

Procurement Workgroup – Topic Summary Sheet

Topic: Construction Procurement Processes by Localities, K-12 School Districts, Authorities

Subject Matter Expert: Beth Dooley, Fairfax Water (for VAGP)

Date: May 24, 2021

Topic Summary: Identify construction procurement processes that would incentivize general contractors to achieve discretionary spend goals for small, women and minority owned businesses (SWaM).

1. Summary of the proposed change or request being reviewed:

Examine current construction procurement processes by local government that would incentivize general contractors to achieve discretionary spend goals for small, women and minority owned businesses

- Provide for an expedited certification process, which allows contractors to count businesses not already certified but that qualify for certification through the Virginia Department of Small Business and Supplier Diversity. In other words, provide a process that permits/promotes/facilitates certification post bid.
 - Note: At the local level, some businesses do not see the value of certification, and many that qualify for certification are not certified. Providing General Contractors with an abundance of qualified and certified subcontractors to select from is imperative to the program. Many localities have very a very small procurement staff. There is a need for some sort of centralized facilitation (promotion) to increase certified subcontractors in localities across Virginia.
- Provide outreach and training to General Contractors.
- Provide outreach and training to vendors.

Examine best practices to provide oversight of subcontracts

- Require General Contractors to submit a subcontracting plan with their bid.
 - Include more oversight by the public body during the construction administration process, i.e. include in site visit by project management the verification that the certified subcontractors included in the subcontracting plan are actually on site performing the subcontracted work.
 - Simplified / standardized reporting requirements to local governments on compliance with subcontracting plans.
 - Require General Contractors to report their actual performance against their subcontracting plan.
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2. What is the current State process: *(provide an explanation of what the current law requirements are or current practices, etc)*

The enabling legislation at the local level requires that all public bodies establish programs to facilitate the participation of small businesses, businesses owned by women, minorities, and service disabled veterans, and employment services organizations in procurement transactions (Va. Code 2.2-4310.B.). Executive Order 035 regarding the discretionary spend goal does not trickle down to the local level. A chief executive of a local governing body can only provide for the provision of enhancement or remedial measures pursuant to Va. Code 15.2-965.1. At the local level this is generally interpreted to mean that a disparity study is required, and if the disparity study shows that a disparity exists then remedial measures may be taken to address the disparity. Most localities do not have a specific discretionary spend goal.

If there is a spend goal associated with federal funding, then that applies to the local purchase made with the associated federal grant funds.

3. Impact proposed changes to the Code of Virginia: *(provide detailed explanations potential impacts)*

Specific Agency or Political Subdivisions Affected:

VAGP is not proposing any changes to the Code of Virginia. The proposal focuses on enhancing DSBSD collaboration and coordination with localities (including K-12) and authorities.

Overall impact:

- Improved coordination and consistency in SWaM participation among localities.
- Increased participation by SWaM contractors
- Increased participation by LOCAL SWaM contractors

Impacts to small businesses to include women and minorities:

- Increased awareness of construction contracting opportunities.
- Increased subcontract awards.

Impacts to the Commonwealth's or locality's budget:

- Potential increase in DSBSD administrative costs to support an expedited, post-bid certification process.
- Increased DSBSD staffing to conduct outreach and education through less-populated regions of the state

Impacts to the Commonwealth's locality's procurement processes:

- Longer lead to allow for post bid certification.

4. **Additional Impacts Identified:** *(provide detailed explanation of any additional potential impacts)*

- None identified

5. **Finding / Recommendation:** *(provide a detailed explanation, suggest edits to the proposed language, changes to policy, best practices, etc)*

Procurement Workgroup – Topic Summary Sheet

Topic: Construction Procurement Process by State Agencies and Covered Institutions

Subject Matter Expert: Department of Small Business and Supplier Diversity

Date: May 25, 2021

Topic Summary: Examine current construction procurement processes by state agencies and covered institutions that would incentivize general contractors to achieve discretionary spend goals for small, women and minority-owned businesses. Also, evaluate subcontractor compliance.

1. Summary of the proposed change or request being reviewed:

Incentivize General Contractors to Achieve Discretionary Spend Goals for SWaM

Require state agencies to hold SWaM vendor fairs on large construction projects. This would be most effective if done in coordination with Prime Contractors.

Unbundle contracts and advertise SWaM subcontract opportunities. Examples might be SWaM tire vendors to support heavy equipment needs/repairs on a construction site.

