia’s recyclable materials tax credit asking that consideration be given to expanding this tax credit. He explained that allowing the use of more recyclable materials reduces cost and helps asphalt plants reduce their carbon footprint. He further explained that the tax credit applies only to asphalt recycling done at a fixed facility and does not account for the evolution of equipment which allows recycled material use in asphalt at project sites. He

concluded his remarks restating the importance of revisiting the recycle tax credit by allowing it to be applied to equipment used at project sites.

V. Findings and Recommendations on SB 1115

Next, Mr. Damico began by asking Staff to confirm if the bill as written impacts institutions of higher education or local government. Ms. Gill stated that the bill would not apply to institutions of higher education operating under management agreements, nor would it apply to local governments that are exempt from the VPPA.

Mr. Heslinga shared that preferences are not generally a part of VITA's information technology procurements as VITA does not generally use competitive sealed bidding to procure IT goods. He stated that most IT procurements inherently involve a large amount of services and require awarding based on more than just price, therefore VITA utilized the competitive negotiation procurement process most often. He concluded his remarks by stating that many IT goods involve a lot of components and depending on how preferences would be structured and applied since not all components may come from Virginia or the USA we could see more protests on IT procurements.

Ms. Innocenti stated that VAGP believes local preference policies are in conflict with the principles of the VPPA and prevent full and open competition. She noted that the VPPA has a provision for best value and depending on the procurement, the locality could introduce a preference as a best value concept.

Mr. Saunders asked for clarification on how preferences are applied using the example that if another state has an in-state preference, does Virginia reciprocate? Mr. Stamps replied that yes, Virginia does reciprocate and would then apply that same preference to Virginia bidders.

Next, Mr. Damico shared that the VPPA currently has a procurement preference in the case of a tie-bid explaining that in the case of a tie-bid, the award would go to a Virginia business. Mr. Damico stated that with the existing tie-bid language, the interest in providing opportunities to Virginia businesses by Senator DeSteph, and the desire to ensure public bodies obtain the best price for goods being procured, he would like to consider something that would address the interests stated while ensuring the Commonwealth gets the best value. He shared that while preferences could impact price, could there be an approach whereby if a state agency issues a bid for a good and an out-of-state business is the lowest responsive and responsible bidder, is there harm in allowing the Virginia business the opportunity to price match the low bid of the out-of-state business?

Mr. Damico asked VDOT if this type of preference would impact federally funded projects. Mr. Wintory stated that he believes it would because you would not be initially awarding to the low bidder. Ms. Pride included that this preference could be applied to state-funded projects, however she is unsure how that would impact competition overall and if out-of-state vendors would not want to participate due to the preference.

Mr. McHugh added that certain terms need to be defined in SB 1115, such as Virginia made products, if implementing SB 1115. He stated that it would be helpful to require the Virginia firm to certify they are in fact a Virginia firm on the bid.

Mr. Damico concluded by asking the Workgroup to provide Senator DeSteph an opportunity to review the draft language he received while at the meeting and to allow the Workgroup additional time to consider the information discussed today.

VI. [Public Comment](#)

None.

VII. [Discussion](#)

None.

VIII. [Adjournment](#)

Mr. Damico adjourned the meeting at 2:03 p.m. and noted that the next Workgroup meeting is scheduled for July 18, 2023 at 9:30 a.m. in the House Committee Room located in the Pocahontas Building.

For more information, see the [Workgroup's website](#) or contact that Workgroup's staff at pwg@dgs.virginia.gov.

Appendix E: July 18, 2023 Meeting Materials

This appendix contains the meeting materials from the July 18, 2023 Workgroup meeting.

1. Agenda
2. Approved Meeting Minutes

Public Body Procurement Workgroup

<https://dgs.virginia.gov/dgs/directors-office/pwg/>

Meeting # 5

Tuesday, July 18, 2023, 9:30 a.m.

House Committee Room

Pocahontas Building

900 E. Main St, Richmond, Virginia

AGENDA

- I. **Call to Order; Remarks by Chair**
- II. **Approval of Meeting Minutes from the June 27, 2023 Workgroup Meeting**
- III. **Update on SB 1115**
- IV. **Presentation on SB 954**

*Virginia Contractor Procurement Alliance, on behalf of The Honorable J. Chapman Petersen, Patron
Senate of Virginia*

- V. **Public Comment on SB 954**
- VI. **Public Comment**
- VII. **Discussion**
- VIII. **Adjournment**

Members

Department of General Services
Virginia Information Technologies Agency
Department of Planning and Budget
Virginia Association of State Colleges and
University Purchasing Professionals

Department of Small Business and Supplier Diversity
Virginia Department of Transportation
Virginia Association of Governmental Procurement

Representatives

Office of the Attorney General
Senate Finance Committee

House Appropriations Committee
Division of Legislative Services

Staff

Sandra Gill, Deputy Director, DGS
Jessica Hendrickson, Director of Policy and Legislative Affairs, DGS

Approved Meeting Minutes

Public Body Procurement Workgroup

Meeting # 5

Tuesday, July 18, 2023, 9:30 a.m.

House Committee Room

The Pocahontas Building

900 E. Main Street, Richmond, Virginia 23219

<https://dgs.virginia.gov/dgs/directors-office/pwg/>

The Public Body Procurement Workgroup (the Workgroup) met in-person in the House Committee Room in the Pocahontas Building in Richmond, Virginia, with Joe Damico, Director of the Department of General Services (DGS), presiding. The meeting began with remarks from Mr. Damico, followed by an update on SB 1115, a presentation on SB 954, public comment and concluded with discussion among the Workgroup members. Materials presented at the meeting are available through the [Workgroup's website](#). A recording of the meeting is available on the [House of Delegates video streaming site](#).

Workgroup members and representatives present at the meeting included Joe Damico (Department of General Services), Lisa Pride (Virginia Department of Transportation), Patricia Innocenti (Virginia Association of Governmental Procurement), John McHugh (Virginia Association of State Colleges and University Purchasing Professionals), Leslie Haley (Office of the Attorney General), Jason Saunders (Department of Planning and Budget), Willis Morris (Department of Small Business and Supplier Diversity), Joanne Frye (the Division of Legislative Services), Kim McKay (House Appropriations Committee), and Mike Tweedy (Senate Finance and Appropriations Committee). A member from the Virginia Information Technologies Agency (VITA) did not attend.

I. Call to Order; Remarks by Chair

Joe Damico, Director
Department of General Services

Mr. Damico called the meeting to order and shared that Josh Heslinga with the VITA is not in attendance.

II. Approval of Meeting Minutes from the June 27, 2023 Workgroup Meeting

Mr. Morris made a motion to approve the meeting minutes from the June 27, 2023 meeting of the Workgroup. The motion was seconded by Mr. Saunders and unanimously approved by the Workgroup.

III. Update on SB 1115

Mr. Damico shared with the Workgroup that further discussion on this bill will be held at the next meeting scheduled for August 8, 2023.

IV. Presentation on SB 954

Mr. Damico began by informing the Workgroup that Senator Petersen is unable to attend to introduce SB 954 to the Workgroup, however, Senator Petersen requested the Virginia Contractor Procurement Alliance (VCPA) speak on his behalf.

Tony Biller, President and CEO of Nielsen Builders, Inc. spoke on behalf of the VCPA to the Workgroup. Mr. Biller shared with the Workgroup that the VCPA was formed almost more than a decade ago to look at procurement issues and is comprised of general contractors, ranging from \$20 million to \$100 million dollars which are considered mid-size contractors, and some subcontractor members. He stated that VCPA was formed because around 2008 – 2010, almost all construction projects were procured via competitive sealed bidding and that began to change with the allowance of alternative procurements. Mr. Biller stated that his focus is primarily on universities, however the problem he will describe is now moving into the public sector and other projects. He explained that competitive sealed bidding is when the owner hires an architect to design a project for an intended use and once the design is complete, the project is put out to bid on the open market, then the lowest bidder wins the project.

He explained that the original concept for alternative procurements was for projects that are unique and required a different method other than low bid, so construction management (CM) and design-build (DB) were created. He provided two examples of when CM would be appropriate to use, (i) a \$150 million athletic facility, or (ii) a rotunda that needs renovation where specific historic experience from the contractor who would handle this project is needed.

Mr. Biller stated that his group is not against CM as a concept, however they are concerned about the overuse of CM. He shared that several years ago, the Joint Legislative Audit and Review Commission (JLARC) did a study about procurement and in the study it stated that competitive sealed bidding is the only way to ensure the best quality and best price. Mr. Biller shared that CM, for the taxpayers, is not necessarily the best value or the lowest price.

Mr. Biller continued by providing two reasons why he believes everyone wants to use alternative procurement methods over competitive sealed bidding; (i) it is easy because you just issue a request for proposals or request for qualifications and then choose which vendor you want because competition isn't the driving force and contractors are chosen based on their resume and, (ii) it saves time because first a study is done, then the concept, then ask the state for money for design, hire a designer, design the project, then ask the state for construction money, then there is a two-three year construction period, concluding that this process is easily a five year process at best. He stated the claim being made that using CM saves time is a weak argument, however, he provided a hypothetical case of a federal requirement that all buildings be ADA accessible within six months is a good example for the use of CM because of the time constraint.

Mr. Biller provided the Workgroup an explanation on "complexity", stating that anything can be complex, and that complexity is hard to define. He shared that he does not believe a dorm, recreation facility, or a firehall, should be considered complex, however a rotunda renovation or a \$125 million research facility, may be considered complex. He stated that some universities make the claim that because something is on campus that makes it complex, however, every job at the university is on campus which would make everything complex.

Mr. Biller addressed change orders to the Workgroup. He explained the process for design-bid-build (DBB) as, first design the project, then bid the project, then build the project. Mr. Biller explained that change orders are generated by the owner when the owner or architect want to change something, left something out of the project, or an unknown was discovered, but not because the contractor left something out in their bid. He explained that CM projects have change orders and with a CM contract there is a contingency included that is often millions of dollars so when change orders are needed, they are funded from the contingency.

Mr. Biller explained that the pandemic and supply chain challenges are being cited as reasons to use CM. He shared that pre-pandemic equipment orders were filled quickly and now it is taking months or even years without explanation to fill orders. He stated that some claim that using CM will cure or help this problem but eliminating competition by using CM allows contractors to raise their prices.

Next, Mr. Biller began his PowerPoint presentation to the Workgroup and shared that his company has over 100 years of experience working at a university campus where his company built over 100 projects using the competitive sealed bid process. He shared that when the university began using alternative procurement methods his company was told that they are qualified but not as qualified as another company to work on buildings that his company built. He shared that this situation is not unique to his company. Mr. Biller explained that he started gathering procurement data over \$5 million from the universities and is beginning to gather the same data from cities and counties. He explained that he chose the \$5 million project amount because most universities use the bid process for projects valued under \$5 million.

Mr. Biller pointed to data on his PowerPoint presentation, stating that some may claim the data presented today is wrong and that 60-80% of the projects are bid out, which is true, but those projects are under \$5 million. He shared that when you look at dollars spent, the numbers are very different and the information on the presentation is for capital projects over \$5 million. Mr. Biller pointed out that over the last 13 years there had been \$6.3 billion spent on construction projects at Virginia universities and \$5.9 billion of that was procured using alternative methods, not competitive bidding. He added that he has the raw FOIA data used to develop the information being shared today and he brought paper copies for the Workgroup. He stated that in the last ten years the use of alternative procurements has gotten pervasively worse and the 2021 data shows there are no projects bid. He further explained the first slide, stating that of the 262 projects over \$5 million only 42 were competitively bid, noting that 10 contractors received awards using alternative methods. He shared that two contractors did one-third of the work and had these projects been competitively bid, there is no way this would have happened. Mr. Biller finished the first slide stating that if companies like his, and others, would have been allowed to compete then a lot more people would have gotten opportunities that the mid-size companies have been eliminated from.

Next, Mr. Biller presented slides that focused on three universities construction spend. Before explaining the data on the first university, James Madison University, he informed the Workgroup that his company has built over 100 buildings at JMU and recently finished a \$15 million project there. He stated that JMU spent \$789 million on construction and only 8.2% was competitively bid, adding that the three contractors that received 57% of the total money spent are capable of bidding on projects rather than being subjectively awarded projects. Mr. Biller presented data on Old Dominion University (ODU) and William and Mary (WM), stating that ODU spent \$327 million on construction and only 4.8% was competitively bid, and WM spent \$656 million on construction and none of those projects were competitively bid.

Mr. Biller presented a slide that listed the top ten contractors by earnings between 2008-2021 and noted that his company ranks around 15th. He stated that a lot of universities, when asked why they use CM, they respond “because its allowed and we like it”. He shared that his company has done CM projects at University of Virginia (UVA) and at JMU and he would do another CM project tomorrow because he makes more money on CM projects than bid projects.

