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HOUSE BILL NO. 1208

Offered January 17, 2014

A BILL to amend and reenact §§ 2.2-4302.1, as it shall become effective, 2.2-4302.2, as it shall become effective, 2.2-4350, and 2.2-4352 of the Code of Virginia, relating to the Virginia Public Procurement Act; consideration of early payment discounts.

Patron—Albo

Referred to Committee on General Laws

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-4302.1, as it shall become effective, 2.2-4302.2, as it shall become effective, 2.2-4350, and 2.2-4352 of the Code of Virginia are amended and reenacted as follows:

§ 2.2-4302.1. (Effective July 1, 2014) Process for competitive sealed bidding.

A. The process for competitive sealed bidding shall include the following:

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 certified 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 to Bid, 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; and

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.

B. Discounts for early payment of invoices offered by any bidder shall not be considered in the determination of the lowest priced bid on any contract awarded using competitive sealed bidding.

C. No bidder shall be required to offer discounts for early payment of invoices as a condition of any Invitation to Bid, and no bidder shall be declared nonresponsive for failure to offer a discount for early payment of invoices.

§ 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 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;

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.

F. Any offer submitted in response to a Request for Proposal may contain offers for discounts for the early payment of invoices by public bodies. If offered, such discounts shall not be considered in the selection of qualified offerors or in the evaluation of prices submitted by any such offeror.

§ 2.2-4350. Prompt payment of bills by state agencies.

A. Every state agency that acquires goods or services, or conducts any other type of contractual business with nongovernmental, privately owned enterprises shall promptly pay for the completely delivered goods or services by the required payment date.

Payment shall be deemed to have been made when offset proceedings have been instituted, as authorized under the Virginia Debt Collection Act (§ 2.2-4800 et seq.).

B. Separate payment dates may be specified for contracts under which goods or services are provided in a series of partial deliveries or executions to the extent that such contract provides for separate payment for such partial delivery or execution.

C. Discounts for prompt payment shall not be considered in the evaluation or made a condition of offers or bids by any state public body. However, any offered discount may form a part of the award and shall be taken if payment is made within the discount period indicated in the offer or bid by the offeror or bidder. As an alternative to offering a prompt payment discount in conjunction with the offer or bid, offerors or bidders who are awarded contracts may include prompt payment discounts on individual invoices. In connection with any discount offered for prompt payment, time shall be computed from the date of the submission of the invoice by the contractor or supplier.

§ 2.2-4352. Prompt payment of bills by localities.

Every agency of local government that acquires goods or services, or conducts any other type of contractual business with a nongovernmental, privately owned enterprise, shall promptly pay for the completed delivered goods or services by the required payment date. The required payment date shall be either: (i) the date on which payment is due under the terms of the contract for the provision of the goods or services; or (ii) if a date is not established by contract, not more than forty-five days after goods or services are received or not more than forty-five days after the invoice is rendered, whichever is later.

Separate payment dates may be specified for contracts under which goods or services are provided in a series of partial executions or deliveries to the extent that the contract provides for separate payment for partial execution or delivery.

Within twenty days after the receipt of the invoice or goods or services, the agency shall notify the supplier of any defect or impropriety that would prevent payment by the payment date.

Unless otherwise provided under the terms of the contract for the provision of goods or services, every agency that fails to pay by the payment date shall pay any finance charges assessed by the supplier that shall not exceed one percent per month.

The provisions of this section shall not apply to the late payment provisions in any public utility

tariffs or public utility negotiated contracts.

Discounts for prompt payment shall not be considered in the evaluation or made a condition of offers or bids by any local public body. However, any offered discount may form a part of the award and shall be taken if payment is made within the discount period indicated in the offer or bid by the offeror or bidder. As an alternative to offering a prompt payment discount in conjunction with the offer or bid, offerors or bidders who are awarded contracts may include prompt payment discounts on individual invoices. In connection with any discount offered for prompt payment, time shall be computed from the date of the submission of the invoice by the contractor or supplier.