Dictate marketing requirements for all construction projects over a certain dollar threshold. Let's say for all projects over \$10 million the project and unbundled sub projects need to be advertised in the paper and two pre-construction vendor fairs should be held as an example.

Require goal setting for subcontract use on construction projects over a certain dollar threshold.

Provide monetary incentives to Prime Contractors to encourage SWaM vendor usage. Examples can be awards that allow Primes to capture cost plus award fees to use SWaM vendors.

Allow for expedited payment terms to reward contractors that utilize SWaM contractors.

Reduce eVA fees for Prime Contractors that successfully leverage SWaM subcontractors.

Evaluate the award process to determine if additional points can be awarded to Prime Contractors that commit to higher subcontract goals.

Reduce procurement submission requirements to encourage SWaM business participation as a Prime Contractor and require mandatory briefings when a vendor is unsuccessful so they know how to correct or improve on upcoming solicitations.

Subcontractor Compliance

Create an automated tool within eVA and mandate all Prime Contractors enter subcontract data both SWaM and Non-SWaM. As part of the tool automate compliance checkpoints whereby the

subcontractors are contacted once identified as performing on a contract to verify they are and that they are being paid timely.

Chronic and unjustified payment delays should become part of the evaluation process of past performance.

A simplified mediation process should be available to SWaM businesses that find themselves in dispute with a Prime Contractor. Requiring civil action is costly and not always feasible.

Require and ensure Prime Contractors are assessed and pay interest and penalties for late payments to SWaM subcontractors.

2. What is the current State process: *(provide an explanation of what the current law requirements are or current practices, etc)*

Currently EO35 and the APSPM guide set-aside practices for SWaM vendors and their use in the procurement process.

The APSPM lays out guidelines when subcontractor plans are to be submitted and timelines for subcontractor payment however there is no compliance process to ensure subcontractor plans are being adhered to.

The VPPA establishes procurement law in Virginia.

3. Impact proposed changes to the Code of Virginia: *(provide detailed explanations potential impacts)*

Specific Agency or Political Subdivisions Affected:

I don't believe any of these recommendations will require changes to the Code of Virginia but to guidance documents and systems managed by the Dept. of General Services.

State agencies and covered institutions will be responsible for implementing policy change at their level.

Overall impact:

Will incentivize Prime Contractor utilization of SWaM businesses and ensure compliance with subcontractor commitments.

Impacts to small businesses to include women and minorities:

Will support utilization of SWaM businesses in the procurement process.

Impacts to the Commonwealth's budget:

There may be budget implications to implement system design changes in eVA and design subcontractor compliance monitoring.

Impacts to the Commonwealth's procurement processes:

Additional requirements will require retraining of Commonwealth procurement personnel to ensure understanding and compliance.

4. Additional Impacts Identified: *(provide detailed explanation of any additional potential impacts)*

Additional workload likely to ensure Prime Contractor compliance around engagement and utilization of SWaM businesses.

5. Finding / Recommendation: *(provide a detailed explanation, suggest edits to the proposed language, changes to policy, best practices, etc)*

Reference Item #1 for recommendations. Implementation would need to be discussed more fully among the workgroup members.

Procurement Workgroup – Topic Summary Sheet

Topic: Examine best practices to provide oversight of subcontracts – Technology goods and services

Subject Matter Expert: Dan Wolf, Virginia IT Agency

Date: 5/25/2021

Topic Summary: Examine best practices to provide oversight of subcontracts

1. Summary of the proposed change or request being reviewed:

This report examines best practices for oversight of subcontracts in the area of technology goods and services. VITA's current requirements are aligned with existing law (Va. Code § 2.2-4310 and Executive Order 35). No current recommendations for changes to existing law were assessed as part of this report, but near-term focus should remain on updating discretionary spend goals for small, women, and minority (SWaM) businesses in partnership with DBSD and DGS as required by Executive Order 35.

2. What is the current State process: *(provide an explanation of what the current law requirements are or current practices, etc)*

The current requirements are outlined in Va. Code § 2.2-4310 and Executive Order 35, which includes:

- Target goal of 42% of discretionary spending for Executive Branch agencies.
- Agency annual SWaM plans to DSBSD.
- Agency's policies compliant with the requirements EO 35.
- Purchases less than \$100,000 are set aside for award to DSBSD-certified small businesses when price quoted is fair and reasonable and is not less than 5% of lowest responsible and responsible non-cert bidder.
- Purchases less than \$10,000 are set aside for microbusinesses. *(same as above)*
- Small business subcontract plan required if purchase greater than \$100,000 *(requirement established by previous executive order)*.
- Prime contractor required to report compliance with its small sub contract plans.
- Before final payment is made to the supplier, the agency shall confirm prime contractor compliance with subcontract plans.
- Contracts and renewals require final payment to contractor to be withheld until complies with small bus subcontract plan.
- SBSD provides reporting
 - Quarterly monitoring and reporting to Secretary of Administration.
 - Reports to Governor provide spending in detail by SWaM category and agency.

