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SENATE BILL NO. 235

Senate Amendments in [] — February 11, 2000

A BILL to amend and reenact §§ 11-37 and 11-41 of the Code of Virginia, relating to notices and advertisements of procurement.

Patrons—Ticer, Byrne, Couric, Edwards, Howell, Maxwell, Newman, Schrock and Whipple; Delegates: Bennett, Diamonstein, May, Nixon, Plum and Purkey

Referred to Committee on General Laws

Be it enacted by the General Assembly of Virginia:

1. That §§ 11-37 and 11-41 of the Code of Virginia are amended and reenacted as follows:

§ 11-37. Definitions.

The words defined in this section shall have the meanings set forth below throughout this chapter.

"Competitive sealed bidding" is a method of contractor selection which includes the following elements:

1. Issuance of a written Invitation to Bid containing or incorporating by reference the specifications and contractual terms and conditions applicable to the procurement. Unless the public body has provided for prequalification of bidders, the Invitation to Bid shall include a statement of any requisite qualifications of potential contractors. When it is impractical to prepare initially a purchase description to support an award based on prices, an Invitation to Bid may be issued requesting the submission of unpriced offers to be followed by an Invitation to Bid limited to those bidders whose offers have been qualified under the criteria set forth in the first solicitation.

2. Public notice of the Invitation to Bid at least ten days prior to the date set for receipt of bids by posting in a designated public area, [*which may be a designated Internet website,*] or publication in a newspaper of general circulation, or both. [*Public notice may also be published on the Department of General Services' central electronic procurement website and other appropriate websites. Effective July 1, 2002, publishing by state agencies, departments and institutions on the Department's central electronic procurement website shall be required.*] In addition, bids may be solicited directly from potential contractors. Any additional solicitations shall include businesses selected from a list made available by the Department of Minority Business Enterprise.

3. Public opening and announcement of all bids received.

4. Evaluation of bids based upon the requirements set forth in the invitation, which may include special qualifications of potential contractors, life-cycle costing, value analysis, and any other criteria such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose, which are helpful in determining acceptability.

5. Award to the lowest responsive and responsible bidder. When the terms and conditions of multiple bids are so provided in the Invitation to Bid, awards may be made to more than one bidder.

6. Competitive sealed bidding shall not be required for procurement of professional services.

"Competitive negotiation" is a method of contractor selection which includes the following elements:

1. Issuance of a written Request for Proposal indicating in general terms that which is sought to be procured, specifying the factors which will be used in evaluating the proposal and containing or incorporating by reference the other applicable contractual terms and conditions, including any unique capabilities or qualifications which will be required of the contractor.

2. Public notice of the Request for Proposal at least ten days prior to the date set for receipt of proposals by posting in a public area normally used for posting of public notices, [*which may be a designated Internet website,*] and by publication in a newspaper or newspapers of general circulation in the area in which the contract is to be performed so as to provide reasonable notice to the maximum number of offerors that can be reasonably anticipated to submit proposals in response to the particular request. [*Public notice may also be published on the Department of General Services' central electronic procurement website and other appropriate websites. Effective July 1, 2002, publishing by state agencies, departments and institutions on the Department's central electronic procurement website shall be required.*] In addition, proposals may be solicited directly from potential contractors.

3. a. Procurement of professional services. The public body shall engage in individual discussions with two or more offerors deemed fully qualified, responsible and suitable on the basis of initial responses and with emphasis on professional competence, to provide the required services. Repetitive informal interviews shall be permissible. The offerors shall be encouraged to elaborate on their qualifications and performance data or staff expertise pertinent to the proposed project, as well as alternative concepts. The Request for Proposal shall not, however, request that offerors furnish estimates

60 of man-hours or cost for services. At the discussion stage, the public body may discuss nonbinding
61 estimates of total project costs, including, but not limited to, life-cycle costing, and where appropriate,
62 nonbinding estimates of price for services. Proprietary information from competing offerors shall not be
63 disclosed to the public or to competitors. At the conclusion of discussion, outlined in this subdivision,
64 on the basis of evaluation factors published in the Request for Proposal and all information developed in
65 the selection process to this point, the public body shall select in the order of preference two or more
66 offerors whose professional qualifications and proposed services are deemed most meritorious.
67 Negotiations shall then be conducted, beginning with the offeror ranked first. If a contract satisfactory
68 and advantageous to the public body can be negotiated at a price considered fair and reasonable, the
69 award shall be made to that offeror. Otherwise, negotiations with the offeror ranked first shall be
70 formally terminated and negotiations conducted with the offeror ranked second, and so on until such a
71 contract can be negotiated at a fair and reasonable price. Should the public body determine in writing
72 and in its sole discretion that only one offeror is fully qualified, or that one offeror is clearly more
73 highly qualified and suitable than the others under consideration, a contract may be negotiated and
74 awarded to that offeror.

