



COMMONWEALTH of VIRGINIA

Office of the Attorney General

October 3, 2012

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Dear Senator Wagner, Delegates Stolle and Knight, and Senators Northam and McWaters:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You present the following questions related to the Public-Private Transportation Act of 1995 ("PPTA"), the Secretary of Transportation's PPTA Implementation Manual and Guidelines of May 21, 2012 ("PPTA Guidelines") and the current consideration by the Governor and the Secretary of Transportation of proposals submitted by three private entities for the concession to operate Port of Virginia ("Port") facilities owned and/or leased by the Commonwealth of Virginia through the Virginia Port Authority ("VPA"):

1. You ask who or which public entity has authority under the PPTA to review and evaluate the proposals from these three private entities;
2. You ask who or which public entity has the authority, following the vetting of the proposals, to determine whether or not to select a preferred proposer with which to enter into negotiations for a comprehensive agreement for the concession to operate Port facilities;
3. You ask who or which public entity has the authority under the PPTA, after negotiations with the preferred proposer, to reverse or override the selection of that proposer;
4. You ask who or which public entity has the authority under the PPTA (i) to approve and, (ii) to execute any final comprehensive agreement on behalf of the Commonwealth for the concession to operate Port facilities; and

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In May 2012, the Secretary of Transportation adopted the new PPTA guidelines¹¹ setting forth the organizational structure adopted by the Office of the Secretary of Transportation for developing, implementing and administering PPTA projects. These guidelines confer upon the Secretary overall authority respecting that entire process¹² and establish a PPTA Steering Committee. The PPTA Steering Committee, is chaired by the Commonwealth Transportation Commissioner and consists of numerous Virginia governmental transportation officials, including a VPA representative. The PPTA Steering Committee is tasked, among other responsibilities, with reviewing the recommendations of Office of Transportation Public-Private Partnerships (“OTP3”) regarding which proposers should advance in the PPTA evaluation process. The committee is directed to “[p]rovide high-level policy and procurement guidance to the OTP3 on an as-needed basis.”¹³ The OTP3 Director is supported by a “multidisciplinary program staff,” industry experts and consultants for the review process. In conjunction with representatives of the responsible public entity, the Director, subject to oversight by the PPTA Steering Committee, bears overall responsibility for conducting the PPTA process following the Secretary’s receipt of an unsolicited or solicited proposal regarding a qualifying transportation project.

In a memorandum dated May 22, 2012, to the Secretary and the Chairman of the VPA Board (“the OTP3 Memorandum”), the OTP3 Director recommended certain modifications to the review process described in the PPTA Guidelines and a proposed schedule for the review process.¹⁴ Near in time to the

¹⁰ See APM TERMINALS, INC., ADDENDUM TO UNSOLICITED CONCEPTUAL PROPOSAL (Apr. 30, 2012), *available at* <http://www.vappta.org/resources/APMT%20Unsolicited%20Conceptual%20Proposal%20-%20April%2030%20Addendum.pdf>; and APM TERMINALS INC., SECOND ADDENDUM TO UNSOLICITED CONCEPTUAL PROPOSAL (July 23, 2012), *available at* http://www.vappta.org/resources/APMT%20Unsolicited%20Proposal_Addendum%202.pdf.

¹¹ The PPTA directs the responsible public entity “to develop guidelines that establish the process of acceptance and review of a proposal from a private entity pursuant to [the applicable provisions of the PPTA].” Section 56-560(D).

¹² See generally PPTA Guidelines, Subsection 2.1.

¹³ See PPTA Guidelines, Subsection 2.3. The PPTA Steering Committee is a creation of the PPTA Guidelines, one of a number of departures from the process set forth in the PPTA. This Office does not have information regarding any participation of the PPTA Steering Committee in the process to evaluate the proposals regarding a concession of Port facilities. Nor is it aware that the PPTA Steering Committee reviewed any recommendations of OTP3. However, in the OTP3 Memorandum, outlining modifications to the review process described in the PPTA Guidelines for use in the current process, it appears that the PPTA Steering Committee is not participating in the process. For example, that memorandum includes statements to the effect, “the Secretary determined that APM’s unsolicited conceptual proposal satisfied the minimum requirements of applicable law and the Guidelines,” “[t]he Secretary and OTP3 will be better able to review and evaluate APM’s unsolicited conceptual proposal using a modified project development and procurement process,” “[t]he Secretary will formally accept APM’s unsolicited conceptual proposal for further review based on the outcome of the policy level review,” “the OTP3 will review alternative proposals to determine compliance with the requirements of the Request and Guidelines,” and, “[t]he Secretary retains the right to terminate its evaluation of APM’s unsolicited conceptual proposal and alternative proposals at any time.”

