ADMINISTRATION OF GOVERNMENT: VIRGINIA PUBLIC PROCUREMENT ACT.

‘Living wage’ requirement is matter of general social or economic policy that is unrelated to goods or services sought to be procured under Act. Locality has no authority to require contractors to provide living wage to employees as condition to award of public contract.

The Honorable Samuel A. Nixon, Jr.
Member, House of Delegates
December 10, 2002

Issue Presented

You ask whether localities in the Commonwealth have the authority to require contractors responding to a request for proposal to provide a "living wage" to their employees as a requirement for submission or, in the alternative, to provide a "living wage" to their employees as a condition in any contract.¹

Response

It is my opinion that a "living wage" requirement is unrelated to the goods or services to be procured and, therefore, is not authorized under the Virginia Public Procurement Act. Accordingly, 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.

Background

You advise that the 2000 Session of the General Assembly amended §§ 11-35 and 11-37 of the Virginia Public Procurement Act to permit parties purchasing on behalf of government to consider "best value" when making procurement decisions.² You relate that other parties interpret the 2000 amendment to permit localities to require that contractors pay specific wages in excess of the minimum wage required by law.

Applicable Authorities and Discussion

The 2000 Session of the General Assembly added the following sentences to § 11-35(G): "Public 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." Further, the 2000 Session added the following definition to § 11-37: "'Best value,' as predetermined in the solicitation, means the overall combination of quality, price, and various elements of required services that in total are optimal relative to a public body’s needs."

The 2001 Session of the General Assembly repealed §§ 11-35 through 11-80 of the Virginia Public Procurement Act, and revised and recodified the Act at §§ 2.2-4300 through 2.2-4377. Section 11-35(G) and the definition of "best value" as contained in § 11-37 were recodified verbatim at §§ 2.2-4300(C) and 2.2-4301, respectively. The purpose of the Act "is to enunciate the public policies pertaining to governmental procurement from nongovernmental sources." Section 2.2-4303(A) 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."

Given the context of your question, it appears your inquiry concerns the use of best value considerations in competitive negotiation solicitations. Competitive negotiation allows a governmental unit to consider factors related to the goods or services being solicited other than price. Although the definition of "best value" is broadly worded, it may not be read to include social and economic policies deemed important by the procuring body. The purpose of the Virginia Public Procurement Act is to ensure that solicitations by governmental units are presented and awarded in a fair manner to promote competition.

A 1992 opinion of the Attorney General concludes 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. This Office previously has concluded that a county seeking to impose an affordable housing requirement on the selection of a depository for county funds is impermissible. Moreover, a 1986 opinion determined that a city may not adopt an ordinance prohibiting discrimination on the basis of sexual orientation in the award of government contracts, and a 1983 opinion concluded that a locality may not adopt a policy granting preference to local bidders.
Like the policy initiatives examined in these previous opinions of the Attorney General, a living wage requirement is a matter of general social or economic policy that is unrelated to the goods or services sought to be procured. The 2000 amendment does not justify a departure from the long-standing interpretation of the Virginia Public Procurement Act as discussed in the previous opinions of the Attorney General. To the contrary, the Act’s definition of "best value" makes clear that "best value" inheres in elements of the required goods or elements of the required services, and in both cases, relates to the public body’s needs. There is nothing in § 2.2-4300(C) or § 2.2-4301 to suggest that the General Assembly intended any change in the basic policy of the Act that specifications reflect the procurement needs of the public body, and that those needs relate to the products or services being procured. Therefore, a locality does not have authority to require contractors to provide a "living wage" to their employees as a requirement of receiving public contracts.

Conclusion

Accordingly, it is my opinion that a "living wage" requirement is unrelated to the goods or services to be procured and, therefore, is not authorized under the Virginia Public Procurement Act. Accordingly, 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.


3 2000 Va. Acts, supra note 2, at 1199 (quoting language recodified at § 2.2-4300(C)).

4 Id. (quoting language recodified at § 2.2-4301).


7 Section 2.2-4300(C).

Section 2.2-4327(A), however, now permits any county or city authorized pursuant to the statute to consider a depository’s promotion of affordable housing as a selection criterion.


Section 2.2-4328, however, now authorizes localities to adopt a local preference policy to resolve tie bids.