COUNTIES, CITIES AND TOWNS: PUBLIC RECREATIONAL FACILITIES AUTHORITIES ACT.

WORKERS’ COMPENSATION: INSURANCE AND SELF-INSURANCE.

Public recreational facilities authority has statutory authority to purchase insurance for construction project through owner-controlled insurance program which provides for workers’ compensation general and excess liability, professional liability, pollution liability, force majeure/debt service guarantee, and contractor default (in lieu of surety coverage). Such insurance coverage satisfies statutory obligation to provide workers’ compensation insurance and payment and performance bonds. Public recreational facilities authority that contracts with independent contractor to perform work within authority’s trade, business or occupation is "statutory employer" of employees employed by construction contractors and subcontractors. Sole remedy for employees is provided by Workers’ Compensation Act.

The Honorable Eric Cantor
Member, House of Delegates
June 18, 1999

You inquire regarding the authority of a public recreational facilities authority to purchase insurance for its projects through an owner-controlled insurance program ("OCI program").

You provide the following facts relative to your inquiry. The Greater Richmond Convention Center Authority (the “Authority”) is a duly authorized public recreational facilities authority created pursuant to the Public Recreational Facilities Authorities Act (the “Authorities Act”). The Authority is a political subdivision of the Commonwealth exercising public and essential governmental functions to provide for the public health and welfare. The localities participating in the Authority are the city of Richmond and counties of Chesterfield, Hanover and Henrico.

Pursuant to the Authorities Act, the Authority plans to purchase and expand the Richmond Centre, which is a convention center facility located in Richmond. The expansion will increase the square footage of the Richmond Centre to approximately 605,000 square feet, at a projected cost of approximately $169 million. The Authority will operate and manage the Richmond Centre after completion of its expansion.

The Authority will incur substantial expenses to secure insurance coverage against construction-related losses and claims, as well as coverage for its operation of the expanded Richmond Centre. In such large construction projects, contractors and subcontractors typically obtain their own workers’ compensation and commercial general liability insurance policies. Every contractor includes, as part of its bid on the project, the cost of such insurance policies and a significant markup added to the actual cost of the policies. The owner of the construction project typically subsidizes these insurance costs.

The Authority desires to depart from the typical manner in which insurance is purchased on large construction projects and use an OCI program to obtain all insurance coverage necessary for the expansion and operation of the Richmond Centre. Owners of large construction projects have used OCI programs to produce significant savings on insurance costs while providing improved insurance coverage.

An OCI program is a master program that provides broad and uniform insurance coverage with high liability limits. Under an OCI program, the owner of the construction project purchases comprehensive insurance that covers the owner, contractors, subcontractors and all other parties involved in the construction activities. The owner may achieve a substantial cost savings from the
use of an OCI program resulting in lower administrative costs, credits for volume insurance purchasing, coordinated safety and claims programs, and elimination of contractor policy cost markups.

OCI programs have been used primarily for large construction projects, such as the Richmond Centre expansion. Coverage under an OCI program typically includes workers’ compensation, primary and excess commercial general liability, professional liability, pollution liability, and force majeure/debt service guarantees. Many disadvantaged and minority contractors and subcontractors frequently are unable to provide adequate amounts of these coverages. The use of an OCI program can increase the participation of such contractors in the overall construction project by relieving them of the responsibility for procuring individual insurance coverages.

The Authority believes that the use of an OCI program for the expansion and operation of the Richmond Centre will allow the Authority leverage to obtain for its contractors, at a substantially lower cost, the best insurance coverages and the highest quality claim services than could be obtained using the traditional approach to procuring construction insurance.

You first inquire whether a public recreational facilities authority, such as the Authority, has the statutory authority to purchase insurance through an OCI program.

Section 15.2-5601 of the Code of Virginia, a portion of the Authorities Act defines the term "project" to mean "any one or more of the following: auditorium, … coliseum, convention center." The term "cost" is defined to mean, "as applied to any project, all or any part of the cost of acquisition, construction, alteration, enlargement, reconstruction and remodeling of a project or portion thereof, including the cost of … insurance." The General Assembly authorizes and empowers authorities, such as the Authority, "[t]o acquire, purchase, lease as lessee, construct, reconstruct, improve, extend, operate and maintain projects"; "[t]o enter into contracts with … any person providing for or relating to any project"; "[t]o make and enter into all contracts and agreements necessary or incidental to the performance of its duties and the execution of its powers under [the Authorities Act]"; and "[t]o do all acts and things necessary or convenient to carry out the powers granted by [the Authorities Act]." Additionally, the General Assembly mandates that the Authorities Act "shall be liberally construed to effect [its] purposes."

Where the language of a statute is plain and unambiguous, the legislature should be assumed to have intended to mean what it plainly has expressed, and statutory construction is unnecessary. Therefore, it is clear that the General Assembly has granted to public recreational facilities authorities, such as the Authority, the statutory authority to purchase insurance for projects, such as the proposed Richmond Centre expansion.