Next, Mr. Biller addressed cost and the argument that the CM method saves money. He shared that legislators have asked him to compare the most recent dormitory project that was bid to a dormitory project that was CM and he cannot do the comparison because a dormitory project has not been bid in 15 years. He shared that the City of Richmond raised meals taxes to build four new schools in the last couple of years and because the City used CM rather than the competitive bid process the City was able to only build three schools.

Mr. Biller shared with the Workgroup that DGS keeps a listing of what construction is supposed to cost on their website which is updated each year. He stated that he sampled

four dormitory projects comparing the cost of the project to the DGS listing of project costs and he calculated that the four projects cost almost \$56 million more than they should have cost. Mr. Biller pointed to the next slide that outlined recent municipal projects that are being procured using CM, such as schools, towers, and police stations.

Mr. Biller concluded his remarks speaking to SB 954. He stated that the bill had what he believed was the best solution and that it boils down to a couple of things that the legislation addressed; (i) projects over \$125 million are most likely large and complex so use whatever procurement method you want, (ii) complexity and all factors that a waiver is needed for in the cases where projects are under \$125 million and should be done CM. He also addressed the purpose of the preconstruction services language in the bill stating that public bodies should be able to hire for those services but after those services are complete, the project goes out to bid.

Mr. Damico thanked Mr. Biller for his presentation on behalf of VCPA and Senator Petersen and asked if the Workgroup members have any questions.

John McHugh asked Mr. Biller who did the analysis of the FOIA data collected? Mr. Biller stated that the analysis was done internally at Nielsen.

Mr. McHugh asked Mr. Biller why \$5 million and above was selected for projects to analyze if the capital project threshold during this timeframe was \$2 million? Mr. Biller explained that there was nothing magical about the \$5 million other than trying to exclude non-capital projects like sewer projects and smaller projects that are typically bid.

Mr. McHugh asked if the JLARC study that Mr. Biller referenced is the 2016 JLARC study and asked that the Workgroup look at the study. Mr. Biller shared that there is a table in the report that states the only method that is best quality and lowest price is design-bid-build.

Mr. McHugh asked Mr. Biller about his statement that CM is destroying small and mid-size businesses and asked if that is from Mr. Biller's perspective or from the small/women/minority community? Mr. Biller responded that a mid-size contractor cannot get through the filters of the complex packages to get any work sharing that only the large companies get the work.

Mr. McHugh asked Mr. Biller about the data he presented and if he was successful in changing law in 2018? Mr. Biller responded that yes, the law has changed but it hasn't fixed the problems. Mr. McHugh followed stating that the data should be looked at since the 2018 law change.

Mr. McHugh concluded by asking Mr. Biller what the bonding capacity of his company is. Mr. Biller stated that their single contract is \$150 million and cap is \$200 million.

V. Public Comment on SB 954

Next, the Workgroup heard public comment from stakeholders on SB 954, first hearing comments from the stakeholders in support of SB 954.

The first stakeholder to comment in support of SB 954 was Jack Dyer, owner of Gulf Seaboard General Contractors, a certified minority and small business for over 42 years. He first provided an overview of his company experience stating that he has built projects over \$100 million such as schools, courthouses, complex projects, new buildings, old buildings, and multi-phased projects. Mr. Dyer shared that prior to CM being used his company did multiple projects with Mary Washington, Virginia Commonwealth University, Virginia State University, and J. Sargeant Reynolds Community College and was very successful, however, once the use of CM began, he was told that his company is qualified to do the work but did not score high enough compared to the multinational companies. Mr. Dyer stated that it is a shame to have to fight for business with our own government and that the elected representatives seem determined to put medium size businesses out of business with their actions, not maliciously but because they do not know any better. He stated that SB 954 is not a repeal of the present code and that it is adjusting the code to allow maximum feasible competition and open access. He stated that the changes to the Virginia Public Procurement Act (VPPA) over the decades has brought on negative aspects and as such, has returned us to a pre-1982 procurement condition with no respect for the code, no uniform policies, no standards, application conflicts between public bodies, favoritism, and questionable corruption. Mr. Dyer shared that small and medium size companies and subcontractors are in jeopardy of going out of business. He stated that the VPPA principles are that public procurement is characterized by competitive bidding because the public perceives that this method ensures equal access to public business, provides control over contracting officials, and implies cost savings, and clearly establishes competition. He concluded his remarks by addressing an earlier question posed by Mr. McHugh, who asked why companies do not partner with larger companies on CM projects to gain more experience. Mr. Dyer asked why he should have to partner on a project he is clearly capable of doing, providing an example of a \$105 million high school bid project that his company completed on time. Mr. McHugh asked Mr. Dyer the bonding capacity of his company, to which Mr. Dyer shared about \$155 million for single projects and about \$200 million aggregate. Mr. McHugh asked if Mr. Dyer recently won an award with VCCS, to which Mr. Dyer stated yes.

The second stakeholder to speak was Todd Morgan, the president and owner of MB Contractors, a 111 year old company. He began his remarks sharing that his company has completed K-12 projects, millions of square feet, across Virginia. Mr. Morgan pointed to the PowerPoint presentation VCPA shared earlier, specifically Roanoke County and Roanoke City, stating that his company has done work for both and now they are moving towards more CM projects. He stated that he has partnered with CM's before on projects and on numerous occasions he spends his time trying to keep the CM from hiring his employees, asking why he would want to partner with someone when he can do the work himself. He concluded his remarks by stating that if the Workgroup truly cares about

competition in procurement and tax dollars, take this issue seriously. Mr. McHugh asked Mr. Morgan what his company bonding capacity is, to which Mr. Morgan stated \$50 million for single projects and \$80 million for combined.

The third stakeholder to speak was Cindy Shelor, owner of John T. Morgan Roofing and Sheet Metal Company, a 90-year-old company. She stated that she is a subcontractor, and competitiveness is not there in CM projects. She supports this legislation and Virginia Association of Roofing Professionals also supports this legislation. She concluded her remarks stating that there needs to be fair and open procurement in all aspects when tax dollars are spent. Mr. McHugh asked Ms. Shelor what her company bonding capacity is, to which Ms. Shelor stated less than \$10 million on single projects because she is a subcontractor.

The fourth stakeholder to speak was Jack Avis, owner of Avis Construction. He began by stating that his company has completed projects at Virginia Military Institute, VA Tech, Radford, and several Community colleges but have been shut out of those projects and now K-12 projects are using CM and PPEA. Mr. Avis shared that it is unique that so many from Roanoke are here today, stating that it is because businesses out there are getting destroyed due to not as much work out that way. He stated he was told that his company was not qualified to renovate a building that his company previously built and this is destroying more than just general contractors, it's hurting subcontractors, architects and engineers, insurance companies, bonding companies, etc. He continued by stating that he wants to know why these projects can't be bid out and hire a pre-construction consultant then bid the project, sharing that he renovated a major high school project bid, valued at \$37 million during COVID that was shut down for two weeks and still finished on time. Mr. McHugh asked Mr. Avis what is company bonding capacity is, to which Mr. Avis stated \$80 million for single projects and \$110-\$120 million aggregate.

The fifth stakeholder to speak was Tom Evans of Southwood Building Systems. He shared that he started the company 48 years ago and built the company on competitive sealed bidding. He shared that his company has been hurt by the use of CM. He stated that today, there are 4-5 projects out as CM projects that are \$15 million, so no one is paying attention to the regulations and the local governments and higher education say they do not care because it is their money and they will spend it how they want. He concluded his remarks stating that there is no reason why these projects cannot be bid. Mr. McHugh asked Mr. Evans what his company bonding capacity is, to which Mr. Evans stated \$75 million for single projects and \$125 million aggregate.

The sixth stakeholder to speak was Sam Daniel, primary owner of Daniel and Company. He stated that he has grown his business through competitive sealed bid work sharing that around the 2008-2010 timeframe is when he began to see his work at the universities diminish. Mr. Daniel echoed the previous comments made and stated that CM and alternative procurement methods have negatively impacted business over the years, and he hopes that a change can be made. He concluded his remarks by providing the bonding capacity of his company, stating that it is \$30 million for single projects and \$60 million

aggregate. Mr. McHugh asked Mr. Daniel if his company has a term contract with VCU, to which Mr. Daniel responded yes and that he just submitted for one at UVA.

The seventh stakeholder to speak was Matt Benka with the VCPA. He shared that their membership is significantly larger than just the companies that spoke today and their membership is comprised of midsize general contractors. He stated that they have been shut out of the market for over a decade and a half and he hopes they have proven that today. Mr. Benka stated that it is important to remember that this is the states money that the colleges are spending and are overspending dramatically as shown with DGS data and contracts are being given to a handful of contractors.

Mr. Damico thanked Mr. Benka and his members for coming today and testifying, stating that he would like a better understanding on some of the testimony today, specifically regarding his members being told they are not qualified to do the work because if a company has been in business for 40 years or 111 years, they have the experience to do the work. Mr. Damico asked Mr. Benka to share what the public bodies are saying to the contractors when being told they are not qualified to do the work. Mr. Benka stated that is a hard question to answer because this happened all of a sudden when procurement officers realized they can pick whichever contractor they want. Mr. Benka explained that his members would receive letters saying they are not as qualified as the larger companies or being told that they are not qualified enough to get out of the prequalification phase on buildings they constructed themselves.

Next, the Workgroup heard comments from stakeholders in opposition to SB 954.

The first stakeholder to speak was Rich Sliwoski, Vice President of Facilities Management at VCU. He began his remarks by reading an excerpt from Nielsen's website, which he said describe the benefits of using CM. Mr. Sliwoski shared regarding time on projects, that every month a project is delayed, it costs an additional million dollars and early release packages are only available with CM. He stated that when using low bid the agency has no oversight into the project management team assigned to the project, which could include someone who has never worked on the type of project. He stated that auxiliary funds are not funds from the state, instead they are funds from housing revenues and philanthropic efforts. Mr. Sliwoski stated for housing projects, there is a time schedule that has to be met and CM is the best for providing that. Mr. Sliwoski addressed contingency funds on CM projects and explained if the contingency funds are not used then the funds are returned back to the owner, adding that with his last four projects, he has returned \$8 million back to the Commonwealth. He shared that under design-bid-build, that contingency is retained in the pocket of the contractor. Mr. Sliwoski shared that at the Virginia Community College System (VCCS), there have been 33 opportunities out, and 30 of those are bids. He stated that CM came about in the early 2000's when concerns arose about minority contractors being frozen out, and CM has done away with this by expanding to all aspects of the community. Mr. Sliwoski concluded his remarks by stating that Century Construction, who he believes is a member of VCPA, has been given 27 opportunities to bid from VCU in the last year and VCU has received no responses.

The second stakeholder to speak was Brandon Robinson of Associated General Contractors of Virginia (AGCVA), the construction association that represents 500 companies and 300 contractors in Virginia. He shared that some members support the bill and members oppose the bill, however they oppose the bill as it was introduced. Mr. Robinson stated there has been compelling testimony today about the need for change because the market is skewed, but the market is not skewed. He stated that earlier it was brought up that in 2018 the statute changed and requires DGS to submit annual reports for projects \$2 million and greater, which was part of the compromise in 2018, and the data since 2018 by projects and amount, the majority are DBB (60-70%). Mr. Robinson stated that CM is an important tool in the toolbox and the JLARC report is a great resource that explains how CM is advantageous. He shared that he submitted written comments for consideration by the Workgroup, if the Workgroup decides a change is needed. He stated that AGCVA compiled a small group of their members with an equal number of people that support the bill and oppose the bill to come to common ground compromise. He finalized his remarks by pointing out the considerations for review, (i) procurement qualifications should be based on construction experience, no project delivery method, (ii) complexity of the project should be the primary determining factor for using alternative methods, and (iii) they would like to see an increase in transparency when choosing a method and selecting a contractor.

