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SENATE BILL NO. 732

Offered February 15, 2006

A BILL to amend and reenact §§ 2.2-4303 and 2.2-4308 of the Code of Virginia, relating to the Virginia Public Procurement Act; methods of procurement; design-build by certain local public bodies.

Patron—Herring

Introduced at the request of Governor

Referred to Committee on General Laws and Technology

Be it enacted by the General Assembly of Virginia:**1. That §§ 2.2-4303 and 2.2-4308 of the Code of Virginia are amended and reenacted as follows:**

§ 2.2-4303. 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. 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 § 2.2-4301. The basis for this determination shall be documented in writing.

D. 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:

1. By the Commonwealth, its departments, agencies and institutions, *and any local governing body with a population in excess of 80,000, or by two or more local governing bodies having a combined population in excess of 80,000 that are participating in a cooperative procurement under § 2.2-4304*, on a fixed price design-build basis or construction management basis under § 2.2-4306;

2. By any public body for the construction, alteration, repair, renovation or demolition of buildings when the contract is not expected to cost more than \$1 million;

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

4. As otherwise provided in § 2.2-4308.

E. 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 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.

F. 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 or published in a newspaper of general circulation on the day the public body awards or announces its decision to award the contract, whichever

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59 occurs first, or as soon thereafter as is practicable. Public notice may also be published on the
60 Department of General Services' central electronic procurement website and other appropriate websites.

61 G. A public body may establish purchase procedures, if adopted in writing, not requiring competitive
62 sealed bids or competitive negotiation for single or term contracts for goods and services other than
63 professional services if the aggregate or the sum of all phases is not expected to exceed \$50,000;
64 however, such small purchase procedures shall provide for competition wherever practicable. Purchases
65 under this subsection that are expected to exceed \$30,000 shall require the written informal solicitation
66 of a minimum of four bidders or offerors.

67 H. A public body may establish purchase procedures, if adopted in writing, not requiring competitive
68 negotiation for single or term contracts for professional services if the aggregate or the sum of all phases
69 is not expected to exceed \$30,000; however such small purchase procedures shall provide for
70 competition wherever practicable.

71 I. Upon a determination made in advance by a public body and set forth in writing that the purchase
72 of goods, products or commodities from a public auction sale is in the best interests of the public, such
73 items may be purchased at the auction, including online public auctions. Purchase of information
74 technology and telecommunications goods and nonprofessional services from a public auction sale shall
75 be permitted by any authority, department, agency, or institution of the Commonwealth if approved by
76 the Chief Information Officer of the Commonwealth. The writing shall document the basis for this
77 determination. However, bulk purchases of commodities used in road and highway construction and
78 maintenance, and aggregates shall not be made by online public auctions.

79 J. The purchase of goods or nonprofessional services, but not construction or professional services,
80 may be made by reverse auctioning. However, bulk purchases of commodities used in road and highway
81 construction and maintenance, and aggregates shall not be made by reverse auctioning.

82 § 2.2-4308. Design-build or construction management contracts for public bodies other than the
83 Commonwealth; eligibility requirements; award of contract; records to be kept.

84 A. While the competitive sealed bid process remains the preferred method of construction
85 procurement for public bodies in the Commonwealth, any public body other than the Commonwealth
86 may enter into a contract for construction on a fixed price or not-to-exceed price design-build or
87 construction management basis provided the public body complies with the requirements of this section
88 and has obtained the approval of the Design-Build/Construction Management Review Board (the Review
89 Board) pursuant to § 2.2-2406. Provided, however, that projects undertaken (i) pursuant to subdivision D
90 2 of § 2.2-4303, (ii) *by any local governing body with a population in excess of 80,000*, or (iii) pursuant
91 to § 2.2-4304 *by two or more local governing bodies having a combined population in excess of 80,000*
92 shall be exempt from approval of the Review Board.

93 Prior to making a determination as to the use of design-build or construction management for a
94 specific construction project, the public body shall have in its employ or under contract a licensed
95 architect or engineer with professional competence appropriate to the project who shall advise the public
96 body regarding the use of design-build or construction management for that project and who shall assist
97 the public body with the preparation of the Request for Proposal and the evaluation of such proposals.

98 Prior to issuing a Request for Proposal for any design-build or construction management contract for
99 a specific construction project, the public body shall:

100 1. Have adopted, by ordinance or resolution, written procedures governing the selection, evaluation
101 and award of design-build and construction management contracts. Such procedures shall be consistent
102 with those described in this chapter for the procurement of nonprofessional services through competitive
103 negotiation. Such procedures shall also require Requests for Proposals to include and define the criteria
104 of such construction project in areas such as site plans; floor plans; exterior elevations; basic building
105 envelope materials; fire protection information plans; structural, mechanical (HVAC), and electrical
106 systems; and special telecommunications; and may define such other requirements as the public body
107 determines appropriate for that particular construction project. Except as may otherwise be approved by
108 the Review Board, such procedures for:

109 a. Design-build construction projects shall include a two-step competitive negotiation process
110 consistent with the Review Board's regulations.

111 b. Construction management projects shall include selection procedures and required construction
112 management contract terms consistent with the Review Board's regulations.

113 2. Have documented in writing that for a specific construction project (i) a design-build or
114 construction management contract is more advantageous than a competitive sealed bid construction
115 contract; (ii) there is a benefit to the public body by using a design-build or construction management
116 contract; and (iii) competitive sealed bidding is not practical or fiscally advantageous.

117 B. Once approved by the Review Board in accordance with § 2.2-2406, the public body may procure
118 a design-build or construction management contract for the specific construction project presented to the
119 Review Board. Unless otherwise specified in the Request for Proposal, the contract shall be awarded to
120 the fully qualified offeror who submits an acceptable proposal at the lowest cost in response to the

121 Request for Proposal.

122 C. The public body shall provide information as requested by the Review Board to allow post-project
123 evaluation by the Review Board.