



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Mark R. Herring
Attorney General

202 North Ninth Street
Richmond, Virginia 23219
804-786-2071
Fax 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

August 10, 2016

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

Dear Delegate 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

Section 2.2-4321.2 of the *Code of Virginia* governs the use of labor agreements for certain public projects. You ask whether it applies to projects authorized¹ under Virginia's Public-Private Transportation Act of 1995² (the "PPTA").

Applicable Law and Discussion

Section 2.2-4321.2³ is a provision of the Virginia Public Procurement Act⁴ (the "Procurement Act"). It governs the use of project-specific agreements with labor organizations for a defined class of public works contracts. These project-specific agreements with labor organizations are colloquially known as project labor agreements ("PLAs").

¹ This opinion assumes the term "authorized under" to mean "awarded under." Many public contracts could be construed as authorized under the PPTA, but in actuality are awarded by some other statutory procurement vehicle such as the Virginia Public Procurement Act. In such a case, the provisions of the Procurement Act would govern the procurement, regardless of whether the contract is arguably authorized under the PPTA.

² VA. CODE ANN. §§ 33.2-1800 through 33.2-1824 (2014 & Supp. 2015).

³ See 2012 Va. Acts chs. 685, 732.

⁴ VA. CODE ANN. §§ 2.2-4300 through 2.2-4377 (2014 & Supp. 2015).

In general, the statute establishes three broad rules that apply to the use of PLAs on public works contracts. First, a state agency cannot require the use of a PLA on a public works contract.⁵ Second, a state agency cannot prohibit the use of a PLA on a public works contract.⁶ Finally, within a public works contract, discrimination is prohibited against certain individuals or entities on the basis of whether that individual or entity has signed or agreed to adhere to a PLA.⁷ These three broad rules apply both when the state agency is the actual purchasing entity and when it is simply issuing grants, providing financial assistance, or entering into a cooperative agreement.⁸ Thus, the statute ensures that the use of a PLA remains voluntary on public works contracts, and it prohibits discrimination against an individual or entity based on its PLA status.

Pursuant to § 33.2-1819 of the PPTA, the General Assembly expressly exempted the PPTA from most, but not all, provisions of the Procurement Act.⁹ For example, one exception is that the PPTA expressly requires public entities to adopt PPTA guidelines that are consistent with certain principles of competitive procurement established within the Procurement Act.¹⁰ However, there is nothing that excepts § 2.2-4321.2 (the PLA statute) from the general rule that the Procurement Act “shall not apply”¹¹ to the PPTA. Accordingly, it is my opinion that § 2.2-4321.2 does not apply to contracts awarded under the PPTA.

You allude to an apparent tension in the law between two statutes on this subject. On the one hand, § 33.2-1819 provides that the Procurement Act “shall not apply” to the PPTA. On the other hand, § 2.2-4321.2(F)(1) exempts a defined class of public-private agreements from § 2.2-4321.2 (the PLA statute).

At first glance, when read together, these two provisions do invite the following question: why is the exemption of § 2.2-4321.2(F)(1) necessary when contracts awarded under the PPTA already are generally exempt from the provisions of the Procurement Act under § 33.2-1819? However, the statutes can be read in harmony¹² without strain because not all public-private agreements¹³ fall under the PPTA. As stated above, all contracts awarded under the PPTA are exempt from § 2.2-4321.2 by virtue of § 33.2-1819. Also, all public-private agreements meeting the conditions of § 2.2-4321.2(F)(1) are exempt from § 2.2-4321.2, even when not awarded under the PPTA. It is well accepted that statutes relating to the same subject should not be read in isolation. Such statutes should be read *in pari materia*.¹⁴

⁵ See § 2.2-4321.2(B)(1) and (C)(1) (2014).

⁶ *Id.*

⁷ See § 2.2-4321.2(B)(2) and (C)(2).

⁸ See § 2.2-4321.2(B) and (C).

⁹ See § 33.2-1819 (2014) (providing that the Procurement Act “shall not apply to” the PPTA).

¹⁰ See, e.g., § 33.2-1819(1) through (5).

¹¹ Section 33.2-1819.

¹² As a general rule of statutory construction, where two statutes are in apparent conflict they must be read in harmony to the extent possible to give full force and effect to each. See, e.g., *Boynton v. Kilgore*, 271 Va. 220, 229 (2006).

¹³ It is important to note that the term “public-private agreements” is not defined within the Procurement Act or within the *Code of Virginia*, at large.

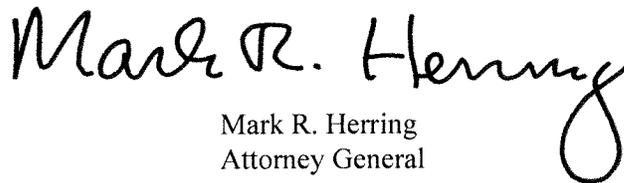
¹⁴ 2003 Op. Va. Att’y Gen. 18, 19.

Conclusion

Accordingly, it is my opinion that § 2.2-4321.2 does not apply to contracts awarded under the PPTA.¹⁵

With kindest regards, I am

Very truly yours,

A handwritten signature in black ink that reads "Mark R. Herring". The signature is written in a cursive style with a large, looping "H" and a long tail on the "g".

Mark R. Herring
Attorney General

¹⁵ See also 2012 Op. Va. Att'y Gen. 9, 11 (opining that § 2.2-4321.2 does not apply to the Metropolitan Washington Airports Authority because it is exempt from the Procurement Act under § 5.1-174 of the *Code of Virginia*).