The third stakeholder to speak was David Turner, Vice President of Kjellstrom and Lee, a midsize general contractor that works on public and private projects that are both large, small, complex and not so complex. He shared that most of the projects his company completes are CM and that they do a significant amount of CM work with the Commonwealth, while being a local company that works exclusively in Virginia. Mr. Turner stated that his company competes with many firms that are multistate firms, national, or international firms, yet his company still finds success. He shared that his company has grown about three to four times over the last 20 years, in employee count and annual revenues. He stated he has seen first hand how CM has contributed to his success and the success of their trade partners, particularly the ones in the SWaM community. He shared that the bonding capacity for his company is \$150 single and \$250 aggregate. He concluded his remarks stating that he is speaking as a representative of AGCVA today and has spent much time over the years on legislative efforts surrounding construction procurement issues, which are complex, and even within AGCVA their members have differing views stating that the considerations shared with the Workgroup represent a good first step towards a consensus within the AGCVA. Mr. Damico asked Mr. Turner when his company first started if CM was the main procurement method or were there other procurement methods used? Mr. Turner stated that the company was formed in 1961 and over the years his company has done every method in existence, however, the period discussed today was primarily bid work and private industry CM work which has grown into public CM work. Mr. Damico followed up by asking Mr. Turner how his company transitioned their expertise in bid work to being competitive with CM? Mr. Turner stated that it was not really a transition, that it was a different approach to the process and a lot of sweat equity and building relationships and delivering the projects well.

The fourth stakeholder to speak was Taylor Brandon, Vice President of F. Richard Wilton Jr. Inc, a Richmond company for 70 years. Mr. Brandon shared he also serves on the state board of contractors and on the board of AGCVA. He stated his company does all delivery methods for projects including lump sum, CM, design-build, and there are pros and cons to each. He shared as a subcontractor, all of his estimates are lump sum and provided at no charge and one might think as a subcontractor that he would not want to bid a job multiple times but there are benefits to doing this. He expanded on the benefits, stating that if (i) there is a GC already chosen, he will often receive a scope sheet that is very detailed about who is responsible for which work, so there are no scope gaps, (ii) ability to avoid bad bids because if a bid is too low because something was left out then there is an opportunity to fix it, which cannot be done on a hard bid job and the subcontractor would have to deal with it, (iii) part of the criteria to get on a subcontractor list is experience, manpower, ability to do the job, and (iv) can discuss and work through discrepancies in the drawings with the owner and CM. He also shared more benefits to CM are the allowances, ability to assist with value engineering to help with budget, coordinate products before building, and which preconstruction can take longer but the job goes faster, more efficient, and the project team is usually better and more qualified. Mr. McHugh asked Mr. Brandon how his company finds out about work on major projects? Mr. Brandon stated he is invited to bid by the CM. Mr. McHugh followed up asking what his company bonding capacity is, which Mr. Brandon stated that as a subcontractor they are not usually required to carry bonds.

The fifth stakeholder to speak was Adam Smith, Associate Director of Procurement for Capital Construction at VA Tech, speaking on behalf of VA Tech and VASCUPP to express deep concerns with SB 954. He stated SB 954 will significantly impact the availability of an essential contracting tool and at VA Tech, due to the size and scope of the campus and projects, VA Tech regularly uses all procurement methods and that maintaining the authority to choose such appropriate method is critically important as they manage a capital program in excess of one billion dollars. Mr. Smith stated that sometimes CM is the right solution, and sometimes it is not, however the authority to make the decision on procurement methods to ensure appropriate mitigation of project risk is important so they can stay within budget and schedule, all while fulfilling the unique needs of the institution and respective projects. He shared the concerns brought up today is a significant departure from the best procurement practices, referencing the JLARC report, he stated that the report is correct in that dollar threshold is not the most effective criteria to use to determine the best procurement method as cost does not reflect the projects complexity or time sensitivity. He concluded his remarks by stating that all capital projects undergo significant review, both internal and externally, and that the CM method provides better opportunities to utilize SWaM businesses over DBB stating that for all these reasons it is not in the best interest of the Commonwealth to adopt SB 954.

The sixth stakeholder to speak was James Patteson, retired Director of Public Works at Fairfax County. He shared his past experience, stating that the total value of a building is not only in the construction but also the quality of the work. Mr. Patteson stated that he is concerned about SB 954 limiting the use of CM for localities with the proposed threshold

and complex definition changes. He shared that in CM the contractor is added to the team during preconstruction and is valuable to have the contractor, A/E, and the owner at the table for adding value engineering and ownership. He addressed remarks made earlier about CM being used because it is easy, explaining that CM is actually harder because it requires another partner at the table and at the end of the project it delivers better value because of the partnership. He addressed the suggestion to hire a constructability professional to work with agencies through design explaining that is very different than working with the contractor that will be responsible for delivering the project and taking on the project risk. He concluded his remarks stating that with CM, 90% of the work is performed by subcontractors, it is competitively bid, and can add qualitative criteria to this approach which adds value.

The seventh stakeholder to speak was Elizabeth Dooley representing VAGP which has over 1300 members working in the procurement field. She stated she is also speaking on behalf of VML and VACO, who also oppose the bill. Ms. Dooley shared that the DGS report shows a majority of construction contracts at the state and local level are awarded through DBB and that CM is used where appropriate. She explained when public bodies use CM, it is a well-reasoned decision and not chosen arbitrarily, explaining that CM projects finish earlier than DBB for various reasons, such as the ability to leverage options for early site work, constructability reviews, and value engineering. She explained that CM allows for a guaranteed maximum price early on and the ability to secure better interest rates on bonds. She stated that she does not agree that CM cost more than DBB or is less competitive and that it is difficult to compare DBB and CM because only one method is used on each procurement. She concluded her remarks by asking the Workgroup to advise the General Assembly that no changes are necessary and the current processes work well across the Commonwealth.

The eighth stakeholder to speak was Julia Hammond, on behalf of the Associated Builders and Contractors which is Virginia's largest construction association representing general contractors, subcontractors, and skilled trades across the Commonwealth. She stated she is also representing the Federation of Independent Business Virginia, a small business trade association. She stated the vast majority of Virginia's contractors, their associations, subcontractors, and skilled trades, oppose this legislation both during the General Assembly session and here today. Ms. Hammond stated that there are things that we can work on, such as change orders or prequalification, but this legislation is not the way to do it. She stated that during 2018 everyone worked very hard on the changes that were enacted, which was not easy and required a lot of negotiation and study. She concluded her remarks by stating that from the DGS data, the changes enacted in 2018 are working and more procurement methods are being used and more contractors are a part of the process.

The final stakeholder to speak was Travis Bowers, representing the Black Business Alliance of Virginia. He shared the bonding limit of his company is more than zero but substantially less than the other businesses that previously spoke. Mr. Bowers explained that his company, THC Bowers, has done GC work, lump sum hard bid work, and has also gone the CM approach, putting his employees in the CPSM seminars and learn from

other companies. He stated that his company has learned and adjusted over the years, sharing that CM is a more inclusive route for the community. Mr. Bowers stated that during COVID, everyone experienced supply chain issues and that going forward, everyone has to work smarter. He concluded his remarks sharing that CM allows the minority community to take better advantage of relationship, not just as a prime but at a sub-tier approach, and that these relationships are not there with low bid. He strongly opposes SB 954.

Support in part/oppose in part:

The first stakeholder to speak was Chris Stone, Senior Principal with Clark Nexsen, one of Virginia's largest A/E firms. Mr. Stone stated his opposition to a portion of SB 954, specifically lines 186-191 and lines 234-239, explaining these sections in the bill break the CM services apart. He explained that when a client hires a designer, the designer starts with planning, programming, and is a part of the process through schematics and until the end of the project and when a client hires a construction manager, the designer is able to develop a relationship and design the project with input from the construction manager. He stated the proposed language would allow for the project to be bid at some point and has preconstruction services, but it is not clear when those services would end. He shared that this proposed process would be like changing horses in the middle of a race. He concluded his remarks by stating that this language has unintended consequences for a significant number of change orders because a contractor would build the project who wasn't involved in the design.

Neutral: none

VI. Public Comment

None.

VII. Discussion

Mr. McHugh requested an electronic copy of the FOIA data that Mr. Benka provided in hard copy format. Mr. Benka agreed to provide that data electronically, adding that he has submitted FOIA requests to higher education institutions for new data and asks if the colleges would share their information as well.

Mr. Damico requested that the Workgroup review the 2016 JLARC report that was mentioned today prior to the next meeting.

Mr. Tweedy stated that during the discussion today, competition was brought up a lot. He requested that for the next meeting if the Workgroup could have a better understanding of the process of how a CM is chosen to help gauge if the process is competitive.

Mr. Damico concluded by stating that today we heard that VCPA, AGCVA, and ABC, have all studied the issue and asked that they review the legislation again, AGCVA's

considerations, and determine if there is any changes that everyone could be in agreement with, prior to the next meeting.

VIII. Adjournment

Mr. Damico adjourned the meeting at 11:38 a.m. and noted that the next Workgroup meeting is scheduled for August 8, 2023 at 1:00 p.m. in the House Committee Room located in the Pocahontas Building.

For more information, see the [Workgroup's website](#) or contact that Workgroup's staff at pwg@dgs.virginia.gov.

Appendix F: August 8, 2023 Meeting Materials

This appendix contains the meeting materials from the June 27, 2023 Workgroup meeting.

1. Agenda
2. Approved Meeting Minutes

Public Body Procurement Workgroup

<https://dgs.virginia.gov/dgs/directors-office/pwg/>

Meeting # 6

Tuesday, August 8, 2023, 1:00 p.m.

House Committee Room

Pocahontas Building

900 E. Main St, Richmond, Virginia

AGENDA

- I. **Call to Order; Remarks by Chair**
- II. **Approval of Meeting Minutes from the July 18, 2023 Workgroup Meeting**
- III. **Public Comment on SB 1115**
- IV. **Findings and Recommendations on SB 1115**
- V. **Presentation on Construction Management Process**

Sandra Gill, Deputy Director
Department of General Services

Curtis Manchester, Assistant Attorney General
Office of the Attorney General

- VI. **Presentation on the 2016 Development and Management of State Contracts Report**

Tracey Smith, Associate Director
Virginia Joint Legislative Audit & Review Commission

- VII. **Public Comment on SB 954**
- VIII. **Consideration and Discussion of Public Comment, Written Comments, and Other Information Received by the Workgroup on SB 954**
- IX. **Findings and Recommendations on SB 954**
- X. **Public Comment**
- XI. **Discussion**
- XII. **Adjournment**

Members

Department of General Services
Virginia Information Technologies Agency
Department of Planning and Budget
Virginia Association of State Colleges and
University Purchasing Professionals

Department of Small Business and Supplier Diversity
Virginia Department of Transportation
Virginia Association of Governmental Procurement

Representatives

Office of the Attorney General
Senate Finance Committee

House Appropriations Committee
Division of Legislative Services

Staff

Sandra Gill, Deputy Director, DGS
Jessica Hendrickson, Director of Policy and Legislative Affairs, DGS

Approved Meeting Minutes

Public Body Procurement Workgroup

Meeting # 6

Tuesday, August 8, 2023, 1:00 p.m.

House Committee Room

The Pocahontas Building

900 E. Main Street, Richmond, Virginia 23219

<https://dgs.virginia.gov/dgs/directors-office/pwg/>

The Public Body Procurement Workgroup (the Workgroup) met in-person in the House Committee Room in the Pocahontas Building in Richmond, Virginia, with Joe Damico, Director of the Department of General Services (DGS), presiding. The meeting began with remarks from Mr. Damico, followed by public comment, presentations, and concluded with discussion among the Workgroup members. Materials presented at the meeting are available through the [Workgroup's website](#). A recording of the meeting is available on the [House of Delegates video streaming site](#).

Workgroup members and representatives present at the meeting included Joe Damico (Department of General Services), Kerry Bates (Virginia Department of Transportation), Joshua Heslinga (Virginia Information Technologies Agency), Patricia Innocenti (Virginia Association of Governmental Procurement), John McHugh (Virginia Association of State Colleges and University Purchasing Professionals), Andrew MacDonald (Office of the Attorney General), Jason Saunders (Department of Planning and Budget), Willis Morris (Department of Small Business and Supplier Diversity), Joanne Frye (the Division of Legislative Services), Andrea Peeks (House Appropriations Committee), and Mike Tweedy (Senate Finance and Appropriations Committee).

I. Call to Order; Remarks by Chair

Joe Damico, Director
Department of General Services

Mr. Damico called the meeting to order and stated that during all public comment opportunities there will be a three minute time limit per person.

II. Approval of Meeting Minutes from the July 18, 2023 Workgroup Meeting

Mr. McHugh stated that at the last meeting there was a comment made regarding corruption that is not addressed in the meeting and asked what the process is to have that comment addressed in the minutes. Mr. Damico stated that the minutes for this meeting can reflect such comment from the prior meeting unless Mr. McHugh has an amendment to the July 18, 2023 minutes.

Mr. Damico shared that he believes the claim of corruption made at the last meeting was addressed, however, if someone believes corruption is occurring then the appropriate agencies should be notified, such as the Virginia State Police and the Office of the Inspector General.

Mr. Morris made a motion to approve the meeting minutes from the July 18, 2023 meeting of the Workgroup. The motion was seconded by Mr. Saunders and unanimously approved by the Workgroup.

