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**HOUSE BILL NO. 1592**

Offered January 12, 2011

Prefiled January 6, 2011

*A BILL to amend and reenact §§ 2.2-4301, 56-573.1:1, and 56-575.17 of the Code of Virginia, relating to public procurement; posting on state website.*

Patrons—Iaquinto and Cole

Referred to Committee on General Laws

**Be it enacted by the General Assembly of Virginia:**

**1. That §§ 2.2-4301, 56-573.1:1, and 56-575.17 of the Code of Virginia are amended and reenacted as follows:**

§ 2.2-4301. Definitions.

As used in this chapter:

"Affiliate" means an individual or business that controls, is controlled by, or is under common control with another individual or business. A person controls an entity if the person owns, directly or indirectly, more than 10 percent of the voting securities of the entity. For the purposes of this definition "voting security" means a security that (i) confers upon the holder the right to vote for the election of members of the board of directors or similar governing body of the business or (ii) is convertible into, or entitles the holder to receive, upon its exercise, a security that confers such a right to vote. A general partnership interest shall be deemed to be a voting security.

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

"Business" means any type of corporation, partnership, limited liability company, association, or sole proprietorship operated for profit.

"Competitive negotiation" is a method of contractor selection that 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 that 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 that will be required of the contractor.

2. Public notice of the Request for Proposal at least 10 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. 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~~ Publishing on the public Internet procurement website designated by the Department of General Services shall be required ~~of any (i) state agency, department, or institution; (ii) regional entity that serves a public purpose; and (iii) political subdivision of the Commonwealth other than a county, city or town.~~ 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. In addition, offerors shall be informed of any ranking criteria that will be used by the public body in addition to the review of the professional competence of the offeror. 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,

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59 negotiations with the offeror ranked first shall be formally terminated and negotiations conducted with  
60 the offeror ranked second, and so on until such a contract can be negotiated at a fair and reasonable  
61 price. Notwithstanding the foregoing, if the terms and conditions for multiple awards are included in the  
62 Request for Proposal, a public body may award contracts to more than one offeror.

63 Should the public body determine in writing and in its sole discretion that only one offeror is fully  
64 qualified, or that one offeror is clearly more highly qualified and suitable than the others under  
65 consideration, a contract may be negotiated and awarded to that offeror.

66 A contract for architectural or professional engineering services relating to construction projects may  
67 be negotiated by a public body, for multiple projects provided (i) the projects require similar experience  
68 and expertise, (ii) the nature of the projects is clearly identified in the Request for Proposal, and (iii) the  
69 contract term is limited to one year or when the cumulative total project fees reach the maximum cost  
70 authorized in this paragraph, whichever occurs first. For state public bodies, such contract, except those  
71 awarded for environmental, location, design and inspection work regarding highways and bridges by the  
72 Commonwealth Transportation Commissioner may be renewable for four additional one-year terms at  
73 the option of the public body. For local public bodies, such contract may be renewable for four  
74 additional one-year terms at the option of the public body. Under such contract, (a) the fair and  
75 reasonable prices, as negotiated, shall be used in determining the cost of each project performed, (b)  
76 except those awarded for environmental, location, design and inspection work regarding highways and  
77 bridges by the Commonwealth Transportation Commissioner, the sum of all projects performed in one  
78 contract term shall not exceed \$500,000 or, in the case of a state agency, as defined in § 2.2-4347, such  
79 greater amount as may be determined by the Director of the Department of General Services, not to  
80 exceed \$1 million, except that in any locality or any authority or sanitation district with a population in  
81 excess of 80,000, the sum of all such projects shall not exceed \$5 million; and (c) except those awarded  
82 for environmental, location, design and inspection work regarding highways and bridges by the  
83 Commonwealth Transportation Commissioner or for architectural and engineering services for rail and  
84 public transportation projects by the Director of the Department of Rail and Public Transportation, the  
85 project fee of any single project shall not exceed \$100,000 or, in the case of a state agency, such greater  
86 amount as may be determined by the Director of the Department of General Services not to exceed  
87 \$200,000, except that in any locality or any authority or sanitation district with a population in excess of  
88 80,000, such fee shall not exceed \$1 million. Any unused amounts from the first contract term shall not  
89 be carried forward to the additional term. Competitive negotiations for such contracts may result in  
90 awards to more than one offeror provided (1) the Request for Proposal so states and (2) the public body  
91 has established procedures for distributing multiple projects among the selected contractors during the  
92 contract term. For contracts for environmental location, design and inspection work regarding highways  
93 and bridges by the Commonwealth Transportation Commissioner, the sum of all projects in one contract  
94 term shall not exceed \$5 million and such contract may be renewable for two additional one-year terms  
95 at the option of the Commissioner. For architectural and engineering services for rail and public  
96 transportation projects by the Director of the Department of Rail and Public Transportation, the sum of  
97 all projects in one contract term shall not exceed \$2 million and such contract may be renewable for  
98 two additional one-year terms at the option of the Commissioner.