¹⁴ On May 21, 2012, the Secretary, acting through OPT3, completed a revision of previous Secretarial PPTA Guidelines and adopted the current PPTA Guidelines. Those guidelines, at Section 1.1, state that, “[t]he Secretary of Transportation adopts this Implementation Manual for use by the commonwealth’s transportation agencies, including...the Virginia Port Authority[.]” The VPA Board thus far has not adopted the Secretary’s and OTP3’s use of the PPTA Guidelines respecting the proposals for the concession to operate Port facilities, nor has the VPA Board adopted the recommended modifications to the review process and schedule as contained in the OTP3 Memorandum.

5. You ask whether the Governor has the authority to reverse or override (i) the selection of a preferred proposer, or (ii) the approval of the final comprehensive agreement.¹

Response

It is my opinion that:

1. The VPA, pursuant to § 56-557, is the responsible public entity under the PPTA for any concession of Port facilities because the General Assembly has conferred on it alone the power to develop and/or operate Port facilities and, as a result, the VPA bears statutory responsibility to review and evaluate the proposals received from APMT, Carlyle and RREEF, and to do so according to any guidelines adopted by it pursuant to §§ 56-560 and 56-573.1;
2. The VPA, as the responsible public entity under the PPTA, has the authority pursuant to §§ 56-560 and 56-573.1 to determine whether or not to select a preferred proposer with which to enter into negotiations for a comprehensive agreement for the concession to operate Port facilities;²
3. The selection of the preferred proposer remains in the discretion of the VPA as the responsible public entity, but the VPA may not sign a comprehensive agreement without first receiving the approval of the Secretary of Transportation as required by § 56-573.1(2);
4. Under the PPTA, specifically §§ 56-560 and 56-573.1, the VPA, as the responsible public entity, has the authority to (i) approve entering into a comprehensive agreement, and (ii) subject to final approval by the Secretary of Transportation pursuant to § 56-573.1(2), execute a comprehensive agreement on behalf of the Commonwealth for the concession to operate Port facilities; and
5. The Governor, having supervisory authority over the Secretary of Transportation under § 2.2-200(B), may provide appropriate coordination and guidance as the Secretary of Transportation exercises his authority under § 56-573.1(2) to determine whether to give final approval before the responsible public entity signs a comprehensive agreement.

¹ You also ask whether the unsolicited conceptual proposal received by the Secretary of Transportation from APM Terminals, Inc. (“APMT”), and the two subsequently received alternative conceptual proposals solicited from Carlyle Infrastructure Partners, L.P. (“Carlyle”) and RREEF America, L.L.C. (“RREEF”), meet the requirements of the PPTA and the PPTA Guidelines. I decline to render an opinion on this issue, however, because the sufficiency of the contents of the proposals cannot be determined. Those proposals neither were submitted to nor accepted by the responsible public entity as required by the PPTA, and the PPTA empowers only the responsible public entity to determine whether to waive any of the minimum standards for PPTA proposals enumerated in § 56-560 or to require additional information pursuant to guidelines adopted by the responsible public entity or other written instructions from the responsible public entity.

² Although your inquiry does not implicate directly the issue, I note that while the PPTA proposal process is not subject to the Virginia Public Procurement Act, VA. CODE ANN. §§ 2.2-4300 through 2.2-4377 (2011), the PPTA requires the responsible public entity to follow a procurement process that is consistent with, as appropriate, either “competitive sealed bidding” or “competitive negotiation” as those terms are defined by the Virginia Public Procurement Act. *See* § 56-573.1.