Note: The comment regarding corruption made during the July 18, 2023 meeting by Jack Dyer, owner of Gulf Seaboard General Contractors. Mr. Dyer spoke in support of the SB 954 explaining that over the years the revisions to the VPPA have resulted in negative aspects and returned us to a pre 1982 status. Mr. Dyer stated that there is no respect for the code, no uniform policies, no standards, application conflicts between public bodies, favoritism, and questionable corruption.

III. Public Comment on SB 1115

Mr. Damico invited the public to provide comment on SB 1115. The only stakeholder to comment was Dillon Bishop on behalf of the Heavy Construction Contractors Association. Mr. Bishop stated that they support the bill.

IV. Findings and Recommendations on SB 1115

Next, Mr. Damico asked the Workgroup for recommendations for SB 1115. Hearing none, Mr. Damico shared that §2.2-4324 allows that in the event of a tie bid that preference shall be given to goods produced in Virginia or goods, services, and construction provided by Virginia persons, firms or corporations. He noted that the patron of the bill expressed interest in providing additional preference opportunities for Virginia businesses and products produced in the United States. At the Workgroup meeting on June 27, 2023, the Workgroup discussed allowing a Virginia resident to match the price of the lowest responsive and responsible bidder who is a resident of another state. Mr. Damico stated that there was also discussion previously regarding if this would impact competition, explaining that this would still be a competitive sealed bid so it should not impact the competitive process.

Mr. Damico shared two recommendations for the Workgroup to consider for SB 1115. The first recommendation is to amend §2.2-4324 to allow in the instance of a tie bid for goods, as long as the Virginia tie bid requirements are not met, that an award preference shall be given to goods that are manufactured in the United States. Mr. Damico asked the Workgroup if there are any questions about the recommendation. Hearing none, Mr. Heslinga made a motion to move the recommendation forward. The motion was seconded by Mr. Morris and carried by a unanimous vote.

The second recommendation is to amend §2.2-4324 to allow, in the case of bids for goods that a Virginia resident or Virginia company has the opportunity to match the price of the lowest responsive and responsible bidder who is a resident of another other state. Hearing no questions on the second recommendation, Mr. Heslinga made a motion to move the recommendation forward. The motion was seconded by Mr. Morris and carried by a unanimous vote.

No other recommendations were offered.

V. Presentation on Construction Management Process

Next, Mr. Damico introduced Sandra Gill, Deputy Director of the Department of General Services, to provide a high-level overview of the legislative history regarding construction management and design-build (CM/DB). Ms. Gill shared that in 1982 the General Assembly passed the Virginia Public Procurement Act (VPPA) and in the 1983 session amended the VPPA to include the utilization of CM/DB. She stated that in 1996 General Laws issued a report on the utilization of CM/DB and made modifications to allow local public bodies to use CM/DB. She noted that a review board was created in 1996 to review and approve local governments use of CM/DB which was then repealed in 2011. In 2006, institutions of higher education autonomy began and those institutions were no longer subject to the VPPA. In 2014, General Laws created another group to review the VPPA which resulted in no significant changes being made to CM/DB. In 2017, after a complex work group of stakeholders, including construction communities, higher education, local public bodies, and state agencies, the VPPA was amended to create 43.1. Ms. Gill concluded her remarks by stating that this is a high-level overview of a complex topic.

The second presentation to the Workgroup was from Curtis Manchester, Senior Assistant Attorney in the construction division with the Office of the Attorney General who spoke on the competitive processes involved with CM and design-bid-build (DBB). Before proceeding, Mr. Manchester shared that there are variations in the processes for institutions of higher education and local governments which will not be discussed today and explained that VDOT projects will not be discussed as they do not use CM for their projects. He stated that the materials provided today are his materials and are not an official opinion by the attorney general. Mr. Manchester began with the background and shared that in 1980 the general assembly created a multifaceted taskforce that included public and provide entities to study procurement, which included construction, and in looking at the statutes at the time, the taskforce stated that competition should be the goal

and did not specify one kind of competition. They also advocated for the VPPA to include competitive negotiation, pointing out that competitive negotiation allows the public body to consider important factors it deems important for the project without mandating an award to the lowest cost. He stated that construction management contracts are awarded by competitive negotiation and cited many reasons why one may not want to award to the lowest offeror, such as timing, qualifications, undeveloped specifications or plans. He explained that the general assembly took the recommendations from the taskforce and adopted most of them stating that in the VPPA there is a declaration of intent, and touched on three of many items; (i) that public bodies obtain high quality goods and services at reasonable cost, not lowest cost (II) competition be sought to max degree feasible, but didn't discuss a specific type of competition, (iii) individual public bodies have broad flexibility in fashioning details of such competition, resulting in the adoption of competitive sealed bidding and competitive negotiation in the VPPA.

Mr. Manchester pointed out that the code mandates competitive sealed bidding for construction, unless you use competitive negotiation for CM explaining that SB 954 makes a preference for competitive sealed bidding, however the code already mandates this. He explained that in the competitive sealed bidding process the owner has completed construction plans/specifications, there is no consultation with the contractor, the owner prepares and issues an invitation for bid (IFB), and explained that there is no negotiation and then bids are received. Once bids are received, there is a public opening of the bids then an evaluation to determine the responsive and responsible bidder with the lowest price. He explained that bidders do not need to disclose experience, project team, which subcontractors will be used and that contractors do not have to publicly advertise their subcontracting work. After posting a notice of intent to award, the owner awards the contract and coordination begins with the contractor.

Mr. Manchester then explained the process for CM. He stated that with CM the owner is looking for someone to come on board before the project plans/specifications are finished to help the owner and design team to develop the plans and specifications. The owner is looking for contractors with demonstrated ability to perform, expertise of subcontractors and types of subcontractors that the CM may bring, including small businesses. He shared that the first part of a CM contract is for preconstruction services, which include sequencing and project schedule, plan development, materials, and cost estimating. The second part of a CM contract is for the construction phase and which is only entered into upon completion of the working drawings and the parties agreeing to a guaranteed maximum price (GMP) that the CM will perform within, then if there are any remaining funds at the completion of the project are sent back to the state. He shared that in procuring a CM, for state agencies only, there is an evaluation committee comprised of at least three members to include a licensed design professional and an architect/engineer provided by DEB. The evaluation committee proceeds with prequalification of offerors, which can include the offerors bonding capacity and proposed project team experience, however, there is no requirement to have past CM experience. Once the prequalification is complete the owner then issues request for proposals to the prequalified contractors and notifies the offerors that were not prequalified. He explained the process of evaluating the prequalified contractors proposal responses and that the committee looks

at the proposed project approach, sequencing, method for handling risks, the subcontractors and small business participation plans, and fees for the CM services. The evaluation committee conducts interviews to obtain clarifications on proposals and then ranks the proposals using combined scores from the RFQ and RFP. Then the evaluation committee enters into negotiations with the top two offerors and makes a recommendation to award to one offeror to the agency head. The other offerors not selected for CM are notified in writing which provides a second opportunity for an offeror to protest if they feel they were treated unfairly. Mr. Manchester concluded his remarks noting that by statute the CM can only perform 10% of the work and the remaining 90% of the work has to be subcontracted by competitive sealed bid.

Mr. Tweedy asked for an explanation on the process when an offeror protests or appeals? Mr. Manchester provided a high level response that when an offeror is precluded from being prequalified to bid the offeror generally has a right to protest to the entity first, then to a court.

Mr. McHugh asked if both an invitation for bid and competitive negotiation are competitive processes? Mr. Manchester stated that is correct. Mr. McHugh followed up that previously the Workgroup was told that invitation for bid is the only competitive option and asked if that is incorrect. Mr. Manchester stated that is not correct because both are form of competition but two different types of competition.

Mr. Damico asked when the subcontracting of the 90% of work occur? Mr. Manchester stated that this occurs prior to negotiation for the GMP and shared that the owner gets to see the bids, bid tabs, and the subcontractor big packages go to the owner as a part of the GMP number proposed for part two. Mr. Damico followed up asking if the subcontractor bidding process looks like the Commonwealth's bidding process, or is it more like competitive negotiation? Mr. Manchester believes that the process is more like the bidding process however, there are exceptions in cases of specialty contractors.

VI. Presentation on the 2016 Development and Management of State Contracts Report

Next, Tracey Smith, Associate Director with the Virginia Joint Legislative Audit and Review Committee (JLARC) provided the Workgroup an overview of the 2016 Development and Management of State Contracts report. She stated that the study covered a lot of topics and resulted in 30 recommendations for the general assembly, DGS, VITA and others to consider. During the course of the study, one issue brought to JLARC by former Delegate Landis, was the increasing use of alternative procurement methods by institutions of higher education for construction projects. Ms. Smith shared that she watched the previous Workgroup meeting and noted that the JLARC report was referenced a lot. She provided clarification on comments made at the last meeting, explaining that someone stated that JLARC found that competitive sealed bidding is the only way to guarantee the best quality and best price, however, this is not correct. She stated on page 21 of the report states that purchasing goods and services from vendors offering the lowest price does not always maximize quality and because the quality of the goods or services is not a consideration under the competitive sealed bidding

procurement method, agencies may purchase poor quality goods or services that do not meet agency expectations. Additionally, at the previous meeting there were references to a table on page 108 in the report and that table was only designed to describe the basis of the contract award and not the ultimate outcome of the project.

Ms. Smith explained that at the time of the JLARC study, there was not a centralized source of data on the performance of contracts for higher education and because of this JLARC requested data on 28 construction projects from four higher education institutions. The data received included 11 CM projects, 4 DB projects, and 13 DBB projects and JLARC compared change orders, schedule delays, and cost overruns. She noted that since the JLARC study a lot of additional data has been collected and the information discussed today is not a reflection of the current state of what we know about the performance of the contracts. She shared a finding from the report that universities used all three methods of procurement for costly projects but the median cost of projects using alternative methods substantially exceeded cost of DBB projects and that higher education institutions were generally satisfied with all three procurement methods. Next, she explained that JLARC surveyed and interviewed procurement staff at state agencies and institutions of higher education to determine their satisfaction with project quality and project timeliness under DBB and CM explaining that (i) 78% were satisfied with the project quality under DBB, and 88% were satisfied with the project quality under CM and (ii) 69% were satisfied with the project timeliness under DBB, with 81% satisfied with project timeliness under CM.

She shared another finding from the JLARC report that projects procured under each method deviated from original contract provisions; at least some of each type of project experienced delays, cost overruns, and change orders. The data provided for this finding, she explained, should not be used to compare the performance of contracts across the three methods because there were not enough contracts in the sample to make such comparisons. She explained the purpose is to show that regardless of the procurement method, cost overruns, delays, and change orders occurred across all three methods, sharing that no method ensures a problem free project.

Another finding Ms. Smith addressed is during the study vendors reported concerns about limited competition and transparency, some of which was corroborated by JLARC research. She shared that about 1400 vendors responded to JLARCs survey and about one-fourth responded stating that winning vendors seem preselected or selection criteria prevented the vendor from qualifying to submit a bid or proposal. JLARC did find that several institutions of higher education reported using narrow qualification criteria for CM, explaining that some institutions of higher education allow only pre-qualified vendors that have had experience with this project delivery method to submit proposals. She explained that while previous experience with the project delivery method is a valid consideration, using this criterion to prevent vendors from qualifying to submit a proposal appears to unnecessarily narrow the pool of potential vendors for the contract. She concluded her presentation stating that JLARC made a recommendation for DGS to clarify in the CPSM that agencies shall not disqualify vendors during the request for

qualifications stage because of a lack of direct experience with a specific project delivery method.

Mr. Tweedy asked if all entities are subject to the DGS CPSM? Ms. Smith responded that there are institutions of higher education that are not subject to the CPSM and when JLARC brought this up during the study, the institutions of higher education stated that they model their procurement activities to align with state policies. Ms. Gill added that the JLARC report was completed before the legislative changes that created 43.1 which requires higher education to comply with the SOA procedures when adopting their own procedures.

Mr. Damico asked if (i) alternative methods may be beneficial for complex or time sensitive construction projects, (ii) a dollar threshold is not the most effective criteria for deciding which method to use because a projects costs does not necessarily reflect the complexity or time sensitivity of the project, and (iii) the design bid build process is the default method is correct in the report. Ms. Smith stated those statements are correct.

VII. Public Comment on SB 954

Public comments in support of SB 954.

