

1 VIRGINIA ACTS OF ASSEMBLY — CHAPTER

2 *An Act to amend and reenact § 11-37 of the Code of Virginia, relating to the Virginia Public*
3 *Procurement Act; procurement of architectural or professional engineering services.*

4 [S 627]

5 Approved

6 **Be it enacted by the General Assembly of Virginia:**7 **1. That § 11-37 of the Code of Virginia is amended and reenacted as follows:**

8 § 11-37. Definitions.

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

10 "Competitive sealed bidding" is a method of contractor selection which includes the following
11 elements:12 1. Issuance of a written Invitation to Bid containing or incorporating by reference the specifications
13 and contractual terms and conditions applicable to the procurement. Unless the public body has provided
14 for prequalification of bidders, the Invitation to Bid shall include a statement of any requisite
15 qualifications of potential contractors. When it is impractical to prepare initially a purchase description
16 to support an award based on prices, an Invitation to Bid may be issued requesting the submission of
17 unpriced offers to be followed by an Invitation to Bid limited to those bidders whose offers have been
18 qualified under the criteria set forth in the first solicitation.19 2. Public notice of the Invitation to Bid at least ten days prior to the date set for receipt of bids by
20 posting in a designated public area, or publication in a newspaper of general circulation, or both. In
21 addition, bids may be solicited directly from potential contractors. Any additional solicitations shall
22 include businesses selected from a list made available by the Department of Minority Business
23 Enterprise.

24 3. Public opening and announcement of all bids received.

25 4. Evaluation of bids based upon the requirements set forth in the invitation, which may include
26 special qualifications of potential contractors, life-cycle costing, value analysis, and any other criteria
27 such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose, which
28 are helpful in determining acceptability.29 5. Award to the lowest responsive and responsible bidder. When the terms and conditions of multiple
30 bids are so provided in the Invitation to Bid, awards may be made to more than one bidder.

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

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

33 1. Issuance of a written Request for Proposal indicating in general terms that which is sought to be
34 procured, specifying the factors which will be used in evaluating the proposal and containing or
35 incorporating by reference the other applicable contractual terms and conditions, including any unique
36 capabilities or qualifications which will be required of the contractor.37 2. Public notice of the Request for Proposal at least ten days prior to the date set for receipt of
38 proposals by posting in a public area normally used for posting of public notices and by publication in a
39 newspaper or newspapers of general circulation in the area in which the contract is to be performed so
40 as to provide reasonable notice to the maximum number of offerors that can be reasonably anticipated to
41 submit proposals in response to the particular request. In addition, proposals may be solicited directly
42 from potential contractors.43 3. a. Procurement of professional services. The public body shall engage in individual discussions
44 with two or more offerors deemed fully qualified, responsible and suitable on the basis of initial
45 responses and with emphasis on professional competence, to provide the required services. Repetitive
46 informal interviews shall be permissible. The offerors shall be encouraged to elaborate on their
47 qualifications and performance data or staff expertise pertinent to the proposed project, as well as
48 alternative concepts. The Request for Proposal shall not, however, request that offerors furnish estimates
49 of man-hours or cost for services. At the discussion stage, the public body may discuss nonbinding
50 estimates of total project costs, including, but not limited to, life-cycle costing, and where appropriate,
51 nonbinding estimates of price for services. Proprietary information from competing offerors shall not be
52 disclosed to the public or to competitors. At the conclusion of discussion, outlined in this subdivision,
53 on the basis of evaluation factors published in the Request for Proposal and all information developed in
54 the selection process to this point, the public body shall select in the order of preference two or more
55 offerors whose professional qualifications and proposed services are deemed most meritorious.
56 Negotiations shall then be conducted, beginning with the offeror ranked first. If a contract satisfactory

57 and advantageous to the public body can be negotiated at a price considered fair and reasonable, the
 58 award shall be made to that offeror. Otherwise, negotiations with the offeror ranked first shall be
 59 formally terminated and negotiations conducted with the offeror ranked second, and so on until such a
 60 contract can be negotiated at a fair and reasonable price. Should the public body determine in writing
 61 and in its sole discretion that only one offeror is fully qualified, or that one offeror is clearly more
 62 highly qualified and suitable than the others under consideration, a contract may be negotiated and
 63 awarded to that offeror.

64 *A contract for architectural or professional engineering services relating to construction projects may*
 65 *be negotiated by a state agency, as defined in § 11-62.1, for multiple projects provided (i) the projects*
 66 *require similar experience and expertise, (ii) the nature of the projects is clearly identified in the*
 67 *Request for Proposal, and (iii) the contract term is limited to one year or when the cumulative total*
 68 *project fees reach the maximum cost authorized in this paragraph, whichever occurs first. Such contract*
 69 *may be renewable for one additional term at the option of the state agency. Under such contract, (i) the*
 70 *fair and reasonable prices, as negotiated, shall be used in determining the cost of each project*
 71 *performed, (ii) the sum of all projects performed in one contract term shall not exceed \$500,000 or such*
 72 *lesser amount as may be determined by the Director of the Department of General Services, and (iii) the*
 73 *project fee of any single project shall not exceed \$100,000 or such lesser amount as may be determined*
 74 *by the Director of the Department of General Services. Any unused amounts from the first contract term*
 75 *shall not be carried forward to the additional term. Competitive negotiations for such contracts may*
 76 *result in awards to more than one offeror provided (i) the Request for Proposal so states and (ii) the*
 77 *state agency has established procedures for distributing multiple projects among the selected contractors*
 78 *during the contract term.*

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

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

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

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

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

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

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

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

109 "Nonprofessional services" means any services not specifically identified as professional services in
 110 the definition of professional services.

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

117 "Professional services" means work performed by an independent contractor within the scope of the

practice of accounting, actuarial services, architecture, land surveying, landscape architecture, law, dentistry, medicine, optometry, pharmacy or professional engineering. "Professional services" shall also include the services of an economist procured by the State Corporation Commission.

"Public body" means any legislative, executive or judicial body, agency, office, department, authority, post, commission, committee, institution, board 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 this chapter.

"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.