



# COMMONWEALTH of VIRGINIA

*Hal E. Greer*  
*Director*

*Joint Legislative Audit and Review Commission*  
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JLARC Meeting – Minutes  
June 13, 2016

## Attending

### JLARC Members:

Delegate Robert Orrock, Chairman; Delegate David B. Albo, Delegate M. Kirkland Cox, Senator Emmett Hanger, Delegate Chris Jones, Delegate R. Steven Landes, Senator Ryan McDougle, Senator Thomas K. Norment, Delegate John M. O'Bannon, Senator Frank Ruff, Delegate Lionell Spruill.

### JLARC Staff:

Hal Greer, Director; Nathalie Molliet-Ribet, Senior Associate Director; Justin Brown, Associate Director; Kimberly Sarte, Assistant Director; Lauren Axselle, Erik Beecroft, Sarah Berday-Sacks, Jamie Bitz, Susan Bond, Drew Dickinson, Kathy DuVall, Nicole Gaffen, Nick Galvin, Maria Garnett, Mark Gribbin, Nia Harrison, Paula Lambert, Jeff Lunardi, Liana Major, Joe McMahon, Ellen Miller, Jordan Paschal, Nathan Skreslet, Tracey Smith, Nichelle Williams.

### Others:

Joe Damico, Julie Whitlock, Sandra Gill (Department of General Services); Nelson Moe, Eric Link, Ashley Colvin, Perry Pascaul, Chad Wirz, David Swynford, Phil Pippert (VITA); John Westrick (Office of the Attorney General); Charles Kilpatrick (VDOT Commissioner); Mike Reinholtz (APA); Tracey G. Wiley and Randy Sherrod (Department of Small Business and Supplier Diversity); Tripp Perrin (lobbyist for Lindl Corp); Heidi Abbott (Hunton & Williams); Patrick Cushing (Williams Mullen); Matt Benka (MDB Strategies); Brian Goodman (Virginia Retirement System); Jason Powell, April Kees, Adam Rosatelli, Mike Tweedy (Senate Finance Committee staff); David Reynolds and Susan Massart (House Appropriations Committee staff); Jason Saunders (Department of Planning and Budget); Phil Leone (Virginia Tech); Massey Whorley (The Commonwealth Institute); Michael Martz (Richmond Times Dispatch); Alan Suderman (Associated Press); and Anne Marie Morgan (Virginia Public Radio).

The meeting was called to order at 10:00 a.m. by Delegate Orrock, Chairman. Delegate Orrock requested a moment of silence in remembrance of the lives lost in the recent Orlando mass shooting. Delegate Orrock then asked the Commission to elect a new Vice-Chairman. Senator Ruff made a motion to nominate Senator Norment as JLARC's Vice-Chairman. Delegate Spruill seconded the motion. There being no objections, Senator Norment was elected Vice-Chairman unanimously by the Commission.

Delegate Orrock then recognized Hal Greer, JLARC staff Director, who introduced a new JLARC staff member to the Commission (Jordan Paschal) and provided a brief overview of the meeting agenda. Subsequently, Mr. Greer introduced Tracey Smith who provided the Commission with a presentation of the *Development and Management of State Contracts in Virginia* report. Ms. Smith answered a number questions from the Commission throughout her presentation, which are described in five sections below.

#### **State Contracting presentation: Performance of state contracts**

At the conclusion of the presentation section on the performance of state contracts, Delegate Jones asked if the team encountered any cases where a state agency was required to use a SWAM vendor for a purchase but the box containing the purchased items arrived from Amazon. Ms. Smith indicated that there were examples of this provided to them over the course of their research and explained that the report includes recommendations to address the process used to define businesses as small or micro. Delegate Jones then asked if the team encountered any examples where an agency had awarded a contract to a small business in order to meet its small business goals.

