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HOUSE BILL NO. 1238

Offered January 17, 2014

A *BILL to amend and reenact §§ 2.2-4302.1 and 2.2-4302.2, as they shall become effective, of the Code of Virginia, relating to the Virginia Public Procurement Act; disclosure of cost estimates in solicitations prohibited.*

Patron—Gilbert

Referred to Committee on General Laws

Be it enacted by the General Assembly of Virginia:

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

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

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, *except that no Invitation to Bid shall contain the public body's cost estimate for that which is sought to be procured.* 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.

§ 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, *except that no Request for Proposal shall contain the public body's cost estimate for that which is sought to be procured;*

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

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59 the factors involved in the Request for Proposal, including price if so stated in the Request for Proposal.
60 Negotiations shall then be conducted with each of the offerors so selected. Price shall be considered, but
61 need not be the sole or primary determining factor. After negotiations have been conducted with each
62 offeror so selected, the public body shall select the offeror which, in its opinion, has made the best
63 proposal and provides the best value, and shall award the contract to that offeror. When the terms and
64 conditions of multiple awards are so provided in the Request for Proposal, awards may be made to more
65 than one offeror. Should the public body determine in writing and in its sole discretion that only one
66 offeror is fully qualified, or that one offeror is clearly more highly qualified than the others under
67 consideration, a contract may be negotiated and awarded to that offeror; or

68 4. For professional services, the public body shall engage in individual discussions with two or more
69 offerors deemed fully qualified, responsible and suitable on the basis of initial responses and with
70 emphasis on professional competence, to provide the required services. Repetitive informal interviews
71 shall be permissible. The offerors shall be encouraged to elaborate on their qualifications and
72 performance data or staff expertise pertinent to the proposed project, as well as alternative concepts. In
73 addition, offerors shall be informed of any ranking criteria that will be used by the public body in
74 addition to the review of the professional competence of the offeror. The Request for Proposal shall not,
75 however, request that offerors furnish estimates of man-hours or cost for services. At the discussion
76 stage, the public body may discuss nonbinding estimates of total project costs, including, but not limited
77 to, life-cycle costing, and where appropriate, nonbinding estimates of price for services. In accordance
78 with § 2.2-4342, proprietary information from competing offerors shall not be disclosed to the public or
79 to competitors. At the conclusion of discussion, outlined in this subdivision, on the basis of evaluation
80 factors published in the Request for Proposal and all information developed in the selection process to
81 this point, the public body shall select in the order of preference two or more offerors whose
82 professional qualifications and proposed services are deemed most meritorious.

83 Negotiations shall then be conducted, beginning with the offeror ranked first. If a contract
84 satisfactory and advantageous to the public body can be negotiated at a price considered fair and
85 reasonable, the award shall be made to that offeror. Otherwise, negotiations with the offeror ranked first
86 shall be formally terminated and negotiations conducted with the offeror ranked second, and so on until
87 such a contract can be negotiated at a fair and reasonable price.

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

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

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

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

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

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

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

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

120 5. Job order contracting, the sum of all projects performed in a one-year contract term shall not

121 exceed \$2 million.

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

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

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

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

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

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

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