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HOUSE BILL NO. 290

Offered January 8, 2014

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A BILL to amend and reenact §§ 2.2-4301, 2.2-4302.2, and 23-38.110, as they shall become effective, of the Code of Virginia, relating to the Virginia Public Procurement Act; competitive negotiation; job order contracting.

Patron—Albo

Referred to Committee on General Laws

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-4301, 2.2-4302.2, and 23-38.110, as they shall become effective, of the Code of Virginia are amended and reenacted as follows:

§ 2.2-4301. (Effective July 1, 2014) 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 the method of contractor selection set forth in § 2.2-4302.2.

"Competitive sealed bidding" is the method of contractor selection set forth in § 2.2-4302.1.

"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.

"Employment services organization" means an organization that provides employment services to individuals with disabilities that is an approved Commission on the Accreditation of Rehabilitation Facilities (CARF) accredited vendor of the Department for Aging and Rehabilitative Services.

"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.

"Job order contracting" means a method of procuring construction services by establishing a book of unit prices and then obtaining a contractor to perform work as needed using the prices, quantities, and specifications in the book as the basis of its pricing. The contractor may be selected through either competitive sealed bidding or competitive negotiation depending on the needs of the public body procuring the construction services. A minimum amount of work may be specified in the contract. The contract term and the project amount shall not exceed the limitations specified in *subsection D of § 2.2-4302.2 or § 2.2-4303.*

"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

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59 lease of goods, or the sale of services, insurance or construction, of the type to be procured under the
60 contract, and who at such time is eligible and qualified in all respects to perform that contract, and who
61 would have been eligible and qualified to submit a bid or proposal had the contract been procured
62 through competitive sealed bidding or competitive negotiation.

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

67 "Public body" means any legislative, executive or judicial body, agency, office, department, authority,
68 post, commission, committee, institution, board or political subdivision created by law to exercise some
69 sovereign power or to perform some governmental duty, and empowered by law to undertake the
70 activities described in this chapter. "Public body" shall include any metropolitan planning organization or
71 planning district commission which operates exclusively within the Commonwealth of Virginia.

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

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

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

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

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

87 **§ 2.2-4302.2. (Effective July 1, 2014) Process for competitive negotiation.**

88 A. The process for competitive negotiation shall include the following:

89 1. Issuance of a written Request for Proposal indicating in general terms that which is sought to be
90 procured, specifying the factors that will be used in evaluating the proposal and containing or
91 incorporating by reference the other applicable contractual terms and conditions, including any unique
92 capabilities, specifications or qualifications that will be required;

93 2. Public notice of the Request for Proposal at least 10 days prior to the date set for receipt of
94 proposals by posting on the Department of General Services' central electronic procurement website or
95 other appropriate websites. Additionally, public bodies shall publish in a newspaper of general
96 circulation in the area in which the contract is to be performed so as to provide reasonable notice to the
97 maximum number of offerors that can be reasonably anticipated to submit proposals in response to the
98 particular request. Posting on the Department of General Services' central electronic procurement website
99 shall be required of any state public body. Local public bodies are encouraged to utilize the Department
100 of General Services' central electronic procurement website to provide the public with centralized
101 visibility and access to the Commonwealth's procurement opportunities. In addition, proposals may be
102 solicited directly from potential contractors. Any additional solicitations shall include certified businesses
103 selected from a list made available by the Department of Small Business and Supplier Diversity; and

104 3. For goods, nonprofessional services, and insurance, selection shall be made of two or more
105 offerors deemed to be fully qualified and best suited among those submitting proposals, on the basis of
106 the factors involved in the Request for Proposal, including price if so stated in the Request for Proposal.
107 Negotiations shall then be conducted with each of the offerors so selected. Price shall be considered, but
108 need not be the sole or primary determining factor. After negotiations have been conducted with each
109 offeror so selected, the public body shall select the offeror which, in its opinion, has made the best
110 proposal and provides the best value, and shall award the contract to that offeror. When the terms and
111 conditions of multiple awards are so provided in the Request for Proposal, awards may be made to more
112 than one offeror. Should the public body determine in writing and in its sole discretion that only one
113 offeror is fully qualified, or that one offeror is clearly more highly qualified than the others under
114 consideration, a contract may be negotiated and awarded to that offeror; or

115 4. For professional services, the public body shall engage in individual discussions with two or more
116 offerors deemed fully qualified, responsible and suitable on the basis of initial responses and with
117 emphasis on professional competence, to provide the required services. Repetitive informal interviews
118 shall be permissible. The offerors shall be encouraged to elaborate on their qualifications and
119 performance data or staff expertise pertinent to the proposed project, as well as alternative concepts. In
120 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. In accordance with § 2.2-4342, 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.

Notwithstanding the foregoing, if the terms and conditions for multiple awards are included in the Request for Proposal, a public body may award contracts to more than one 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 and suitable than the others under consideration, a contract may be negotiated and awarded to that offeror.

B. For multiple projects, a contract for architectural or professional engineering services relating to construction projects, ~~or a contract for job order contracting~~, may be negotiated by a public body, provided (i) the projects require similar experience and expertise, (ii) the nature of the projects is clearly identified in the Request for Proposal, and (iii) the contract is limited to a one-year term or when the cumulative total project fees reach the maximum cost authorized in this subsection, whichever occurs first.