Background

The VPA is a body corporate and a political subdivision of the Commonwealth of Virginia.³ All powers, rights and duties provided to the VPA legislatively are to be exercised by the VPA Board of Commissioners (“VPA Board”).⁴ It is the duty of the VPA, on behalf of the Commonwealth to “foster and stimulate the commerce of the ports of the Commonwealth, to promote the shipment of goods and cargoes through the ports, to seek to secure necessary improvements of navigable tidal waters within the Commonwealth, and in general to perform any act or function which may be useful in developing, improving, or increasing the commerce, both foreign and domestic, of the ports of the Commonwealth.”⁵

In 1952, the General Assembly established the VPA’s predecessor entity, and the legislature subsequently assigned to the VPA the mission of consolidating the maritime harbor and water terminals of the cities of Norfolk, Newport News, and Portsmouth and providing for the centrally directed operation of all state-owned port facilities in Hampton Roads.⁶ Pursuant to its statutory authorities,⁷ the VPA currently controls the following Commonwealth-owned Port facilities that constitute part of the Port of Virginia: Norfolk International Terminals (“NIT”); Newport News Marine Terminal (“NNMT”); Portsmouth Marine Terminal (“PMT”); and the Virginia Inland Port (“VIP”), located in Warren County, Virginia.⁸

The Secretary of Transportation (“the Secretary”) received from APMT an unsolicited conceptual proposal dated April 4, 2012, for the concession of Port facilities.⁹ APMT supplemented that proposal with additional information on April 30, 2012, and July 23, 2012.¹⁰

³ VA. CODE ANN. § 62.1-128 (2006). *See generally* Chapter 10 of Title 62.1, Virginia Port Authority, §§ 62.1-128 through 62.1-147.2 (2006 & Supp. 2012).

⁴ Section 62.1-129 (Supp. 2012).

⁵ Section 62.1-132.3 (2006).

⁶ *See* 1952 Va. Acts ch. 61 (creating the Virginia State Ports Authority); § 62.1-132.8 (2006).

⁷ The VPA is authorized to acquire, construct, maintain, equip, and operate marine terminals, port facilities, wharves, docks, ships, piers, quays, elevators, compressors, refrigeration storage plants, warehouses, and other structures necessary for the convenient use of the same in the aid of commerce. Section 62.1-132.18 (2006). The VPA may hold title to property in its own name and is able to issue revenue bonds for such acquisitions. *Id.* The VPA also has broad powers to rent, lease, buy, own, acquire, construct, reconstruct, and dispose of harbors, seaports, port facilities, and such property, whether real or personal, as it may find necessary or convenient and to issue revenue bonds therefor without pledging the faith and credit of the Commonwealth. Section 62.1-132.19 (2006).

⁸ In addition, the VPA leases the APM Terminals Virginia (“APMTVA”), owned by APMT and located in Portsmouth, Virginia. The VPA maintains a separate Virginia nonstock corporation, Virginia International Terminals, Inc. (“VIT”), to operate Commonwealth-controlled Port facilities under a service agreement with the VPA. The VPA also leases the Port of Richmond, a marine terminal on the James River owned by the City of Richmond and operated by PCI of Virginia, L.L.C. *See* COMPREHENSIVE ANNUAL FINANCIAL REPORT FOR THE VIRGINIA PORT AUTHORITY (Fiscal Year Ended June 30, 2011), *available at* <http://www.portofvirginia.com/media/19260/cafr%20final%20web%20version.pdf>.

⁹ *See* APM TERMINALS, INC., UNSOLICITED CONCEPTUAL PROPOSAL (April 4, 2012), *available at* http://www.vappta.org/resources/APM%20Unsolicited%20Conceptual%20Proposal_Web.pdf. The APMT proposal would establish a standard landlord-tenant port concession for a period of 48 years, with APMT operating the following Port facilities: NIT, APMTVA, NNMT, PMT, and VIP.

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issuance of the OTP3 Memorandum, the Secretary accepted the APMT proposal for further consideration, citing §§ 56-560 and 56-573.1:1. The Secretary then directed OTP3 to take steps to solicit publicly additional conceptual proposals. On May 23, 2012, the Office of the Secretary of Transportation issued a Request for Alternative Proposals Relating to the Virginia Port Authority.¹⁵

On May 30, 2012, the Governor issued Executive Order 46, affirming his delegation to the Secretary of the Governor's powers and duties under the PPTA to act as the responsible public entity on behalf of the Commonwealth for both solicited and unsolicited proposals involving VPA qualifying transportation facilities.¹⁶ In support of this delegation, Executive Order 46 cites the authority bestowed on the Governor by the Constitution of Virginia, Article V, §§ 1, 7, 8, and 10, and Virginia Code §§ 2.2-103 and 2.2-104.¹⁷

