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HOUSE BILL NO. 582

Offered January 11, 2012

Prefiled January 10, 2012

A BILL to amend and reenact §§ 2.2-4303 and 2.2-4317, as it is currently effective and as it shall become effective, of the Code of Virginia, relating to the Virginia Information Technologies Agency; procurement of information technology and telecommunications goods and services.

Patrons—Watson and Yancey

Referred to Committee on Science and Technology

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-4303 and 2.2-4317, as it is currently effective and as it shall become effective, 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. *This subsection shall not apply to procurements made pursuant to § 2.2-2012.*

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 on a fixed price design-build basis or construction management basis under § 2.2-4306;

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

3. By any governing body of a locality with a population in excess of 100,000, provided that the locality has the personnel, procedures, and expertise to enter into a contract for construction on a fixed price or not-to-exceed price design-build or construction management basis and shall otherwise be in compliance with the provisions of this section, § 2.2-4308, and other applicable law governing design-build or construction management contracts for public bodies other than the Commonwealth. The procedures of the local governing body shall be consistent with the two-step competitive negotiation process established in § 2.2-4301; 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 on the Department of General Services' central electronic procurement website or other appropriate websites, and in addition, public bodies may publish in a newspaper of general circulation on the day the public body awards or announces its decision to award the contract, whichever occurs first. Posting on the Department of General Services' central electronic procurement website shall be required of any state public body. Local public bodies are encouraged to utilize the Department of General Services' central electronic procurement website to provide the public with centralized visibility and access to the Commonwealth's procurement opportunities.

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59 F. In case of emergency, a contract may be awarded without competitive sealed bidding or
60 competitive negotiation; however, such procurement shall be made with such competition as is
61 practicable under the circumstances. A written determination of the basis for the emergency and for the
62 selection of the particular contractor shall be included in the contract file. The public body shall issue a
63 written notice stating that the contract is being awarded on an emergency basis, and identifying that
64 which is being procured, the contractor selected, and the date on which the contract was or will be
65 awarded. This notice shall be posted on the Department of General Services' central electronic
66 procurement website or other appropriate websites, and in addition, public bodies may publish in a
67 newspaper of general circulation on the day the public body awards or announces its decision to award
68 the contract, whichever occurs first, or as soon thereafter as is practicable. Posting on the Department of
69 General Services' central electronic procurement website shall be required of any state public body.
70 Local public bodies are encouraged to utilize the Department of General Services' central electronic
71 procurement website to provide the public with centralized visibility and access to the Commonwealth's
72 procurement opportunities.

73 G. A public body may establish purchase procedures, if adopted in writing, not requiring competitive
74 sealed bids or competitive negotiation for single or term contracts for goods and services other than
75 professional services if the aggregate or the sum of all phases is not expected to exceed \$100,000;
76 however, such small purchase procedures shall provide for competition wherever practicable. Purchases
77 under this subsection that are expected to exceed \$30,000 shall require the (i) written informal
78 solicitation of a minimum of four bidders or offerors and (ii) posting of a public notice on the
79 Department of General Services' central electronic procurement website or other appropriate websites.
80 Posting on the Department of General Services' central electronic procurement website shall be required
81 of any state public body. Local public bodies are encouraged to utilize the Department of General
82 Services' central electronic procurement website to provide the public with centralized visibility and
83 access to the Commonwealth's procurement opportunities.

84 H. A public body may establish purchase procedures, if adopted in writing, not requiring competitive
85 negotiation for single or term contracts for professional services if the aggregate or the sum of all phases
86 is not expected to exceed \$50,000; however such small purchase procedures shall provide for
87 competition wherever practicable.

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

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

99 § 2.2-4317. (Effective until December 1, 2013) Prequalification generally; prequalification for
100 construction.

101 A. Prospective contractors may be prequalified for particular types of supplies, services, insurance or
102 construction, and consideration of bids or proposals limited to prequalified contractors. Any
103 prequalification procedure shall be established in writing and sufficiently in advance of its
104 implementation to allow potential contractors a fair opportunity to complete the process.

105 B. Any prequalification of prospective contractors for construction by a public body shall be pursuant
106 to a prequalification process for construction projects adopted by the public body. The process shall be
107 consistent with the provisions of this section.

