

OP. NO. 06-034

ADMINISTRATION OF GOVERNMENT: VIRGINIA PUBLIC PROCUREMENT ACT – CONTRACT FORMATION AND ADMINISTRATION.

EDUCATIONAL INSTITUTIONS: UNIVERSITY OF VIRGINIA –BOARD OF VISITORS — FINANCIAL AND ADMINISTRATIVE OPINIONS – CAPITAL PROJECTS; PROCUREMENT; PROPERTY GENERALLY.

No authority granted to University of Virginia’s Board of Visitors to require that minimum or living wage be paid by private contractors and vendors to their employees. Virginia Public Procurement Act does not authorize requirement of living wage in public procurement process.

John T. Casteen, III
President, University of Virginia
April 28, 2006

Issue Presented

You ask whether the Board of Visitors of the University of Virginia may stipulate a minimum or living wage requirement, other than the wage levels required by federal and state law, that must be paid by private contractors and vendors to their employees either as a condition of the award of a procurement contract or pursuant to the Board’s general regulatory authority.

Response

It is my opinion that the Board of Visitors of the University of Virginia does not have the authority to require as a term of a contract with private parties, that a minimum or living wage be paid by private contractors and vendors to their employees. Such authority has not been granted to the Board by the General Assembly, and the Virginia Public Procurement Act does not authorize the requirement of a living wage in the public procurement process.

Applicable Law and Discussion

It is well established in Virginia that a university, through its governing board, “has not only the powers expressly conferred upon it, but it also has the implied power to do whatever is reasonably necessary to effectuate the powers expressly granted.”¹ This broad authority does not, however, supersede statutory or case law, public policy, or explicit statements of the General Assembly regarding specific topics.² The Board of Visitors of the University of Virginia is granted the authority to “make such regulations as they may deem expedient, not being contrary to law.”³ By enacting the Virginia Public Procurement Act⁴ (the “Procurement Act”), the General Assembly has established explicit statutory provisions governing public procurement of goods and services.

The purpose of the Procurement Act “is to enunciate the public policies pertaining to governmental procurement from nongovernmental sources.”⁵ Section 2.2-4303(A) of the Procurement Act provides that “[a]ll public contracts with nongovernmental contractors for the purchase or lease of goods, or for the purchase of services, insurance, or construction, shall be awarded after competitive sealed bidding, or competitive negotiation as provided in this section, unless otherwise authorized by law.” The Procurement Act further ensures that solicitations by governmental units are presented and awarded in a fair manner in order to promote competition.⁶ The intent of the Procurement Act is to provide a procedure under which pursuant to a competitive bidding process, the tax dollars of the Commonwealth are spent in an efficient and reasonable manner to obtain the highest quality of goods and services.⁷ The Procurement Act operates as a statement by the General Assembly regarding the factors it considers relevant and which may be considered by a government body in the procurement process.

The Attorney General has responded on several occasions to requests for advice on factors that may be considered in the procurement process.⁸ The Attorney General previously has concluded that it is inconsistent with the policy of the Procurement Act to condition award of a contract on factors that are unrelated to the goods or services being procured.⁹ Additionally, the Attorney General has concluded that a county seeking to impose an affordable housing requirement on the selection of a depository for county funds is impermissible,¹⁰ a city may not adopt an ordinance prohibiting discrimination on the basis of sexual orientation in the award of government contracts,¹¹ and a locality may not adopt a policy granting preference to local bidders.¹² In each of these instances, the Attorney General opined that specifications must reflect the procurement needs of the public body, and that those needs must be related to the products or services procured.¹³

The essence of the Procurement Act is to award a contract for the procurement of goods or services to the lowest “responsive or responsible” bidder, to conserve the taxpayers’ money. Adding a living wage requirement would logically be inconsistent with this requirement, since requiring increased labor costs would undoubtedly lead to a higher price of such goods or services to the Commonwealth.

