



# Department of **General Services**



## Virginia Procurement Preferences

June 27, 2023



# Preferences

## Virginia Public Procurement Act

- § 2.2-4324: Preference for Virginia in case of tie bid and reciprocal preferences
- § 2.2-4325: Virginia coal in state facilities
- § 2.2-4326: Recycled paper and paper products
- § 2.2-4328: Local products and firms (for localities)
- § 2.2-4328.1: Energy-efficient/water efficient goods
- § 2.2-4328.2: Personal protective equipment



# Types of Preferences

## Tie Bid Preference

- In the instance of a tie bid – Preference shall be given to goods produced in Virginia, or goods, services or construction provided by Virginia persons, firms or corporations.



# Types of Preferences

## Absolute Preference

- If the lowest bidder is a resident contractor of another state with an absolute preference, the bid shall not be considered.
- Absolute preference is defined as a state that will only consider bids from resident contractors residing within that state.



# Types of Preferences

## Percentage Preference

- Whenever the lowest responsive and responsible bidder is a resident of any other state and such state under its laws allows a resident contractor of that state a percentage preference, a like preference shall be allowed to the lowest responsive and responsible bidder who is a resident of Virginia and is the next lowest bidder.



# Types of Preferences

## Price Matching Preference

- If the lowest responsive and responsible bidder is a resident of any other state and such state under its laws allows a resident contractor of that state a price-matching preference, a like preference shall be allowed to bidders who are residents of Virginia.
- If the lowest responsive and responsible Virginia bidder is unable to match the price, the preference shall be given to other Virginia bidders in ascending price order.



## § 2.2-1111 Preferences

Requires DGS/DPS to establish procurement preferences for:

- Products containing recycled oil and recycled antifreeze (APSPM 3.15.e)
- Biodiesel fuel for use in on-road internal combustion engines and #2 fuel burned in a boiler, furnace, or stove for heating (APSPM 3.15.h)



# Policies on Preferences

The DGS/DPS Agency Procurement and Surplus Property Manual (APSPM) provides guidance to executive branch agencies under its purview on preferences in Chapter 3 for the procurement of non-IT goods and non-professional services.

The DGS/DEB Construction and Professional Services Manual (CPSM) provides guidance to executive branch agencies on preferences in Chapter 7 for the procurement of professional services and construction.



# **SB 1115 - CONFLICTS WITH FEDERAL LAW AND IMPACTS ON VDOT'S CONSTRUCTION PROGRAM**

Public Body Procurement Work Group - Meeting # 4  
House Room #1, The Virginia State Capitol

| Randy Wintory, Claims & Legal Affairs Manager  
VDOT Construction Division

June 27, 2023

# Proposed In-State Preferences

- **Virginia Products:**
  - Applies a 7% decrease in the price bid for Virginia products.
  - Limits selection to bids received from manufacturers using materials or components made in VA or US when there are 3 or more such bids.
- **Virginia Bidders:** Allows Virginia bidders to match the actual low bid from out-of-state bidder if bids are within 5% or \$10,000, whichever is less.

# Concerns About the Proposed In-State Preferences

- Federal laws prohibit State DOTs that receive Federal Aid from using In-State Preferences.
- Compliance with SB 1115 would put VDOT at risk of losing its Federal Aid for its federally-funded highway projects.
- SB 1115 needs to exclude VDOT from application of the In-State Preferences provided for in SB 1115.
- In addition, clarifications are needed regarding certain other terms and provisions of SB 1115.

## **Virginia has the 3rd largest state-maintained road system in the U.S.**

- 129,500 lane miles of roads consisting of:
  - 5,593 lane miles of Interstate highways,
  - 22,515 lane miles of Primary highways, and
  - 101,392 lane miles of Secondary roads.
- > 21,000 bridges / large culverts
- 4 Underwater / 2 Mountain Tunnels
- 3 ferry services
- 5 Traffic Operations Centers
- 41 Safety Rest Areas and Welcome Centers

# VDOT Program Funding

- **The Federal Aid Highway Program (FAHP) is a major source of funding.**
  - FAHP provides financial assistance (Federal Aid) to State DOTs for construction, maintenance and operation of the interstate, primary highways and secondary local roads.
  - The Federal Highway Administration (FHWA) is charged with implementing and administering FAHP.

# VDOT Programs Funded With Federal Aid Funds

## PROGRAMS

Ground Transportation Planning & Research (602)

Highway Construction Programs (603)

Highway System Maintenance (604)

Financial Assistance to Localities (607)

Non-Toll Supported Transportation Debt Service (612)

# Significance of Federal Aid Funding for Highway Construction

## FY 2022 Highway Construction Programs

- **\$3.3 Billion** - Allocated to Highway Construction Programs
- **353** – Number of Construction Contracts Awarded
  - 299 (85%) awarded to VA contractors
- **\$1.5 Billion** – Value of Contracts Awarded
  - **278** – Federally Eligible Contracts
  - **\$1.3 Billion** – Value of Federally Eligible Contracts

*Note: FY 2022 was a typical year*

# Federal Law & Regulations on Preferences

- **23 U.S.C. 112 – Letting of contracts** – Construction contracts must be awarded on the basis of the lowest responsive bid.
- **23 CFR 1.36 - Compliance with Federal Laws & Regulations** – Authorizes FHWA to withhold funds if they determine that a State has violated or failed to comply with the Federal Aid laws or regulations.
- **23 CFR 635.112 - Letting of contracts** - Bidding procedures must be non-discriminatory regardless of National, State or local boundaries. Contrary State laws are not applicable to Federal Aid projects.
- **23 CFR 635.114 - Award of contract & concurrence in award** - Federal-aid contracts must be awarded only on the basis of the lowest responsive bid.
- **23 CFR 635.409 - Restrictions upon materials** – Prohibits the use of price differentials in favor of In-State articles or materials produced, or discrimination against Out-of-State articles or materials.