Such contracts may be renewable for four additional one-year terms at the option of the public body. The fair and reasonable prices as negotiated shall be used in determining the cost of each project performed and the sum of all projects performed in a one-year contract term shall not exceed \$500,000, except that for:

1. A state agency, as defined in § 2.2-4347, the sum of all projects performed in a one-year contract term shall not exceed \$1 million as may be determined by the Director of the Department of General Services;

2. Any locality or any authority, sanitation district, metropolitan planning organization or planning district commission with a population in excess of 80,000, or any city within Planning District 8, the sum of all projects performed in a one-year contract term shall not exceed \$5 million and those awarded for any airport as defined in § 5.1-1 and aviation transportation projects, the sum of all such projects shall not exceed \$1.5 million;

3. Architectural and engineering services for rail and public transportation projects by the Director of the Department of Rail and Public Transportation, the sum of all projects in a one-year contract term shall not exceed \$2 million. Such contract may be renewable for two additional one-year terms at the option of the Director; *and*

4. Environmental location, design and inspection work regarding highways and bridges by the Commissioner of Highways, the initial contract term shall be limited to two years or when the cumulative total project fees reach \$5 million, whichever occurs first. Such contract may be renewable for two additional one-year terms at the option of the Commissioner, and the sum of all projects in each one-year contract term shall not exceed \$5 million; *and*

~~5. Job order contracting, the sum of all projects performed in a one-year contract term shall not exceed \$2 million.~~

Competitive negotiations for such contracts may result in awards to more than one offeror provided (i) the Request for Proposal so states and (ii) the public body has established procedures for distributing multiple projects among the selected contractors during the contract term.

C. For any single project, for ~~(i)~~ architectural or professional engineering services relating to construction projects, ~~or (ii) job order contracting~~, the project fee shall not exceed \$100,000, or for architectural or engineering services for airports as defined in § 5.1-1 and aviation transportation projects, the project fee ~~of any single project~~ shall not exceed \$500,000, except that for:

1. A state agency as defined in § 2.2-4347, the project fee shall not exceed \$200,000, as may be determined by the Director of the Department of General Services; *and*

2. Any locality or any authority or sanitation district with a population in excess of 80,000, or any city within Planning District 8, the project fee shall not exceed \$2 million; *and*

~~3. Job order contracting, the project fee shall not exceed \$400,000.~~

D. *For job order contracting, the per project cost shall not exceed \$400,000, and the sum of all*

182 *projects performed in a one-year contract term shall not exceed \$2 million.*

183 *E. For the purposes of subsections B and C, and D, any unused amounts from the first contract term*
184 *shall not be carried forward to the additional term.*

185 *E. F. Multiphase professional services contracts satisfactory and advantageous to the completion of*
186 *large, phased, or long term projects may be negotiated and awarded based on a fair and reasonable price*
187 *for the first phase only, where the completion of the earlier phases is necessary to provide information*
188 *critical to the negotiation of a fair and reasonable price for succeeding phases. Prior to the entering into*
189 *any such contract, the public body shall (i) state the anticipated intended total scope of the project and*
190 *(ii) determine in writing that the nature of the work is such that the best interests of the public body*
191 *require awarding the contract.*

192 **§ 23-38.110. Procurement; discrimination prohibited; participation of small, women-owned, and**
193 **minority-owned business enterprises.**

194 A. (Effective July 1, 2014) Subject to the express provisions of the management agreement described
195 in § 23-38.88, covered institutions may be exempt from the provisions of the Virginia Public
196 Procurement Act (§ 2.2-4300 et seq.), except for § 2.2-4342 (which section shall not be construed to
197 require compliance with the prequalification application procedures of subsection B of § 2.2-4317);
198 provided, however, that any deviations from the Virginia Public Procurement Act approved in a
199 Management Agreement shall be uniform across all covered institutions; and provided further that the
200 governing body of a covered institution shall adopt, and the covered institution shall comply with,
201 policies for the procurement of goods and services, including professional services, that shall be based
202 upon competitive principles and shall in each instance seek competition to the maximum practical
203 degree. The policies shall implement a system of competitive negotiation for professional services
204 pursuant to subsections A, B, and E F of § 2.2-4302.2, shall prohibit discrimination because of race,
205 religion, color, sex or national origin of the bidder or offeror in the solicitation or award of contracts,
206 shall incorporate the prompt payment principles of §§ 2.2-4350 and 2.2-4354, and shall consider the
207 impact on correctional enterprises under § 53.1-47.

208 B. Such policies may, among other things, (i) provide for consideration of the dollar amount of the
209 intended procurement, the term of the anticipated contract, and the likely extent of competition; (ii)
210 implement a prequalification procedure for contractors or products; and (iii) include provisions for
211 cooperative arrangements with other covered institutions, other public or private educational institutions,
212 other public or private organizations or entities, including public-private partnerships, public bodies,
213 charitable organizations, health care provider alliances or purchasing organizations or entities, state
214 agencies or institutions of the Commonwealth or the several states, the District of Columbia, the
215 territories and the United States, and any combination thereof. Nothing in this section shall preclude a
216 covered institution from requesting and utilizing, and covered institutions are hereby encouraged to
217 utilize, the assistance of the Virginia Information Technologies Agency in information technology
218 procurements.

219 C. In the solicitation and awarding of contracts, no covered institution shall discriminate against a
220 bidder or offeror because of race, religion, color, sex, national origin, age, disability, or any other basis
221 prohibited by state or federal law. The procurement policies of a covered institution shall provide that,
222 whenever solicitations are made seeking competitive procurement of goods or services, it shall be a
223 priority of the institution to provide for fair and reasonable consideration of small, women-owned, and
224 minority-owned businesses and to promote and encourage a diversity of suppliers. The institution shall
225 post on the Department of General Services' central electronic procurement website all Invitations to
226 Bid, Requests for Proposal, sole source award notices, and emergency award notices to ensure visibility
227 and access to the Commonwealth's procurement opportunities on one website.

228 D. As part of any procurement provisions of a management agreement, the governing board of a
229 covered institution shall identify the public, educational, and operational interests served by any
230 procurement rule or rules that deviate from those in the Virginia Public Procurement Act.