

ADMINISTRATION OF GOVERNMENT GENERALLY: DEPARTMENT OF GENERAL SERVICES - PURCHASES AND SUPPLY.

EDUCATIONAL INSTITUTIONS: BONDS AND OTHER OBLIGATIONS.

CONTRACTS: VIRGINIA PUBLIC PROCUREMENT ACT.

Medical College of Hampton Roads is independent public body politic and corporate, rather than subordinate agency of Commonwealth; is subject to purchasing requirements of Virginia Public Procurement Act but not to purchasing procedures prescribed by Division of Purchases and Supply. Virginia International Terminals is not state agency or institution and makes no purchases out of state treasury; is not subject to DPS purchasing procedure.

Mr. Donald C. Williams

Director, Department of General Services

May 1, 1996

You ask whether the authority granted under § 2.1442 of the *Code of Virginia* to the Division of Purchases and Supply, Department of General Services, applies to the purchasing function at the Medical College of Hampton Roads (the "Medical College") and the Virginia International Terminals ("VIT").¹

You relate that the Appropriation Act contains an \$11 million appropriation to the Medical College. You also relate that § 2314 classifies the Medical College as an educational institution, declaring it to be a public body constituted as a governmental instrumentality for the dissemination of education. Finally, you advise that VIT was established by the Virginia Port Authority to oversee the operations of the various ports; however, you do not describe the precise nature of VIT or its source of funding for its purchases.

The principal question to be addressed is whether the Medical College and VIT are departments, divisions, officers or agencies of the Commonwealth for purposes of the purchasing requirements in § 2.1442.

The 1964 Session of the General Assembly created the Medical College as a "public body politic and corporate."² Section 2314 declares the Medical College to be a public body, constituted as a governmental instrumentality for the dissemination of education.³ Section 2316 empowers the Medical College to sue and be sued; to have a common seal; to acquire and hold real or personal property or interests in its own name; to execute all instruments necessary or convenient for the purposes of Chapter 3 of Title 23, relating to bonds and other obligations; to issue bonds and to provide for the rights of the holders of such bonds with the consent of the Governor; to perform any acts and do any thing authorized by Chapter 3 either by means of its own officers, agents or employees, or by contracts with private corporations, firms or individuals; and to do all acts and things necessary or convenient to carry out the powers and purposes given to it by the General Assembly in Chapter 3.

The Appropriation Act for the 1994-1996 biennium characterizes the Medical College as a "state agency" and lists it within the executive branch.⁴ Section 6 of the 1994-1996

Appropriation Act, however, specifically provides that its definitions apply to the listed terms "used in this act."⁵ Therefore, the General Assembly clearly did not intend § 6(D) of the Appropriation Act to direct the application of the provisions of § 2.1442 to the Medical College.

The Medical College is a special purpose unit of government. Many of these entities exist both at the state and local levels. Questions concerning the legal status of special purpose units of government have frequently arisen because of the many purposes for which they are created and the differing provisions of their organic legislative acts or enabling statutes. Several prior opinions of the Attorney General have considered whether special units of government are state agencies, and whether a special unit serving as a subordinate or auxiliary body to fulfill a state purpose is dependent on state appropriations and is subject to state control to any great degree.⁶

In this instance, the Medical College was created by, and operates pursuant to, an act of the General Assembly and is a "public body politic and corporate."⁷ The Board of Visitors of the Medical College is appointed by seven city councils in the Tidewater area and by a foundation.⁸ Although the Medical College is funded, in part, by the State, it has its own sources of funds beyond those funds appropriated to it.⁹ The only state oversight of Medical College activities is that it must exercise the powers conferred by the General Assembly "consistent with the approval authority of the State Council of Higher Education pursuant to the Code of Virginia."¹⁰ These factors, therefore, support the conclusion that the Medical College is an independent public body politic and corporate, rather than a subordinate agency of the Commonwealth. Therefore, it is my opinion that, although the Medical College is a "public body" subject to the Virginia Public Procurement Act,¹¹ § 2.1-442 does not apply to it.

You indicate that VIT was established by the Virginia Port Authority to oversee the operations of the various ports. The information you provide does not indicate that VIT is either an agency or an institution of the State, or that its purchases are made in whole or in part out of the state treasury. I find no legislation prescribing the nature of this entity and no appropriation of funds from the state treasury to VIT in the 1994-1996 Appropriation Act. In the case of *Artist v. Virginia International Terminals, Inc.*, however, the Norfolk federal district court observed that an opinion of the Attorney General concluded that because VIT was incorporated under the former Virginia Nonstock Corporation Act, it is a private entity whose employees are private employees and not public employees of the State or any political subdivision.¹² The court concluded that VIT is not a state agency for purposes of Eleventh Amendment immunity, and indicated that VIT was incorporated as a nonstock corporation and could not acquire state treasury funding.¹³

Based on the above, therefore, it is my opinion that the facts you provide do not indicate that the purchasing procedure in § 2.1442 applies to VIT.

