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HOUSE BILL NO. 774

Offered January 10, 2018

Prefiled January 9, 2018

A BILL to amend and reenact §§ 2.2-4379 through 2.2-4382 of the Code of Virginia, relating to public procurement; contracting for construction on a construction management basis.

Patrons—Landes and Fowler

Referred to Committee on General Laws

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-4379 through 2.2-4382 of the Code of Virginia are amended and reenacted as follows:

§ 2.2-4379. Definitions.

As used in this chapter, unless the context requires a different meaning:

"Complex project" means a construction project that includes one or more of the following significant components: difficult site location, ~~unique equipment, specialized unconventional~~ building systems, ~~multifaceted program~~, accelerated schedule *due to regulatory mandates*, registered historic designation, or intricate phasing ~~or some other aspect that makes competitive sealed bidding not practical~~.

"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.

"Covered institution" means a public institution of higher education operating (i) subject to a management agreement set forth in Article 4 (§ 23.1-1004 et seq.) of Chapter 10 of Title 23.1, (ii) under a memorandum of understanding pursuant to § 23.1-1003, or (iii) under the pilot program authorized in the appropriation act.

"Department" means the Department of General Services.

"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, or other item specified in the contract.

"Public body" means the same as that term is defined in § 2.2-4301.

"State public body" means any authority, board, department, instrumentality, agency, or other unit of state government. "State public body" does not include any covered institution; any county, city, or town; or any local or regional governmental authority.

§ 2.2-4380. Construction management or design-build contracts for state public bodies authorized.

A. Any state public body may enter into a contract for construction on a fixed price or not-to-exceed price construction management or design-build basis, provided that such public body complies with the requirements of this article and the procedures adopted by the Secretary of Administration for using construction management or design-build contracts.

B. Procedures adopted by a state public body pursuant to this article shall include the following requirements:

1. *The construction management or design-build contracts may be utilized for projects where the estimated cost is expected to be greater than \$40 million of actual construction costs. For construction management or design-build contracts that have an estimated cost expected to be \$40 million of actual construction costs or less, the state public body must comply with the provisions of subdivisions 2 through 8.*

~~A written~~ 2. Written determination is made in advance by the state public body that competitive sealed bidding is not practicable or fiscally advantageous, and such writing shall document the basis for the determination to use construction management or design-build. The determination shall be included in the Request for Qualifications and maintained in the procurement file;

~~2.~~ 3. Prior to making a determination as to the use of construction management or design-build for a specific construction project, a state public body shall have in its employ or under contract a licensed architect or engineer with professional competence appropriate to the project who shall (i) advise the public body regarding the use of construction management or design-build for that project and (ii) assist the public body with the preparation of the Request for Proposal and the evaluation of such proposals;

~~3.~~ 4. Public notice of the Request for Qualifications is posted on the Department's central electronic procurement website, known as eVA, at least 30 days prior to the date set for receipt of qualification

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59 proposals;

60 4. 5. For construction management contracts, the contract is entered into no later than the completion
61 of the schematic phase of design, unless prohibited by authorization of funding restrictions;

62 5. 6. Prior construction management or design-build experience or previous experience with the
63 Department's Bureau of Capital Outlay Management shall not be required as a prerequisite for award of
64 a contract. However, in the selection of a contractor, a state public body may consider the experience of
65 each contractor on comparable projects;

66 6. 7. Construction management contracts shall require that (i) no more than 10 percent of the
67 construction work, as measured by the cost of the work, be performed by the construction manager with
68 its own forces and (ii) the remaining 90 percent of the construction work, as measured by the cost of
69 the work, be performed by subcontractors of the construction manager, which the construction manager
70 shall procure by publicly advertised, competitive sealed bidding to the maximum extent practicable; and

71 7. 8. The procedures allow for a two-step competitive negotiation process.

72 C. The Department shall evaluate the proposed procurement method selected by the state public body
73 *when the estimated cost is expected to be \$40 million of actual construction costs or less* and make its
74 recommendation as to whether the use of the construction management or design-build procurement
75 method is appropriate for the specific project. In its review, the Department shall also consider:

76 1. The written determination of the state public body;

77 2. The compliance by the state public body with subdivisions ~~B 1, 2, and 7~~ B 2, 3, and 8;

78 3. The project cost, expected timeline, and use;

79 4. Whether the project is a complex project; and

80 5. Any other criteria established by the Department to evaluate the proposed procurement method for
81 the project.