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

104 Multiphase professional services contracts satisfactory and advantageous to a local public body for  
105 environmental, location, design and inspection work regarding construction of infrastructure projects may  
106 be negotiated and awarded based on qualifications at a fair and reasonable price for the first phase only,  
107 when completion of the earlier phases is necessary to provide information critical to the negotiation of a  
108 fair and reasonable price for succeeding phases. Prior to the procurement of any such contract, the local  
109 public body shall state the anticipated intended total scope of the project and determine in writing that  
110 the nature of the work is such that the best interests of such public body require awarding the contract.

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

and awarded to that offeror.

"Competitive sealed bidding" is a method of contractor selection, other than for professional services, 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 10 days prior to the date set for receipt of bids by posting in a designated public area, 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, posting by state agencies, departments and institutions~~ *Posting* on the public Internet procurement website designated by the Department of General Services shall be required of any (i) state agency, department, or institution; (ii) regional entity that serves a public purpose; and (iii) political subdivision of the Commonwealth, other than a county, city or town. 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 awards are so provided in the Invitation to Bid, awards may be made to more than one bidder.

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

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

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

"Potential bidder or offeror" for the purposes of §§ 2.2-4360 and 2.2-4364 means a person who, at the time a public body negotiates and awards or proposes to award a contract, is engaged in the sale or lease of goods, or the sale of services, insurance or construction, of the type to be procured under the contract, and who at such time is eligible and qualified in all respects to perform that contract, and who would have been eligible and qualified to submit a bid or proposal had the contract been procured through competitive sealed bidding or competitive negotiation.

"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.

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

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

187 "Reverse auctioning" means a procurement method wherein bidders are invited to bid on specified  
188 goods or nonprofessional services through real-time electronic bidding, with the award being made to  
189 the lowest responsive and responsible bidder. During the bidding process, bidders' prices are revealed  
190 and bidders shall have the opportunity to modify their bid prices for the duration of the time period  
191 established for bid opening.

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

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

198 § 56-573.1:1. Posting of conceptual proposals; public comment; public access to procurement records.

199 A. Conceptual proposals submitted in accordance with subsection A or B of § 56-560 to a  
200 responsible public entity shall be posted by the responsible public entity within 10 working days after  
201 acceptance of such proposals as follows:

202 1. For responsible public entities that are (i) state agencies, departments, and institutions, (ii) *regional*  
203 *entities that serve a public purpose, or (iii) political subdivisions of the Commonwealth other than*  
204 *counties, cities or towns*, posting shall be on the Department of General Service's web-based electronic  
205 procurement program commonly known as "eVA;" and

206 2. For responsible public entities that are local ~~public~~ *governing bodies or school boards*, posting  
207 shall be on the responsible public entity's website or by publication, in a newspaper of general  
208 circulation in the area in which the contract is to be performed, of a summary of the proposals and the  
209 location where copies of the proposals are available for public inspection. Posting may also be on the  
210 Department of General Service's web-based electronic procurement program commonly known as  
211 "eVA," in the discretion of ~~the~~ *such* local responsible public entity.

212 In addition to the posting requirements, at least one copy of the proposals shall be made available for  
213 public inspection. Nothing in this section shall be construed to prohibit the posting of the conceptual  
214 proposals by additional means deemed appropriate by the responsible public entity so as to provide  
215 maximum notice to the public of the opportunity to inspect the proposals. Trade secrets, financial  
216 records, or other records of the private entity excluded from disclosure under the provisions of  
217 subdivision 11 of § 2.2-3705.6 shall not be required to be posted, except as otherwise agreed to by the  
218 responsible public entity and the private entity.