The first stakeholder to speak was Jack Dyer owner of Gulf Seaboard General Contractors and President of the Virginia Contractor Procurement Alliance (VCPA) shared that they believe CM does not provide the best method of procurement for construction projects over \$5M that are not historical, extremely large, or complex and that CM is a more expensive route by 15-25%. He offered recommendations that are reflected SB 954 explaining (i) the need to have one person responsible for pre-approving the use of CM at the local, state, and higher education level, adding that approval should be done by the Secretary of Administration, (ii) increase the threshold to \$125 million which would require pre-approval to use CM for any projects under this amount, and (iii) revise the definition for complex, noting that previous CM experience should not be a prequalification requirement. He concluded his remarks by sharing that the declaration of intent of the VPPA is that all procurement procedures be conducted in a fair and impartial manner with the avoidance or appearance of impropriety, that all qualified vendors shall have access to public business, and the code requires written advance determination that competitive sealed bidding is not practical or physically advantageous and shall document the basis for that determination to utilize CM or DB.

Mr. Damico asked Mr. Dyer if the document provided prior to the meeting by MDB Strategies documents the recommendations that he just described, to which Mr. Dyer replied yes.

The second stakeholder to speak was Tony Biller of Nielsen Builders. Mr. Biller spoke to competition in IFBs stating that they are advertised in the public and anyone can respond as long as they meet the criteria, such as bonding, insurance, licensing. He explained that

contractors can bid for subcontractors and that is a wide open process. He shared for CM, when putting together the GMP, in his experience of doing 5 projects with the state, there was no requirement that he get competitive sealed bids from the trades. He said that they go out and get bids and proposals for subcontractors but it is not the lowest bid and not open to everyone who is qualified to be a responder so yes, there is competition but the processes are different.

The third stakeholder to speak was Greg Lionberger of Lionberger Construction. He shared that he believes DBB is the best method for straightforward non-complex projects and believes the best price comes from competitive sealed bidding.

Mr. Morris asked for clarification on non-complex projects versus complex projects and how his company makes a determination on this. Mr. Lionberger responded that renovating a coliseum can be a very complex project but a dormitory is not complex.

The fourth stakeholder to speak was Mark Meland, President of Century Construction. He stated that he supports the legislation and at the last meeting someone brought up his company having a contract with VCU. He explained that his company does have a contract with VCU however the contract has multiple other companies on it for small projects.

The fifth stakeholder to speak was Brandon Spencer, Executive Vice President of Kembridge Construction. He stated that he has been shut out of CM projects. He spoke to bonding requirements and asked for a fair chance at projects.

The sixth stakeholder to speak was Scott Shufflebarger, representing Virginia Association of Roofing Professionals stating that he believes DBB is the primary method and should be for public construction. He said that he believes CM stifles competition and limits opportunities to his membership. He concluded his remarks sharing that he fully supports SB 954 and its intent to raise the threshold for CM and implement more restrictive language for its use.

Mr. Damico asked if Mr. Shufflebarger has competed for subcontractor work on a CM project. Mr. Shufflebarger shared that he has never had the opportunity. Mr. Damico asked if he did had the opportunity would he compete? Mr. Schufflebarger replied, yes. Mr. Damico then asked why he thinks he has never had the opportunity? Mr. Schufflebarger stated that certain general contractors seem to get the CM projects and his company is not on those contractors bid list, even though they are qualified.

Mr. McHugh asked the size of the roofing associations membership. Mr. Schufflebarger stated they are compromised of approximately 170 members. Mr. McHugh followed up by asking if all of the members have trouble getting bids for CM work? Mr. Schufflebarger stated that some members do participate in the process.

Mr. Morris asked if for an explanation on the comment of not being allowed to participate in CM? Mr. Schufflebarger said he doesn't believe they are being specifically

excluded but when CM is used, the general contractors use a smaller pool of roofers based on their experience and connections and provided an example stating that in the Richmond area if there are 150 roof contractors, one general contractor probably works with 4-5 roof contractors on a regular basis and those 4-5 would get the opportunity.

Ms. Peeks asked for clarification regarding the code requirement that 90% of the CM subcontracts are bid out competitively and if the law requires use of competitive sealed bidding to the maximum extent practicable. Mr. Manchester approached and responded that his remarks are based on SOA procedures for CM which expressly state that the CM must procure by publicly advertised sealed bidding 90% of the work, if practicable.

Mr. Morris asked if there is a broad and narrow interpretation on practicable and if that language is being narrowly interpreted as the roofing comments indicate there isn't a lot of competition. Mr. Coppa replied that he does not know but the CMs could be surveyed and on how they interpret the term "practicable".

Mr. Tweedy asked Mr. Manchester if the SOA procedures say that is it on the owner of the project to enforce the procedures? Mr. Manchester said ultimately the owners are required to enforce their procedures.

Public comments in opposition of SB 954:

The first stakeholder to speak was Burt Jones, Associate Vice Chancellor for the Virginia Community College System (VCCS), sharing that he has 35 years with the Commonwealth overseeing design and construction of projects and he has used all possible methods for construction procurement. He shared that he is a member of the National Association of State Facility Administrators that has worked closely with general contractors to produce documents on how to properly use CM, noting that Virginia is a leader in the country on how CM is used. Mr. Jones stated that he was a part of the group mentioned earlier that worked on the definition of complex projects and when SB 954 was introduced it was the first time he saw the definition changes. He said the \$125 million threshold would remove the use of CM for most and out of 33 current capital projects, none of them meet the criteria in the proposed bill. He concluded his remarks discussing that the bill has preconstruction services requirements with the CM then requires procuring construction through competitive sealed bidding which will completely remove the advantages of having a CM and resulting in a loss of the knowledge of the CM.

The second stakeholder to speak was Craig Shorts, Associate Vice President of Business Services at James Madison University (JMU). He shared that over the last 20 years JMU has procured and managed over a billion dollars in construction projects that utilized DBB, DB, and CM, noting that during this time no procurements have been protested. He explained the process that JMU goes through to choose the appropriate delivery method and ensure it is in alignment with state code. He stated that internally JMU evaluates based on project specific risk and project complexity, sharing that the overall contract value is one component also looking at time / schedule constraints, team expertise, and more. He concluded his remarks explaining that JMU's use of CM has increased on large

projects due to the ability to mitigate risks for everyone, its collaborative, more efficient, helps avoid cost overages, allows early start packages, and other pitfalls often associated with DBB.

Mr. Saunders asked if JMU has used CM for dormitory projects? Mr. Shorts replied, yes.

Ms. Peeks asked if the operations of a university factor into the decision of complexity? Mr. Shorts provided an example of an addition to the college of business building that had to be scheduled between semesters and included doing demolitions between semesters where the contractor had to figure out how to stage and schedule that work so operations were not disrupted.

Mr. McHugh asked if when defining the risks and concerns if funding and financing is a part of the complex determination? Mr. Shorts responded that it depends on the project.

Mr. Morris asked if there is a grey area in the decision matrix JMU uses to decide on which method to use? Mr. Shorts responded that there is grey area in the entire construction industry, a lot of judgement calls, and considering the environment being worked in, but it becomes obvious which method is best for the project and avoiding risk pitfalls.

Public Comments for support in part or oppose in part:

No comments

Public Comments that are Neutral:

No comments

VIII. Consideration and Discussion of Public Comment, Written Comments, and Other Information Received by the Workgroup on SB 954

Mr. Damico stated the Workgroup has received information verbally and in writing from stakeholders, including the contractor community, institutions of higher education, state agencies, local governments, and also the report from JLARC, and at this time the Workgroup can begin discussion and see if there are any recommendations from the Workgroup members.

Mr. Saunders asked if there is currently a process where DEB or DGS are involved in helping verify the procurement method when agencies want to use CM and if so, how does that work? Mr. Damico explained in accordance with 43.1 state public bodies can make a determination on which procurement method to use for a particular construction project, and if a method other than DBB is chosen, the state public body has to justify and submit to DEB for review. Next DEB makes a recommendation on whether the state public bodies chosen method is an appropriate method for the project. Mr. Damico explained that the state public body can choose to comply with the DEB recommendation

or proceed with the originally selected method. This process is the same for institutions of higher education.

Mr. Saunders then asked how often the owners choice procurement method and DEB recommendation align for construction projects? Mr. Damico shared that 43.1 includes a reporting requirement for institutions of higher education and state public bodies and that data appears to show eight instances where DEB did not agree with the institution of higher educations selected method but they proceeded anyway, noting that this is eight out of approximately 55 projects since 2017.

Mr. McHugh stated that a lot of information has been exchanged over the last two meetings, sharing that VASCUUP introduced a listing of bills introduced since 2015 to show the Workgroup the amount of effort that has gone into this topic. He explained there are opportunities where the parties, if they would come together, could make changes legislatively and that SB 954 is not a reasonable suggestion. As heard today, there is conflict created by doing the two part process proposed in SB 954 and very few projects that would qualify for the us of CM with the proposed threshold. He said the bill would make CM not an option and believes it is not appropriate to recommend this bill to the general assembly but believes there are possibly some options to move forward.

Mr. Heslinga noted that a lot of people are seeking to increase competition or believing that have not been a part of the competition, so if the Workgroup does not bring forward any particular legislative recommendation, it may be valuable to bring up this as a key issue and should focus on how we get the most competition we can.

Ms. Peeks shared her experience with the House members on this topic and understood that some of the industry groups invested in this were supposed to have met and come up with recommendations or suggestions, asking if the industry groups have met yet. Mr. Dyer stated that he spoke with AGC and they are working to find a time to meet, acknowledging that as a former chair of AGC he understands the constraints of their summer conference. He stated that the letter the AGC offered at the last meeting included three areas that echo some of the recommendations that have been presented. Brandon Robinson with AGC came forward and echoed Mr. Dyer's comments and confirmed they have been working to find a time to meet and come up with some ideas and look forward to bringing a consensus in the future.

Ms. Innocenti proposed as a part of the solution to look at modifying the existing SOA procedures rather than making legislative changes. Mr. Damico asked if there are any recommendations on the proposed changes to the SOA procedures either at this meeting or at next meeting. No recommendations were offered.

Mr. Tweedy stated that a lot of additional information was provided today, through email over the past few weeks, and if the stakeholders plan to get together, he suggested giving more thought to recommendations and asked if we are bringing that up at the next meeting for further discussion? Mr. Damico said he will discuss more in item nine,

sharing that he has a number of recommendations for the workgroup to consider at the appropriate time and the next meeting would be the opportunity to discuss further.

Mr. Jones with VCCS approached and asked that the interest groups from 2017 be included in the industry group discussion.

IX. Findings and Recommendations on SB 954

Mr. Saunders shared his hesitation to include a dollar threshold in the code because it can quickly become obsolete and in lieu of a dollar threshold, if there is a determination by the workgroup that the current process is not working as intended or best it could, perhaps the Workgroup could explore the definition of complex project. He said it sounds like the process is working as set out in the code but questioned if this accomplishing the goals our elected officials want.

Mr. Damico stated that his proposed recommendations are a result of what DGS has heard for over ten years and in the discussions from last week and again today from stakeholders. He explained there have been a lot of good comments and right perspectives from everyone and as we all know, through legislation it is never perfect for a single person or single group and we do our best to compromise and move on. He provided background on how DGS came up with the recommendations, explained when the general assembly took action on CM/DB in 2017 that the general assembly deliberately pulled local/state/higher education into 43.1 to treat them all the same rather than this topic residing in the VPPA where it would apply to some and not all. He shared his perspective that the intent was to standardize CM/DB use across government.

Mr. Damico continued, noting that 43.1 defines complexity and since 2017 when 43.1 was enacted, he has not heard of any issues with the definition as it exists today until the proposed changes in SB 954. He explained the code requires DEB, because of their expertise, has been entrusted by the general assembly to review each project ensuring the right method is selected. He stated that 43.1 requires state agencies, higher education, and local government to report their performance in CM/DB/DBB for transparency purposes because the general assembly wanted to better see and understand how public bodies are performing in these areas.

He shared that the JLARC study confirms that DEB sets the standards for building construction and related professional services and that JLARC reported that DBB is the default method and that state public bodies and higher education are to obtain approval to use CM/DB, however 43.1 does not implement that DGS/DEB should make that call. He shared that it appears alternative methods are beneficial and that a dollar threshold is not the most effective criteria because project cost does not always reflect complexity. DGS looked at the data provided by the VCPA which was focused on higher education from 2008-2014, noting that it appears other methods of procurement were used 86%, and 14% of the time DBB was used. Then from 2015-2017, the data shows a slight trend down in the use of other procurement methods. This data was used by the general assembly with

the JLARC study, to enact 43.1. After 43.1 was enacted the VCPA data from 2018-2021 shows the use of other procurement methods was 74.2% and use of DBB 25.5%, roughly a 9% move away from other procurement methods and trending down. He explained that DGS also looked at the data provided by AGC that is inclusive of all public bodies that reported to DGS for annual reports and that data shows the use of other procurement methods was 25.8% and DBB 74.2% for 2018-2021 for projects over \$3M, which is the capital outlay threshold determined by DPB. It appears that as a result of 43.1 the use of DBB is trending up and other methods trending down. He noted that the Workgroup also heard from small businesses at last meeting that CM has helped provide them business opportunities and helped them grow.

