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SENATE BILL NO. 639

Offered January 24, 2000

A BILL to amend and reenact §§ 11-35 and 11-37 of the Code of Virginia, relating to the Virginia Public Procurement Act; definitions; best value.

Patrons—Hawkins; Delegate: Ruff

Referred to Committee on General Laws**Be it enacted by the General Assembly of Virginia:****1. That §§ 11-35 and 11-37 of the Code of Virginia are amended and reenacted as follows:**

§ 11-35. Title; purpose; applicability.

A. This chapter may be cited as the Virginia Public Procurement Act.

B. The purpose of this chapter is to enunciate the public policies pertaining to governmental procurement from nongovernmental sources, to include governmental procurement which may or may not result in monetary consideration for either party. This chapter shall apply whether the consideration is monetary or nonmonetary and regardless of whether the public body, the contractor, or some third party is providing the consideration.

C. The provisions of this chapter, however, shall not apply, except as stipulated in the provisions of §§ 11-41.1, 11-49, 11-51, 11-54, 11-56 through 11-61 and 11-72 through 11-80, to any town with a population of less than 3,500 as determined by the last official United States census.

D. Except to the extent adopted by such governing body, the provisions of this chapter also shall not apply, except as stipulated in subsection E, to any county, city or town whose governing body adopts by ordinance or resolution alternative policies and procedures which are based on competitive principles and which are generally applicable to procurement of goods and services by such governing body and the agencies thereof. This exemption shall be applicable only so long as such policies and procedures, or other policies and procedures meeting the requirements of this section, remain in effect in such county, city or town. Such policies and standards may provide for incentive contracting which offers a contractor whose bid is accepted the opportunity to share in any cost savings realized by the locality when project costs are reduced by such contractor, without affecting project quality, during construction of the project. The fee, if any, charged by the project engineer or architect for determining such cost savings shall be paid as a separate cost and shall not be calculated as part of any cost savings.

Except to the extent adopted by such school board, the provisions of this chapter shall not apply, except as stipulated in subsection E, to any school division whose school board adopts by policy or regulation alternative policies and procedures which are based on competitive principles and which are generally applicable to procurement of goods and services by such school board. This exemption shall be applicable only so long as such policies and procedures, or other policies or procedures meeting the requirements of this section, remain in effect in such school division. This provision shall not exempt any school division from any centralized purchasing ordinance duly adopted by a local governing body.

E. Notwithstanding the exemptions set forth in subsection D, the provisions of §§ 11-41 C, 11-41.1, 11-46 B, 11-49, 11-51, 11-54, 11-56 through 11-61 and 11-72 through 11-80 shall apply to all counties, cities and school divisions, and to all towns having a population greater than 3,500 in the Commonwealth. The method for procurement of professional services set forth in subdivision 3 a of § 11-37 in the definition of competitive negotiation shall also apply to all counties, cities and school divisions, and to all towns having a population greater than 3,500, where the cost of the professional service is expected to exceed \$30,000 in the aggregate or for the sum of all phases of a contract or project. A school board that makes purchases through its public school foundation or purchases educational technology through its educational technology foundation, either as may be established pursuant to § 22.1-212.2:2 shall be exempt from the provisions of this chapter, except, relative to such purchases, the school board shall comply with the provisions of §§ 11-51 and 11-72 through 11-80; however, a school board that makes purchases through its public school foundation established pursuant § 22.1-212.2:2 shall not be exempt from the provisions of this chapter.

F. The provisions of this chapter shall not apply to those contracts entered into prior to January 1, 1983, which shall continue to be governed by the laws in effect at the time those contracts were executed.

G. To the end that public bodies in the Commonwealth obtain high quality goods and services at reasonable cost, 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, it is the intent of the General

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60 Assembly that competition be sought to the maximum feasible degree, that individual public bodies
61 enjoy broad flexibility in fashioning details of such competition, that the rules governing contract awards
62 be made clear in advance of the competition, that specifications reflect the procurement needs of the
63 purchasing body rather than being drawn to favor a particular vendor, and that the purchaser and vendor
64 freely exchange information concerning what is sought to be procured and what is offered. *Public bodies*
65 *are encouraged to consider best value concepts when making procurement decisions.*

66 H. Notwithstanding the foregoing provisions of this section, the selection of services by the Virginia
67 Retirement System related to the management, purchase or sale of authorized investments, including but
68 not limited to actuarial services, shall be governed by the standard set forth in § 51.1-124.30 and shall
69 not be subject to the provisions of this chapter.