VITA's current implementation in support of these requirements:

- VITA Small Purchase Policy
 - Purchases less than \$10,000 set aside for microbusinesses.
 - If price is fair and reasonable, 5% of lowest bid.
 - Purchases greater than \$10,000 but less than \$100,000 set aside for small business. (price reasonableness is required).
 - Purchases greater than \$100,000 but less than \$200,000 are considered small purchases but not required to be set aside.
- VITA Subcontractor Procurement Plan
 - Supplier Procurement Subcontracting Plan
 - Required as part of all solicitations over \$200,000.
 - Contractor plans/commitments and actuals are reported through VITA's Supplier Reporting System (SRS).
- VITA SWaM Policy
 - All solicitations/contracts require contractor to submit a Supplier Procurement and Subcontractor Plan to show all subcontractors the offeror/supplier intends to use.
 - Small Business Procurement and Subcontractor spend – suppliers must submit a monthly report of spend and subcontracting spend data via SRS.
 - Before final contract payment made, VITA/agency shall confirm prime contractor has certified compliance with subcontracting plan. Any variances must be explained.
 - SRS report can be run to determine “actual” SWaM spend vs. “committed” SWaM spend.
 - Contracts and renewals may include a provision for final contract payment to be withheld until prime contractor complies with Procurement and Subcontracting plan.
 - Supplier compliance with Subcontracting plan and spend reporting shall be considered in determining supplier's eligibility for future contract awards/renewals.
- Suppliers are required to report monthly subcontractor use in SRS along with their monthly sales.
 - All data is provided on one report; it is not separate reports.
 - That spend could include SWaM and non-SWaM subcontractor spend.
 - Some suppliers agree to a SWaM commitment percentage where they agree that a specified percentage of their monthly sales will be used with a SWaM certified subcontractor; VITA has the ability to monitor actual usage to their commitment.
- VITA submits monthly subcontractor spend to DSBSD in order for agencies and other public bodies who purchase off our contracts to receive credit for their SWaM use on their DSBSD dashboard.

3. Impact proposed changes to the Code of Virginia: (provide detailed explanations potential impacts)

Specific Agency or Political Subdivisions Affected:

N/A

Overall impact:

N/A

Impacts to small businesses to include women and minorities:

N/A

Impacts to the Commonwealth's budget:

N/A

Impacts to the Commonwealth's procurement processes:

N/A

4. Additional Impacts Identified: *(provide detailed explanation of any additional potential impacts)*

None at this time

5. Finding / Recommendation: *(provide a detailed explanation, suggest edits to the proposed language, changes to policy, best practices, etc)*

Procurement Workgroup – Topic Summary Sheet

Topic: Construction Procurement Processes by State Agencies and Covered Institutions

Subject Matter Expert: Covered Institutions

Date: May 25, 2021

Topic Summary:

- Examine current construction procurement processes by state agencies and covered institutions that would incentivize general contractors to achieve discretionary spend goals for small, women, and minority-owned businesses

1. Summary of the proposed change or request being reviewed:

Proactive steps required by state agencies and institutions:

- Outreach
 - Proactive Outreach for Potential Subcontractors List: Request GC's to submit list of potential subcontractors they plan to use with solicitation response. Have SBSD and Agency/Institution outreach to non-SWAM certified firms to promote and assist with certification/re-certification challenges.
 - DSBSD to offer direct SWAM vendor training, expedite certifications when a non-certified firm has an opportunity on a large capital project and match-make viable firms with general contractors.
 - Require all general contractors awarded a state capital construction project to host a SWAM vendor outreach event
 - Enhance technology for a user friendly, filterable SWAM Search Tool that enhances the ability of general contractors to source available and viable SWAM firms.
 - Have DSBSD create a master list of prequalified SWAM certified trades for GC's to leverage when fulfilling a contract
 - Ensure Prime General Contractor has an individual (similar to requirements for state agencies) identified for each project that will be their SWaM champion.
 - SWAM certification (if applicable) in alignment with eVA registration- Begin SWaM certification during eVA registration.
- Certification: Ensure adequate number of available certified SWAM firms. Remove barriers and provide greater outreach and assistance for firms seeking certification and/or re-certification.
 - Reward SWaM success- "Grandfather" SWaM vendors as SWaM certified for a period of time after they outgrow the program.