Ms. Smith indicated that state agency procurement staff expressed frustrations about the requirement that a 20 percent weight for small business status be applied when evaluating request for proposals, and noted that the report includes a recommendation to collect statewide data to help determine if this percentage requirement should be reconsidered.

#### **State Contracting presentation: Maximizing contract value**

Senator Ruff asked if the team was able to determine whether there was a significant price difference in business bids before versus after the micro definition was created. Ms. Smith explained that the team had not examined that particular difference. Small business bids overall were about nine percent higher than other business bids. Senator Ruff then asked whether there should be any caps on the price difference between small versus micro businesses. Ms. Smith stated that state agencies would need to develop their own caps because of the difference between the size and purchases of agencies. Senator Ruff asked if there should be a depository of pre-qualified bidders in addition to a depository of bidders who are not meeting the state's performance standards. Ms. Smith explained that there is currently such a depository for agencies to use. Senator Ruff asked if DGS should be responsible for maintaining this depository to ensure that the information is more centralized. Ms. Smith stated that this is possible but such an effort would require cooperation among multiple state agencies. Delegate Landes asked if the team looked at prior executive orders related to small business contracting to determine if there were any conflicts with the current executive order. Ms. Smith indicated that the team did not examine this specifically, but stated that the current executive order is consistent with statute related to small business contracting. Ms. Smith stated that the team can look into this further and provide additional information to the Commission.

Delegate Landes then asked if the research on the small business preference included the public four-year higher education institutions. Ms. Smith explained that the team's research included all agencies that use eVA, including public four-year higher education

institutions. Delegate Orrock asked if the central compilation of state contract performance data would include positive performance (e.g. under budget, on time), as well as poor performance. Ms. Smith explained that this would be implied to also include vendors who are meeting or exceeding their contract performance expectations.

#### **State Contracting presentation: Minimizing contract risk**

Delegate O'Bannon asked if the team had received any examples of high-risk contracts not being monitored correctly. Ms. Smith indicated that there were examples of high-dollar contracts that did not include any penalties, incentives, or performance measures. Ms. Smith stated that the team can provide the Commission with additional examples of high-risk contracts that were not monitored correctly.

Senator McDougle asked why the Attorney General's (AG) office does not currently review all state agency contracts over a certain dollar amount. Ms. Smith explained that some agencies have the AG's office review their contracts, but this is currently not a requirement. Delegate Cox asked why this is not done on a more regular basis. Ms. Smith stated that some agencies have used these provisions more regularly, but procurement staff are often under fairly tight timelines and they may have an agency attorney review the contracts only to ensure the content is legal rather than to mitigate risk. Delegate Cox then asked if there is standard language for staff at the AG's office to use for high-risk, high-dollar contracts. Ms. Smith indicated that a standard set of provisions—including penalties, incentives, and performance measures—have to be tailored to what is being purchased by state agencies. Delegate Spruill asked whether there could be a standard requirement to include the AG's office in the contract review process. Ms. Smith stated that the report includes a recommendation that all high-risk contracts would have this requirement.

Delegate Orrock asked how other states have defined high-risk contracts and developed a process for managing them. Ms. Smith indicated that several states require additional scrutiny for any contracts above a specific dollar amount.

Delegate Jones asked if it is typical for an agency to have a procurement agent or professional staff responsible for procurement. Ms. Smith stated that agencies have professional procurement staff that are certified by the state to conduct high dollar procurements. She further explained that procurement staff emphasized their intent to abide by the state's procurement rules, however, not all agencies have risk provisions in place. Ms. Smith noted that DMAS and VDOT have good practices in place to minimize risk, but this needs to be expanded to ensure that all agencies are addressing high-risk contracts.

