



COMMONWEALTH of VIRGINIA

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The Honorable Jennifer B. Boysko
Member, Senate of Virginia
730 Elden Street
Herndon, Virginia 20170

Dear Senator Boysko:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the Code of Virginia.

Issue Presented

You ask whether a public body may include in a solicitation issued pursuant to the Virginia Public Procurement Act a requirement that the successful bidder or offeror pay its employees or contract workers a minimum wage or living wage, other than the wage levels required by federal and state law.

Applicable Law and Discussion

The purpose of the Virginia Public Procurement Act¹ is “to enunciate the public policies pertaining to governmental procurement from nongovernmental sources.”² Among the policies expressly enumerated in the Procurement Act are “that competition be sought to the maximum feasible degree, . . . [and] *that individual public bodies enjoy broad flexibility in fashioning details of such competition.*”³ One of the express objectives of the Procurement Act is “that public bodies in the Commonwealth obtain high quality goods and services at reasonable cost.”⁴ The only limiting language in the Procurement Act directly applicable to a public body⁵ establishing the requirements for a solicitation is a statement of the general principle “that specifications reflect the procurement needs of the purchasing body rather than being drawn to favor a particular vendor.”⁶

¹ VA. CODE ANN. §§ 2.2-4300 to -4377.

² VA. CODE ANN. § 2.2-4300(B).

³ VA. CODE ANN. § 2.2-4300(C) (emphasis added).

⁴ *Id.*

⁵ This opinion applies to all public bodies whose procurement authority is governed by the provisions of the Procurement Act. *See* VA. CODE ANN. § 2.2-4301 (defining the term “public body”).

⁶ *Id.*

The Procurement Act generally requires public bodies to procure contracts for goods and services through either competitive sealed bidding or competitive negotiation.⁷ The processes for competitive sealed bidding and competitive negotiation found in §§ 2.2-4302.1 and 2.2-4302.2, respectively, include broad and flexible language about what specifications and requirements are to be included in solicitations. The section of the Procurement Act specific to the competitive sealed bidding process (§ 2.2-4302.1) directs a public body to include in its written Invitation to Bid “the specifications and contractual terms and conditions applicable to the procurement” and “a statement of any requisite qualifications of potential contractors.”⁸ That section of the Procurement Act contains no language that limits or narrows the range of “specifications” or qualifications that a public body may include in the Invitation to Bid. Likewise, the section of the Procurement Act specific to the competitive negotiation process (§ 2.2-4302.2) imposes no limitations on the broad discretion afforded a public body when issuing a “written Request for Proposal indicating in general terms that which is sought to be procured, . . . including any unique capabilities, specifications or qualifications that will be required.”⁹

With respect to a public body’s evaluation of bids and proposals, and its award decisions, the Procurement Act also affords public bodies certain broad discretion. Section 2.2-4302.1 of the Code, which applies to the competitive sealed bidding process, provides that the evaluation of bids can include “any other criteria [as set forth in the Invitation to Bid] . . . which are helpful in determining acceptability.”¹⁰ When making award decisions under the competitive negotiation process, the Procurement Act requires that the public body rely on its opinion of which proposal best meets the needs of the public body based on the requirements and factors in the solicitation: “After negotiations have been conducted with each offeror so selected, the public body shall select the offeror which, in its opinion, has made the best proposal and provides the best value, and shall award the contract to that offeror.”¹¹

Taken together, these provisions of the Procurement Act afford public bodies broad discretion in determining the specifications, qualifications, and other requirements that form the foundation of a solicitation for goods and services, consistent with the Act’s policies and objectives. Accordingly, each public body is best suited to make decisions about what requirements and specifications are needed to obtain the goods and services that will meet “the procurement needs of the [public] body.”¹²

The same analysis applies in the case of a solicitation requirement that the successful bidder or offeror pay its employees or contract workers a living or other minimum wage. Nothing in the Procurement Act or other applicable law categorically prohibits public bodies from including such a requirement in its solicitations. There is no legal basis upon which I can conclude that public bodies lack the discretion to determine whether a living wage or other minimum wage requirement is properly included in solicitations under the Procurement Act. Such a determination is bounded by the procurement needs of the public body with respect to the goods and services being procured.

⁷ VA. CODE ANN. § 2.2-4303.

⁸ VA. CODE ANN. § 2.2-4302.1(1).

⁹ VA. CODE ANN. § 2.2-4302.2(A)(1).

¹⁰ VA. CODE ANN. § 2.2-4302.1(4). Although competitive sealed bidding requires award to the “lowest responsive and responsible bidder,” the discretion to broadly set requirements, qualifications, terms, and other criteria can significantly impact responsiveness and responsibility.

¹¹ VA. CODE ANN. § 2.2-4302.2(A)(3).

¹² VA. CODE ANN. § 2.2-4300(C).