¹The first sentence of § 2.1442 provides: "All purchases made by any department, division, officer or agency of the Commonwealth shall be made in accordance with Chapter 7 (§ 11-35 et seq.) of Title 11 and such rules and regulations as the Division [of Purchases and Supply] may prescribe."

²Ch. 471, § 1, 1964 Va. Acts Reg. Sess. 736, 736 (creating Norfolk Area Medical Center Authority). Subsequent amendments to § 1 of Chapter 471 have not interfered with the designation of the Medical College as a "public body politic and corporate." Ch. 396, 1975 Va. Acts 656, 656 (changing name to Eastern Virginia Medical Authority); Ch. 329, 1987 Va.

Acts Reg. Sess. 409, 409 (changing name to Medical College of Hampton Roads). There have been two other amendments to Chapter 471, which did not affect § 1. See Ch. 386, 1988 Va. Acts 464 (amending § 11 to provide for issuance of refunding bonds and to clarify source of payment of bonds); Ch. 454, 1991 Va. Acts Reg. Sess. 695 (amending §§ 26, § 8, §§ 1014, §§ 16 and 17, and adding § 8.1, relating to governance of Medical College by Board of Visitors and to powers of Medical College).

³Section 2314 provides that certain educational institutions and the Medical College "are hereby classified as educational institutions and are declared to be public bodies and constituted as governmental instrumentalities for the dissemination of education. The powers of every such institution derived directly or indirectly from [Chapter 3 of Title 23] shall be vested in and exercised by a majority of the members of its board, and a majority of such board shall be a quorum for the transaction of any business authorized by this chapter. Wherever the word 'board' is used in this chapter, it shall be deemed to include the members of a governing body designated by another title."

⁴See Ch. 853, 1995 Va. Acts 1842. The 1994-1996 Appropriation Act provides that when used in the act, "[s]tate agency' means a court, department, institution, office, board, council or other unit of state government located in the legislative, judicial or executive departments or group of independent agencies, or central appropriations, as shown in this act, and which is designated in this act by title and a three-digit agency code." *Id.* § 6(D), at 184344. Section 173 provides appropriations for "Medical College of Hampton Roads (274)," which is listed under the heading "Executive Department," including §§ 115 to 1-125. *Id.* at 2037, 18672191.

⁵*Id.* at 1843.

⁶See Op. Va. Att'y Gen.: 1987-1988 at 84 (Virginia Beach Erosion Council is considered independent political subdivision and is, therefore, "public body" subject to competitive procurement procedures); 1986-1987 at 97, 99 (multijurisdictional jail board is not independent political subdivision; is subject to control of participating local jurisdictions); 1985-1986 at 91, 92 (local governing body has narrow statutory power to control or limit function of park authority; park authority is independent entity); *id.* at 149, 149, 150 (soil and water conservation districts are independent political subdivisions and not state agencies); *id.* at 336, 338 (Virginia Public Building Authority is state agency subject to state control and dependent on state appropriations); 1983-1984 at 78, 78, 79 (Fairfax County Economic Development Authority is political subdivision; park authority is independent governmental entity); 1981-1982 at 337 (Virginia Education Loan Authority is state agency for narrow purpose of § 2.141.2); 1979-1980 at 5, 8 (Chippokes Plantation Farm Foundation is state agency); 1978-1979 at 305 (Virginia Education Loan Authority is independent political subdivision of State); 1977-1978 at 454 (Peninsula Transportation District Commission is political subdivision); 1974-1975 at 336 (Cumberland Plateau Mental Health and Mental Retardation Authority is political subdivision of State); 1973-1974 at 217, 218 (Virginia Port Authority is political subdivision for purpose of former § 9-108); see also *Prendergast v. Park Authority*, 227 Va. 190, 194, 313 S.E.2d 399, 401 (1984); *VEPCO v. Hampton Red. Authority*, 217 Va. 30, 225 S.E.2d 364 (1976) (discussing status of political subdivisions in assorted contexts).

⁷1964 Va. Acts, *supra* note 2.

⁸Section 2, 1991 Va. Acts, *supra* note 2, at 695.

⁹See 1995 Va. Acts, *supra* note 4, at 203740; §§ 1017, 1991 Va. Acts, *supra* note 2, at 698-702.

¹⁰Section 3, 1991 Va. Acts, *supra* note 2, at 696.

¹¹Sections 1135 to 1180.

¹²679 F. Supp. 587, 591 (E.D. Va.) *aff'd*, 857 F.2d 977 (4th Cir. 1988).

¹³679 F. Supp. at 59293.