- Allow GC's to report SWaM spend from SWAM qualifying subcontractors from other states- amend reciprocity restrictions to increase eligible vendors
- Allow sole proprietors to automatically be counted as a SWaM vendor
- Allow the usage of the SBA vendor pool to count in addition to SBSD certified SWaM vendors
- Emphasize Woman and minority-owned businesses in SWaM goals
- Recognition/Training:
 - Mentor Protégé Program: Establish a robust mentor protégé program to expand capacity for available and certified SWAM firms.
 - Goal Achievement Recognition: Identify and publicly recognize general contractors who consistently achieve SWAM goals. Have Governor's level recognition of top performers.
- Agency efforts
 - Agencies designate a SWAM Procurement Champion specifically for capital projects. This individual meets with architects, engineers, contractors and vendors to encourage SWAM Participation in subcontracting activities.
 - Agencies monitor SWAM utilization throughout the project in progress. Action plans are submitted by the general contractor are reviewed by the agency for compliance to the GC's SWAM utilization plan.
 - Require awarded Prime general contractor to include SWaM goals for their subcontractors
 - Require any contractor that does not meet its sub-contractor goal to meet with agency SWaM champion (potentially SBSD representative and Project Manager as well) to debrief and review barriers/complications that existed and methods of improvement for the future.

2. What is the current State process: *(provide an explanation of what the current law requirements are or current practices, etc)*

- SWaM
 - Certification: General contractors, agencies and institutions are only able to include spend with certified SWAM firms in their SWAM subcontracting and SWAM utilization numbers. Reporting does not include those firms that are eligible for SWAM certification but who have not certified, sole proprietors or SWaM vendors from non-reciprocal states
 - Mentor Protégé Program: not aware of a state developed Mentor Protégé program,
 - Goal Achievement Recognition: None specific to this area.
 - Proactive Outreach to Potential Subcontractor List: Only done at an agency/institution level.
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3. Impact proposed changes to the Code of Virginia: *(provide detailed explanations potential impacts)*

Amend Code of Virginia Section 2.2-1606 (8) that requires that SBSB deny certain states participation as a result of their programs or procurement preferences which negatively affect Virginia-based businesses (such as denying them certification or having non-Virginia, in-state preferences or pre-conditions for participation).

Specific Agency or Political Subdivisions Affected:

DSBSB

Overall impact:

Allowing vendors already certified under SBA or other states might require additional labor for monitoring. Mentor-Protégé setup might require additional labor as well

Impacts to small businesses to include women and minorities:

Would increase the amount of small businesses, women and minorities that can be used

Impacts to the Commonwealth's budget:

Might increase the DSBSB budget

Impacts to the Commonwealth's procurement processes:

Would increase competition and would benefit small businesses, women and minority-owned businesses.

4. Additional Impacts Identified: *(provide detailed explanation of any additional potential impacts)*

N/A

5. Finding / Recommendation: *(provide a detailed explanation, suggest edits to the proposed language, changes to policy, best practices, etc)*

See #1

Procurement Workgroup – Topic Summary Sheet

Topic: Construction Procurement Processes by State Agencies and Covered Institutions

Subject Matter Expert: Covered Institutions

Date: May 25, 2021

Topic Summary:

- Examine best practices to provide oversight of subcontracts

1. Summary of the proposed change or request being reviewed:

Proactive steps required by state agencies and institutions:

- Oversight of subcontractors
 - Regulatory
 - Refer complaints related to improper classification of independent contractors to the Department of Taxation as codified in [House Bill 1407](#) and [Senate Bill 744](#), Complaints can also be referred to the Board Of Contractors as codified in [House Bill 1646](#). Other bills that protect workers are [House Bill 984](#) and [Senate Bill 894](#), [House Bill 1199](#) and [Senate Bill 662](#),
 - Refer complaints of wage theft to the Department of labor and Industry as codified in [House Bill 336](#) and [Senate Bill 49](#)
 - These agencies should establish a hotline for workers to file a complaint
 - Have each GC submit the names of each subcontractor employee working on the project to Department of Taxation/Board of Contractors. Department of Taxation/Board of Contractors to email/Call each employee at the end of the project and ask a predetermined set of questions related to workplace practices. Create an incentive program with monetary and promotional incentives for contractors that continually score highly.
 - Agency Specific
 - Have each GC name a Contract Administrator (CA) for each subcontract
 - Develop a standard list of administration tasks for CA's to manage subcontractor performance
 - Include quality, safety and timely payment of subs as part of the CA's responsibilities
 - Include standard contract language holding contractors responsible for oversight of their subs in all construction contracts

- Require GC's to enter in to memo of understanding with their second and third tier subcontractors that gives assurance to both sides the expectations of each side include labor practices.

