DRAFT 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 reflected in the meeting minutes and asked what the process is to have that comment included 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 is 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 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 interpretated 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, nothing 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 pubic 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.

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.

Public Body Procurement Workgroup meeting #6 on August 8, 2023

Draft considerations for SB 954

1. 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 hearing allowing for public comments on the proposed use of CM/DB. (DGS)
2. 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. (DGS)
3. 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. (DGS)
4. Consider modifying the SOA procedures rather than making legislative changes. (VAGP)

Note: during the meeting four considerations were offered, however two of the considerations have been combined into item #1 above.