CONTRACTS: VIRGINIA PUBLIC PROCUREMENT ACT.

City's rental payments, derived partly from state appropriation, will be made for health department's use of building after building is completed; do not constitute public funding paid to contractors for planning, design or construction of building. Such contracts are not public contracts subject to competitive bidding requirements of Act.

The Honorable Jean W. Cunningham

Member, House of Delegates

December 18, 1996

You inquire regarding interpretation of § 1135(I) of the Code of Virginia, 1 a portion of the Virginia Public Procurement Act 2 (Procurement Act), under the following related facts.

The City of Richmond is considering a lease financing arrangement whereby the city health department will use the Northside Health Services Building (Building) to consolidate its operations.

The City of Richmond and Eggleston Development LLC. (Eggleston) will form a nonprofit corporation exempt from federal taxation 3 to own and lease the Building to the city. The purposes of the corporation will be (1) to acquire the Building site and to design, construct and equip the Building; and (2) upon completion, to lease the Building, as lessor, to the city. The corporation will be a Virginia nonstock corporation governed by a board of directors that may include city officials and representatives of Eggleston. Neither the city officials nor the Eggleston representatives shall constitute a majority of the board members. Furthermore, the Eggleston representatives shall not vote on matters in which Eggleston has a pecuniary interest.

Under a trust agreement, the trustee and lessor will issue and sell certificates of participation evidencing the certificate holders' direct and undivided interest to the rental payments made under the lease between the city and the lessor. The rental payment will consist of an interest component and a principal component, similar to that of traditional bonds.

The lessor will acquire the Building site with proceeds from the certificates, if necessary, and, pursuant to the terms of a development agreement between the lessor and Eggleston, Eggleston will design, construct and
equip the Building. Once the Building is available for occupancy, Eggleston will have no property interest in, or have any obligation with respect to, the Building.

The lessor will determine all aspects of the design, construction and equipping of the Building. The city will provide the lessor with the total square footage it will require and the portion of square footage it will need for office and clinical use. The city will not review architectural drawings or oversee the progression of the construction phases of the Building. City or state appropriations will not be used to pay contractors that provide either planning, design and construction services or equipment.

The lease will be long term and will contain provision for rental payments sufficient to fully amortize the costs of the Building. The lease is expected to contain an option that will enable the city to purchase the Building for a de minimis amount upon termination. Under the lease, the city will be expressly subject to annual appropriations from the city council. The State will provide an annual lump sum appropriation to the city for the general purpose of maintaining and operating the health department and for paying the rent.

Your specific inquiry is whether the city’s rental payments under the terms of the lease, which are derived partly from state appropriation, constitute the funding of the planning, design or construction of the Building under § 1135(I) of the Procurement Act, thereby making the development agreement between the lessor and Eggleston subject to the Act’s requirements.

Section 1141(A) specifies that the Procurement Act applies to all public contracts with nongovernmental contractors for the purchase or lease of goods, or for the purchase of services, insurance, or construction. A 1984 opinion of the Attorney General concludes that routine leases generally do not involve the purchase of goods or services, and, therefore, are not subject to the Act. The opinion also concludes that one must examine the substance of the lease to determine whether, in actuality, it is one for the purchase of goods and services or merely one for the lease of real property. Although you do not provide a copy of the lease for my review, you relate the following: the city will be the lessee of the Building; rental payments will be made pursuant to the lease terms and will consist of both an interest and a principal component; the lease will be long-term with rental payments sufficient to fully amortize the costs of the Building; the lease is expected to contain an option to enable the city to purchase the Building for a de minimis amount upon termination; the city will rely on annual appropriations from the city council to make the rental payments,
and the State will appropriate an annual lump sum to the city for the general purpose of maintaining and operating the city's health department and for paying the rent. I do not discern from these facts any indication that the lease is one for the purchase of goods or services. Consequently, for the purposes of this opinion, I shall assume that the lease concerns solely the lease to the city of the real property—the Building.