In determining whether the authority to exercise a statutorily created power in a particular manner may be implied from a statute, an examination must initially be made as to whether the statute contains any guidance on the manner in which the power is to be exercised. The Authorities Act is silent as to the method by which public recreational facilities authorities, such as the Authority, may purchase insurance.

For many years, Virginia has followed the Dillon Rule of strict construction concerning the powers of local governing bodies, limiting such powers to those conferred expressly by law or by necessary implication from such conferred powers. In the facts you present, the Dillon Rule is applicable to determine, in the first instance, from express words or by implication, whether a public recreation facilities authority may purchase insurance coverage for the project. This initial determination, however, does not end the inquiry. If the authority to purchase insurance coverage does exist, a determination must then be made whether the particular authority is being exercised properly—i.e., the "reasonable selection of method" rule may be applied to decide "whether there may be implied the authority to execute the power in the particular manner chosen." The
"reasonable selection of method" rule "permits local public bodies to exercise discretionary authority where a grant of power is silent upon its mode or manner of execution" before the rule comes into play.\textsuperscript{15}

Under the "reasonable selection of method" rule, the Authority’s use of an OCI program is within its discretionary authority since the Authorities Act is silent on the manner in which the Authority is to purchase insurance. It is my view that the Authority is entitled to some deference since the use of an OCI program, as you describe it, is designed to ensure that higher minority participation in the construction project will be achieved, better insurance coverages will be obtained, and significant cost savings will inure to the benefit of the constituents of the Authority’s jurisdictions and, eventually, to the taxpayers of the Commonwealth.

The Authority is authorized by the General Assembly to purchase insurance for construction projects.\textsuperscript{16} The Authorities Act, however, is silent as to the methods by which such insurance is to be obtained by the Authority. The provisions of the Authorities Act allowing the Authority to take all necessary and convenient actions in exercising its enumerated powers under the Act must be liberally construed.\textsuperscript{17} Therefore, I am of the opinion that a public recreational facilities authority has the statutory authority to purchase insurance through an OCI program.

You next ask whether the participation of private contractors and subcontractors in an OCI program that provides comprehensive insurance and a separate surety OCI program that provides workers’ compensation insurance and surety bond coverage will satisfy the obligations in §§ 11-46.3\textsuperscript{19} and 11-58\textsuperscript{19} of the Virginia Public Procurement Act\textsuperscript{20} to provide workers’ compensation insurance coverage and payment and performance bonds.

You represent that an OCI program may provide for workers’ compensation, general and excess liability, professional liability, pollution liability, force majeure/debt service guarantee, and contractor default (in lieu of surety) coverage. You advise, however, that contractors are required by statute to provide some of these insurance coverages and will be reluctant to participate in an OCI program unless the coverage they receive under the program will satisfy their statutory obligations.

Section 11-46.3(A) prohibits a contractor from performing any work on a government construction project until such contractor "has obtained, and continues to maintain for the duration of such work, such workers’ compensation coverage as may be required pursuant to the provisions of Chapter 8 (§ 65.2-800 et seq.) of Title 65.2."\textsuperscript{21} Furthermore, such contractor must provide evidence of such coverage to the governmental entity "prior to award of contract."\textsuperscript{22}

Employers are required to ensure the payment of workers’ compensation claims by securing their liability with "an insurer authorized to transact the business of workers’ compensation insurance in [Virginia],"\textsuperscript{23} by receiving permission from the Workers’ Compensation Commission to be self-insured,\textsuperscript{24} or by "[b]eing a member … of a group self-insurance association licensed by the State Corporation Commission."\textsuperscript{25} You represent that every contractor performing construction work on the Richmond Centre will be required to participate in the OCI program. Therefore, the use of the OCI program will ensure that each contractor and subcontractor will satisfy the statutory obligation to provide and maintain workers’ compensation insurance.

Section 11-58(A) requires that when a "public construction contract exceeding $100,000 [is] awarded to any prime contractor, such contractor shall furnish" both a performance bond\textsuperscript{26} and a payment bond\textsuperscript{27} to the public body. Each such bond is required to be in the amount of the construction contract.\textsuperscript{28} You represent that surety OCI programs operate in the same manner as do OCI programs on large construction projects. Therefore, you advise that a prime contractor participating in a surety OCI program will be issued a payment and performance bond that may be used to satisfy the aforementioned statutory obligation.
Consequently, the coverages provided to contractors under the OCI program that you describe, as well as a separate surety OCI program, will, in my opinion, permit the contractors to satisfy the statutory requirements to provide workers' compensation insurance and payment and performance bonds.

Your final inquiry is whether a public recreational facilities authority is a "statutory employer" within the meaning of the Virginia Workers' Compensation Act when it constructs and operates a convention center.

Section 65.2-302(A), a portion of the Workers' Compensation Act, defines the term "statutory employer" as follows:

When any person (referred to in this section as "owner") undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (referred to in this section as "subcontractor") for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any worker employed in the work any compensation under [the Act] which he would have been liable to pay if the worker had been immediately employed by him.