Next, Mr. Damico offered the following recommendations for the Workgroup to consider; (i) the general assembly consider stating in 43.1 that DBB is the default method of procurement for construction unless an alternative method (CM/DB) is approved by DEB for state agencies and institutions of higher education, and for local government the local governing board. This approach would eliminate the cost threshold requirement as all of DBB will be the default unless otherwise determined by DEB or local governing board, (ii) the general assembly consider amending DEBs authority in 43.1 from evaluating the proposed procurement method selected by a public body or institution of higher education and making a recommendation if it's appropriate, to DEB making a final decision on method to be used, (iii) the general assembly require local public bodies obtain approval to use CM/DB by its local governing board and for transparency purposes approval shall be made at a public meeting of the governing board to allow stakeholders to comment, and (iv) after hearing concerns about subcontracting under the CM process and that subcontractors have not been adequately informed of opportunities that the general assembly consider requiring public bodies use eVA to advertise the subcontractor opportunities available for CM/DB projects

Mr. McHugh thanked Mr. Damico for explaining the background and asked if the data discussed matches the data the Workgroup received from the VCPA? Mr. Damico stated the data was pulled from the VCPA and AGC data provided to the Workgroup and that he filtered on \$3M plus projects.

Mr. McHugh shared that he represents 14 different restructured institutions of higher education, all of which have own governing boards and management agreements. He asked if the proposed requirement to advertise CM/DB subcontractor opportunities would be considered a unilateral change to the management agreements if this potential change is made? Mr. Damico suggested that legal is best suited to answer, but the intent is that this would not impact or require management agreements changes since 43.1 is outside of the management agreements.

Mr. McHugh stated the data illustrated shows a downturn in the use of alternative methods, so it appears that the changes legislatively made in 2017 actually are working. The downward trend indicates that institutions of higher education have heard the concerns and have responded appropriately and consider when DBB could be used as the procurement method. He explained, when looking at a project, one option to consider is

do nothing, but he is not suggesting that today, although the changes that were in effect five years ago may have made the impact that was intended, therefore a recommendation could be to go back and confirm that the results of the 2017 legislation are making the changes necessary. The data the VCPA provided goes back to 2008 but what has not been shown is what has happened since the 2017 legislative change. He stated that the extreme statements and recommendations have been shared instead of a thoughtful and inclusive approach that identifies potential future opportunities to change the law. Mr. Damico welcomed the idea for someone to pull together the data from 2017 to show how public bodies are performing since 2017.

Mr. Morris stated at a recent meeting a small business stakeholder spoke about being favorably impacted by one method over another, and asked if it is reasonable to look at how the small business community has been impacted? Mr. Damico said that construction procurement requires a level of participation by small businesses and believes that there is a reporting requirement for small business participation on construction projects. Mr. Coppa shared that there is a reporting requirement in construction contracts as required in EO-35 by each agency and explained that the data is reported to the agency procurement office and project manager, in addition to being reported to DSBSD by the agency through the self-reporting portal.

Mr. Damico stated that hearing the legislative desire to hear from the contractor industry, he does not believe we are in a position to move forward with a recommendation today and would like to give an opportunity to digest what has been discussed as well as give the stakeholders a chance to meet. He shared that at next meeting we can continue the discussion on the offered recommendations and any others that may come up at the next meeting. Mr. Morris and Mr. McHugh both agreed.

Mr. McHugh clarified if we are looking for industry to come together and possibly make a recommendation? Ms. Peeks replied yes and asked that the industry stakeholders include higher education, too.

X. Public Comment

None

XI. Discussion

None

XII. Adjournment

Mr. Damico adjourned the meeting at 3:43 p.m. and noted that the next Workgroup meeting is scheduled for August 22, 2023 at 1:00 p.m. in the House Room 1 located in the Capitol.

For more information, see the [Workgroup's website](#) or contact that Workgroup's staff at pwg@dgs.virginia.gov.

Appendix G: August 22, 2023 Meeting Materials

This appendix contains the meeting materials from the August 22, 2023 Workgroup meeting.

1. Agenda
2. Meeting Materials
 - a. Draft Recommendations for SB 1115
3. Approved Meeting Minutes

Public Body Procurement Workgroup

<https://dgs.virginia.gov/dgs/directors-office/pwg/>

Meeting # 7

Tuesday, August 22, 2023, 1:00 p.m.

House Room 1

The Virginia State Capitol

1000 Bank Street, Richmond, Virginia 23218

AGENDA

- I. **Call to Order; Remarks by Chair**
- II. **Approval of Meeting Minutes from the August 8, 2023 Workgroup Meeting**
- III. **Public Comment on Draft Recommendation for SB 1115**
- IV. **Finalize Recommendations on SB 1115**
- V. **Public Comment on SB 954**
- VI. **Findings and Recommendations on SB 954**
- VII. **Public Comment**
- VIII. **Discussion**
- IX. **Adjournment**

Members

Department of General Services
Virginia Information Technologies Agency
Department of Planning and Budget
Virginia Association of State Colleges and
University Purchasing Professionals

Department of Small Business and Supplier Diversity
Virginia Department of Transportation
Virginia Association of Governmental Procurement

Representatives

Office of the Attorney General
Senate Finance Committee

House Appropriations Committee
Division of Legislative Services

Staff

Sandra Gill, Deputy Director, DGS
Jessica Hendrickson, Director of Policy and Legislative Affairs, DGS

Public Body Procurement Workgroup

Draft Recommendations for SB 1115

Recommendation 1:

The Workgroup recommends that the General Assembly consider amending subsection (A) of §2.2-4324 to allow in the instance of a tie bid for goods when there is not a resident of Virginia that an award preference shall then be given to goods that are manufactured in the United States.

Recommendation 2:

The Workgroup recommends that the General Assembly consider amending §2.2-4324 to allow the next lowest responsive and responsible bidder who is a resident of Virginia, or a Virginia company, be given the option to match the price of the lowest responsive and responsible bidder in a procurement for goods who is a resident of another state.

Approved Meeting Minutes

Public Body Procurement Workgroup

Meeting # 7

Tuesday, August 22, 2023, 1:00 p.m.

House Room 1

The Capitol Building

1000 Bank Street, Richmond, Virginia 23218

<https://dgs.virginia.gov/dgs/directors-office/pwg/>

The Public Body Procurement Workgroup (the Workgroup) met in-person in House Room 1 in the Capitol in Richmond, Virginia, with Joe Damico, Director of the Department of General Services (DGS), presiding. The meeting began with remarks from Mr. Damico, followed by public comment, discussion, and concluded with draft recommendations by the Workgroup members. Materials presented at the meeting are available through the [Workgroup's website](#). A recording of the meeting is available on the [House of Delegates video streaming site](#).

Workgroup members and representatives present at the meeting included Joe Damico (Department of General Services), Kerry Bates (Virginia Department of Transportation), Joshua Heslinga (Virginia Information Technologies Agency), Patricia Innocenti (Virginia Association of Governmental Procurement), John McHugh (Virginia Association of State Colleges and University Purchasing Professionals), Leslie Haley (Office of the Attorney General), Jason Saunders (Department of Planning and Budget), Willis Morris (Department of Small Business and Supplier Diversity), and Joanne Frye (the Division of Legislative Services). Andrea Peeks (House Appropriations Committee) and Mike Tweedy (Senate Finance and Appropriations Committee) were absent.

I. Call to Order; Remarks by Chair

Joe Damico, Director
Department of General Services

Mr. Damico called the meeting to order and thanked the Workgroup members for their hard work this year stating that today the Workgroups focus is on SB 1115 and SB 954.

II. Approval of Meeting Minutes from the August 8, 2023 Workgroup Meeting

Mr. McHugh requested a correction to his comment made at the last meeting in section II of the draft minutes, replacing reflected with addressed, and replacing included with addressed.

Mr. Morris made a motion to approve the meeting minutes from the July 8, 2023 meeting as amended. The motion was seconded by Mr. Heslinga and unanimously approved by the Workgroup.

III. Public Comment on Draft Recommendation for SB 1115

Mr. Damico invited the public to provide comment on the draft recommendations for SB 1115 and reminded everyone that there is a three-minute limit for each person speaking.

No comments were made.

IV. Finalize Recommendations on SB 1115

Mr. Damico welcomed Senator DeSteph, patron of SB 1115, to the meeting and asked if the Senator would like to share any remarks before the Workgroup begins discussion to finalize recommendations. Senator DeSteph introduced Brett Vassey, President and CEO of the Virginia Manufacturers Association, and invited Mr. Vassey to speak.

Mr. Vassey thanked the Workgroup for their continued work on competitiveness of state procurement policy as it pertains to manufactured goods and thanked Senator DeSteph for two consecutive years of introducing legislation on this topic. Mr. Vassey stated that the two recommendations before the Workgroup for consideration will get the manufacturers where they want to be. He stated that one of the recommendations makes sure if an out of state bidder has an absolute or percentage preference that it is mandatorily applied in the state bid, and second, an artful solution rather than a point system of preference, is to allow a tie bid breaking option which has been utilized successfully in North Carolina. He concluded his remarks stating his support for the recommendations for consideration today.

Next, Senator DeSteph provided final remarks to the Workgroup. He shared that all states around Virginia have preferences for companies within their states and he wants to give preference to Virginia companies. He added that he appreciates the work done with tie bids where a Virginia business would be given the opportunity to match the lowest bidder from another state. Senator DeSteph mentioned that he has spoken to the Secretary of Transportation about this too and anything he can do to help Virginia businesses, he will. He concluded that he appreciates the recommendations provided and will incorporate them into the bill he moves forward this year.

Mr. Damico thanked the Senator for coming in and his collaboration.

Mr. Damico read the first recommendation before the Workgroup: The Workgroup recommends that the General Assembly consider amending subsection (A) of §2.2-4324 to allow in the instance of a tie bid for goods when there is not a resident of Virginia that an award preference shall then be given to goods that are manufactured in the United States. Mr. Heslinga made a motion to approve the recommendation. The motion was seconded by Ms. Innocenti and carried by a vote of 6-0¹.

Next, Mr. Damico read the second recommendation before the Workgroup: The Workgroup recommends that the General Assembly consider amending §2.2-4324 to allow the next lowest responsive and responsible bidder who is a resident of Virginia, or a Virginia company, be given the option to match the price of the lowest responsive and responsible bidder in a procurement for goods who is a resident of another state. Mr. Morris made a motion to approve the recommendation. The motion was seconded by Mr. Heslinga and carried by a vote of 6-0².

V. Public Comment on SB 954

Mr. Damico began by summarizing where the Workgroup left off at the last meeting. He stated that the last meeting resulted in four considerations for the Workgroup to review and that Ms. Peeks was interested in hearing back from the industry on their efforts to meet and further discuss SB 954. Moving into public comment, Mr. Damico reminded everyone of the three-minute limit per person.

Public comments in support of SB 954.

The first stakeholder to speak was Jack Dyer, owner of Gulf Seaboard General Contractors and President of the Virginia Contractor Procurement Alliance (VCPA). He thanked the Workgroup for the time put into SB 954 this summer and supports the recommendations before the Workgroup. Mr. Dyer referenced a letter sent on August 18, 2023 that has been provided to the Workgroup that included clarity on the recommendations.

The second stakeholder to speak was Matt Benka with the Virginia Contractor Procurement Alliance (VCPA). He shared their support for the recommendations before the Workgroup. Mr. Benka shared that the industry groups did meet and found some common ground on some issues and will continue to work together on the other issues.

The third stakeholder to speak was Brandon Spencer, Executive Vice President of Kembridge Construction. He stated that he supports the recommendations and appreciates the hard work put into this.

¹ Yes: Ms. Innocenti, Mr. Morris, Mr. Heslinga, Mr. McHugh, Mr. Bates, Mr. Damico

² Yes: Ms. Innocenti, Mr. Morris, Mr. Heslinga, Mr. McHugh, Mr. Bates, Mr. Damico

The fourth stakeholder to speak was Tom Evans of Southwood Building Systems, sharing that he is a member of VCPA. He thanked the Workgroup for their hard work and that the recommendations are the best he has seen in 15 years of working on procurement issues and hopes they will move forward.

The fifth stakeholder to speak was Mark Meland, President of Century Construction. He shared that he fully supports the recommendations made by DGS.