A 1986 opinion of the Attorney General concludes that contracts entered into by a private developer entitled to reimbursement by a public body are not subject to the Procurement Act when the construction and materials contracts are not contracts of the public body itself. You relate that the lessor will use proceeds from the certificates of participation to acquire the Building site and to pay Eggleston's costs of designing, constructing and equipping the Building. Therefore, public contracts will not be required for the procurement of any construction or planning and design services for construction. Furthermore, you advise that the city will not review architectural drawings or oversee the progress of the construction phases of the Building.

Consequently, the construction and materials contracts entered into by the lessor with Eggleston, and by Eggleston with others, are not public contracts of the city. Consistent with the prior opinion of the Attorney General, provision in the lease for rental payments by the city, which ultimately will reimburse certificate holders after completion of the Building, does not indicate a relationship between the lessor or Eggleston with the contractors for the design, planning and construction of the Building. Such contracts, therefore, are not public contracts which must be bid according to competitive procurement procedures.

Section 1135(I) applies to procurement of any construction or planning and design services for construction when the planning, design or construction is funded by state appropriations. Where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction. The city's lease payments do not constitute direct public appropriations for the planning, design or construction of the Building. The lessor in the facts will use the proceeds of the certificates of participation to acquire the Building site and to pay Eggleston for designing, constructing and equipping the Building. There will be no payments from public appropriations until the city begins making rental payments for the use of the completed Building that the lessor will own, at least, during the term of the lease. The protection of the Procurement Act is extended to public funds, and none
are involved at the time of construction\textsuperscript{12} of the Building. Under the facts, public funds are involved after the construction of the Building is completed. Accordingly, in conformity with the prior opinions of the Attorney General, I must answer your specific inquiry in the negative.

\textsuperscript{1}Section 1135(I) provides that the Virginia Public Procurement Act shall apply to procurement of any construction or planning and design services for construction by a Virginia not-for-profit corporation or organization not otherwise specifically exempted when the planning, design or construction is funded by state appropriations greater than $10,000 unless the Virginia not-for-profit corporation or organization is obligated to conform to procurement procedures which are established by federal statutes or regulations, whether or not those federal procedures are in conformance with the provisions of [the Act].

\textsuperscript{2}Sections 1135 to 1180.


\textsuperscript{4}De minimis generally means very small or trifling. BLACK'S LAW DICTIONARY 431 (6th ed. 1990).

\textsuperscript{5}I note that although the city's proposal raises additional issues other than the requested interpretation of § 1135(I) as applied to the related facts, you do not inquire regarding such additional issues. Consequently, I express no opinion regarding such issues, which include: (1) whether the § 501(c)(3) nonprofit corporation is, in effect, a public body, as that term is defined in § 1137, because it is formed by both the city and Eggleston; (2) whether such corporation would be recognized as a separate legal entity for purposes of the Procurement Act. Compare RF&P Corporation v. Little, 247 Va. 309, 316, 440 S.E.2d 908, 913 (1994) (separateness of RF&P is upheld in absence of evidence that RF&P was sham corporation used to disguise wrongs) with Trucking Corporation v. Commonwealth, 207 Va. 23, 3132, 147 S.E.2d 747, 75354 (1966) (separate legal identity is ignored where corporation is merely device or sham used to disguise wrongs or nullify established policies of law); (3) whether the city's lease would, in substance, constitute a procurement of construction and construction planning and design services subject to the requirements and prohibitions of the Procurement Act. See, e.g., 1983-1984 Op. Va. Atty Gen. 290 (college contracts procuring services of campus bookstore operators to
sell goods to students are subject to requirements of Procurement Act; (4) whether the city has authority to form such contemplated corporation; and (5) whether there are any applicable restrictions on the availability or use of the state appropriation.

6 The Procurement Act defines public contract as an agreement between a public body and a nongovernmental source that is enforceable in a court of law. Section 1137. A public body is comprised of any political subdivision created by law to exercise some sovereign power or to perform some governmental duty, and empowered by law to undertake the activities described in the Procurement Act. Id.


8 Id.


10 See § 1141(A).

11 Town of South Hill v. Allen, 177 Va. 154, 165, 12 S.E.2d 770, 774 (1941).