In a letter dated August 7, 2012, to the VPA Board Chairman, the Governor referenced that executive order and declared that the Secretary "is serving as the responsible public entity on my behalf for unsolicited and solicited proposals involving the Virginia Port Authority." The Governor stated that "the VPA also can be considered a responsible public entity under the PPTA," and he asserted that "the purpose of this letter is to clarify the respective roles of the Secretary, acting as my designee, and the VPA in the proposal review and evaluation process." The Governor directed that the Secretary "serve as the coordinating responsible public entity," to leverage the resources of OTP3 to manage the proposal review and evaluation process, "and to provide for a single point of contact for private entities participating in the PPTA process" for the potential concession of Port facilities. The Governor also stated in the letter that the Commonwealth would look to the VPA "to provide input on the proposal review and evaluation process and provide subject matter expertise in support of negotiations for a comprehensive agreement."¹⁸

Carlyle and RREEF submitted to the OTP3 their alternative conceptual proposals on August 13, 2012.¹⁹ On or about August 22, 2012, after making a presentation to the VPA Board, the Secretary also accepted these latter two proposals for further consideration in the ongoing PPTA process.²⁰

Applicable Law and Discussion

The separation of powers is one of the central tenets of Virginia's system of government.²¹ The *Constitution of Virginia* provides that:

¹⁵ See OFFICE OF THE SEC'Y OF TRANSP., REQUEST FOR ALTERNATIVE PROPOSALS RELATING TO THE VIRGINIA PORT AUTHORITY (May 23, 2012), available at http://www.vappta.org/resources/Request%20for%20Alternative%20Proposals_Final.pdf.

¹⁶ See Exec. Order No. 46, 28:22 Va. Reg. Regs. 1689 (July 2, 2012).

¹⁷ *Id.*

¹⁸ Pursuant to § 2.2-200, the Governor appoints the Secretary (subject to confirmation by the General Assembly) and specifies his duties; thus, the Secretary retains at all times a subordinate position to him. See also VA. CODE ANN. § 2.2-104 (2011).

¹⁹ See CARLYLE INFRASTRUCTURE PARTNERS, L.P., ALTERNATIVE CONCEPTUAL PROPOSAL (Aug. 13, 2012), available at http://www.vappta.org/resources/Carlyle%20Alternative%20Proposal_web2.pdf; and RREEF AMERICA, L.L.C., ALTERNATIVE CONCEPTUAL PROPOSAL (Aug. 13, 2012), available at http://www.vappta.org/resources/RREEF%20Alternative%20Proposal_web2.pdf.

²⁰ To date, the VPA Board has not acted to accept any of the proposals for further consideration.

The legislative, executive, and judicial departments shall be separate and distinct, so that none exercise the powers properly belonging to the others, nor any person exercise the power of more than one of them at the same time; provided, however, administrative agencies may be created by the General Assembly with such authority and duties as the General Assembly may prescribe.^[22]

The Virginia Constitution vests the legislative power of the Commonwealth in the General Assembly.²³ The power of the General Assembly is plenary, limited only by the Constitutions of the United States and Virginia.²⁴ In contrast, the executive power of the Commonwealth that the Virginia Constitution vests in the Governor is not nearly as extensive.²⁵ As the Supreme Court of Virginia has observed, “[u]nder our system of government, the governor has and can rightly exercise no power except such as may be bestowed upon him by the constitution and the laws.”²⁶

In an exercise of its legislative power, the General Assembly enacted the PPTA.²⁷ To further the General Assembly’s policy objective “to encourage investment in the Commonwealth by private entities that facilitates the development and/or operation of transportation facilities” by according public and private entities “the greatest possible flexibility in contracting with each other,”²⁸ the PPTA provides the authority for the Commonwealth, and any agency or authority thereof, any county, city or town and any other political subdivision of the foregoing to enter into agreements with private entities so that the private entities may develop and/or operate qualifying transportation facilities, *i.e.*, those facilities included within the legislation’s scope.²⁹

By the plain terms of the PPTA, the General Assembly assigned to the “responsible public entity” the central role in the PPTA proposal evaluation process. Any private entity seeking to develop and/or operate a transportation facility “shall first obtain approval of the responsible public entity under § 56-560.”³⁰

²¹ See I A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 468 (1974) (noting that the doctrine of separation of powers has been enshrined in the Constitution of Virginia since 1776).

²² VA. CONST. art. III, § 1. See also VA. CONST. art. I, § 5.

