

00-105

CONTRACTS: VIRGINIA PUBLIC PROCUREMENT ACT.

COUNTIES, CITIES AND TOWNS: AUTHORITIES FOR DEVELOPMENT OF FORMER FEDERAL AREAS.

Vint Hill Farms Economic Development Authority is exempt from competitive procurement procedures of Act with respect to acquisition of property; is not exempt with regard to procurement of contract for services.

The Honorable Jay K. Katzen
Member, House of Delegates
March 30, 2001

You inquire whether § 15.2-6308 of the *Code of Virginia* exempts the Vint Hill Farms Economic Development Authority (the "Authority") from the requirements of the Virginia Public Procurement Act.

You advise that the Authority was established on March 29, 1996, by proclamation of the Governor pursuant to former §§ 15.1-1320 through 15.1-1341, amended and recodified as §§ 15.2-6300 through 15.2-6321.¹ You relate that the Authority has acquired a military base in Fauquier County from the federal government consisting of approximately 700 acres; obtained rezoning and preliminary subdivision approvals from the board of supervisors consistent with the Authority's master plan; leased over 20 existing commercial buildings to small business; attracted over 225 new jobs; renovated and leased 15 residential units; sold 33 acres to the Federal Aviation Administration for construction of a \$95 million facility; and obtained a tax-exempt loan for infrastructure improvements. The Authority is actively redeveloping the military base to create jobs and add to the tax base of the state and the county.

You also relate that the Authority is in the final phase of a grant received from the Department of Defense toward the redevelopment of Vint Hill Farms. You advise that, after this fiscal year, all income necessary for the Authority to redevelop the former military base to a mixed-use, planned residential, commercial, and industrial community must be self-generated from building rentals, sales proceeds, utility fees, and loans. You advise further that the Authority receives no income from either the state or the county.

You relate further that redevelopment of the site is projected to occur over a 10-to-15 year period. The Authority anticipates that it will purchase goods and services in connection with the demolition, renovation and

maintenance of existing structures and with regard to the construction of new improvements, such as roads, utilities, landscaping and recreation infrastructure.

You advise that the Authority is performing the same real estate landlord and development functions as a private sector development company. You relate that, in such capacity, the amount of time spent during the public procurement process of contracting, advertising and selecting renovation services reduces the Authority's ability to respond effectively when new purchasing or rental opportunities arise. You believe that the public procurement process also reduces the Authority's ability to obtain the services of some proven quality contractors, who can obtain all the work they can do from the private sector without being subjected to the formalized public bid process. Finally, you also believe that the ability to employ contractors of proven quality and responsiveness may save the Authority considerable money over a 10-to-15 year project.

Section 15.2-6308 lists the public and corporate powers granted to development authorities to acquire military installations and return them to "nonmilitary uses and to the tax rolls."² The last paragraph of § 15.2-6308 provides:

No provision of law with respect to the acquisition, operation or disposition of property by other political subdivisions or public bodies shall be applicable to an authority unless specifically stated therein. In any locality where planning, zoning or development regulations may apply, the authority shall comply with and is subject to those regulations to the same extent as a private commercial or industrial enterprise.

The Virginia Public Procurement Act³ requires that "[a]ll public contracts with nongovernmental contractors" be awarded pursuant to competitive procedures, "unless otherwise authorized by law."⁴ The requirements of the Act are applicable to "public bodies." The term "public body," as used in the Act, "means any legislative, executive or judicial body, agency, office, department, authority, ... or political subdivision created by law to exercise some sovereign power or to perform some governmental duty, and empowered by law to undertake the activities described in [the Act]."⁵ The Authority is both an "authority" and a "political subdivision of the Commonwealth."⁶ Prior opinions of the Attorney General consistently conclude that political subdivisions are public bodies within the meaning of § 11-37 and are required to comply with the Act.⁷ It is my opinion that the Authority is a "public body" for purposes of the Act and, therefore, is required to conform to the provisions of the Act. Section 11-37 of the Act sets forth the following additional definitions: "[s]ervices' means any

work performed by an independent contractor wherein the service rendered does not consist primarily of acquisition of equipment or materials, or the rental of equipment, materials and supplies"; "[n]onprofessional services' means any services not specifically identified as professional services";⁸ "[p]ublic contract' means an agreement between a public body and a nongovernmental source that is enforceable in a court of law." Section 11-37, however, does not define the term "property."

Since § 11-41(A) of the Act requires that "[a]ll public contracts with nongovernmental contractors" be procured competitively, "unless otherwise authorized by law," the threshold question is whether the contract is one entered into by, and binding upon, a "public body." If that question is answered affirmatively, then such contract must be competitively procured, "unless otherwise authorized by law."⁹

The specific provision in the last paragraph of § 15.2-6308, stating that no law pertaining to the "acquisition, operation or disposition of property by other political subdivisions or public bodies shall be applicable to an authority unless specifically stated therein," does not define the term "property." In the absence of any such definition, the term must be given its common, ordinary meaning.¹⁰ "Property," as used in § 15.2-6308, means "[t]he right to possess, use, and enjoy a determinate thing (either a tract of land or a chattel); the right of ownership ...[:] [a]ny external thing over which the rights of possession, use, and enjoyment are exercised."¹¹ Although the General Assembly commands that the statutory provisions pertaining to development authorities be "liberally construed,"¹² the plain meaning of § 15.2-6308 must prevail.¹³ As the Supreme Court of Virginia has stated, "the plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction."¹⁴

I am, therefore, of the opinion that, pursuant to § 15.2-6308, the Authority is exempt from the competitive procurement procedures of the Virginia Public Procurement Act with respect to the acquisition of property, but is not exempt with regard to the procurement of any contract for services.

¹1997 Va. Acts ch. 587, at 976, 1391-97. The Act became effective December 1, 1997. See *id.* at 1401 (enacting clause 14).

²Va. Code Ann. § 15.2-6300 (Michie Repl. Vol. 1997) (stating declaration of policy).

³Va. Code Ann. §§ 11-35 to 11-80 (Michie Repl. Vol. 1999 & Supp. 2000).

⁴Section 11-41(A) (Michie Supp. 2000).

⁵Section 11-37 (Michie Supp. 2000).

⁶Va. Code Ann. §§ 15.2-6302; 15.2-6301 (Michie Repl. Vol. 1997) (defining "authority").

⁷See Op. Va. Att'y Gen.: 1990 at 36, 40, 41 (Virginia Recreational Facilities Authority); 1987-1988 at 84, 87 (Virginia Beach Erosion Council); 1982-1983 at 741 (sewer authority); 1980-1981 at 277, 278-79 (Fairfax County Water Authority).

⁸"Professional services" encompass "the practice of accounting, actuarial services, architecture, land surveying, landscape, architecture, law, dentistry, medicine, optometry, pharmacy or professional engineering." Section 11-37.

⁹Section 11-41(A).

¹⁰See *Anderson v. Commonwealth*, 182 Va. 560, 565-66, 29 S.E.2d 838, 840-41 (1944) (construing definition of commonly used words, "listed or assessed," and noting that there can be no departure from such words where manifest intention is clear); 1993 Op. Va. Att'y Gen. 210, 213.

¹¹Black's Law Dictionary 1232 (7th ed. 1999).

¹²Va. Code Ann. § 15.2-6320 (Michie Repl. Vol. 1997).

¹³"If the language of a statute is plain and unambiguous, and its meaning perfectly clear and definite, effect must be given to it." *Temple v. City of Petersburg*, 182 Va. 418, 423, 29 S.E.2d 357, 358 (1944); see also 1993 Op. Va. Att'y Gen. 256, 257.

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