



COMMONWEALTH of VIRGINIA

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The Honorable Riley E. Ingram
Member, House of Delegates
3302 Oaklawn Boulevard
Hopewell, Virginia 23860

Dear Delegate Ingram:

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

Issues Presented

You ask whether pursuant to § 22.1-126 a Virginia school board may receive a gift of in-kind labor for the construction of an auxiliary athletic facility on property owned by the school board. If so, you inquire concerning liability issues, possible violations of the Virginia Public Procurement Act, and the school board's ability to direct the project without impairing the gift.

Response

It is my opinion that § 22.1-126 does not authorize a school board to accept a gift of construction services. However, it is my opinion that a local school board may accept a gift of services pursuant to the Virginia State Government Volunteers Act.¹ It further is my opinion that the Virginia Public Procurement Act does not apply to a donation of services. Finally, it is my opinion that a local school board may impose reasonable conditions upon a donation to make the gift acceptable to the board.

Background

You state that a tax-exempt organization is contemplating raising money for the construction of an auxiliary athletic facility on property owned by the school board. You indicate that a construction contractor may wish to donate the labor for the construction project. Further, you note that the school board is uncertain whether it may accept such an in-kind gift of labor. The school board also has raised questions concerning: (1) any liability arising from construction activities not undertaken pursuant to a contract with the school board; (2) potential violations of the Virginia Public Procurement Act;² and

¹You also inquire concerning the liability of the school board for construction activities taking place on school property that are not pursuant to a contract with the school board. The request does not contain sufficient facts to determine what liability a school board might have for such construction. Certainly liability may occur when there are activities conducted on school board property with the board's knowledge. The extent and nature of any such liability will depend upon the specific facts and circumstances.

²VA. CODE ANN. tit. 2.2, ch. 43, §§ 2.2-4300 to 2.2-4377 (2005 & Supp. 2006).

(3) whether the school board may, by agreement with the contractor, establish a timeframe and parameters for the project while maintaining the character of a gift.

Applicable Law and Discussion

You ask whether a school board is authorized to accept the donation of construction services pursuant to § 22.1-126, which provides, in part, that:

When any real or personal property is given, devised or bequeathed to any school board or for public school purposes, it shall be vested in the school board unless inconsistent with the terms of the gift, devise or bequest and shall be managed and applied by the school board according to the wishes of the donor or testator.

A prior Opinion of the Attorney General has concluded that § 22.1-126 authorizes school boards to accept gifts of real or personal property.³

The question then becomes whether a gift of construction services is a gift of personal property. “Personal property” means “[a]ny moveable or intangible thing that is subject to ownership and not classified as real property.”⁴ Services are not subject to ownership. Accordingly, a gift of services is not a gift of personal property. Therefore, § 22.1-126 does not authorize a school board to accept a gift of construction services.

Although § 22.1-126 does not authorize school boards to accept gifts of construction services, that does not end the inquiry. Local school boards, like many governmental entities, benefit from donations of services from volunteers. In some instances, the use of volunteers is authorized in a specific way. For example, schools are authorized to use volunteers for tutoring in the Community of Readers Program,⁵ for assistance in the attendance office,⁶ and to conduct scoliosis screenings.⁷

Additionally, the Virginia State Government Volunteers Act⁸ authorizes the use of volunteers by governmental entities. “[A]ll departments established in the executive branch of state government and local agencies under the jurisdiction or supervision thereof, and for the purposes of §§ 2.2-3602, 2.2-3604 and 2.2-3605, shall include political subdivisions of the Commonwealth.”⁹ Thus, the question arises whether a school board is a “political subdivision” within the meaning of § 2.2-3601.

In prior opinions, Attorneys General have concluded that school boards are political subdivisions for purposes of the joint exercise of power,¹⁰ the Virginia Public Procurement Act,¹¹ The Virginia Freedom of Information Act,¹² and for establishing a deferred compensation plan.¹³

³See 1989 Op. Va. Att’y Gen. 90, 91.

⁴BLACK’S LAW DICTIONARY 1254 (8th ed. 2004). Real property is “land and anything growing on, attached to, or erected on it.” *Id.*

⁵VA. CODE ANN. § 22.1-208.2:1(B) (2006).

⁶Section 22.1-258 (2006).

⁷Section 22.1-273.1 (2006).