Two prior Attorney General opinions have addressed the requirement of a living wage in a solicitation under the Procurement Act. A 2002 opinion of the Attorney General concluded that “a ‘living wage’ requirement is unrelated to the goods or services to be procured and, therefore, is not authorized under the Virginia Public Procurement Act.”¹³ Similarly, a 2006 opinion stated that “[t]he amount of wages paid by a private contractor to its employees does not affect the needs of a public body or the quality of the product or services,” and concluded that “the Virginia Public Procurement Act does not authorize the requirement of a living wage in the public procurement process.”¹⁴ The conclusions in both opinions rely heavily on the price-centric model of the Procurement Act that was in place prior to 2015, which generally mandated that “price should be the primary criterion in the award of public contracts.”¹⁵

The prior opinions cite no support for the statements that the wages of employees and contractors is unrelated to the quality of the goods or services being procured. In fact, there is evidence demonstrating that payment of a living wage by employers often improves the quality of goods or services produced.¹⁶ This is due to the effect a living wage generally has in making employees more productive, reducing turnover, and decreasing costs, which in turn often improves the quality of the goods and services produced.¹⁷

Moreover, even if the prior opinions were correct at the time they were written under the price-centric model of the Procurement Act, they would be superseded by legislation enacted by the General Assembly in 2015 that abandoned the price-centric model. Prior to 2015, the Procurement Act set a default for public bodies to award contracts to the lowest responsive and responsible bidder using competitive sealed bidding.¹⁸ Public bodies could utilize competitive negotiation, and thereby award contracts based on factors other than price, only after making a written determination that “competitive

¹³ 2002 Op. Va. Att’y Gen. 13, 15.

¹⁴ 2006 Op. Va. Att’y Gen. 5, 7, 8.

¹⁵ 1992 Op. Va. Att’y Gen. 38, 39.

¹⁶ See, e.g., Michael Reich, Peter Hall & Ken Jacobs, *Living Wage Policies at the San Francisco Airport: Impacts on Workers and Businesses*, 44 INDUS. RELATIONS 106, 136 (2005) (noting that implementation of a living wage requirement at the San Francisco Airport significantly decreased turnover, improved job performance and productivity, and increased customer satisfaction); MARK D. BRENNER & STEPHANIE LUCE, *LIVING WAGE LAWS IN PRACTICE: THE BOSTON, NEW HAVEN AND HARTFORD EXPERIENCES* 16 (Univ. of Mass., Pol. Econ. Research. Inst., 2005), available at http://www.peri.umass.edu/fileadmin/pdf/research_brief/RR8.pdf (“Evidence . . . shows that living wage ordinances can boost municipalities’ satisfaction with service contracts. In Multnomah County [Oregon], the contractor’s performance rating rose from 2 out of 5 before the living wage to 4 out of 5 six months after it took effect.”); see also NOOREEN REEZA, ELIZA SCHULTZ & J.H. VERKERKE, *PUBLIC REPORT ON THE ABILITY OF PUBLIC UNIVERSITIES AND POLITICAL SUBDIVISIONS IN VIRGINIA TO REQUIRE CONTRACTORS TO PAY EMPLOYEES A LIVING WAGE* (Univ. of Va., Feb. 20, 2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3541394 (discussing the San Francisco Airport study). A living wage requirement can also function on the front end of the procurement process by attracting a better quality pool of bidders or offerors: that is, bidders or offerors producing better quality products or services that might otherwise have avoided applying due to the likelihood of being undercut by lower-quality firms solely on the basis of price. See Brenner and Luce, *supra*, at 21-23.

¹⁷ See *supra* Reich, Hall & Jacobs, at 136; Brennar and Luce, at 16. Thus, while I do not conclude that the Procurement Act broadly authorizes public bodies to implement their own social or economic policy goals through their procurements, the wages paid to persons performing services or creating goods may be an important factor in meeting the procurement needs of the agency.

¹⁸ See § 2.2-4303(C) of Chapter 760 Acts of Assembly (2015).

sealed bidding is either not practicable or not fiscally advantageous to the public.”¹⁹ The General Assembly removed this requirement in 2015, allowing public bodies to freely choose between competitive sealed bidding and competitive negotiation. This amendment demonstrates a clear expression of the General Assembly that price is not required to be the primary factor, but rather may be one among many that a public body uses to make a decision to award a contract.²⁰

Accordingly, the 2015 amendment removed any doubt that a public body can adopt a living wage requirement to meet its procurement needs, because it made clear that such a requirement is not inconsistent with the general policies of the Procurement Act.²¹

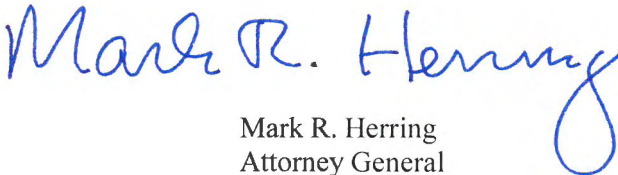
Conclusion

Accordingly, it is my opinion that the Procurement Act provides public bodies with the discretion to determine whether it is appropriate to include in a solicitation the requirement that a successful bidder or offeror pay its employees or contract workers a minimum wage or a living wage, other than the wage levels required by federal and state law.

Ample evidence exists to show that a living wage requirement can improve the quality of goods or services obtained by a public body. Further, the amendments to the Procurement Act made by the General Assembly in 2015 make clear that adoption of a living wage requirement by a public body to meet its procurement needs is permitted.

With kindest regards, I am,

Very Truly Yours,


Mark R. Herring
Attorney General

¹⁹ *Id.*

²⁰ *See, e.g.,* VA. CODE ANN. § 2.2-4302.2(A)(3).

²¹ Notably, the General Assembly has taken notice of workers’ wages when requiring a prevailing wage for public works contracts. VA. CODE ANN. § 2.2-4321.3 (eff. May 1, 2021).