I have considered whether the “best value” provision of the Procurement Act provides authority for an entity to require a “living wage.” The Procurement Act states that “[p]ublic bodies may consider best value concepts when procuring goods and nonprofessional services, but not construction or professional services. The criteria, factors, and basis for consideration of best value and the process for the consideration of best value shall be as stated in the procurement solicitation.”¹⁴ The “best value” must be predetermined in the solicitation and is defined as “the overall combination of quality, price, and various elements of required services that in total are optimal relative to a public body’s needs.”¹⁵

The clear purpose of “best value” considerations is to allow a governmental unit in a competitive negotiation process to consider factors other than price related to the goods or services being solicited. Any factor, however, must fall within the statutory definition of “the overall combination of quality, price, and various elements of required services that in total are optimal relative to a public body’s needs.”¹⁶ Therefore, a link must exist between the factors asserted under “best value” considerations and the needs of the procuring public body. The 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. The rationale supporting “living wage” ordinances or contractual provisions is that public bodies should not contract with nongovernmental employers who pay what are perceived as inadequate wages.¹⁷ In addition, “living wage” policies may address issues such as health insurance, paid vacation, labor relations, and hiring practices. As such, the “living wage” issue clearly is a matter of social, political, or economic policy. It is not related to the goods or services sought to be procured and therefore is not subject to “best value” consideration.

Additionally, there is no evidence that by inserting the “best value” provision in the Procurement Act, the General Assembly intended to depart from the long-standing interpretations of the Procurement Act by the Attorney General.¹⁸ There is nothing in § 2.2-4300(C) or § 2.2-4301 to suggest that the General Assembly intended to change the basic policy of the Procurement Act requiring that specifications reflect the procurement needs of the public body.

The additional management authority granted to the University of Virginia by the General Assembly pursuant to the Restructured Higher Education Financial and Administrative Operations Act¹⁹ (the “Restructuring Act”) does not affect my analysis of the question you present. The Restructuring Act does not bestow upon the University any authority to set “living wage” requirements in contracts. It does provide that an approved management agreement with the Commonwealth *may* exempt a university from provisions of the Procurement Act when such agreement expressly provides for deviations from those provisions.²⁰ There is no general or implicit exemption from the Procurement Act. I note that while a management agreement may exempt the University from provisions of the Procurement Act, the University’s procurement policies must still reflect the “competitive principles” established by the Procurement Act “and shall ... seek competition to the maximum practical degree.”²¹ The Attorney

General has previously stated that such competitive principles are those factors “customarily associated with competition and are generally related to the cost of the work, quality of the work, and capability of the vendor to comply with the bid documents. There is no indication in the [Procurement] Act that ‘competitive principles’ includes non-work related factors.”²²

The executed management agreement for the University of Virginia²³ does not include a living wage exemption from the Procurement Act and acknowledges that the University remains subject to, and its Board of Visitors derives its authority from, the General Assembly.²⁴

In summary, the General Assembly is the body responsible for establishing the public policy of the Commonwealth.²⁵ The General Assembly has established the Commonwealth’s public policy regarding governmental procurement in the Procurement Act.²⁶ The University of Virginia operates under an approved management agreement that is still subject to that public policy and which provides no exception. A prior opinion of the Attorney General concluded that it is inconsistent with the policy of the Procurement Act to condition the award of a contract on factors that are unrelated to the goods or services being procured,²⁷ and the General Assembly has not acted to overrule that opinion.²⁸

Conclusion

Accordingly, it is my opinion that the Board of Visitors of the University of Virginia does not have the authority to require as a term of a contract with private parties, that a minimum or living wage be paid by private contractors and vendors to their employees. Such authority has not been granted to the Board by the General Assembly, and the Virginia Public Procurement Act does not authorize the requirement of a living wage in the public procurement process.

¹ Goodreau v. Rector & Visitors, 116 F. Supp. 2d 694, 703 (W.D. Va. 2000) (quoting Batcheller v. Commonwealth, 176 Va. 109, 123, 10 S.E.2d 529, 535 (1940)).

² Virginia public colleges and universities are state agencies; they are statutory corporations created and empowered by acts of the General Assembly. As such they are subject to the control of the General Assembly and are limited to the powers granted them. See e.g., Jones v. Commonwealth, 267 Va. 218, 222-23, 591 S.E.2d 72, 74-75 (2004); see also VA. CODE ANN § 23-69 (2003) (providing that Board of Visitors of University of Virginia “shall be at all times subject to the control of the General Assembly”); § 23-114 (2003) (providing that Board of Visitors of Virginia Tech “shall at all times be under the control of the General Assembly”); § 23-122 (2003) (providing that Board of Visitors of Virginia Tech “may make such regulations as they deem expedient, not contrary to law”); § 23-91.24 (2003) (providing that Board of Visitors of James Madison University “shall be subject at all times to the control of the General Assembly”). Similar provisions – often utilizing the exact language – prescribe the authority of the Boards of Visitors of the University of Mary Washington, Virginia Military Institute, Radford University, Virginia State University, Norfolk State University, Longwood University, and the College of William & Mary.

