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## MEMORANDUM

**To: Virginia Conflict of Interest and Ethics Advisory Council**

**From: G. Stewart Petoe, Executive Director**

**Date: July 18, 2017**

**Re: Formal Advisory Opinion 2017-F-002 Applicability of Public Procurement Act (§ 2.2-4300 et seq.) Exemptions to the Statutes Governing Personal Interests in Contracts in the Conflict(s) of Interests Acts §§ 2.2-3106, 2.2-3107, 2.2-3108, 2.2-3109, & 30-105**

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### ISSUE PRESENTED

Your question relates to the applicability of the various exemptions and exceptions contained in the Virginia Public Procurement Act (§ 2.2-4300 et seq.), as they relate to the provisions of the State and Local Government Conflict of Interests Act (§ 2.2-3100 et seq.) and the General Assembly Conflicts of Interests Act (§ 30-100 et seq.).

Under the General Assembly Conflicts of Interests Act and under several sections in the State and Local Government Conflict of Interests Act, members of the General Assembly and state and local officials and employees may have a personal interest in certain contracts, which would not otherwise be permitted, if the contract was awarded as a result of competitive sealed bidding or competitive negotiation as set forth in the Public Procurement Act. Within the Public Procurement Act, there are a number of exceptions, exemptions, and limitations that will permit a contract to be awarded without competitive sealed bidding or competitive negotiation.

Your question specifically is, if the Public Procurement Act permits a contract with a state or local agency to be awarded without competitive sealed bidding or competitive negotiation, does that statutory provision thereby allow a state or local official or employee or legislator to have a personal interest in such a contract, provided that all of the legal requirements for the contract are met according to the provisions of the Public Procurement Act, even if such a personal interest would otherwise be prohibited under the applicable conflict of interests act?

### DISCUSSION

The General Assembly Conflicts of Interests Act (the Act) prohibits, pursuant to § 30-105 of the *Code of Virginia*, a member of the General Assembly from having a personal interest in a contract with various state and local agencies and branches of the Virginia government.

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The Honorable Janet D. Howell  
The Honorable Thomas K. Norment, Jr.  
The Honorable Pete W. Stout, III

The Honorable Todd Gilbert  
The Honorable Matthew James  
The Honorable Patricia L. West

Walter C. Erwin  
Bernard L. Henderson, Jr.  
Sharon E. Pandak

Subsection A of this section prohibits Virginia legislators from having a personal interest in a contract with the legislative branch of state government. Subsection B of this section prohibits Virginia legislators from having a personal interest in a contract:

with any governmental agency of the executive or judicial branches of state government, other than in a contract of regular employment, unless such contract is awarded as a result of competitive sealed bidding or competitive negotiation as set forth in § 2.2-4302.1 or 2.2-4302.2 [of the Virginia Public Procurement Act] or is exempted from competitive sealed bidding or competitive negotiation pursuant to § 2.2-4344.

Subsection C of § 30-105 prohibits Virginia legislators from having a personal interest in a contract:

with any governmental agency of local government, other than in a contract of regular employment, unless such contract is (i) awarded as a result of competitive sealed bidding or competitive negotiation as set forth in § 2.2-4302.1 or 2.2-4302.2 or is awarded as a result of a procedure embodying competitive principles as authorized by subdivision A 10 or A 11 of § 2.2-4343, (ii) exempted from competitive sealed bidding, competitive negotiation, or a procedure embodying competitive principles pursuant to § 2.2-4344; or (iii) awarded after a finding, in writing, by the administrative head of the local governmental agency that competitive bidding or negotiation is contrary to the best interest of the public.

Subsections D and E of § 30-105 contain exceptions to the provisions of this section. Additional exceptions to § 30-105 are contained in the very next statute, § 30-106.

