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SENATE BILL NO. 174

Offered January 8, 2014

Prefiled January 2, 2014

A *BILL to amend and reenact §§ 2.2-4301, as it is currently effective, and 2.2-4302.2 as it shall become effective, of the Code of Virginia, relating to the Virginia Public Procurement Act; competitive negotiation; term contracts for certain architectural and engineering services.*

Patron—Black

Referred to Committee on General Laws and Technology

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-4301, as it is currently effective, and 2.2-4302.2, as it shall become effective, of the Code of Virginia are amended and reenacted as follows:

§ 2.2-4301. (Effective until 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 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 on the Department of General Services' central electronic procurement website or other appropriate websites. Additionally, public bodies shall publish in a newspaper 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. 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. 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 Commissioner of Highways may be renewable for four additional one-year terms at the option of the
73 public body. For local public bodies, including metropolitan planning organizations or planning district
74 commissions, such contract may be renewable for four additional one-year terms at the option of the
75 public body. Under such contract, the fair and reasonable prices, as negotiated, shall be used in
76 determining the cost of each project performed, (a) except for those awarded for environmental, location,
77 design and inspection work regarding highways and bridges by the Commissioner of Highways, the sum
78 of all projects performed in one contract term shall not exceed \$500,000 or, in the case of a state
79 agency, as defined in § 2.2-4347, such greater amount as may be determined by the Director of the
80 Department of General Services, not to exceed \$4 \$2.5 million, except that in any locality or any
81 authority, sanitation district, metropolitan planning organization or planning district commission with a
82 population in excess of 80,000, or any city within Planning District 8, the sum of all such projects shall
83 not exceed \$5 \$10 million and those awarded for any airport as defined in § 5.1-1 and aviation
84 transportation projects, the sum of all such projects shall not exceed \$1.5 million, and (b) except for
85 those awarded for environmental, location, design and inspection work regarding highways and bridges
86 by the Commissioner of Highways or for architectural and engineering services for rail and public
87 transportation projects by the Director of the Department of Rail and Public Transportation, the project
88 fee of any single project shall not exceed \$100,000, or for architectural or engineering services for
89 airports as defined in § 5.1-1 and aviation transportation projects, the project fee of any single project
90 shall not exceed \$500,000, or, in the case of a state agency, such greater amount as may be determined
91 by the Director of the Department of General Services not to exceed \$200,000, except that in any
92 locality or any authority or sanitation district with a population in excess of 80,000, or any city within
93 Planning District 8, such fee shall not exceed \$2 million. Any unused amounts from the first contract
94 term shall not be carried forward to the additional term. Competitive negotiations for such contracts may
95 result in awards to more than one offeror provided (1) the Request for Proposal so states and (2) the
96 public body has established procedures for distributing multiple projects among the selected contractors
97 during the contract term. Notwithstanding any other provision in this section, for contracts for
98 environmental location, design and inspection work regarding highways and bridges by the
99 Commissioner of Highways, the initial contract term shall be limited to two years or when the
100 cumulative total project fees reach \$5 million, whichever occurs first. Such contract may be renewable
101 for two additional one-year terms at the option of the Commissioner, and the sum of all projects in each
102 one-year term shall not exceed \$5 million. For architectural and engineering services for rail and public
103 transportation projects by the Director of the Department of Rail and Public Transportation, the sum of
104 all projects in one contract term shall not exceed \$2 million and such contract may be renewable for
105 two additional one-year terms at the option of the Commissioner.

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

111 Multiphase professional services contracts satisfactory and advantageous to a local public body,
112 including metropolitan planning organizations and planning district commissions, for environmental,
113 location, design and inspection work regarding construction of infrastructure projects may be negotiated
114 and awarded based on qualifications at a fair and reasonable price for the first phase only, when
115 completion of the earlier phases is necessary to provide information critical to the negotiation of a fair
116 and reasonable price for succeeding phases. Prior to the procurement of any such contract, the local
117 public body shall state the anticipated intended total scope of the project and determine in writing that
118 the nature of the work is such that the best interests of such public body require awarding the contract.

119 b. Procurement of other than professional services. Selection shall be made of two or more offerors
120 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 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 public body shall select the offeror which, in its opinion, has made the best proposal, and shall award the contract to that offeror. When the terms and conditions of multiple awards are so provided in the Request for Proposal, awards may be made 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 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 on the Department of General Services' central electronic procurement website or other appropriate websites. In addition, public bodies may publish in a newspaper of general circulation. 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. 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 Small Business and Supplier Diversity.

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.

"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.

(Effective July 1, 2014) "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 § 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

182 the definition of professional services.

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

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

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

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

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

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

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

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

213 **§ 2.2-4302.2. (Effective July 1, 2014) Process for competitive negotiation.**

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

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

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

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

241 4. For professional services, the public body shall engage in individual discussions with two or more
242 offerors deemed fully qualified, responsible and suitable on the basis of initial responses and with
243 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. 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 \$4 \$2.5 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 \$10 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;

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;

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 the purposes of subsections B and C, any unused amounts from the first contract term shall not be carried forward to the additional term.

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