The sixth stakeholder to speak was Todd Morgan, President and owner of MB Contractors in Roanoke, VA. He thanked the Workgroup for their hard work on SB 954 and as a member of VCPA and AGC, he hopes the Workgroup will support the recommendations as written.

The seventh stakeholder to speak was Morris Cephas, President of Cephas NeXt in Richmond, stated that he supports the recommendations and appreciates all of the hard work.

The eighth stakeholder to speak was Scott Shufflebarger, representing Virginia Association of Roofing Professionals. He commended the Workgroup on their hard work and efforts highlighting recommendation three and appreciates the efforts to have subcontractor work bid out as part of construction management.

The ninth stakeholder to speak was Tony Biller, President and CEO of Nielsen Builders. He stated that he fully supports DGS recommendations and has a few small tweaks/clarifications for consideration. He highlighted the reinstatement of design-bid-build as the default method of procurement for construction. He stated that he is happy to see a review process in place and likes that local public bodies would have a public hearing, and more opportunities for subcontractors.

Public comments in opposition.

The first stakeholder to speak in opposition was Colette Sheehy, Senior Vice President for Operations and State Government Relations at the University of Virginia (UVA). She stated that in 2005 Governor Warner and the General Assembly partnered with three institutions of higher education (Virginia Tech, William and Mary, and UVA) to change the relationship between those institutions and the Commonwealth. She stated she is probably one of the few people still around that was involved in that legislation and development of the restructured higher education financial and administrative operations act and the management agreements that followed in the next year for these three institutions. She stated the act and the management agreements set the context for higher education's position on this particular bill. She further explained that more than 18 years ago, Governor Warner as a private business executive saw the value and efficiency and cost effectiveness of delegating to institutions with the appropriate expertise the responsibility of transacting business at the local level without additional layers of approval by central agencies. She said she likes to think that Governor Youngkin, a private business executive, is focused on the same objectives of efficiency and cost

effectiveness and would support the continued ability of institutions to make decisions about key operational issues on their campuses. Ms. Sheehy stated that for those not familiar with the restructuring act, it is a very complex piece of legislation that requires accountability on the part of institutions in exchange for autonomy over certain business operations. She stated that everyone appreciates and recognizes the expertise that sits with DEB staff but no one knows a college campus better than those who work there every day. Concluding her remarks stating that institutions remain accountable to the Commonwealth and their board of visitors.

The second stakeholder to speak was Alex Iszard, the Assistant Vice President of Planning, Design and Construction at George Mason University (GMU). He shared that GMU has added over four million square feet during his fifteen year tenure and has utilized both CM and DB effectively to do so. The restructure act has three levels of autonomy and GMU was a level two at the onset of this. He shared that in 2016 GMU moved to level 2.5, a pilot program, and achieved level three in 2021. He explained in July 2017 the new legislation moved CM and DB to its own section of the code and required covered institutions to review all CM/DB procurements. Since this, GMU has requested review of three projects, 2 CM and 1 DB, and prior to any submission they assess projects and ensure the procurement method truly suits the project and in all cases DGS has agreed with GMU's chosen method. He explained the GMU team and their lengthy experience, sharing that dozens of projects have been procured via DBB. Mr. Iszard explained that in an environment of ongoing escalation having a contractor onboard from the onset of the project allows for the use of early release packages to manage schedules and budgets, that GMU has been able to use real time cost and schedule data to determine the most effective structural systems during design, hold the CM accountable for their original fee, despite ongoing escalation, and hold them accountable for preconstruction services. He believes the current language provides appropriate safeguards to ensure competition and while still allowing state agencies to make appropriate decisions related to procurement.

The third stakeholder to speak was Bob Broyden with Virginia Tech (VT), sharing that he has been at VT for three decades overseeing capital financing and planning, design, construction and real estate management. He explained that it is critical that universities be able to maintain the authority to select capital delivery and procurement methods. He stated that for approximately the last two decades, the university has developed highly effective business practices to implement entire capital outlay programs, hundreds of millions of dollars over many projects, and have become experts at doing this at the local level since restructuring. He explained that this includes multiple reviews and approvals by their board of visitors and the reviews and approvals are essential to ensure we deliver the projects on schedule and on budget. Mr. Broyden said a key activity is selecting the project delivery and procurement strategy and they do this very early in the process when the six-year capital outlay plan is identified. Starting in the budget requests submitted to the board or state they identify and disclose the intended project delivery method with a justification. He explained that since VT has been doing this in 2018 under current code, VT has initiated 23 projects, 12 have been DBB, 10 CM, and 1 DB. He concluded his

remarks by asking the Workgroup to consider higher education to continue their authority to maintain for project delivery and procurement methods.

The fourth stakeholder to speak was Dan Pisaniello, the University Architect and Director of Facilities, Planning Design and Construction at William and Mary (WM). He explained that projects procured through CM are required to have a minimum of 90% of the work competitively bid, stating that procurement is only one part of the equation. He said CM is a comprehensive project delivery method, not just an alternative delivery method that includes the owner, design professionals, and contractors. During the design phase the CM becomes a fully integrated part of the team allowing significant value added. He explained that under part one of the contract the CM provides cost estimating, reviews documents for constructability, schedule and sequences activities, research and market analysis for material selection, and a comprehensive evaluation strategy. He concluded with, in the absence of a CM, agencies will still need these services and could incur an administrative burden as those consultants may not be a fully integrated part of the design team.

The fifth stakeholder to comment was Craig Shorts, Associate Vice President of Business Services at James Madison University (JMU). Mr. Shorts pointed to the higher education handouts provided that explain the delivery method on compliance, competition, and executive order 35. He stated on the second page of the handout there is an illustration that shows logically how the CM method can help bring a project in on time or earlier. Time is money and the CM method is hugely important to complete projects on time. He explained that JMU had a athletics facility project valued at \$15 million that finished 130 days late due to complex HVAC components and if the project had been a CM instead of DBB he is 100% sure the project would have been completed on time. Since 2002, JMU has had 41 projects, 19 have been alternative delivery methods and they received nine offerors on average, with 22 DBB projects receiving only four bids on average. He pointed out that CM has more competition. He explained with CM, 90% of the work is done by subcontractors and there are outreach on the projects, not just to the general market but also SWaM vendors, sharing that they seek vendors who are eligible to be SWaM certified, too. He concluded his remarks sharing that of seven solicitations via alternative methods, five of those were awarded to small businesses.

Mr. McHugh asked Mr. Shorts for more detail on the outreach events and how effective they are for receiving more interest and more responses to the competitive subcontract packages issued. Mr. Shorts stated that CM allows agencies to negotiate the terms of outreach, the events the CM has to do, and more. In DBB, bids come back, and you get what you get, there are no provisions for things like this. He stated that in his experience it is an open book process explaining that the CM gets proposals from subcontractors and everyone evaluates and ensures the best value for project. One component is price but there are other components looked at when evaluating the subcontractors. He added that the outreach events are widely attended and advertised, and that social media is used, along with other platforms. He said there is no harm in using eVA to post notices and that would help get the word out and that the CM process allows for a much wider net to be cast for subcontractors than DBB allows.

Mr. Damico asked Mr. Shorts if he can describe how the small business opportunities are pursued under design-bid-build? Mr. Shorts replied, when a DBB is advertised it is advertised on the open market and small businesses can bid on the project. Mr. Damico followed up asking if when awarding to a prime contractor is there any outreach done by the prime contractor? Mr. Shorts stated that there are goals for the prime contractor to meet but no outreach occurs like it does with CM, explaining that in DBB that outreach has already taken place prior to the bid submission.

Mr. McHugh commented that that the intent of the Code of Virginia is that competition is sought to the maximum degree and with the alternative delivery methods there have been almost more than double the responses than with DBB.

The sixth stakeholder to speak was Glenn Thompson of W.M. Jordan Company, a general contractor and construction manager based in Virginia. He echoed the comments by JMU about the process from a construction manager perspective. Mr. Thompson said that they cast a wide net on every project and want as much competition as possible explaining that a considerable amount of time is spent as the bids come in and reviewing the bids with the client, and work to maximize the scope of the competition on each project. He supports the recommendation regarding using eVA to advertise subcontracting opportunities and opposes SB 954.

Mr. Damico asked Mr. Thompson if he bids on any work and if so, when he wins the job does his company do any small business outreach after award or is that done prior to bidding? Mr. Thompson replied that yes that he bids on work, explaining that the small business outreach occurs prior to submitting the bid with CM and with DBB he tries but cannot always maximize small business utilization.

The seventh stakeholder to speak was Michelle Gowdy, Executive Director with the Virginia Municipal League (VML). Ms. Gowdy spoke regarding local government, stating that they oppose recommendation one and three because adding another public hearing requirement is an additional administrative cost for localities and instead suggested a public notice that allows for input. She shared that there is currently a public notice work group that is looking into best practices for localities handling of public notices. She stated that VML opposes state mandates such as the requirement to use eVA.

Mr. Damico asked Ms. Gowdy if the process for local public bodies seeking funding for a capital project is done in public? She replied yes, explaining that they do a five-year capital plan through their governing boards and once a project is funded it will go out to bid with all appropriate public notices. Mr. Damico asked if there is an opportunity during the project development for the procurement method to be identified and allow for public comment to avoid having to hold a special hearing? Ms. Gowdy stated that there are opportunities and explained that both the planning commission and approving body both vote in public and the board or council makes a vote on the final procurement method at public meetings.

Mr. Saunders asked if it would be more in line with the local public body process to recommend that the procurement method be advertised and available for public comment during a regularly scheduled board meeting or public meeting? Ms. Gowdy stated that they can post the type of procurement on their website with the agenda so interested parties are aware of the procurement method being voted on at the meeting.

Mr. McHugh asked if local public bodies are required to use eVA? Ms. Gowdy replied that they are not required but many choose to use eVA and/or their website. She said that VAGP would prefer to have the option to continue to use eVA and use their own locality driven website. Mr. McHugh clarified that the concern from local public bodies is the mandate to use eVA, not the public notice itself? Ms. Gowdy stated that is correct.

The eighth stakeholder to speak was Brandon Robinson with the Association General Contractors (AGC). Mr. Robinson stated that he submitted additional ideas for the Workgroup to consider which is included in the meeting materials. He explained that the considerations AGC has put forward follow what he presented about two meetings ago which focused on transparency, the definition of complexity, and not using past CM experience during the scoring process. Mr. Robinson stated that he understands there is concern about amending the definition of complexity. He said that AGC supports posting in eVA or on local public bodies websites and has no issue with posting subcontracting opportunities on eVA to increase transparency.

There were no public comments for support or oppose in part, or neutral.

VI. Findings and Recommendations on SB 954

Before moving into formal recommendations and voting, the Workgroup had an opportunity to discuss SB 954 and the testimony heard.

Mr. McHugh stated that VASCUPP submitted recommendations to the Workgroup that are a result of information heard today and over the summer. He explained that today the Workgroup heard the intent of the restructuring act and management agreements, why they are relevant to the choice of project delivery methods for institutions, and how institutions have been delegated the authority to make fully informed decisions for themselves. Mr. McHugh stated that we learned how institutions administer their processes, have fair and equal access to funds, and shared how institutions engage their governing boards and how the governing boards hold institutions accountable for timely delivery of projects within budget. He added that the Workgroup learned about the benefits to small and diverse contractor communities also.

Mr. McHugh paraphrased from the VASCUPP handout included in the meeting materials stating; they heard the concerns about qualifications and recommend prohibiting listing previous CM experience as a prerequisite to the scoring process, transparency of the decisions for the project delivery method and recommend that all DEB related documents related to the advisory process be publicly posted on eVA, and recommend addressing

decisions made regarding the project delivery method for general funded projects to align with the DGS recommendation for local public bodies by modifying 43.1 to add the institutions governing board approval is required.

Mr. Damico asked Mr. McHugh about recommendation two that requires all DEB related documents related to the advisory process to be publicly posted on eVA. Mr. Damico explained that currently DEB has a form that institutions are required to complete that supports the institutions decision on the delivery method chosen which is then submitted to DEB for review. He explained that the document and justification is posted on the DGS website as a complete package. Mr. Damico asked Mr. McHugh for an understanding of what other documents he is looking at having posted? Mr. McHugh suggested that the documents that DEB posts should also be posted in eVA. Ms. Gill asked Mr. McHugh if he is proposing that institutions post these documents as an attachment when the institution posts a solicitation? Mr. McHugh replied that he wants to add more transparency to the process, the details and the decision behind the choice of alternative methods. Ms. Gill followed up asking if Mr. McHugh sees this posting of documents occurring when institutions solicit for preconstruction services? Mr. McHugh replied, yes.