Analogous prohibitions apply to state and local officials and employees under the State and Local Government Conflict of Interests Act (COIA). Under subsection A of § 2.2-3106 of COIA, an officer or employee of any governmental agency of state government or the Eastern Virginia Medical School is prohibited from having a personal interest in a contract “with the governmental agency of which he is an officer or employee, other than his own contract of employment.” Subsection B of § 2.2-3106 prohibits state officers and employees from having a personal interest in a contract:

with any other governmental agency of state government unless such contract is (i) awarded as a result of competitive sealed bidding or competitive negotiation as set forth in § 2.2-4302.1 or 2.2-4302.2 or (ii) is awarded after a finding, in writing, by the administrative head of the governmental agency that competitive bidding or negotiation is contrary to the best interest of the public.

Similar language and exceptions are found in § 2.2-3107, which applies to the members of the governing bodies of counties, cities and towns; § 2.2-3108, which applies to members of school boards; and § 2.2-3109, which applies to all other officers and employees of local governmental agencies. Additional exceptions to all three of these statutes are found in § 2.2-3110.

Regarding these enumerated exceptions, it must be noted that all of the statutes contain an exception for at least some contracts that are awarded as a result of competitive sealed bidding. The statutes applicable to Virginia legislators and local government officials and employees who are not members of governing bodies or school boards specifically reference the competitive sealed bidding provisions in § 2.2-4302.1 of the Public Procurement Act.<sup>1</sup> The statute applicable to the members of the governing bodies of counties, cities, and towns and the statute applicable to school board members both refer to competitive sealed bidding, but do not directly reference any of the provisions of the Public Procurement Act.<sup>2</sup> However, any competitive sealed bidding that followed the provisions of the Public Procurement Act would clearly satisfy the requirements of these two latter statutes, even though they are slightly more permissive than the first two statutes in that the sealed competitive bidding does not necessarily have to follow the Public Procurement Act.

Therefore, the General Assembly has clearly permitted all public officials and employees, both at the state and local levels, and legislators to have personal interests in at least certain contracts that would otherwise be impermissible, provided that the contract was the result of competitive sealed bidding that followed the strictures of the Public Procurement Act. In short, the Public Procurement Act serves as a mechanism whereby there is a general reassurance that the contract in question was reached in an impartial and disinterested manner, which, of course, is the chief intent of the Act.<sup>3</sup>

This being the case, it was, until recently, a reasonable construction of the Act and COIA, read in conjunction with the Public Procurement Act, that the prophylactic nature of the latter would permit personal interests in contracts if either the Act or COIA permitted such personal interests to that extent.<sup>4</sup> The *Code of Virginia* is a unified body of law, and all of its statutes should be construed to harmonize with other statutes.<sup>5</sup> It is to be read as one act, prepared and adopted as such.<sup>6</sup> “Statutes which are not inconsistent with one another, and which relate to the same subject matter, are *in pari materia*, and should be construed together; and effect should be given to them all, although they contain no reference to one another....”<sup>7</sup> Thus, as the Public Procurement Act contains within it a number of exceptions, exclusions, and limitations from the

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<sup>1</sup> VA. CODE §§ 2.2-3109 (B) and 30-105(B) and (C) (2017).

<sup>2</sup> VA. CODE §§ 2.2-3107(B)(3) and 2.2-3108(B)(3) (2017).

<sup>3</sup> The Public Procurement Act is designed “to the end...that all procurement procedures be conducted in a fair and impartial manner with avoidance of any impropriety or appearance of impropriety, that all qualified vendors have access to public business and that no offeror be arbitrarily or capriciously excluded...[and] that procurement procedures involve openness and administrative efficiency...” VA. CODE § 2.2-4300 (C) (2017).

<sup>4</sup> Some personal interests in contracts would never be permitted, even if read in conjunction with the Public Procurement Act. For example, a state official or employee is, under COIA, prohibited from having a personal interest in a contract with his own agency, other than his contract of employment, and no allowance is made in such circumstances for a competitive sealed bidding exception. VA. CODE § 2.2-3106(A) (2017).

<sup>5</sup> *Branch v. Commonwealth*, 14 Va. App. 836 (1992).

<sup>6</sup> *First Nat'l Bank v. Holland*, 99 Va. 495 (1901).