70 I. The provisions of this chapter shall apply to procurement of any construction or planning and
71 design services for construction by a Virginia not-for-profit corporation or organization not otherwise
72 specifically exempted when the planning, design or construction is funded by state appropriations greater
73 than \$10,000 unless the Virginia not-for-profit corporation or organization is obligated to conform to
74 procurement procedures which are established by federal statutes or regulations, whether or not those
75 federal procedures are in conformance with the provisions of this chapter.

76 J. The provisions of this chapter shall not apply to items purchased by public institutions of higher
77 education for resale at retail bookstores and similar retail outlets operated by such institution. However,
78 such purchase procedures shall provide for competition where practicable.

79 K. The provisions of this chapter shall not apply to the Virginia Port Authority in the exercise of any
80 of its powers in accordance with Chapter 10 (§ 62.1-128 et seq.) of Title 62.1, provided the Authority
81 implements, by policy or regulation adopted by the Board of Commissioners and approved by the
82 Department of General Services, procedures to ensure fairness and competitiveness in the procurement
83 of goods and services and in the administration of its capital outlay program. This exemption shall be
84 applicable only so long as such policies and procedures meeting the requirements remain in effect.

85 L. Notwithstanding the foregoing provisions of this section, the selection of services by the Board of
86 the Virginia Higher Education Tuition Trust Fund related to the operation and administration of the
87 Fund, including, but not limited to, contracts or agreements for the management, purchase, or sale of
88 authorized investments or actuarial, record-keeping, or consulting services, shall be governed by the
89 standard set forth in § 23-38.80 and shall not be subject to the provisions of this chapter.

90 M. Notwithstanding the provisions of this section, the selection of services by the University of
91 Virginia related to the management and investment of its endowment funds shall be governed by the
92 Uniform Management of Institutional Funds Act (§ 55-268.1 et seq.) as required by § 23-76.1 and shall
93 not be subject to the provisions of this chapter.

94 N. Notwithstanding the provisions of this section, the selection of investment management services
95 by the State Treasurer related to the external management of funds shall be governed by the standard set
96 forth in § 2.1-328.14, and shall be subject to competitive guidelines and policies that are set by the
97 Commonwealth Treasury Board and approved by the Department of General Services; and not be
98 subject to the provisions of this chapter.

99 § 11-37. Definitions.

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

101 *"Best value" means the overall combination of quality, price, and various elements of required*
102 *services that in total are optimal relative to a public body's needs.*

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

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

112 2. Public notice of the Invitation to Bid at least ten days prior to the date set for receipt of bids by
113 posting in a designated public area, or publication in a newspaper of general circulation, or both. In
114 addition, bids may be solicited directly from potential contractors. Any additional solicitations shall
115 include businesses selected from a list made available by the Department of Minority Business
116 Enterprise.

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

118 4. Evaluation of bids based upon the requirements set forth in the invitation, which may include
119 special qualifications of potential contractors, life-cycle costing, value analysis, and any other criteria
120 such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose, which
121 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 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. 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 of man-hours or cost for services. At the discussion stage, the public body may discuss nonbinding estimates of total project costs, including, but not limited to, life-cycle costing, and where appropriate, nonbinding estimates of price for services. Proprietary information from competing offerors shall not be disclosed to the public or to competitors. At the conclusion of discussion, outlined in this subdivision, on the basis of evaluation factors published in the Request for Proposal and all information developed in the selection process to this point, the public body shall select in the order of preference two or more offerors whose professional qualifications and proposed services are deemed most meritorious. Negotiations shall then be conducted, beginning with the offeror ranked first. If a contract satisfactory and advantageous to the public body can be negotiated at a price considered fair and reasonable, the award shall be made to that offeror. Otherwise, negotiations with the offeror ranked first shall be formally terminated and negotiations conducted with the offeror ranked second, and so on until such a contract can be negotiated at a fair and reasonable price. Should the public body determine in writing and in its sole discretion that only one offeror is fully qualified, or that one offeror is clearly more highly qualified and suitable than the others under consideration, a contract may be negotiated and awarded to that offeror.

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

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

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

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

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

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

"Informality" means a minor defect or variation of a bid or proposal from the exact requirements of

183 the Invitation to Bid, or the Request for Proposal, which does not affect the price, quality, quantity or
184 delivery schedule for the goods, services or construction being procured.

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

188 "Nonprofessional services" means any services not specifically identified as professional services in
189 the definition of professional services.

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

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

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

204 "Public contract" means an agreement between a public body and a nongovernmental source that is
205 enforceable in a court of law.

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

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

211 "Services" means any work performed by an independent contractor wherein the service rendered
212 does not consist primarily of acquisition of equipment or materials, or the rental of equipment, materials
213 and supplies.

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