75 Multiphase professional services contracts satisfactory and advantageous to the Department of
76 Transportation for environmental, location, design and inspection work regarding highways and bridges
77 may be negotiated and awarded based on a fair and reasonable price for the first phase only, when
78 completion of the earlier phases is necessary to provide information critical to the negotiation of a fair
79 and reasonable price for succeeding phases.

80 b. Procurement of other than professional services. Selection shall be made of two or more offerors
81 deemed to be fully qualified and best suited among those submitting proposals, on the basis of the
82 factors involved in the Request for Proposal, including price if so stated in the Request for Proposal.
83 Negotiations shall then be conducted with each of the offerors so selected. Price shall be considered, but
84 need not be the sole determining factor. After negotiations have been conducted with each offeror so
85 selected, the public body shall select the offeror which, in its opinion, has made the best proposal, and
86 shall award the contract to that offeror. Should the public body determine in writing and in its sole
87 discretion that only one offeror is fully qualified, or that one offeror is clearly more highly qualified
88 than the others under consideration, a contract may be negotiated and awarded to that offeror.

89 "Construction" means building, altering, repairing, improving or demolishing any structure, building
90 or highway, and any draining, dredging, excavation, grading or similar work upon real property.

91 "Construction management contract" means a contract in which a party is retained by the owner to
92 coordinate and administer contracts for construction services for the benefit of the owner, and may also
93 include, if provided in the contract, the furnishing of construction services to the owner.

94 "Design-build contract" means a contract between a public body and another party in which the party
95 contracting with the public body agrees to both design and build the structure, roadway or other item
96 specified in the contract.

97 "Goods" means all material, equipment, supplies, printing, and automated data processing hardware
98 and software.

99 "Informality" means a minor defect or variation of a bid or proposal from the exact requirements of
100 the Invitation to Bid, or the Request for Proposal, which does not affect the price, quality, quantity or
101 delivery schedule for the goods, services or construction being procured.

102 "Multiphase professional services contract" means a contract for the providing of professional
103 services where the total scope of work of the second or subsequent phase of the contract cannot be
104 specified without the results of the first or prior phase of the contract.

105 "Nonprofessional services" means any services not specifically identified as professional services in
106 the definition of professional services.

107 "Potential bidder or offeror" for the purposes of §§ 11-66 and 11-70 means a person who, at the time
108 a public body negotiates and awards or proposes to award a contract, is engaged in the sale or lease of
109 goods, or the sale of services, insurance or construction, of the type to be procured under such contract,
110 and who at such time is eligible and qualified in all respects to perform that contract, and who would
111 have been eligible and qualified to submit a bid or proposal had the contract been procured through
112 competitive sealed bidding or competitive negotiation.

113 "Professional services" means work performed by an independent contractor within the scope of the
114 practice of accounting, actuarial services, architecture, land surveying, landscape architecture, law,
115 dentistry, medicine, optometry, pharmacy or professional engineering. "Professional services" shall also
116 include the services of an economist procured by the State Corporation Commission.

117 "Public body" means any legislative, executive or judicial body, agency, office, department, authority,
118 post, commission, committee, institution, board or political subdivision created by law to exercise some
119 sovereign power or to perform some governmental duty, and empowered by law to undertake the
120 activities described in this chapter.

121 "Public contract" means an agreement between a public body and a nongovernmental source that is

enforceable in a court of law.

"Responsible bidder" or "offeror" means a person who has the capability, in all respects, to perform fully the contract requirements and the moral and business integrity and reliability which will assure good faith performance, and who has been prequalified, if required.

"Responsive bidder" means a person who has submitted a bid which conforms in all material respects to the Invitation to Bid.

"Services" 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.