²³ VA. CONST. art. IV, § 1.

²⁴ See VA. CONST. art. IV, § 14 (“The authority of the General Assembly shall extend to all subjects of legislation not herein forbidden or restricted; and a specific grant of authority in this Constitution upon any subject shall not work a restriction of its authority upon the same or any other subject.”). See also *Dean v. Paolicelli*, 194 Va. 219, 227, 72 S.E.2d 506, 511 (1952) (“The Constitution is not a grant of power, but only the restriction of powers otherwise practically unlimited, and except as far as restrained by the Constitution of this State and the Constitution of the United States, the legislature has plenary power.”) (quoting *Newport News v. Elizabeth City County*, 189 Va. 825, 831, 55 S.E.2d 56, 60 (1949)).

²⁵ See VA. CONST. art. V, §§ 1, 7, 8, 10-12.

²⁶ *Lewis v. Whittle*, 77 Va. 415, 420 (1883).

²⁷ See Public-Private Transportation Act of 1995, Chapter 22 of Title 56, §§ 56-556 through 56-575 (2007 & Supp. 2011).

²⁸ See § 56-558 (2007).

²⁹ Section 56-557 defines a “qualifying transportation facility” as “one or more transportation facilities developed and/or operated by a private entity pursuant to this chapter.”

³⁰ See § 56-559 (Supp. 2011).

The responsible public entity is authorized to grant such approval only after determining that the proposed development and/or operation of the transportation facility by the private entity “serves the public purpose” of the PPTA.³¹ The responsible public entity further is charged with developing guidelines that establish the process for the acceptance and review of proposals.³² Those guidelines are intended to set forth the schedule for review of the proposal by the responsible public entity, the process for receipt and review of competing proposals, and the type and amount of information that is necessary for adequate review of proposals at each stage of review.³³ Although § 56-560(A) enumerates the specific information required to be included in a private entity’s proposal, the PPTA grants to the responsible public entity the discretion to waive any of the required information or to require additional information from the private entity.³⁴ Moreover, any agreement resulting from the established process is between the private entity and the responsible public entity.³⁵ The PPTA does not afford any entity other than the responsible public entity the authority to exercise these functions.³⁶

For purposes of the PPTA, the General Assembly defined “responsible public entity” as a “public entity, including local governments and regional authorities, that has the power to develop and/or operate the qualifying transportation facility.”³⁷ The PPTA further defines a “public entity” to mean “the Commonwealth and any agency or authority thereof, any county, city, or town and any other political subdivision of any of the foregoing, but shall not include any public service company.” Additionally, a “transportation facility” includes a “port facility or similar commercial facility used for the transportation of persons or goods;” to “develop” means “to plan, design, develop, finance, lease, acquire, install, construct, or expand;” and to “operate” means “to finance, maintain, improve, equip, modify, repair, or operate.”³⁸

Based on these definitions, I conclude that the Virginia Port Authority is the “responsible public entity” for purposes of the consideration of proposals under the PPTA associated with the Port of Virginia. Like the PPTA process itself, the creation of the VPA as a body corporate and political subdivision is the product of legislative action.³⁹ Pursuant to its legislative power, the General Assembly vested in the VPA, through its board, oversight of the Port, which includes an extensive grant of power to the VPA to carry out

³¹ See § 56-560(C) (Supp. 2011) (the responsible public entity may approve a proposal only if it can make the following four public purpose findings: (1) there is a public need for the transportation facility; (2) in the opinion of the responsible public entity, the private entity’s plan is “reasonable and will address the needs identified in the appropriate state, regional, or local transportation plan by improving safety, reducing congestion, increasing capacity, and/or enhancing economic efficiency;” (3) the estimated cost is reasonable in relation to similar facilities; and (4) the private entity’s plan will result in timely development and/or operation of the transportation facility or its more efficient operation).

³² See § 56-560(D).

³³ *Id.*

³⁴ See § 56-560(A).

³⁵ See §§ 56-560(E); 56-566(A) (2007).

³⁶ The PPTA does allow for there to be more than one “responsible public entity” when conditions so require, *see* § 56-566.2 (2007); however, in such instances, the PPTA provides for additional procedures, *id.*, which will be discussed below.

³⁷ See § 56-557 (2007).