108 The application form used in such process shall set forth the criteria upon which the qualifications of
109 prospective contractors will be evaluated. The application form shall request of prospective contractors
110 only such information as is appropriate for an objective evaluation of all prospective contractors
111 pursuant to such criteria. The form shall allow the prospective contractor seeking prequalification to
112 request, by checking the appropriate box, that all information voluntarily submitted by the contractor
113 pursuant to this subsection shall be considered a trade secret or proprietary information subject to the
114 provisions of subsection D of § 2.2-4342.

115 In all instances in which the public body requires prequalification of potential contractors for
116 construction projects, advance notice shall be given of the deadline for the submission of
117 prequalification applications. The deadline for submission shall be sufficiently in advance of the date set
118 for the submission of bids for such construction so as to allow the procedures set forth in this subsection
119 to be accomplished.

120 At least thirty days prior to the date established for submission of bids or proposals under the

procurement of the contract for which the prequalification applies, the public body shall advise in writing each contractor who submitted an application whether that contractor has been prequalified. In the event that a contractor is denied prequalification, the written notification to the contractor shall state the reasons for the denial of prequalification and the factual basis of such reasons.

A decision by a public body denying prequalification under the provisions of this subsection shall be final and conclusive unless the contractor appeals the decision as provided in § 2.2-4357.

C. A public body may deny prequalification to any contractor only if the public body finds one of the following:

1. The contractor does not have sufficient financial ability to perform the contract that would result from such procurement. If a bond is required to ensure performance of a contract, evidence that the contractor can acquire a surety bond from a corporation included on the United States Treasury list of acceptable surety corporations in the amount and type required by the public body shall be sufficient to establish the financial ability of the contractor to perform the contract resulting from such procurement;

2. The contractor does not have appropriate experience to perform the construction project in question;

3. The contractor or any officer, director or owner thereof has had judgments entered against him within the past ten years for the breach of contracts for governmental or nongovernmental construction, including, but not limited to, design-build or construction management;

4. The contractor has been in substantial noncompliance with the terms and conditions of prior construction contracts with a public body without good cause. If the public body has not contracted with a contractor in any prior construction contracts, the public body may deny prequalification if the contractor has been in substantial noncompliance with the terms and conditions of comparable construction contracts with another public body without good cause. A public body may not utilize this provision to deny prequalification unless the facts underlying such substantial noncompliance were documented in writing in the prior construction project file and such information relating thereto given to the contractor at that time, with the opportunity to respond;

5. The contractor or any officer, director, owner, project manager, procurement manager or chief financial official thereof has been convicted within the past ten years of a crime related to governmental or nongovernmental construction or contracting, including, but not limited to, a violation of (i) Article 6 (§ 2.2-4367 et seq.) of this chapter, (ii) the Virginia Governmental Frauds Act (§ 18.2-498.1 et seq.), (iii) Chapter 4.2 (§ 59.1-68.6 et seq.) of Title 59.1, or (iv) any substantially similar law of the United States or another state;

6. The contractor or any officer, director or owner thereof is currently debarred pursuant to an established debarment procedure from bidding or contracting by any public body, agency of another state or agency of the federal government; and

7. The contractor failed to provide to the public body in a timely manner any information requested by the public body relevant to subdivisions 1 through 6 of this subsection.

D. If a public body has a prequalification ordinance that provides for minority participation in municipal construction contracts, that public body may also deny prequalification based on minority participation criteria. However, nothing herein shall authorize the adoption or enforcement of minority participation criteria except to the extent that such criteria, and the adoption and enforcement thereof, are in accordance with the Constitution and laws of the United States and the Commonwealth.

E. The provisions of subsections B, C, and D shall not apply to prequalification for contracts let under § 2.2-2012 or 33.1-12.

§ 2.2-4317. (Effective December 1, 2013) Prequalification generally; prequalification for construction.

A. Prospective contractors may be prequalified for particular types of supplies, services, insurance or construction, and consideration of bids or proposals limited to prequalified contractors. Any prequalification procedure shall be established in writing and sufficiently in advance of its implementation to allow potential contractors a fair opportunity to complete the process.

