



# COMMONWEALTH of VIRGINIA

Office of the Attorney General

Kenneth T. Cuccinelli, II  
Attorney General

April 12, 2013

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Cynthia E. Hudson, Esquire  
City Attorney for the City of Hampton  
City Attorney's Office, City Hall  
22 Lincoln Street  
Hampton, Virginia 23669

Dear Ms. Hudson:

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 the City of Hampton (the "City"), in the award of construction contracts procured by competitive sealed bidding, may grant preference to contractors who employ, or agree to grant hiring preference to, Hampton residents for work to be performed under the contract or, alternatively, whether the City may impose a requirement in its construction contracts that the contractors give a preference for hiring Hampton residents for such work.

## Response

It is my opinion that the City of Hampton does not have the authority to grant a preference in the award of construction contracts procured by competitive sealed bidding to contractors who employ, or agree to grant hiring preference to, Hampton residents for work to be performed under the contract. It is my further opinion that the City may not impose a requirement in its construction contracts that the contractors give a preference for hiring Hampton residents for such work.

## Background

You report that, based on citizen concerns regarding the high levels of unemployment among skilled and unskilled laborers in the City, the Hampton City Council was asked to adopt a requirement in City construction contracting that successful bidders agree to grant preference in hiring to local residents to perform the work procured.

## Applicable Law and Discussion

By enacting the Virginia Public Procurement Act<sup>1</sup> (the "Procurement Act"), the General Assembly has established explicit statutory provisions governing the public procurement of goods and

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<sup>1</sup> See VA. CODE ANN. §§ 2.2-4300 through 2.2-4377 (2011 & Supp. 2012).

services. The purpose of the Procurement Act is to ensure that solicitation by governmental units are presented and awarded in a fair and impartial manner to promote competition.<sup>2</sup> Although localities are given some flexibility in devising the details of their procurement through the adoption of alternative procedures, those alternative procedures must be “based on competitive principles.”<sup>3</sup> Prior opinions of this Office have concluded that it is inconsistent with the principles of the Procurement Act to condition the award of a public contract on factors that are unrelated to the goods or services being procured.<sup>4</sup>

The General Assembly in certain limited circumstances has authorized conditional preferences in the award of public contracts based on specifically enumerated factors. For example, § 2.2-4328 authorizes the governing body of a county, city or town, in the case of a tie bid, to “give preference to goods, services and construction produced in such locality or provided by persons, firms or corporations having principal places of business in the locality.”<sup>5</sup> No provision of the Procurement Act, however, authorizes localities in the award of construction contracts to give preference to bidders who commit to employing local residents. Indeed, as recently as the 2010 and 2011 sessions, the General Assembly has declined to enact legislation that would have authorized localities to give a preference in the award of contracts to construction contractors who hire residents of the locality or the commonwealth.<sup>6</sup>

In Virginia, local governing bodies have only those powers that are expressly conferred upon them, those which may be necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable.<sup>7</sup> Given that the Procurement Act sets forth no express authority for localities to give a preference to contractors who hire local residents, and that the General Assembly has rejected legislation that would have conferred such authority, Dillon Rule principles do not permit a finding that localities are vested with the power to conduct procurements in such a manner.

### Conclusion

Accordingly, it is my opinion that the City of Hampton does not have the authority to grant a preference in the award of construction contracts procured by competitive sealed bidding to contractors who employ, or agree to grant hiring preference to, Hampton residents for work to be performed under

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<sup>2</sup> Section 2.2-4300(C) (2011).

<sup>3</sup> Section 2.2-4343(A)(10) (Supp. 2012). *See* 1983-84 Op. Va. Att’y Gen. 455, 456. You relate that pursuant to the authority granted localities under § 2.2-4343(A)(10), the City has adopted a procurement ordinance that you describe as being in all material respects a local codification of the Procurement Act. *See* HAMPTON, VA., City Code §§ 2-320 to 2.342.

<sup>4</sup> *See* 2002 Op. Va. Att’y Gen. 13 (requirement that contractor provide a “living wage” to its employees is unrelated to goods or services to be procured and not authorized by the Procurement Act); 1992 Op. Va. Att’y Gen. 38 (affordable housing requirement proposed as a condition on the selection of depository institutions is an unrelated condition not permitted by the Procurement Act).

<sup>5</sup> Section 2.2-4328 (2011). *See also* § 2.2-4324 (2011) (in the case of a tie bid, preference to be given to goods produced in Virginia, goods or services or construction provided by Virginia persons, firms or corporations).

<sup>6</sup> *See* S.B. 703, 2010 Reg. Sess. (Va. 2010) and 2011 Reg. Sess. (Va. 2011) (legislation carried over to 2011 session and left in committee in 2011 that proposed amending § 2.2-4324 to permit a locality to implement a bidding system that provides a preference to construction contractors that hire residents of the locality or the commonwealth), respectively *available at* <http://leg1.state.va.us/cgi-bin/legp504.exe?101+sum+SB703> and <http://leg1.state.va.us/cgi-bin/legp504.exe?111+com+S12N06>.

<sup>7</sup> *See* Marble Tech., Inc. v. City of Hampton, 279 Va. 409, 417-18, 690 S.E.2d 84, 88 (2010).

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the contract. It is my further opinion that the City may not impose a requirement in its construction contracts that the contractors give a preference for hiring Hampton residents for such work.

With kindest regards, I am

Very truly yours,

A handwritten signature in blue ink, appearing to read "Ken C II". The signature is stylized and written in a cursive-like font.

Kenneth T. Cuccinelli, II  
Attorney General