³⁸ *Id.*

³⁹ See § 62.1-128.

its important role.⁴⁰ The VPA specifically is tasked with the duty to develop and operate the Port.⁴¹ Particularly relevant to your questions is the fact that the VPA itself may lease part or all of its real or personal property for such time period and upon such terms and conditions as the VPA may determine.⁴² This means that the General Assembly has empowered the VPA Board independently to lease or enter into a concession with another entity to operate its marine terminal facilities. Further, given that (i) the PPTA defines “transportation facility” to include “port facility” and (ii) the General Assembly has placed solely in the hands of the VPA the authority to manage the Port facilities, I must conclude that the VPA is the only public entity that meets the definition of “responsible public entity” under the PPTA respecting any proposals for the concession of Port facilities. Thus, absent a legislative change made by the General Assembly, only the VPA can effectuate a concession with a private entity to operate the Port facilities.

Although the PPTA recognizes that some projects may involve more than one interested public body, this Office cannot conclude that the Governor, or the Secretary acting as his designee, correctly meets the PPTA’s definition of a “responsible public entity” under these circumstances, notwithstanding the language of Executive Order 46, the Governor’s August 7, 2012, letter to the VPA Board Chairman, and the OTP3 Memorandum. In situations where a private entity submits a proposal under the PPTA “that may require approval by more than one public entity,” § 56-566.2 provides that representatives of the affected public entities must meet and “determine which public entity shall serve as the coordinating responsible public entity.” Thereafter, “the coordinating responsible public entity and the private entity shall proceed in accordance with this chapter.”⁴³ The Governor’s actions in designating the Secretary of Transportation as the “coordinating responsible public entity” do not comport with this procedure, as established by the General Assembly.⁴⁴

⁴⁰ See, e.g., *supra* note 7.

⁴¹ See §§ 62.1-128 through 62.1-147.2; *Harrison v. Day*, 200 Va. 764, 769, 774-75, 107 S.E.2d 594, 597-98, 601 (1959) (by creating the Virginia State Ports Authority, the immediate predecessor of the VPA, and specifying its responsibilities and duties, the General Assembly empowered that entity “to own and operate port and harbor facilities”).

⁴² Section 62.1-132.19.

⁴³ Section 56-566.2. This provision appears predicated on the assumption that each public entity is itself a responsible public entity and, thus, its solution of a coordinating responsible public entity is unavailing here.

⁴⁴ A Governor may not use an executive order to exercise any of the legislative power that is vested solely in the General Assembly. See *Jackson v. Hodges*, 176 Va. 89, 94-95, 10 S.E.2d 566, 567 (1940) (Governor cannot by executive order increase salary of Secretary of the Commonwealth for additional duties undertaken because the Constitution provided for such salary to be fixed by law, a responsibility of the General Assembly). See also 2006 Op. Va. Att’y Gen. 36, 38 (executive order changing the Commonwealth’s nondiscrimination policy is beyond the scope of executive authority; altering the public policy of the Commonwealth is a legislative function the authority for which rests solely with the General Assembly); 1983-84 Op. Va. Att’y Gen. 180, 183 (executive order may not be used for reorganization of executive agencies where the General Assembly has prescribed a different method of reorganization as the exclusive method to be used); 1977-78 Op. Va. Att’y Gen. 5, 8 (executive order cannot authorize council to make case decisions and promulgate regulations as those functions can only be granted by the legislature); 1952-53 Op. Va. Att’y Gen. 171 (no statutory authority for the Governor to agree that statutory limits on length and width of motor vehicles will not be strictly enforced against trucks engaged in transporting defense material without special permit); 1941-42 Op. Va. Att’y Gen. 75 (Governor does not possess power to issue and enforce a proclamation requiring observance of daylight savings time). Executive orders are appropriate whenever: (i) the *Code of Virginia* expressly confers that authority upon the Governor, see *Boyd v. Commonwealth*, 216 Va. 16, 19, 215 S.E.2d 915, 917 (1975)