2. What is the current State process: *(provide an explanation of what the current law requirements are or current practices, etc)*

- Agencies are asked to adjudicate cases of wage theft and improper classification
- Commonwealth does not have a simple, widely publicized system for complaint resolution
- § 40.1-29.1. Investigations of employers for nonpayment of wages. This allows an "employee" to bring a civil suit against their employer for misclassification. Department of Labor can also institute proceedings if they find that an "employee" wasn't paid wages

3. Impact proposed changes to the Code of Virginia: *(provide detailed explanations potential impacts)*

Specific Agency or Political Subdivisions Affected:

- The Department of Taxation
- The Department of Labor and Industry

Overall impact:

- Oversight of subcontracts
 - Will unify the complaint and investigation process. It will also serve to help understand how prevalent the problem is and if progress is being made.

Impacts to small businesses to include women and minorities:

- Oversight of subcontracts
 - No negative impact

Impacts to the Commonwealth's budget:

- Oversight of subcontracts

- Will increase the budget for the Department of Taxation and Department of Labor and Industry

Impacts to the Commonwealth's procurement processes:

- Oversight of Subcontracts
 - May increase the cost to the Agencies when increasing the requirements of the sub

4. **Additional Impacts Identified:** *(provide detailed explanation of any additional potential impacts)*

5. **Finding / Recommendation:** *(provide a detailed explanation, suggest edits to the proposed language, changes to policy, best practices, etc) Outlined in #1*

Procurement Workgroup – Topic Summary Sheet

Topic: Construction Procurement Processes by State Agencies and Covered Institutions

Subject Matter Expert: W. Michael Coppa, DEB Director

Date: May 25, 2021

Topic Summary: Identify construction procurement processes that would incentivize general contractors to achieve discretionary spend goals for small, women and minority owned businesses (SWaM).

1. Summary of the proposed change or request being reviewed:

Analyze proactive steps that may currently be required by state agencies and covered institutions for general contractors.

Require general contractors to hold SWaM vendor fairs at the start of each project and prior to subcontract award.

Require general contractors to proactively solicit subcontract bids from a minimum number of SWaM subcontractors.

Institute set asides for SWaM subcontractors.

2. What is the current State process: *(provide an explanation of what the current law requirements are or current practices, etc.)*

Executive Order 035 directs a small business target goal of 42 percent of discretionary spending and 50 percent for capital outlay construction. Each State Agency and Covered Institution small business plans vary depending upon their location and administrative goals, and some plans include woman and minority SWaM elements.

3. Impact proposed changes to the Code of Virginia: *(provide detailed explanations potential impacts)*

Specific Agency or Political Subdivisions Affected:

State Agencies and Covered Institutions

Overall impact:

Increased participation by SWaM subcontractors may result if proposed changes are implemented.

Impacts to small businesses to include women and minorities:

Increased awareness of construction contracting opportunities.
Increased subcontract awards.

Impacts to the Commonwealth's budget:

Potential increased general conditions cost due to an increase in administrative costs.
Potential increased costs from set asides.

Impacts to the Commonwealth's procurement processes:

Potential extended time for bidding.
Added complexity for negotiated contracts

4. **Additional Impacts Identified:** *(provide detailed explanation of any additional potential impacts)*

Potential increased administrative burden on agency Project Managers to ensure compliance with additional requirements.

5. **Finding / Recommendation:** *(provide a detailed explanation, suggest edits to the proposed language, changes to policy, best practices, etc)*

Procurement Workgroup – Topic Summary Sheet

Topic: Best practices to provide oversight of construction subcontracts

Subject Matter Expert: W. Michael Coppa, DEB Director

Date: May 25, 2021

Topic Summary: Examine the best practices by general contractors and Agency Project Managers to oversee subcontract administration, on-site practices and fiscal procedures.

1. Summary of the proposed change or request being reviewed:

Analyze oversight practices that may currently be performed by state agencies, covered institutions and general contractors.

Establish minimum (CPSM / IHE) policies for the administrative, on-site and fiscal oversight of subcontractors.