"Sheltered workshop" means a work-oriented rehabilitative facility with a controlled working environment and individual goals which utilizes work experience and related services for assisting the handicapped person to progress toward normal living and a productive vocational status.

§ 11-41. Methods of procurement.

A. All public contracts with nongovernmental contractors for the purchase or lease of goods, or for the purchase of services, insurance, or construction, shall be awarded after competitive sealed bidding, or competitive negotiation as provided in this section, unless otherwise authorized by law.

B. Professional services shall be procured by competitive negotiation.

C. 1. Upon a determination made in advance by the public body and set forth in writing that competitive sealed bidding is either not practicable or not fiscally advantageous to the public, goods, services, or insurance may be procured by competitive negotiation. The writing shall document the basis for this determination.

Upon a written determination made in advance by (i) the Governor or his designee in the case of a procurement by the Commonwealth or by a department, agency or institution thereof or (ii) the local governing body in the case of a procurement by a political subdivision of the Commonwealth, that competitive negotiation is either not practicable or not fiscally advantageous, insurance may be procured through a licensed agent or broker selected in the manner provided for the procurement of things other than professional services in subdivision 3 b of the definition of "competitive negotiation" in § 11-37. The basis for this determination shall be documented in writing.

2. Construction may be procured only by competitive sealed bidding, except that competitive negotiation may be used in the following instances upon a determination made in advance by the public body and set forth in writing that competitive sealed bidding is either not practicable or not fiscally advantageous to the public, which writing shall document the basis for this determination:

a. By the Commonwealth, its departments, agencies and institutions on a fixed price design-build basis or construction management basis under § 11-41.2;

b. By any public body for the alteration, repair, renovation or demolition of buildings when the contract is not expected to cost more than \$500,000;

c. By any public body for the construction of highways and any draining, dredging, excavation, grading or similar work upon real property; or

d. As otherwise provided in § 11-41.2:2.

D. Upon a determination in writing that there is only one source practicably available for that which is to be procured, a contract may be negotiated and awarded to that source without competitive sealed bidding or competitive negotiation. The writing shall document the basis for this determination. The public body shall issue a written notice stating that only one source was determined to be practicably available, and identifying that which is being procured, the contractor selected, and the date on which the contract was or will be awarded. This notice shall be posted in a designated public area, [~~which may be a designated Internet website,~~] or published in a newspaper of general circulation on the day the public body awards or announces its decision to award the contract, whichever occurs first. [*Public notice may also be published on the Department of General Services' central electronic procurement website and other appropriate websites.*]

E. In case of emergency, a contract may be awarded without competitive sealed bidding or competitive negotiation; however, such procurement shall be made with such competition as is practicable under the circumstances. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file. The public body shall issue a written notice stating that the contract is being awarded on an emergency basis, and identifying that which is being procured, the contractor selected, and the date on which the contract was or will be awarded. This notice shall be posted in a designated public area, [~~which may be a designated Internet website,~~] or published in a newspaper of general circulation on the day the public body awards or announces its decision to award the contract, whichever occurs first, or as soon thereafter as is practicable. [*Public notice may also be published on the Department of General Services' central electronic procurement website and other appropriate websites.*]

F. A public body may establish purchase procedures, if adopted in writing, not requiring competitive

183 sealed bids or competitive negotiation for single or term contracts if the aggregate or the sum of all
184 phases is not expected to exceed \$30,000; however, such small purchase procedures shall provide for
185 competition wherever practicable.

186 G. Any local school board may authorize any of its public schools or its school division to enter into
187 contracts providing that caps and gowns, photographs, class rings, yearbooks and graduation
188 announcements will be available for purchase or rental by students, parents, faculty or other persons
189 using nonpublic money through the use of competitive negotiation as provided in this chapter;
190 competitive sealed bidding is not necessarily required for such contracts. The Superintendent of Public
191 Instruction may provide assistance to public school systems regarding this chapter and other related
192 laws.

193 H. Upon a determination made in advance by the local governing body and set forth in writing that
194 the purchase of goods, products or commodities from a public auction sale is in the best interests of the
195 public, such items may be purchased at the auction. The writing shall document the basis for this
196 determination.

197 I. Effective until January 1, 2001, procurement of goods, services, or construction to address
198 computers, software programs, databases, networks, information systems, firmware, or any other devices
199 which are not compliant with the "Year 2000" date change shall be deemed emergency procurements
200 under subsection E.