B. Any prequalification of prospective contractors for construction by a public body shall be pursuant to a prequalification process for construction projects adopted by the public body. The process shall be consistent with the provisions of this section.

The application form used in such process shall set forth the criteria upon which the qualifications of prospective contractors will be evaluated. The application form shall request of prospective contractors only such information as is appropriate for an objective evaluation of all prospective contractors pursuant to such criteria. The form shall allow the prospective contractor seeking prequalification to request, by checking the appropriate box, that all information voluntarily submitted by the contractor pursuant to this subsection shall be considered a trade secret or proprietary information subject to the provisions of subsection D of § 2.2-4342.

In all instances in which the public body requires prequalification of potential contractors for construction projects, advance notice shall be given of the deadline for the submission of

182 prequalification applications. The deadline for submission shall be sufficiently in advance of the date set
183 for the submission of bids for such construction so as to allow the procedures set forth in this subsection
184 to be accomplished.

185 At least 30 days prior to the date established for submission of bids or proposals under the
186 procurement of the contract for which the prequalification applies, the public body shall advise in
187 writing each contractor who submitted an application whether that contractor has been prequalified. In
188 the event that a contractor is denied prequalification, the written notification to the contractor shall state
189 the reasons for the denial of prequalification and the factual basis of such reasons.

190 A decision by a public body denying prequalification under the provisions of this subsection shall be
191 final and conclusive unless the contractor appeals the decision as provided in § 2.2-4357.

192 C. A public body may deny prequalification to any contractor only if the public body finds one of
193 the following:

194 1. The contractor does not have sufficient financial ability to perform the contract that would result
195 from such procurement. If a bond is required to ensure performance of a contract, evidence that the
196 contractor can acquire a surety bond from a corporation included on the United States Treasury list of
197 acceptable surety corporations in the amount and type required by the public body shall be sufficient to
198 establish the financial ability of the contractor to perform the contract resulting from such procurement;

199 2. The contractor does not have appropriate experience to perform the construction project in
200 question;

201 3. The contractor or any officer, director or owner thereof has had judgments entered against him
202 within the past ten years for the breach of contracts for governmental or nongovernmental construction,
203 including, but not limited to, design-build or construction management;

204 4. The contractor has been in substantial noncompliance with the terms and conditions of prior
205 construction contracts with a public body without good cause. If the public body has not contracted with
206 a contractor in any prior construction contracts, the public body may deny prequalification if the
207 contractor has been in substantial noncompliance with the terms and conditions of comparable
208 construction contracts with another public body without good cause. A public body may not utilize this
209 provision to deny prequalification unless the facts underlying such substantial noncompliance were
210 documented in writing in the prior construction project file and such information relating thereto given
211 to the contractor at that time, with the opportunity to respond;

212 5. The contractor or any officer, director, owner, project manager, procurement manager or chief
213 financial official thereof has been convicted within the past ten years of a crime related to governmental
214 or nongovernmental construction or contracting, including, but not limited to, a violation of (i) Article 6
215 (§ 2.2-4367 et seq.) of this chapter, (ii) the Virginia Governmental Frauds Act (§ 18.2-498.1 et seq.), (iii)
216 Chapter 4.2 (§ 59.1-68.6 et seq.) of Title 59.1, or (iv) any substantially similar law of the United States
217 or another state;

218 6. The contractor or any officer, director or owner thereof is currently debarred pursuant to an
219 established debarment procedure from bidding or contracting by any public body, agency of another
220 state or agency of the federal government; and

221 7. The contractor failed to provide to the public body in a timely manner any information requested
222 by the public body relevant to subdivisions 1 through 6 of this subsection.

223 D. If a public body has a prequalification ordinance that provides for minority participation in
224 municipal construction contracts, that public body may also deny prequalification based on minority
225 participation criteria. However, nothing herein shall authorize the adoption or enforcement of minority
226 participation criteria except to the extent that such criteria, and the adoption and enforcement thereof, are
227 in accordance with the Constitution and laws of the United States and the Commonwealth.

228 E. A state public body shall deny prequalification to any contractor who fails to register and
229 participate in the E-Verify program as required by § 2.2-4308.2.

230 F. The provisions of subsections B, C, and D shall not apply to prequalification for contracts let
231 under § 2.2-2012 or 33.1-12.