Require general contractors to provide written policies on the administrative, on-site and fiscal procedures used in the oversight of subcontractors.

2. What is the current State process: *(provide an explanation of what the current law requirements are or current practices, etc.)*

VPPA (2.2-4300 et seq.) establishes methods for construction contracting to include Design/Bid/Build, CM at Risk and Design/Build. COV Section 2.2-1132 directs the Division of Engineering and Buildings, (DGS) to establish policies and procedures for construction procurement. These procedures are contained within the Construction and Professional Services Manual (CPSM).

General Conditions of the Construction Contract (CO-7), which is part of the CPSM, currently make the general contractor solely responsible for oversight of all aspects of subcontractor activities. Interaction with subcontracts with Agency Project Managers is limited by the CO-7, and Agency Project Managers are instructed to not interfere with the contractual relationship between the general contractor and subcontractors.

3. Impact proposed changes to the Code of Virginia: *(provide detailed explanations potential impacts)*

Specific Agency or Political Subdivisions Affected:

State Agencies and Covered Institutions

Overall impact:

Increased administrative responsibility for the Agency Project Managers.
Potential interference with the progress of the work.
Potential liability for conflicts in oversight.

Impacts to small businesses to include women and minorities:

Assistance in administrative, on-site and fiscal activities.

Impacts to the Commonwealth's budget:

Potential increased general conditions cost due to an increase in administrative costs.
Potential change orders if conflicts in oversight occur

Impacts to the Commonwealth's procurement processes:

None

4. **Additional Impacts Identified:** *(provide detailed explanation of any additional potential impacts)*

Adding agency oversight of subcontracts or specifying criteria for the oversight by general contractors of subcontracts is contrary to the fundamental concept of hiring a general contractor to coordinate construction.

5. **Finding / Recommendation:** *(provide a detailed explanation, suggest edits to the proposed language, changes to policy, best practices, etc.)*

Procurement Workgroup – Topic Summary Sheet

Topic: Best practices to provide oversight of professional services subcontracts

Subject Matter Expert: W. Michael Coppa, DEB Director

Date: May 25, 2021

Topic Summary: Identify best practices by prime Architect/Engineer (A/E) professional services contractors and Agency Project Managers to oversee professional services subcontract administration and fiscal procedures.

1. Summary of the proposed change or request being reviewed:

Analyze oversight practices that may currently be performed by state agencies, covered institutions.

Establish minimum (CPSM / IHE) policies for the administrative and fiscal oversight of subcontractors.

2. What is the current State process: *(provide an explanation of what the current law requirements are or current practices, etc.)*

VPPA (2.2-4300 et seq.) establishes methods for A/E professional services contracting. COV Section 2.2-1132 directs the Division of Engineering and Buildings, (DGS) to establish policies and procedures for professional services contracts. These procedures are contained within the Construction and Professional Services Manual (CPSM).

Terms and Conditions of the A/E Contract (CO-3a), which is part of the CPSM, currently makes the prime A/E solely responsible for oversight of all aspects of professional services subcontractor activities. Interaction with subcontracts with Agency Project Managers is limited by the CO-3a, and Agency Project Managers are instructed to not interfere with the contractual relationship between the prime A/E and the professional services subcontractors.

3. Impact proposed changes to the Code of Virginia: *(provide detailed explanations potential impacts)*

Specific Agency or Political Subdivisions Affected:

State Agencies and Covered Institutions

Overall impact:

Increased administrative responsibility for the Agency Project Managers.
Potential interference with the progress of the work.
Potential liability for conflicts in oversight.

Impacts to small businesses to include women and minorities:

Assistance in administrative and fiscal activities.

Impacts to the Commonwealth's budget:

Potential increased professional services fees due to an increase in
administrative costs.
Potential change orders if conflicts in oversight occur

Impacts to the Commonwealth's procurement processes:

None

4. Additional Impacts Identified: *(provide detailed explanation of any additional potential impacts)*

Adding agency oversight of subcontracts or specifying criteria for the oversight by the prime A/E of the professional services subcontractors is contrary to the fundamental concept of hiring a prime A/E to coordinate design.

5. Finding / Recommendation: *(provide a detailed explanation, suggest edits to the proposed language, changes to policy, best practices, etc.)*

Procurement Workgroup – Topic Summary Sheet

Topic: May 12th, 2021 Email (Two Focus Areas)

Subject Matter Expert: VDOT

Date: June 1, 2021

Topic Summary:

- Examine current construction procurement processes by state agencies and covered institutions that would incentivize general contractors to achieve discretionary spend goals for small, women and minority owned businesses. – *See Item #2 Below*
- Examine best practices to provide oversight of subcontracts.

