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SENATE BILL NO. 645

Offered January 17, 2014

A BILL to amend and reenact §§ 2.2-4302.2 and 2.2-4303, as they shall become effective, of the Code of Virginia, relating to the Virginia Public Procurement Act; transportation construction services.

Patron—McEachin

Referred to Committee on General Laws and Technology

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-4302.2 and 2.2-4303, as they shall become effective, of the Code of Virginia are amended and reenacted as follows:

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

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

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, specifications or qualifications that will be required;

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. Any additional solicitations shall include certified businesses selected from a list made available by the Department of Small Business and Supplier Diversity; and

3. For goods, nonprofessional services, and insurance, selection shall be made of two or more offerors 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 or primary 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 provides the best value, 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; or

4. For 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. 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

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59 such a contract can be negotiated at a fair and reasonable price.

60 *For transportation construction services, factors that may be considered in addition to price include*
61 *(i) the proposed cost of the transportation facility as that term is defined in § 56-557; (ii) the general*
62 *reputation, qualifications, industry experience, and financial capacity of the contractor; (iii) the*
63 *proposed design, operation, and feasibility of the transportation facility; (iv) the eligibility of the facility*
64 *for priority selection, review, and documentation timelines under the public body's guidelines; (v)*
65 *benefits to the public; (vi) the contractor's compliance with a minority business enterprise participation*
66 *plan or good faith effort to comply with the goals of such plan; (vii) the contractor's plans to employ*
67 *local contractors and residents; (viii) the safety record of the contractor; and (ix) other criteria that the*
68 *public body deems appropriate.*

69 Notwithstanding the foregoing, if the terms and conditions for multiple awards are included in the
70 Request for Proposal, a public body may award contracts to more than one offeror.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

117 E. Multiphase professional services contracts satisfactory and advantageous to the completion of
118 large, phased, or long term projects may be negotiated and awarded based on a fair and reasonable price
119 for the first phase only, where the completion of the earlier phases is necessary to provide information
120 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.

§ 2.2-4303. (Effective July 1, 2014) Methods of procurement.

A. All public contracts with nongovernmental contractors for the purchase or lease of goods, or for the purchase of services, insurance, or construction, shall be awarded after competitive sealed bidding, or competitive negotiation as provided in this section, unless otherwise authorized by law.

B. Professional services shall be procured by competitive negotiation.

C. Upon a determination made in advance by the public body and set forth in writing that competitive sealed bidding is either not practicable or not fiscally advantageous to the public, goods, services, or insurance may be procured by competitive negotiation. The writing shall document the basis for this determination.

Upon a written determination made in advance by (i) the Governor or his designee in the case of a procurement by the Commonwealth or by a department, agency or institution thereof or (ii) the local governing body in the case of a procurement by a political subdivision of the Commonwealth, that competitive negotiation is either not practicable or not fiscally advantageous, insurance may be procured through a licensed agent or broker selected in the manner provided for the procurement of things other than professional services set forth in § 2.2-4302.2. The basis for this determination shall be documented in writing.

D. Construction may be procured ~~only~~ by competitive sealed bidding; ~~except that or competitive negotiation may be used in the following instances upon a~~ A determination made in advance by the public body ~~and shall~~ set forth in writing that ~~competitive sealed bidding is either not the selected procurement method is~~ practicable or ~~not~~ fiscally advantageous to the public, which writing shall document the basis for this determination. *The determination shall be presumed appropriate in the following instances:*

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 § 2.2-4302.2; 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.

F. In case of emergency, a contract may be awarded without competitive sealed bidding or competitive negotiation; however, such procurement shall be made with such competition as is practicable under the circumstances. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file. The public body shall issue a written notice stating that the contract is being awarded on an emergency basis, and identifying that which is being procured, the contractor selected, and the date on which the contract was or will be awarded. This notice shall be posted 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, or as soon thereafter as is practicable. Posting on the Department of General Services' central electronic procurement website shall be required of any state public body.

182 Local public bodies are encouraged to utilize the Department of General Services' central electronic
183 procurement website to provide the public with centralized visibility and access to the Commonwealth's
184 procurement opportunities.

185 G. A public body may establish purchase procedures, if adopted in writing, not requiring competitive
186 sealed bids or competitive negotiation for single or term contracts for goods and services other than
187 professional services if the aggregate or the sum of all phases is not expected to exceed \$100,000;
188 however, such small purchase procedures shall provide for competition wherever practicable. For local
189 public bodies, such purchase procedures may allow for single or term contracts for professional services
190 without requiring competitive negotiation, provided the aggregate or the sum of all phases is not
191 expected to exceed \$60,000.

192 For state public bodies, purchases under this subsection that are expected to exceed \$30,000 shall
193 require the (i) written informal solicitation of a minimum of four bidders or offerors and (ii) posting of
194 a public notice on the Department of General Services' central electronic procurement website or other
195 appropriate websites. Posting on the Department of General Services' central electronic procurement
196 website shall be required of any state public body. Local public bodies are encouraged to utilize the
197 Department of General Services' central electronic procurement website to provide the public with
198 centralized visibility and access to the Commonwealth's procurement opportunities.

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

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

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