# In-State Preferences are Prohibited on Federal Aid Contracts

## FHWA Guidance on State Preferences

Applicability: All Federal Aid highway construction projects.

Background: In order to maximize competition for projects, FHWA prohibits the use of in-State preferences in the selection of contractors, materials, or labor.

Guidance: The [State DOT] shall not impose any requirement or enforce any procedure which requires the use of, or provides a price differential in favor of contractors, labor, articles or materials produced within the State. This includes requirements that prohibit, restrict, or discriminate against the use of articles or materials shipped from or prepared, made, or produced in any State, territory, or possession of the U.S.

Basically, labor and materials produced within a State shall not be favored to the exclusion of comparable labor and materials produced outside of the State. State preference clauses give particular advantage to the designated source and thus restrict competition. Therefore, State preference provisions shall not be used on any Federal-aid construction projects.

# In-State Preferences are Prohibited on Federal Aid Contracts

**FHWA has made clear that State Preferences are contrary to the Federal Aid Program and sufficient to cause Federal Aid funding to be withheld:**

- A Montana legislator proposed legislation that would restrict Canadian contractors from bidding on Federal Aid highway projects.
- Responding to an inquiry about it, FHWA issued a memorandum stating:  
*“Should the draft legislative proposal be enacted ... and such language be included in future Federal-aid contract provisions, [FHWA] would consider Montana to be in violation of [applicable Federal] law and regulations ... This would give the FHWA no option but to suspend Montana's authority to obligate Federal-aid funds, until such time as compliance with Title 23 has been reestablished. ...*

FHWA Memorandum re Montana/Canadian Contract Issues, Ref. HNG-22 (Feb. 9, 1999)

# Compliance with SB 1115

- **VDOT would be at risk of losing \$1 Billion or more annually in Federal Aid unless its Federally-funded highway projects are excluded from application of the preferences provided for in SB 1115.**
- **Other States with In-State Preferences have such exclusions.**

# EXAMPLES OF EXCLUSIONS

## SOUTH CAROLINA:

- ***“(3) Compliance with Federal Requirements. ... except to the extent such action would render the governmental body ineligible to receive federal funds whose receipt is conditioned on compliance with mandatorily applicable federal law. ...” S.C. Consolidated Procurement Code Section 11-35-40.***

## TEXAS:

- ***“CONTRACT INVOLVING FEDERAL FUNDS. This subchapter [regarding non-resident bidders on contracts with governmental entities] does not apply to a contract involving federal funds.”***  
TX Govt. Code § 2252.004.

## WEST VIRGINIA:

- ***“(3) If any of the requirements or provisions set forth in this section jeopardize the receipt of federal funds, then the requirement or provisions are void and of no force and effect for that specific project.”***  
W. Va. Code 5A-3-37(c)(3).

## OTHER STATES WITH EXCLUSIONS INCLUDE:

California, Colorado, Hawaii, Michigan, Missouri, Mississippi, Montana, Nebraska, Oklahoma, Vermont, and Wyoming

# Additional Concerns

## Ambiguities

15 "End product" means the tangible product described in a solicitation for bids, including its  
16 component parts and its final form.  
17 "Grown" means locally derived from any timber, agricultural product, aquaculture product, or  
18 livestock that is produced, cultivated, raised, or harvested upon the land or from the water.  
19 "Made" or "manufactured" means assembled, fabricated, or processed into an end product, the price  
20 of which is substantially related to the cost of such assemblage, fabrication, or processing.  
21 **["Principal place of business" means the physical business location where the natural persons who**  
22 **direct, control, and manage the business's day-to-day operations are located.]**  
23 "U.S. end product" means an end product made, manufactured, or grown in the United States.  
24 "Virginia business" means a business that maintains a principal place of business within Virginia.  
25 "Virginia end product" means an end product made, manufactured, or grown in Virginia.  
26 B. In determining the award of any contract for goods, services, or construction, preference shall be  
27 given to Virginia end products and to Virginia businesses or Virginia residents, as applicable, in  
28 accordance with this section.  
29 C. When evaluating bids for purposes of making an award determination, a state public body shall  
30 decrease the price of any bid offered (i) for a Virginia end product, by seven percent and (ii) for a U.S.  
31 end product, by two percent. If the lowest responsive and responsible bidder, **[after price preferences**  
32 **have been taken into account,]** who is a **[resident of Virginia]** is within five percent or \$10,000, whichever  
33 is less, of the lowest responsive and responsible bidder who is a **[resident of another state,]** then the  
34 bidder who is a **[resident of Virginia]** shall be granted the option to match the price of the bidder who is  
35 a **[resident of another state.]**

1. Defined terms not clear – **"principal place of business"** could mean different things.
2. Combined In-State Preferences would not be feasible for procurement of State-funded construction contracts. Contract prices are for installation of products/material incl. labor, material, and equipment. Hundreds of products / materials could be used. For construction, only the in-state bidder preferences would be feasible.
3. Undefined terms – **"resident of Virginia"** and **"resident of another state"** are not defined in Subsection A (Lines 15-25). **"Principal place of business"** is defined, but not used.

# CONCLUSION

## **The following are considerations that VDOT would offer:**

- That SB 1115 be amended to ensure that the In-State Preferences do not apply to Federally-funded contracts or do not apply if Federal Aid for VDOT's Federally-funded programs would be jeopardized.
- That for State Funded construction contracts, the In-State Bidder Preference be the only preference applied to the award of construction contracts.
- That “resident of Virginia” be replaced with “Virginia business”
- That “principal place of business” be replaced with “principal office” per Va. Code Title 13.1.

## QUESTIONS?

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