1. Summary of the proposed change or request being reviewed:

2. What is the current State process: *(provide an explanation of what the current law requirements are or current practices, etc)*

- Planning and Analysis
 - Established a SWaM Task Force covering all procurement areas of VDOT to allow for more cohesive planning and strategy implementation to increase SWaM participation on VDOT contracts. Developed tools to review contractors and subcontracting by district and project which help us focus on appropriate strategies and outreach efforts and monitor progress towards goal.
- Outreach Efforts
 - Monthly Industry Discussions (Focus on it being a Small Business Program – Race/Gender Neutral while emphasizing the Governor's desire that certified small businesses within subcategories - women-, minority- and service disabled veteran-owned are also considered)
 - Focus Area at Pre-Construction Kickoff Meetings

- Constant Contact campaigns to connect with VDOT contractors and subcontractors who may meet the small business criteria or whose certifications have lapsed. We provide assistance and connect them with DSBSD to complete the small business certification process.
- Using data from DGS/eVA, VDOT created an app called VDOT SWaM Patrol to search for small businesses and provide GIS location information particularly for field teams. NOTE - The app is set for statewide rollout soon in partnership with DGS. The co-branded app is called "Start Small". Governor's press release is forthcoming so we don't want to get ahead of that by announcing Start Small publicly.
- Short Term – "Hard" SWaM Goals assigned to Federally-Funded Construction Projects
 - Near Completion on Federally-Funded Contract Special Provision which includes Good Faith Effort requirements and possibility of disqualification of bid and/or bidding. OAG review ongoing.
 - Mirrors existing process Industry is familiar with on federal DBE Goals.
 - VDOT will have an independent business unit (Civil Rights) conduct an analysis of potential SWaM vendors on a project specific basis to set the SWaM Goal for a projects based on the type of work, location, complexity, etc.
- VDOT establishes SWaM goals (same process as DBE goals) on all mega highway projects. VDOT's Civil Rights division conducts an analysis of potential SWaM vendors in a project-specific basis to set the SWaM goal based on type of work, location, complexity, etc.
- Currently all construction contracts include Quarterly Reporting requirements
- Professional services on-call contracts for highway design include SWaM goals and quarterly reporting requirements.
- VDOT analyzing resource allocations impacts to increased SWaM usage and monitoring.

Areas for future consideration:

- SBSD Master Lists are regularly updated with "new" vendors, but need to verify "existing" vendors. Monthly "tickler" where firms validate their information?
- Bonding for SWaM vendors might be an issue.

3. Impact proposed changes to the Code of Virginia: *(provide detailed explanations potential impacts)*

Specific Agency or Political Subdivisions Affected:

Overall impact:

Impacts to small businesses to include women and minorities:

Impacts to the Commonwealth's budget:

Impacts to the Commonwealth's procurement processes:

4. Additional Impacts Identified: *(provide detailed explanation of any additional potential impacts)*

5. **Finding / Recommendation:** *(provide a detailed explanation, suggest edits to the proposed language, changes to policy, best practices, etc)*
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Procurement Workgroup – Topic Summary Sheet

Topic: Best Practices – Oversight of Subcontracts

Subject Matter Expert: Pete Stamps, Director, Division of Purchases and Supply

Date: May 21, 2021

Topic Summary: B.3. Best practices associated with oversight of subcontracts to include reporting requirements for payroll records, contracts and payments to other businesses, including individuals classified as independent contractors.

1. Summary of the proposed change or request being reviewed:

- Update the Agency Procurement and Surplus Property Manual:
 - Include additional reporting requirement in contracts that utilize subcontractors. Such reporting may include, but not limited to specific employed payroll records, payments to subcontractors expense reports to include data on payments to other businesses.
 - Additional requirement for prime contractor subcontractor reporting for procurements under \$100,000 to include: subcontractor company name, contact information, SBSB certification number, value percent or dollar value in the initial term and the description of work, payroll records, contracts and payments to other businesses, including individuals classified as independent contractors.
 - Small Business Subcontracting Plan currently required for contracts in excess of \$100,000 (APSPM Annex 6I and 7-G): Expand reported information to include payroll records, contracts and payments to other subcontractors.
-

2. What is the current State process: *(provide an explanation of what the current law requirements are or current practices, etc)*

