



# COMMONWEALTH of VIRGINIA

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February 27, 2008

Mr. Gene M. Johnson  
Director, Virginia Department of Corrections  
P.O. Box 26963  
Richmond, Virginia 23261

Dear Mr. Johnson:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

### Issue Presented

You ask whether purchases under the Public-Private Education Facilities and Infrastructure Act of 2002<sup>1</sup> ("PPEA") are exempt from § 53.1-47(1), which mandates that state agencies purchase products manufactured by persons confined in state correctional facilities.

### Response

It is my opinion that PPEA is not exempt from the mandatory language of § 53.1-47, but that § 53.1-47 is not applicable to all procurements contemplated under PPEA.

### Applicable Law and Discussion

Virginia Correctional Enterprises ("VCE") employs inmates within the custody of the Department of Corrections in industrial prison jobs to produce goods and provide services, including upholstery, furniture, printing, and laundry, for sale to state agencies.<sup>2</sup> You relate that there is confusion among state agencies regarding the interplay between § 53.1-47(1) and PPEA.

The General Assembly enacted PPEA in 2002<sup>3</sup> to promote the "timely acquisition, design, construction, improvement, renovation, expansion, equipping, maintenance, operation, implementation, or installation of education facilities, technology infrastructure and other public infrastructure and government facilities within the Commonwealth that serve a public need and purpose,"<sup>4</sup> and that "[s]uch public need may not be wholly satisfied by existing methods of procurement in which qualifying projects

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<sup>1</sup> VA. CODE ANN. tit. 56, ch. 22.1, §§ 56-575.1 to 56-575.18 (2007).

<sup>2</sup> Virginia Department of Corrections, Virginia Correctional Enterprises, at <http://www.vadoc.virginia.gov/offenders/institutions/programs/vce.shtml> (last visited Feb. 11, 2008).

<sup>3</sup> See 2002 Va. Acts ch. 571, at 764, 764-76.

<sup>4</sup> Section 56-575.2(A)(1).

are acquired, designed, constructed, improved, renovated, expanded, equipped, maintained, operated, implemented, or installed.”<sup>5</sup> Section 56-575.2(D) provides that “[C]hapter [22.1] shall be liberally construed in conformity with the purposes hereof.”

Section 53.1-47 provides that:

Articles and services produced or manufactured by persons confined in state correctional facilities:

1. Shall be purchased by all departments, institutions and agencies of the Commonwealth which are supported in whole or in part with funds from the state treasury for their use or the use of persons whom they assist financially. Except as provided in § 53.1-48, no such articles or services shall be purchased by any department, institution or agency of the Commonwealth from any other source[.]

Section 53.1-48 provides that the Director of the Division of Purchases and Supply may exempt an agency from the provisions of § 53.1-47 when the article produced by VCE<sup>6</sup> does not meet the reasonable requirements of such agency<sup>7</sup> or when VCE cannot accommodate the procurement request for other reasons.<sup>8</sup> The Director of the Division must provide written justification to the Director of the Department of Corrections for such an exemption.<sup>9</sup> State agencies cannot evade the requirements of § 53.1-47 merely by making slight variations to their procurement needs.<sup>10</sup>

PPEA provides alternative procurement procedures for qualifying projects. Section 56-575.1 of PPEA defines a “qualifying project” as:

(i) any education facility, including, but not limited to a school building, any functionally related and subordinate facility and land to a school building (including any stadium or other facility primarily used for school events), and any depreciable property provided for use in a school facility that is operated as part of the public school system or as an institution of higher education; (ii) any building or facility that meets a public purpose and is developed or operated by or for any public entity; (iii) any improvements, together with equipment, necessary to enhance public safety and security of buildings to be principally used by a public entity; (iv) utility and telecommunications and other communications infrastructure; (v) a recreational facility; (vi) technology infrastructure and services, including, but not limited to, telecommunications, automated data processing, word processing and management information systems, and related information, equipment, goods and services; (vii) any technology, equipment, or infrastructure designed to deploy wireless broadband services to schools, businesses, or

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<sup>5</sup> Section 56-575.2(A)(2).