⁸Tit. 2.2, ch. 36, §§ 2.2-3600 to 2.2-3605 (2005).

⁹Section 2.2-3601.

¹⁰1995 Op. Va. Att’y Gen. 72, 72.

[A] school board, or school division, constitutes a discrete juristic entity, separate from the city or county in which it is organized. It may sue or be sued in its own name, hold and convey real personal property, enter into contracts, and hire, supervise and discharge its own employees. Although a school board or school division has a number of statutory relationships with both the Commonwealth and with the county or city in which it is organized, it constitutes a separate political subdivision of the Commonwealth.^[14]

It is my opinion that a school board is a “political subdivision” for purposes of the Virginia State Government Volunteers Act.

Section 2.2-3602(A) of the Virginia State Government Volunteers Act permits governmental entities, including political subdivisions, to “develop volunteer programs and accept the services of volunteers, including regular-service volunteers, occasional-service volunteers, or material donors, to assist in programs carried out or administered by that department.” A “volunteer” is defined as “any person who, of his own free will, provides goods or services, without any financial gain, to any agency, instrumentality or political subdivision of the Commonwealth.”¹⁵ It is my opinion that § 2.2-3602(A) permits a local school board to accept construction services from a person who provides such services of his own free will and without any financial gain.

You also ask whether the proposed arrangement would violate the Virginia Public Procurement Act.¹⁶ School boards are considered “public bodies” within the meaning of the Procurement Act.¹⁷ The Procurement Act applies “whether the consideration is monetary or nonmonetary and regardless of whether the public body, the contractor, or some third party is providing the consideration.”¹⁸ In the case of a gift, no consideration is provided, so the Procurement Act does not apply. The Act also requires that “[a]ll public contracts with nongovernmental contractors for the purchase or lease of goods, or 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.”¹⁹ “The ordinary definition of ‘purchase’ is ‘the acquiring of title to or property in anything for a price.’”²⁰ In the circumstances you describe, the public body is not offering consideration nor is it purchasing or initiating the provision of services. Therefore, the Procurement Act does not apply to a donation of construction services to a local school board.

¹¹ 1987-1988 Op. Va. Att’y Gen. 118, 119 (interpreting former § 11-41(C)(2)(i) of Virginia Public Procurement Act).

¹² 1982-1983 Op. Va. Att’y Gen. 729, 729 (interpreting former § 2.1-342(b)(4) of The Freedom of Information Act).

¹³ 1975-1976 Op. Va. Att’y Gen. 298, 298.

¹⁴ 1987-1988 Op. Va. Att’y Gen., *supra* note 11, at 119.

¹⁵ *See* § 2.2-3601.

¹⁶ *See supra* note 2.

¹⁷ *See* 1983-1984 Op. Va. Att’y Gen. 461, 461 (interpreting former § 11-41(A)); *see also* 1987-1988 Op. Va. Att’y Gen., *supra* note 11, at 119 (concluding that school board is political subdivision of Commonwealth).

¹⁸ Section 2.2-4300(B) (2005).

¹⁹ Section 2.2-4303(A) (Supp. 2006).

²⁰ *Gen. Trading Corp. v. Motor Vehicle Dealer Bd.*, 28 Va. App. 264, 268, 503 S.E.2d 809, 811-12 (1998) (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1845 (1981)).

Finally, you ask whether the school board may, by agreement with the contractor, establish a timeframe and parameters for the project, and still maintain the character of a gift. A local school board is not obligated to accept any gift, and it may restrict its acceptance of a gift to the satisfaction of appropriate terms. Such restrictions reasonably may include timeframes and parameter limitations. Therefore, a local school board may require that a gift be acceptable to the board prior to accepting such gift. Whether such a conditioned gift maintains the character of a gift must be determined on a case-by-case basis. A variety of purposes may determine whether such a transaction constitutes a gift.

Conclusion

Accordingly, it is my opinion that § 22.1-126 does not authorize a school board to accept a gift of construction services. However, it is my opinion that a local school board may accept a gift of services pursuant to the Virginia State Government Volunteers Act.²¹ It further is my opinion that the Virginia Public Procurement Act does not apply to a donation of services. Finally, it is my opinion that a local school board may impose reasonable conditions upon a donation to make the gift acceptable to the board.

Thank you for letting me be of service to you.

Sincerely,



Robert F. McDonnell

²¹See *supra* note 1.