- 2.2-4310– directed all public bodies to establish programs consistent with the chapter to facilitate the participation of small businesses, businesses owned by women, minorities, and service disabled veterans, and employment services organizations in procurement transactions.
- Executive Order #35, directs all executive branch agencies and institutions of higher education having statutory authority over procurement, in conjunction with DSBSD, DGS, VITA, VDOT and IHE that have procurement autonomy per the Restructured Higher Education Financial and Administrative Operations Act and all other executive branch agencies that have statutory authority for procurement, to implement the requirements stated therein.
- APSPM Special Term and Condition #36 currently is required for solicitations for goods, nonprofessional services, or non-capital outlay construction over \$100,000 and when a small business subcontracting plan is a condition of the award. Further, the current requirement for prime contractors reporting subcontractor activity is limited to the subcontractor company name, contact information, SBSB certification number, value percent or dollar value in the initial term and the description of work.

- The current violation of not providing evidence of compliance with the Small Business Subcontracting Plan is that payments may be withheld until the purchasing agency confirms that the contractor has certified compliance with the contractor's submitted Small Business Subcontracting Plan and can further be terminated for default.
- § 2.2-4354. **Payment clauses to be included in contracts.** Any contract awarded by any state agency, or any contract awarded by any agency of local government in accordance with § 2.2-4352, shall include: **1. A payment clause that obligates the contractor to take one of the two following actions within seven days after receipt of amounts paid to the contractor by the state agency or local government for work performed by the subcontractor under that contract: a. Pay the subcontractor for the proportionate share of the total payment received from the agency attributable to the work performed by the subcontractor under that contract; or b. Notify the agency and subcontractor, in writing, of his intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment.** 2. A payment clause that requires (i) individual contractors to provide their social security numbers and (ii) proprietorships, partnerships, and corporations to provide their federal employer identification numbers. 3. An interest clause that obligates the contractor to pay interest to the subcontractor on all amounts owed by the contractor that remain unpaid after seven days following receipt by the contractor of payment from the state agency or agency of local government for work performed by the subcontractor under that contract, except for amounts withheld as allowed in subdivision 1. 4. An interest rate clause stating, "Unless otherwise provided under the terms of this contract, interest shall accrue at the rate of one percent per month." Any such contract awarded shall further require the contractor to include in each of its subcontracts a provision requiring each subcontractor to include or otherwise be subject to the same payment and interest requirements with respect to each lower-tier subcontractor. A contractor's obligation to pay an interest charge to a subcontractor pursuant to the payment clause in this section shall not be construed to be an obligation of the state agency or agency of local government. A contract modification shall not be made for the purpose of providing reimbursement for the interest charge. A cost reimbursement claim shall not include any amount for reimbursement for the interest charge.

3. **Impact proposed changes to the Code of Virginia:** *(provide detailed explanations potential impacts)*

- No changes to 2.2-4300.
- Changes to Administrative Code, Chapter 130. Agency Procurement and Surplus Property **Manual**

Commented [SP(1)]: What changes would we want to make to the code to facilitate the best practices for oversight.

Commented [SP(2)]: Or should all additions be regulation changes through the APSPM

Specific Agency or Political Subdivisions Affected:

- Any executive branch agency or institution of higher education issuing and utilizing contracts with subcontracting opportunities.

Overall impact:

- Increased validation and visibility that prime contractors are utilizing DSBSD certified small businesses in government contracting.

Impacts to small businesses to include women and minorities:

- Potential Increase usage of DSBSD small businesses by prime contractors due to increase focus on prime's utilization of DSBSD small businesses.
- Prime contractors may not want to disclose the additional requested information regarding payroll records, and payments to other businesses.

Impacts to the Commonwealth's budget:

- Additional agency resources required to review new subcontracting contract requirements.
- Potential increased cost for goods and services due to reduced competition due to vendors who may not want to deal with the additional red tape.

Impacts to the Commonwealth's procurement processes:

- Additional administrative burden to review contracts for compliance.
- Potential training requirements for vendors and contracting staff regarding additional requirements.
- Potential for reduction in competition due to increased requirements placed on vendors

4. **Additional Impacts Identified:** *(provide detailed explanation of any additional potential impacts)*

- Potential changes to Executive Order #35 (or a replacement EO), to include reporting requirements for procurements under \$100,000.
- Changes to eVA's Subcontractor Payment Reporting portal to include: procurements under 100,000, expansion of reporting on payroll records, contracts and payments to other businesses, including individuals classified as independent contractors

5. **Finding / Recommendation:** *(provide a detailed explanation, suggest edits to the proposed language, changes to policy, best practices, etc)*