³ Section 23-76 (2003).

⁴ VA. CODE ANN §§ 2.2-4300 to 2.2-4377 (2005).

⁵ Section 2.2-4300(B).

⁶ Section 2.2-4300(C).

⁷ *Id.*

⁸ See *infra* notes 9-12 and accompanying text.

⁹ 1992 Op. Va. Att’y Gen. 38.

¹⁰ *Id.* Section 2.2-4327 now permits any county or city authorized pursuant to the statute to consider a depository’s promotion of affordable housing as a selection criterion.

¹¹ 1985-1986 Op. Va. Att’y Gen. 19.

¹²1983-1984 Op. Va. Att'y Gen. 455. Section 2.2-4328(A) now authorizes localities to adopt a local preference policy to resolve tie bids; however, § 2.2-4328(B) limits the local preference policy to bids submitted under a written "Invitation to Bid."

¹³Some of these actions are now permissible due to legislative changes enacted subsequent to the respective opinions of the Attorney General. See *supra* notes 10 and 12.

¹⁴Section 2.2-4300(C).

¹⁵Section 2.2-4301.

¹⁶*Id.* (defining "best value").

¹⁷The press release issued by the Living Wage Campaign calls the provision of a living wage a "moral imperative." Press Release, Living Wage Campaign, Statement from the Living Wage Campaign Regarding President Casteen's Remarks at Faculty Senate Meeting (Mar. 1, 2006), available at <http://livingwage.wordpress.com/2006/03/02/press-release-3106-response-to-pres-casteens-remarks/> (last visited Apr. 20, 2006). The Living Wage Campaign website states that "[t]he concept behind any living wage campaign is simple: Our limited public dollars should not be subsidizing poverty-wage work." The Living Wage Resource Center: The National Movement, *The Living Wage Movement: Building Power in our Workplaces and Neighborhoods*, at <http://www.livingwagecampaign.org/index.php?id=2071> (last visited Apr. 20, 2006). The Economic Policy Institute states that "[t]he rationale behind the [living wage] ordinances is that city and county governments should not contract with or subsidize employers who pay poverty-level wages." See The Economic Policy Institute, *Living Wage Facts at a Glance*, available at http://www.epinet.org/content.cfm/issueguides_living_wage_livingwagefacts (last visited Apr. 20, 2006).

¹⁸The Supreme Court of Virginia has stated that "[t]he legislature is presumed to have had knowledge of the Attorney General's interpretation of the statutes, and its failure to make corrective amendments evinces legislative acquiescence in the Attorney General's view." *Richard L. Deal & Assocs. v. Commonwealth*, 224 Va. 618, 622, 299 S.E.2d 346, 348 (1983).

¹⁹Sections 23-38.88 to 23-38.121 (Supp. 2005).

²⁰Section 23-38.110(A).

²¹*Id.*

²²1983-1984 Op. Va. Att'y Gen. 455, 456 (emphasis in original).

²³The General Assembly approved the 2006 Management Agreement Between the Commonwealth of Virginia and the University of Virginia on March 27, 2006. See 2006 H.B. 1502, available at <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=061&typ=bil&val=hb1502>; 2006 S.B. 675, available at <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=061&typ=bil&val=sb675> [hereinafter "2006 Agreement"].

²⁴See *id.*, ch. 3, art. 2, at *105-11 (2006 Agreement); see also § 23-38.91(B) (providing that each covered institution still will be governed by appropriation act and its enabling legislation). The University of Virginia's enabling legislation includes a provision that it shall at all times be subject to the control of the General Assembly. See § 23-69.

²⁵*City of Charlottesville v. DeHaan*, 228 Va. 578, 583, 323 S.E.2d 131, 133 (1984).

²⁶See § 2.2-4303(A).

²⁷See *supra* note 9 and accompanying text.

²⁸See *supra* note 18. See also, a 2002 opinion of the Attorney General which concluded that a locality does not have the authority to require contractors to provide a "living wage" to their employees as a condition to the award of a public contract. 2002 Op. Va. Att'y Gen. 13. The extent to which localities have acted contrary to the 2002 opinion does not set a precedent for universities to act likewise. Virginia's public colleges and universities are agencies of the Commonwealth; counties, cities, and towns are subordinate political subdivisions of the Commonwealth subject to the Dillon Rule of strict construction. It is my opinion that any locality requiring a "living wage" as a condition to award a procurement contract is violating the Procurement Act.