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In response to your first two inquiries, I therefore conclude that the VPA, as the sole responsible public entity, is the only entity with authority to review and evaluate the proposals submitted by the private entities you name in your inquiry and to select a preferred proposer, if any. With regard to your next two questions, however, while the VPA remains the sole responsible public entity, the fact that the VPA nominally functions as a state agency within the meaning of § 56-573.1(2),⁴⁵ means that “the approval of the Secretary of Transportation shall be required as more specifically set forth in the guidelines before the comprehensive agreement is signed.” The responsible public entity’s “approval” of a proposal, that is, acceptance of it for further consideration pursuant to § 56-560, remains subject to subsequent negotiation and entry of a comprehensive agreement. Pursuant to §§ 56-560 and 56-573.1, as the responsible public entity for the Port facilities, VPA maintains under the PPTA the prerogative to approve entry of an interim agreement and/or a comprehensive agreement for the concession to operate Port facilities. The signing of a comprehensive agreement under the PPTA, however, is subject to the Secretary’s authority to approve execution thereof. Once the VPA Board has received the Secretary’s approval, and after having considered and approved the comprehensive agreement by passing an appropriate VPA Board resolution, VPA’s Executive Director then would execute such an agreement.⁴⁶

Lastly, in response to your final question, because the Governor has supervisory authority over the Secretary of Transportation,⁴⁷ I conclude that the Governor may provide appropriate coordination and guidance as the Secretary of Transportation exercises his authority under § 56-573.1(2), as discussed above, to determine whether to give final approval before the responsible public entity signs a comprehensive agreement.

Conclusion

Accordingly, it is my opinion that:

1. The VPA, pursuant to § 56-557, is the responsible public entity under the PPTA for any concession of Port facilities because the General Assembly has conferred on it alone the power to develop and/or operate Port facilities and, as a result, the VPA bears statutory responsibility to review and evaluate

(emergency services and disaster law provided the statutory basis for executive order changing speed limit during acute fuel shortage); (ii) there is a genuine emergency that requires the Governor to issue an order under his constitutional responsibility to abate a danger to the public, *see* VA. CONST. art. V, § 7; and (iii) the executive order is merely administrative in nature, as opposed to legislative, *see* 1983-84 Op. Va. Att’y Gen. at 182.

⁴⁵ Section 62.1-128 establishes the VPA, “as a body corporate and as a political subdivision of the Commonwealth,” and states that it is “constituted a public instrumentality exercising public and essential governmental functions[.]” It enjoys substantial autonomy and discretion in the exercise of its powers and duties respecting the Port of Virginia. *See generally* §§ 62.1-128 through 62.1-147.2. Nonetheless, for purposes of § 56-573.1(2), the VPA functions as a state agency and thus requires this secretarial approval to enter a comprehensive agreement. This conclusion comports with the reasoning and conclusions of several previous opinions of this Office that explored the sometimes dual identities of various public bodies as state “agencies” or “public instrumentalities,” versus “political subdivisions.” *See* 1977-78 Op. Va. Att’y Gen. 454 (pertaining to the Peninsula Transportation District Commission), 1978-79 Op. Va. Att’y Gen. 305 (pertaining to the Virginia Education Loan Authority), and 1979-80 Op. Va. Att’y Gen. 5 (pertaining to the Chippokes Plantation Farm Foundation).

⁴⁶ *See* § 56-573.1(2); *and* §§ 62.1-129, 62.1-130 and 62.1-132.1.

⁴⁷ *See* § 2.2-200(B).

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the proposals received from APMT, Carlyle and RREEF, and to do so according to any guidelines adopted by it pursuant to §§ 56-560 and 56-573.1;

2. The VPA, as the responsible public entity under the PPTA, has the authority pursuant to §§ 56-560 and 56-573.1 to determine whether or not to select a preferred proposer with which to enter into negotiations for a comprehensive agreement for the concession to operate Port facilities;
3. The selection of the preferred proposer remains in the discretion of the VPA as the responsible public entity, but the VPA may not sign a comprehensive agreement without first receiving the approval of the Secretary of Transportation as required by § 56-573.1(2);
4. Under the PPTA, specifically §§ 56-560 and 56-573.1, the VPA, as the responsible public entity, has the authority to (i) approve entering into a comprehensive agreement, and (ii) subject to final approval by the Secretary of Transportation pursuant to § 56-573.1(2), execute a comprehensive agreement on behalf of the Commonwealth for the concession to operate Port facilities; and
5. The Governor, having supervisory authority over the Secretary of Transportation under § 2.2-200(B), may provide appropriate coordination and guidance as the Secretary of Transportation exercises his authority under § 56-573.1(2) to determine whether to give final approval before the responsible public entity signs a comprehensive agreement.

With kindest regards, I am

Very truly yours,

A handwritten signature in blue ink that reads "Ken C II". The signature is stylized and written in a cursive-like font.

Kenneth T. Cuccinelli, II
Attorney General