<sup>6</sup> See *supra* note 2 and accompanying text.

<sup>7</sup> For purposes of this opinion, I use the term state agency(ies) to mean state agencies, institutions, and departments.

<sup>8</sup> VA. CODE ANN. § 53.1-48 (2005).

<sup>9</sup> *Id.*

<sup>10</sup> Section 53.1-49 (2005).

residential areas; or (viii) any improvements necessary or desirable to any unimproved locally- or state-owned real estate.

These procedures are available only if the public entity “has the power to develop and operate the applicable qualifying project.”<sup>11</sup>

A practical statutory compliance problem arises when state agencies are authorized to procure new buildings and furnishings for those buildings, but the available funds are identified as bond proceeds secured by a capital lease of the facility. In such a case, the state agency may not have authorization to acquire needed furnishings for the new building without contracting for a so-called “turn key” facility in which the capital funds used to construct the project also pay for the furnishings as a part of the overall compensation paid to the project developer. A private entity is not authorized to use VCE as a source of furnishings, and an apparent conflict arises between the application of PPEA and § 53.1-47.<sup>12</sup>

The language of PPEA is sweeping and provides for liberal construction to effect its purposes.<sup>13</sup> PPEA does not address the procurement of specific items available from VCE, nor does it include language expressly limiting § 53.1-47. On the other hand, § 53.1-47 includes language which at least implies that it is only applicable to the procurement of goods and services and not to capital procurements like the ones about which you inquire. PPEA contains a list of the statutes and regulations from which it is exempt, and § 53.1-47 is not one of them.<sup>14</sup>

It is a well established rule of statutory construction that “‘when one statute speaks to a subject in a general way and another deals with a part of the same subject in a more specific manner, the two should be harmonized, if possible, and where they conflict, the latter prevails.’”<sup>15</sup> In this case, PPEA and § 53.1-47(1) can be read in harmony. State agencies must follow the specific mandate of § 53.1-47(1) and purchase products made by persons confined in state correctional facilities or request an exemption pursuant to § 53.1-48 when purchasing goods and services rather than capital projects. To the extent that VCE does not manufacture an appropriate product or cannot accommodate a procurement request, a state agency may obtain an exemption to allow the purchase of such product from another source. In capital projects, however, the provisions of § 53.1-47 do not apply. Thus, products manufactured by VCE that are procured properly as an integral part of a “turn key” capital project do not require an exemption from § 53.1-47(1).

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<sup>11</sup>Section 56-575.1 (defining “responsible public entity”).

<sup>12</sup>Sections 53.1-47 and 53.1-48 mandate that state agencies purchase products made by persons confined in state correctional facilities to the extent that such products meet the agencies’ procurement needs. However, the avenue provided by § 53.1-48 to obtain an exemption from the Division of Purchases and Supply indicates that the contemplated procurement actions are not capital projects but the procurement of goods and services.

<sup>13</sup>See § 56-575.2(D).

<sup>14</sup>See § 56-575.16.

<sup>15</sup>*Frederick County Sch. Bd. v. Hannah.*, 267 Va. 231, 236, 590 S.E.2d 567, 569 (2004) (quoting *Va. Nat’l Bank v. Harris*, 220 Va. 336, 340, 257 S.E.2d 867, 870 (1979)); *accord County of Fairfax v. Century Concrete Servs., Inc.*, 254 Va. 423, 427, 492 S.E.2d 648, 650 (1997).

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### **Conclusion**

Accordingly, it is my opinion that PPEA is not exempt from the mandatory language of § 53.1-47, but that § 53.1-47 is not applicable to all procurements contemplated under PPEA.

Thank you for letting me be of service to you.

Sincerely,

A handwritten signature in black ink, reading "Robert F. McDonnell". The signature is fluid and cursive, with the first name "Robert" and last name "McDonnell" clearly legible.

Robert F. McDonnell