<sup>7</sup> *Commonwealth v. Sanderson*, 170 Va. 33, 38 (1938).

general requirement that public contracts should be awarded only after competitive sealed bidding, competitive negotiation, or a procedure embodying competitive principles, it could be concluded that such exceptions would also be applicable in the context of the Act and COIA.<sup>8</sup>

In 2017, though, the General Assembly modified the Act by specifically incorporating one, and only one, of the “exceptions statutes” located in the Public Procurement Act.<sup>9</sup> The legislature is presumed to have been familiar with the subject matter with which it was dealing,<sup>10</sup> and to know the law when enacting legislation.<sup>11</sup> “When construing statutes, it is presumed that the absence of language, or a provision, in a body of legislation is purposeful, if potentially equally relevant language is included in a similar body of legislation. ‘Interpretation of the statute by comparison to other, similar statutes supports this result...showing that the General Assembly clearly knew how to limit a privilege...when it so desired.’”<sup>12</sup>

As the General Assembly did not include any of the other exceptions provided for in the Public Procurement Act when making this amendment, it must be concluded that they are not to be incorporated when construing § 30-105.<sup>13</sup> Also, as the General Assembly did not amend any of the parallel statutes in COIA, they too must be construed as not containing or incorporating any of the additional exceptions from the Public Procurement Act;<sup>14</sup> the current exceptions listed in the COIA statutes must now be deemed exclusive.<sup>15</sup>

## CONCLUSION

Accordingly, an impermissible personal interest in a contract under either the General Assembly Conflicts of Interests Act or the State and Local Government Conflict of Interests Act does not become permissible merely because the contract fits into one of the exceptions or limitations provided for in the Virginia Public Procurement Act. In order for such a contract to be

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<sup>8</sup> See, e.g., VA. CODE §§ 2.2-4308 (Design-build or construction management contracts for public bodies other than the Commonwealth; eligibility requirements; award of contract; records to be kept), 2.2-4343 (Exemption from operation of chapter for certain transactions), 2.2-4344 (Exemptions from competition for certain transactions), 2.2-4345 (Exemptions from competitive sealed bidding and competitive negotiation for certain transactions; limitations), and 2.2-4346 (Other exemptions for certain transactions) (2017).

<sup>9</sup> 2017 Va. Acts chs. 829, 832. These acts provided that the Public Procurement Act exceptions provided for in § 2.2-4344 would be added to the list of permissible contracts in which a legislator may have a personal interest. No other exceptions were added.

<sup>10</sup> *Landers v. Commonwealth*, 126 Va. 780, 781 (1919).

<sup>11</sup> See *Charles v. Commonwealth*, 270 Va. 14, 19 (2005).

<sup>12</sup> *Hitt Constr. v. Pratt*, 53 Va. App. 422, 429 (2009) (quoting *Schwartz v. Schwartz*, 46 Va. App. 145, 157-58 (2005)).

<sup>13</sup> A general principle of statutory construction, *expressio unius est exclusio alterius*, holds that the mention of a specific item in a statute implies that other omitted items were not intended to be included within the scope of the statute. *Smith Mtn. Lake Yacht Club, Inc. v. Ramaker*, 261 Va. 240, 246 (2001).

<sup>14</sup> The legislature is presumed to know what it intends to do and can do. *Miller v. Commonwealth*, 172 Va. 639, 649 (1930).

<sup>15</sup> *Accord* 1985 Op. Va. Att’y Gen. 53 (it is an impermissible personal interest in a contract under the Comprehensive Conflict of Interests Act [the antecedent to the General Assembly Conflicts of Interests Act] if a law firm, in which a member of the General Assembly is a partner, has a contract to provide legal services to a state college that will result in more than \$500 in fees per year). At the time of this Opinion, the provision of legal services was exempted from the Public Procurement Act, as is the case today. Former VA. CODE § 11-45(B)(i) (1984) (repealed 2001).

permissible, it must meet one of the exceptions that are specifically listed in the appropriate conflict act.