#### **State Contracting presentation: Monitoring and enforcing contracts**

Delegate Landes asked why procurement staff do not also monitor the performance of contracts to ensure that provisions are being followed. Ms. Smith explained that procurement officers may end up administering a contract but when this does not happen, it is often the result of a resource issue. She noted that state agency procurement staff are typically full-time, which is fairly common in other states as well. Also, agencies generally have end users with program expertise who administer contracts. However, these end users lack experience and do not have the necessary training for administering contracts. Delegate

Landes then asked if procurement officers have a responsibility to know what is in a contract and advise contract administration. Ms. Smith noted that procurement officers do have this responsibility but this is not happening as much as it should in all agencies. It is sometimes left up to the contract administrators to determine how to maintain the contracts. Ms. Smith explained that eight out of 107 contracts had a contract administrator assigned on a full-time basis. Delegate O'Bannon asked if there are other states that have a better model for the contract handoff process. Ms. Smith stated that the team can follow up on this and provide additional information to the Commission.

Delegate Spruill asked if procurement officers are properly trained. Ms. Smith commented that there are no concerns with the level of training for procurement officers. Contract administrators, however, require an entirely different skill set and there is very limited training here.

Delegate Albo asked where the contracts are being drafted if not by the AG's office. Ms. Smith explained that contracts are being drafted by the state agencies. Procurement staff are trained professionals and they typically seek input from the end users of the contracts. In addition, agencies are able to use boiler plate language in contracts. Delegate Orrock noted that part of the problem appears to be due to the complexities involved with contracts needed for the various items purchased by state agencies (e.g. office supplies versus construction services).

Delegate Jones commented that there seems to be ample protection from the whistleblower protection act but asked if there were other channels for staff to raise concerns regarding whether contract milestones are met. Ms. Smith explained that there is no formal process for a contract administrator to alert someone that a contract is not meeting deadlines or milestones, however, this varies by agency. Some agencies are reluctant to use enforcement mechanisms or performance disincentives for contracts. Delegate Jones indicated that he has heard about instances where an employee has seen something go wrong with a contract and attempted to make it known, but the problem was dismissed by agency leadership. He asked how employees are protected from the whistleblower protection act. Ms. Smith indicated that there are expectations on employees to raise a red flag if a contract is going wrong.

Senator McDougle asked what percentage of contracts are drafted by vendors versus state agencies. Ms. Smith explained that she believed state agency staff generally write contracts, but it would be difficult to determine how many contracts originate with vendors. Delegate O'Bannon asked if these are Request for Proposals (RFPs) or negotiations. Ms. Smith noted that larger contracts tend to be RFPs, and that typically the RFP becomes the final contract. Negotiations occur between the agency, vendor, and DGS or VITA. Delegate O'Bannon noted that there appears to be a lack of uniformity across contracts.

Delegate Orrock asked if there have been instances where a vendor has expressed concerns regarding a contract administrator having a poor reputation. Ms. Smith noted that the next section of the presentation covers vendor experiences.

### **State Contracting presentation: Vendors' experiences with state contracting**

Delegate Albo commented that this study did not appear to assess the type of methods used for construction contracts. Ms. Smith explained that Appendix E of the report includes information on contracting methods and a description of those that tend to result in performance issues.

Delegate Orrock asked if other states have issues reporting contract-related complaints and if there is a more anonymous process for submitting a complaint. Ms. Smith noted that concern about not being able to anonymously submit complaints is an obstacle to vendors submitting complaints in Virginia, but the team did not look into this for other states.

Senator Ruff asked if the issue areas identified in the report were eliminated, would state contracting revert back to a low bid or concealed bid method. Ms. Smith noted that eliminating the issue areas would not necessarily result in using one method over another.

Delegate Landes asked if the report includes a recommendation on how to standardize the collection of statewide contract performance data. Ms. Smith stated that Chapter 7 of the report includes a recommendation to create a central database to collect information about high-risk state contracts. Delegate Landes then commented that the report includes a lot of complicated recommendations, so he requested that the House Appropriations and Senate Finance Committees work together to create an approach to discuss a mechanism to implement the recommendations. Delegate Orrock asked the team to provide a list of the recommendations that are being addressed to state agencies so that agencies may consult this list. Delegate Albo commented that there should be a meeting with the chairmen of the Senate Finance and House Appropriations Committees, Attorney General's office, and DGS to discuss the report recommendations.