Statutory employees of "owners" are limited under the Workers' Compensation Act to bringing a claim against an "owner" for injuries received while performing work for such owner. A political subdivision is an "owner" within the meaning of § 65.2-302(A). Therefore, the issue to be determined is whether the work the political subdivision has contracted with an independent contractor to perform is within the "trade, business or occupation" of the political subdivision.

The appropriate test applied to governmental entities to determine their "trade, business or occupation" does not focus simply on what they do, but on what they are supposed to do. "In other words, any activity which a government entity is authorized or required to do is considered its trade, business or occupation."

The Authority clearly is acting within its "trade, business or occupation" when contracting for the Richmond Centre expansion. As made clear in the Authorities Act, the Authority is authorized to construct a convention center. Therefore, I am of the opinion that the Authority is the "statutory employer" of all employees who are employed by the construction contractors and subcontractors working on the Richmond Centre expansion. As such, I am also of the opinion that the sole remedy for such employees is provided by the Workers' Compensation Act.

---

1Tit. 15.2, ch. 56, Va. Code Ann. §§ 15.2-5600 to 15.2-5616.

2See § 15.2-5604.

3See § 15.2-5602 (allowing localities to create authority "by ordinance or resolution").

4See § 15.2-5604(3).

5Section 15.2-5601.
Virginia courts historically have resolved questions concerning implied legislative authority by analyzing the legislative intent and have consistently refused to imply powers that the General Assembly clearly did not intend to convey. See Commonwealth v. Arlington County Bd., 217 Va. 558, 577, 232 S.E.2d 30, 42 (1977).


Id. at 574, 232 S.E.2d at 40.

See § 15.2-5601 (defining "cost").

See §§ 15.2-5604(11), 15.2-5615.

Section 11-46.3 provides:

"A. No contractor shall perform any work on a construction project of a department, agency or institution of the Commonwealth unless he (i) has obtained, and continues to maintain for the duration of such work, such workers' compensation coverage as may be required pursuant to the provisions of Chapter 8 (§ 65.2-800 et seq.) of Title 65.2 and (ii) provides prior to the award of contract on a form furnished by the department, agency, or institution of the Commonwealth evidence of such coverage.

"B. The Department of General Services shall provide the form to such departments, agencies, or institutions. Failure of a department, agency or institution to provide such form prior to the award of contract shall waive the requirements of clause (ii) of subsection A.

"C. No subcontractor shall perform any work on a construction project of a department, agency or institution of the Commonwealth unless he has obtained, and continues to maintain for the duration of such work, such workers' compensation coverage as may be required pursuant to the provisions of Chapter 8 (§ 65.2-800 et seq.) of Title 65.2.

"D. The provisions of this section shall apply to localities on and after January 1, 1994, and the Department of General Services shall furnish the forms to localities."

Section 11-58 provides:
"A. Upon the award of any public construction contract exceeding $100,000 awarded to any prime contractor, such contractor shall furnish to the public body the following bonds:

"1. A performance bond in the sum of the contract amount conditioned upon the faithful performance of the contract in strict conformity with the plans, specifications and conditions of the contract.

"2. A payment bond in the sum of the contract amount. Such bond shall be for the protection of claimants who have and fulfill contracts to supply labor or materials to the prime contractor to whom the contract was awarded, or to any subcontractors, in the prosecution of the work provided for in such contract, and shall be conditioned upon the prompt payment for all such material furnished or labor supplied or performed in the prosecution of the work. "Labor or materials" shall include public utility services and reasonable rentals of equipment, but only for periods when the equipment rented is actually used at the site.

"B. Each of such bonds shall be executed by one or more surety companies selected by the contractor which are legally authorized to do business in Virginia.

"C. If the public body is the Commonwealth of Virginia, or any agency or institution thereof, such bonds shall be payable to the Commonwealth of Virginia, naming also the agency or institution thereof. Bonds required for the contracts of other public bodies shall be payable to such public body.

"D. Each of the bonds shall be filed with the public body which awarded the contract, or a designated office or official thereof.

"E. Nothing in this section shall preclude a public body from requiring payment or performance bonds for construction contracts below $100,000.

"F. Nothing in this section shall preclude such contractor from requiring each subcontractor to furnish a payment bond with surety thereon in the sum of the full amount of the contract with such subcontractor conditioned upon the payment to all persons who have and fulfill contracts which are directly with the subcontractor for performing labor and furnishing materials in the prosecution of the work provided for in the subcontract."

20 Sections 11-35 to 11-80.

21 Section 11-46.3(C) contains the same provision for subcontractors.

22 Section 11-46.3(A).

23 Section 65.2-801(A)(1).

24 Section 65.2-801(A)(2).

25 Section 65.2-801(A)(3).

26 Section 11-58(A)(1).

27 Section 11-58(A)(2).

28 Section 11-58(A)(1), (2).
28 Sections 65.2-100 to 65.2-1310.


32 See id. at 383, 355 S.E.2d at 599-600.


34 See § 15.2-5604(3).

35 Section 65.2-302(A) imposes liability on the Authority for its "statutory employees" as if those employees had been employed directly by the Authority; however, the Authority may rely on the workers’ compensation insurance coverage obtained through the OCI program to insure against such liability.