



COMMONWEALTH of VIRGINIA

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The Honorable Mark D. Sickles
Member, House of Delegates
Post Office Box 10628
Franconia, Virginia 22310

Dear Delegate Sickles:

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 recent legislation directing a state agency, when providing a grant of state funds for the construction or operation of public works, to ensure that bid specifications and other documents for the project neither require nor prohibit bidders, offerors, contractors, or subcontractors to enter into, or adhere to, a Project Labor Agreement ("PLA") affects the Commonwealth's procurement authority for bodies such as the Metropolitan Washington Airports Authority ("MWAA").¹

Response

It is my opinion that a state agency can negotiate to include in its grant agreement a provision that makes MWAA's receipt of Virginia funds conditional upon MWAA conducting the procurement in a manner that does not give a preference to offerors who will have a PLA. It is further my opinion that, although such a condition would be enforceable in accordance with general contract laws, it could not be enforced through the special remedial provisions contained in the new legislation, because MWAA is not subject to the statute providing those remedies.

Background

During its 2012 regular session, the General Assembly enacted House Bill 33 and Senate Bill 242.² The Governor signed these bills on April 9, 2012, and they are effective beginning July 1, 2012.

¹ You also ask a question relating to appointments to the MWAA Board of Directors. The subject of MWAA Board appointments is presently the subject of litigation. Thus, in accordance with longstanding principles, this Office will decline to opine on matters that are associated with pending litigation. See 2012 Op. Va. Att'y Gen. 11-004 at 1 n.1. See also Op. Va. Att'y Gen.: 1996 at 152, 153; 1987-88 at 45, 46; 1977-78 at 34.

² See H.B. 33, 2012 Reg. Sess. (Va.), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?121+ful+HB33ER+pdf>, and S.B. 242, 2012 Reg. Sess. (Va.), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?121+ful+SB242ER+pdf>, respectively. The enrolled versions of these bills are identical in all respects material to this opinion and will be referred to hereafter collectively as the "bills." See 2012 Va. Acts chs. 685, 732.

The legislation amended the Virginia Public Procurement Act³ by adding a new section - § 2.2-4321.2. The text of the provision pertinent to your inquiry, § 2.2-4321.2(C), is as follows:

A state agency issuing grants, providing financial assistance, or entering into cooperative agreements for the construction, manufacture, maintenance, or operation of public works shall ensure that neither the bid specifications, project agreements, nor other controlling documents therefor awarded by recipients of grants or financial assistance or by parties to cooperative agreements, nor those of any construction manager acting on behalf of such recipients, shall: (1) Require or prohibit bidders, offerors, contractors, or subcontractors to enter into or adhere to agreements with one or more labor organizations, on the same or related projects; or (2) Otherwise discriminate against bidders, offerors, contractors, subcontractors, or operators for becoming or refusing to become or remain signatories or otherwise to adhere to agreements with one or more labor organizations, on the same or other related projects.

Applicable Law and Discussion

Pursuant to the newly enacted § 2.2-4321.2, a state agency issuing grants or providing financial assistance for construction of public works “shall ensure” that the bid specifications and certain other documents issued by the recipients do not discriminate against offerors based on whether they will have an agreement with a labor organization.⁴ To facilitate compliance, the amendment also provides that, if a recipient of such grants or financial assistance “performs in a manner contrary to” the new provisions, injunctive relief may be granted to prevent the violation, and confers upon offerors, contractors, and others standing “to challenge any bid specification ... that violates the provisions of this section.”⁵ As a further enforcement tool, the new section implicitly prohibits state agencies from providing the funds until such time as compliance with the bills is “ensure[d].”⁶ Additionally, irrespective of the enactment of § 2.2-4321.2 and in the absence of such a law, a granting agency can negotiate to include similar requirements as a condition of signing any commitment to provide grants or financial assistance.

MWAA is a public body corporate and politic that is independent of Virginia.⁷ The General Assembly expressly exempted MWAA from the provisions of the Virginia Public Procurement Act.⁸ Though otherwise permissible, the newly added remedies and requirements are not applicable to or enforceable against MWAA. Nonetheless, MWAA’s exemption from the Virginia Public Procurement Act does not insulate it from general laws pertaining to the enforcement of contracts, and state agencies would be able to seek judicial remedies if MWAA were to breach a contractual commitment it made not

³ VA. CODE ANN. §§ 2.2-4300 through 2.2-4377 (2011 & Supp. 2012).

⁴ Section 2.2-4321.2(C) (Supp. 2012).

⁵ See § 2.2-4321.2(D) and (E).

⁶ Pursuant to § 2.2-4321.2(C), a state agency issuing grants “shall ensure” compliance by the recipients. If a state agency is unable to obtain the required commitment from a proposed recipient, the state agency’s only remaining avenue for complying with the new section would be to withhold the grants and thus avoid becoming a “state agency issuing grants...” This implicit command to withhold funds would not affect a right to receive funds that has already vested before the effective date of the new statute. See VA. CODE ANN. § 1-239 (2011) (“No new act of the General Assembly shall be construed ... in any way whatever to affect ... any right accrued, or claim arising before the new act of the General Assembly takes effect....”).

⁷ VA. CODE ANN. § 5.1-153 (2010). See § 5.1-156(B) (2010); 49 U.S.C. § 49106.

⁸ Section 5.1-174 (2010). See also *Washington-Dulles Transp., Ltd. v. Metro. Wash. Airports Auth.*, 263 F.3d 371, 376 (4th Cir. 2001).

to include a PLA preference in its procurement documents or to otherwise meet the conditions found in § 2.2-4321.2.⁹

Although MWAA is exempt from § 2.2-4321.2, state agencies dealing with MWAA are not. To comply with the statute's command that they "shall ensure" no PLA preference be given, state agencies engaged in issuing grants to, providing financial assistance to, or entering into cooperative agreements for the construction, maintenance, or operation of public works with MWAA or similar entities must require that the contract documents specify that no PLA preference be given and that the conditions found in § 2.2-4321.2 be met, and must provide the appropriate remedial measures if the contract terms are not honored.

Conclusion

Accordingly, it is my opinion that a state agency can negotiate to include in its grant agreement a provision that makes MWAA's receipt of Virginia funds conditional upon MWAA conducting the procurement in a manner that does not give a preference to offerors who will have a PLA. It is further my opinion that, although such a condition would be enforceable in accordance with general contract laws, it could not be enforced through the special remedial provisions contained in the new legislation, because MWAA is not subject to the statute providing those remedies.

With kindest regards, I am

Very truly yours,

A handwritten signature in blue ink that reads "Ken C II". The signature is stylized and written in a cursive-like font.

Kenneth T. Cuccinelli, II
Attorney General

⁹ See, e.g., § 5.1-156(A)(11) (MWAA shall have the power "[t]o sue and be sued in its own name"), § 5.1-173 (2010) ("[t]he courts of the Commonwealth of Virginia shall have original jurisdiction of all actions brought by or against the Authority" and "[t]he Authority shall be liable for its contracts..."); *Washington-Dulles Transp., Ltd.*, 263 F.3d at 376.