Following Ms. Smith's presentation, Delegate O'Bannon made a motion to receive the report and authorize printing. There being no objections, the motion was approved unanimously by the Commission.

### **JLARC Research of Medicaid Improper Payments**

Subsequently, Mr. Greer introduced Nathalie Molliet-Ribet who provided the Commission with a presentation of JLARC's research on Medicaid improper payments. Delegate Landes asked why some of JLARC's recommendations related to late eligibility renewals have not yet been implemented. Ms. Molliet-Ribet indicated that sufficient funding has played a role, such as additional funding needed to pay for the central processing unit at DMAS. Delegate O'Bannon commented that pharmaceutical costs are a big driver, so the team should look into the different ways and volumes other states can purchase medications. Senator McDougle also commented on the price differences that other states are charged for medications. At the conclusion of Ms. Molliet-Ribet's presentation, Delegate Orrock stated that this presentation was an update and that no action was needed by the Commission.

### **Proposed Policies and Procedures for Fiscal Impact Review of Executive Orders**

Mr. Greer then introduced Kimberly Sarte, Assistant Director for Ongoing Oversight and Fiscal Analysis, who provided the Commission with a brief presentation on proposed policies and procedures for JLARC's fiscal impact reviews of executive orders. At the conclusion of her presentation, Ms. Sarte requested Commission action to vote on the proposed policies and procedures. Delegate Orrock asked that the proposed procedures include email or written request to the JLARC director. He also expressed some concern regarding the three days mentioned in the procedures. Ms. Sarte explained that the Director would provide a response to the requesting Chairman within three days indicating when JLARC staff would be able to issue a statement about the request. Mr. Greer emphasized that he appreciated Delegate Orrock being sensitive to the potential time constraints, but that JLARC staff believed three days was sufficient.

Delegate O'Bannon made a motion to adopt the proposed policies and procedures for JLARC's fiscal impact reviews of executive orders. The motion was seconded by Senator Ruff and approved unanimously by the Commission. Ms. Sarte explained that the Director will send a letter to all committee chairmen with the new policies and procedures for JLARC's fiscal impact reviews of executive orders.

### **VITA Progress Report on Transition of Central IT Services**

Mr. Greer then introduced Nelson Moe, Chief Information Officer of the Commonwealth, who provided the Commission with a progress report briefing on VITA's infrastructure services sourcing. Mr. Moe answered several questions asked by the Commission throughout his presentation. Senator McDougle asked about a letter VITA recently sent to Northrop Grumman declaring the company to be in breach of contract for losing emails. He asked how many emails were lost and what information Northrop Grumman has been able to retrieve. Mr. Moe commented that he would prefer to discuss this issue one-on-one in a private setting. Delegate O'Bannon asked if VITA has adequate legal support as the agency begins to negotiate new contracts for central IT services. Mr. Moe stated that the Attorney General's (AG) office will be providing support and that the Appropriation Act gives VITA funding needed to retain additional counsel. Delegate Jones asked if VITA is not satisfied with the AG's support, does Mr. Moe have the proper level of authority to obtain outside counsel or expertise, even if the AG's office objects. After briefly consulting with Eric Link (VITA's Executive Director of Legal and Legislative Services), Mr. Moe stated that if the AG objects to VITA using outside counsel, he will escalate the issue within the administration if needed. At the conclusion of Mr. Moe's presentation, Delegate Orrock stated that this presentation was an update and that no action was needed by the Commission.

Lastly, Mr. Greer announced that the next Commission meeting is scheduled for Monday, July 11, which will include presentations from VRS and VA529.

There being no further business, the Commission rose at 12:07 p.m.

Approved by: Harold E. Greer  
Harold E. Greer, Director

Date: 6/27/16.

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