Mr. Saunders inquired about recommendation three, asking Mr. McHugh if this recommendation would allow institutions in the case of general funded projects to have the institutions governing board overrule the recommendation by DEB on the project delivery method? Mr. McHugh stated that it would be any appropriated projects. Mr. Saunders asked if there is a sense of how many capital projects are general funded verses non-general funded? Mr. McHugh stated that the majority of funding is non-general fund.

Ms. Innocenti offered a recommendation for consideration from VAGP explaining that the eVA participation by local public bodies is inclusive of cities, counties, towns, and K-12 throughout the Commonwealth. She explained that they do use eVA for public notice because it is an effective tool. She stated that she supports the recommendation from VML which allows the option to post CM/DB opportunities on eVA or on the local public bodies local website. She indicated that she opposes the concept of having a required public hearing.

Next, Mr. Damico offered recommendations for the Workgroup to consider. Before proposing the recommendations, he explained that 43.1 of the Code was introduced by the General Assembly to make an attempt to bring state public bodies, institutions of higher education, and local public bodies into conformance with processes related to how CM/DB is procured. He explained that it is his understanding that 43.1 was purposely created because of the autonomy that institutions of higher education have and where the CM/DB language resided, in the VPPA, institutions of higher education were excluded because their autonomy and MOU/MOA's excluded them. He stated that his understanding of the intent of 43.1 is to have a set of criteria and processes that the industry can expect from public bodies when procuring these delivery methods, providing some common standards that the contractor community can rely on. Mr. Damico touched on the 2016 JLARC report and stated that DEB probably has the most experienced

number of professionals that are involved in the review of design documents that includes the building code official standpoint and their expertise on inspections. JLARC indicated that DBB is the default method, which they testified to at the last Workgroup meeting, and said that alternative methods may be beneficial for more complex and time sensitive projects, including that a dollar threshold is not the most effective criteria to use when determining a delivery method. He shared that today the Workgroup heard from JMU that a \$15 million project done as DBB may not have encountered significant delays had CM been used.

Mr. Damico stated that the complex definition was approved in 2017 by the General Assembly and has not heard any concerns by the industry or public bodies that changes to the definition are needed. Through testimony he has heard that there may be a desire to make changes to the complex definition and if this is the case, the stakeholders can address this but DGS will not recommend amending the definition.

Mr. Damico summarized the data provided to the Workgroup from the VCPA, citing that the data shows a trend towards DBB being used more. The AGC data provided shows that DBB is used 74% of the time over the other procurement methods being used 26% of the time. He said that DBB is being used the majority of the time and he concludes from the data sets that there is consideration being given by the public bodies as to the method being selected. The small business community told the Workgroup that CM is more helpful to them and provides more business opportunities.

Mr. Damico spoke to transparency, sharing that the data the General Assembly requires DEB to report is to provide them the opportunity to see what is going on as it relates to public bodies decisions on procurement methods. This data shows that when DEB has reviewed a decision by state agencies on an alternative method of delivery, DEB has agreed with the chosen method 100% of the time. The data shows that when DEB has reviewed a decision by institutions of higher education, there have been eight instances where DEB did not agree with the chosen delivery method but the institution proceeded anyway, which is within their authority to do. He shared that DEB is current required to review the proposed method of delivery and make a decision if DEB agrees, or not, within five days. Mr. Damico stated that this information sets the stage and background as to what has been considered by DGS in offering the following three recommendations.

Mr. Damico offered three recommendations for the Workgroups consideration: the first recommendation is the General Assembly consider stating in 43.1 that DBB is the default method of procurement unless an alternative method (CM/DB) is approved by DGS/DEB for institutions of higher education and state public bodies, or in the case of local public bodies, the local governing board must approve the use of CM/DB in a public forum allowing for public comment on the use of CM/DB. The second recommendation is the General Assembly consider amending DGS authority in 43/1 from evaluating the proposed use of CM/DB by state public bodies and institutions of higher education to DGS/DEB making a final decision as to the use of CM/DB on each project. The third recommendation is that the General Assembly consider requiring public bodies to

advertise available subcontracting opportunities on the DGS central electronic procurement website, known as eVA, for CM/DB projects.

Mr. McHugh thanked Mr. Damico for going through the recommendations and asked if the intent of the recommendations today would result in potentially removing the threshold from the existing 43.1? Mr. Damico replied that he believes the responsibilities of the Workgroup are to make recommendations for the General Assembly to consider as they are the policy makers for the Commonwealth and if the decision by the General Assembly is that DBB is the default method and CM/DB requires DGS/DEB approval, then yes, DGS would work with the SOA to remove the dollar threshold as it relates to the selection of delivery method.

Mr. McHugh pointed to the first recommendation from Mr. Damico that states that DBB is the default method unless an alternative method is approved by DGS, explaining that in the Attorney General's testimony the Workgroup heard that this language is already in the Code, asking if it is necessary to make the same statement in another section of the Code. He continued his remarks sharing that the recommendation for local public bodies to go to their local governing board essentially aligns with the VACUPP recommendation and asked for consideration of modifying the recommendation. He explained that institutions of higher education governing boards consider more complicated things other than construction method and how it fits into the master plan, such as negotiations and discussions with multiple jurisdictions, funding and financing of buildings, and all of these are non-construction considerations that the board is aware of and made aware of during various meetings. He stated that he does not dispute that DEB is the right resource to rely on for advising the proper method but their review is isolated to construction and does not take the other important factors into consideration. He concluded his remarks on the DGS recommendations stating that in terms of the eVA posting requirement, he is not opposed to this and supports competition to the maximum degree, adding that today the Workgroup heard testimony on how outreach events are conducted.

Mr. Damico thanked Mr. McHugh for his comments, stating that he doesn't see the Workgroup as the policy making group but instead a group that informs the General Assembly that we have discussed the topic and provide considerations for their review as they address the issue going forward in the General Assembly. He stated that he will propose the DGS recommendations as written and acknowledged that there could be multiple recommendations for the General Assembly to consider as they determine the proper use of these alternative methods.

Next the Workgroup made formal recommendations and voted on which will move forward.

Recommendation 1: [Consider] Prohibit state agencies and covered institutions from listing previous CM experience as a prerequisite or using such experience in the scoring process for prequal or award of a contract. Local governments are purposely left out. Mr.

McHugh made a motion move this recommendation forward. The motion was seconded by Mr. Bates and carried by a vote of 6-1³.

Recommendation 2: [Consider] all documents exchanged between agencies and covered institutions with the Division of Engineering and Buildings related to the advisory process of the selection of alternative methods (CM/DB) as a projects delivery method shall be also posted publicly to eVA. Mr. McHugh made a motion to move this recommendation forward. The motion was seconded by Ms. Innocenti. Prior to voting, Mr. Heslinga requested clarification on the wording, suggesting the removal of the word “advisory”. McHugh suggested changing advisory to current in the recommendation so it would read “consider all documents exchanged between agencies and covered institutions with the Division of Engineering and Buildings related to the current process of the selection of alternative methods (CM/DB) as a projects delivery method shall also be posted publicly to eVA. Mr. McHugh made a motion to move the recommendation forward as amended. The motion was seconded by Mr. Heslinga and carried by a vote of 6-1⁴.

Mr. Damico, having voted on the prevailing side of recommendation 1, would like to propose adding “consider” in front of that recommendation. Mr. McHugh made a motion to accept the addition. The motion was seconded by Mr. Heslinga and carried by a vote of 6-1⁵.

Recommendation 3: “Consider modifying 2.2-4381(F) as bolded: “If a covered institution elects to proceed with the project using a construction management or design-build procurement method despite the recommendation of the Department to the contrary, **for general fund funded projects, covered institutions shall request a review by its governing board and may proceed with construction management or design-build procurement method only upon receiving approval by its governing board to not accept the recommendation of the Department. The covered institution should include the written statement of a covered institution’s Governing Board’s approval to not follow the recommendation of the Department in the procurement file. For all other projects**, if a covered institution elects to proceed with the project using a construction management or design-build procurement method despite the recommendation of the Department to the contrary, such covered institution shall state in writing its reasons therefor and any justification for not following the recommendation of the Department and submit same to the Department. The written statement of a covered institution’s decision to not follow the recommendation of the Department shall be maintained in the procurement file.” Mr. McHugh made a motion to move the recommendation forward. The motion was seconded by Ms. Innocenti and carried by a vote of 4-2-1⁶.

³ Yes; Innocenti, Morris, Heslinga, McHugh, Bates, Damico. Abstain: Saunders

⁴ Yes; Innocenti, Morris, Heslinga, McHugh, Bates, Damico. Abstain: Saunders

⁵ Yes; Innocenti, Morris, Heslinga, McHugh, Bates, Damico. Abstain: Saunders

⁶ Yes; Innocenti, Morris, McHugh, Bates. No: Damico, Saunders. Abstain: Heslinga,

Recommendation 4: Workgroup recommend that local public bodies be required to post notice on eVA or their local website at least 14 days prior to the governing body making a decision to use either CM or DB on a particular project but that no public hearing be required. Ms. Innocenti made a motion to move the recommendation forward. The motion was seconded by Mr. McHugh, The motion did not carry by a vote of 2-4-1⁷.

Recommendation 5: The General Assembly consider stating in 43.1 that design-bid-build is the default method of procurement unless an alternative method (CM/DB) is approved by DGS' Division of Engineering and Buildings (DEB) for institutions of higher education and state public bodies, or in the case of local public bodies, the local governing board must approve the use of CM/DB in a public forum allowing for public comments on the proposed use of CM/DB. Mr. Morris made a motion to move the recommendation forward. The motion was seconded by Ms. Innocenti and carried by a vote of 6-1⁸.

Recommendation 6: The General Assembly consider amending DGS' authority in 43.1 from evaluating the proposed use of CM/DB by state public bodies and institutions of higher education to DGS' DEB making a final decision as to the use of CM/DB on each project. Mr. Saunders made a motion to move the recommendation forward. The motion was seconded by Mr. Morris and carried by a vote of 5-2⁹.

Recommendation 7: The General Assembly consider requiring public bodies to advertise available subcontracting opportunities on the DGS central electronic procurement website, known as eVA, for CM/DB projects. Mr. Morris made a motion to move the recommendation forward. The motion was seconded by Mr. Heslinga and carried by a vote of 4-1-1¹⁰.

The Workgroup tabled a previously provided consideration to modify any SOA procedures rather than making legislative changes and provide a statement in the report that the SOA procedures would be modified as necessary in response to legislative changes made during the General Assembly session.

Mr. Morris, having voted on the prevailing side of recommendation 3, made a motion to reconsideration of the vote. Mr. Heslinga seconded the motion and carried by a vote of 4-3¹¹. Recommendation 3 was before the Workgroup again for voting. Mr. Morris made a motion to move recommendation 3 forward. The motion was seconded by Mr. Damico and failed to carry by a vote of 4-3¹².

Ms. Innocenti made a motion to move forward a recommendation that the General Assembly consider requiring public bodies advertise available subcontracting

⁷ Yes: Innocenti, McHugh. No: Morris, Heslinga, Bates, Damico. Abstain: Saunders

⁸ Yes: Innocenti, Morris, Heslinga, Bates, Damico, Saunders. No: McHugh

⁹ Yes: Morris, Heslinga, Bates, Damico, Saunders. No: Innocenti, McHugh

¹⁰ Yes: Morris, Heslinga, Bates, Damico, Saunders. No: Innocenti. Abstain: McHugh

¹¹ Yes: Morris, Heslinga, Damico, Saunders. No: Innocenti, McHugh, Bates

¹² Yes: Innocenti, McHugh, Bates. No: Morris, Heslinga, Damico, Saunders

opportunities on the DGS' central electronic procurement website, known as eVA, or the local government website for CM/DB projects. The motion was seconded by Mr. McHugh and failed by a vote of 4-2-1¹³

Mr. McHugh asked if there will be another opportunity to provide a recommendation for consideration. Mr. Damico stated that the recommendations voted on today will allow staff to put them into writing for the next meeting the Workgroup will have a final vote on the recommendations to include in the report and if at this time a member would like to propose another recommendation for the Workgroup to vote on, they can.

VII. Public Comment

None.

VIII. Discussion

None.

IX. Adjournment

Mr. Damico adjourned the meeting at 3:13 p.m. and noted that the next Workgroup meeting is scheduled for September 14, 2023 at 1:00 p.m. in the James Monroe Building, conference room C.

For more information, see the [Workgroup's website](#) or contact that Workgroup's staff at pwg@dgs.virginia.gov.

¹³ Yes: Innocenti, McHugh. No: Morris, Heslinga, Bates, Damico. Abstain: Saunders