219 B. In addition to the posting requirements of subsection A, for 30 days prior to entering into an  
220 interim or comprehensive agreement, a responsible public entity shall provide an opportunity for public  
221 comment on the proposals. The public comment period required by this subsection may include a public  
222 hearing in the sole discretion of the responsible public entity. After the end of the public comment  
223 period, no additional posting shall be required.

224 C. Once the negotiation phase for the development of an interim or a comprehensive agreement is  
225 complete and a decision to award has been made by a responsible public entity, the responsible public  
226 entity shall present the major business points of the interim or comprehensive agreement, including the  
227 use of any public funds, to its oversight board at a regularly scheduled meeting of the board that is open  
228 to the public.

229 D. Once an interim agreement or a comprehensive agreement has been entered into, a responsible  
230 public entity shall make procurement records available for public inspection, in accordance with the  
231 Virginia Freedom of Information Act (§ 2.2-3700 et seq.). For the purposes of this subsection,  
232 procurement records shall not be interpreted to include (i) trade secrets of the private entity as defined in  
233 the Uniform Trade Secrets Act (§ 59.1-336 et seq.) or (ii) financial records, including balance sheets or  
234 financial statements of the private entity that are not generally available to the public through regulatory  
235 disclosure or otherwise.

236 E. Cost estimates relating to a proposed procurement transaction prepared by or for a responsible  
237 public entity shall not be open to public inspection.

238 F. Any inspection of procurement transaction records under this section shall be subject to reasonable  
239 restrictions to ensure the security and integrity of the records.

240 G. The provisions of this section shall apply to accepted proposals regardless of whether the process  
241 of bargaining will result in an interim or a comprehensive agreement.

242 § 56-575.17. Posting of conceptual proposals; public comment; public access to procurement records.

243 A. Conceptual proposals submitted in accordance with subsection A or B of § 56-575.4 to a

responsible public entity shall be posted by the responsible public entity within 10 working days after acceptance of such proposals as follows:

1. For responsible public entities that are (i) state agencies, departments, and institutions, (ii) *regional entities that serve a public purpose, or (iii) political subdivisions of the Commonwealth other than counties, cities or towns*, posting shall be on the Department of General Service's web-based electronic procurement program commonly known as "eVA;" and

2. For responsible public entities that are local *governing bodies or school boards*, posting shall be on the responsible public entity's website or by publication, in a newspaper of general circulation in the area in which the contract is to be performed, of a summary of the proposals and the location where copies of the proposals are available for public inspection. Posting may also be on the Department of General Service's web-based electronic procurement program commonly known as "eVA," in the discretion of the local responsible public entity.

In addition to the posting requirements, at least one copy of the proposals shall be made available for public inspection. Nothing in this section shall be construed to prohibit the posting of the conceptual proposals by additional means deemed appropriate by the responsible public entity so as to provide maximum notice to the public of the opportunity to inspect the proposals. Trade secrets, financial records, or other records of the private entity excluded from disclosure under the provisions of subdivision 11 of § 2.2-3705.6 shall not be required to be posted, except as otherwise agreed to by the responsible public entity and the private entity.

B. The responsible public entity shall hold a public hearing on the proposals during the proposal review process, but not later than 30 days prior to entering into an interim or comprehensive agreement.

C. Once the negotiation phase for the development of an interim or a comprehensive agreement is complete, but before an interim agreement or a comprehensive agreement is entered into, a responsible public entity shall make available the proposed agreement in a manner provided in subsection A.

D. Once an interim agreement or a comprehensive agreement has been entered into, a responsible public entity shall make procurement records available for public inspection, upon request. For the purposes of this subsection, procurement records shall not be interpreted to include (i) trade secrets of the private entity as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.) or (ii) financial records, including balance sheets or financial statements of the private entity that are not generally available to the public through regulatory disclosure or otherwise.

E. Cost estimates relating to a proposed procurement transaction prepared by or for a responsible public entity shall not be open to public inspection.

F. Any inspection of procurement transaction records under this section shall be subject to reasonable restrictions to ensure the security and integrity of the records.

G. The provisions of this section shall apply to accepted proposals regardless of whether the process of bargaining will result in an interim or a comprehensive agreement.