82 D. The Department shall conduct its review within five working days after receipt of the written
83 determination and render its written recommendation within such five-working-day period. The written
84 recommendation of the Department shall be maintained in the procurement file.

85 E. If a state public body elects to proceed with the project using a construction management or
86 design-build procurement method despite the recommendation of the Department to the contrary, such
87 state public body shall state in writing its reasons therefor and any justification for not following the
88 recommendation of the Department and submit same to the Department. The written statement of a state
89 public body's decision to not follow the recommendation of the Department shall be maintained in the
90 procurement file.

91 **§ 2.2-4381. Construction management or design-build contracts for covered institutions**
92 **authorized.**

93 A. Any covered institution may enter into a contract for construction on a fixed price or
94 not-to-exceed price construction management or design-build basis, provided that such institution
95 complies with the requirements of this article and with the procedures adopted by the Secretary of
96 Administration for using construction management or design-build contracts.

97 B. Covered institutions shall:

98 1. Develop procedures for determining the selected procurement method which, at a minimum, shall
99 consider cost, schedule, complexity, and building use;

100 2. Submit such procedures, and any subsequent changes to adopted procedures, to the Department for
101 review and comment; and

102 3. Submit Department-reviewed procedures to its board of visitors for adoption.

103 C. Procedures adopted by a board of visitors pursuant to this article shall include the following
104 requirements:

105 1. *The construction management or design-build contracts may be utilized for projects where the*
106 *estimated cost is expected to be greater than \$40 million of actual construction costs. For construction*
107 *management or design-build contracts that have an estimated cost expected to be \$40 million of actual*
108 *construction costs or less, the covered institution must comply with the provisions of subdivisions 2*
109 *through 8.*

110 2. A written determination is made in advance by the covered institution that competitive sealed
111 bidding is not practicable or fiscally advantageous, and such writing shall document the basis for the
112 determination to use construction management or design-build. The determination shall be included in
113 the Request for Qualifications and maintained in the procurement file;

114 ~~2.~~ 3. Prior to making a determination as to the use of construction management or design-build for a
115 specific construction project, a covered institution shall have in its employ or under contract a licensed
116 architect or engineer with professional competence appropriate to the project who shall (i) advise the
117 covered institution regarding the use of construction management or design-build for that project and (ii)
118 assist the covered institution with the preparation of the Request for Proposal and the evaluation of such
119 proposals;

120 ~~3.~~ 4. Public notice of the Request for Qualifications is posted on the Department's central electronic

procurement website, known as eVA, at least 30 days prior to the date set for receipt of qualification proposals;

4. 5. For construction management contracts, the contract is entered into no later than the completion of the schematic phase of design, unless prohibited by authorization of funding restrictions;

5. 6. Prior construction management or design-build experience or previous experience with the Department's Bureau of Capital Outlay Management shall not be required as a prerequisite for award of a contract. However, in the selection of a contractor, a covered institution may consider the experience of each contractor on comparable projects;

6. 7. Construction management contracts shall require that (i) no more than 10 percent of the construction work, as measured by the cost of the work, be performed by the construction manager with its own forces and (ii) the remaining 90 percent of the construction work, as measured by the cost of the work, be performed by subcontractors of the construction manager, which the construction manager shall procure by publicly advertised, competitive sealed bidding to the maximum extent practicable; and

7. 8. The procedures allow for a two-step competitive negotiation process.

D. The Department shall evaluate the proposed procurement method selected by a covered institution when the *estimated cost is expected to be \$40 million of actual construction costs or less* and make its recommendation as to whether the use of the construction management or design-build procurement method is appropriate for the specific project. In its review, the Department shall also consider:

1. The written determination of the covered institution;

2. The compliance by the covered institution with subdivisions ~~C 1, 2, and 7~~ C 2, 3, and 8;

3. The project cost, expected timeline, and use;

4. Whether the project is a complex project; and

5. Any other criteria established by the Department to evaluate the proposed procurement method for the project.

E. The Department shall conduct its review within five working days after receipt of the written determination and render its written recommendation within such five-working-day period. The written recommendation of the Department shall be maintained in the procurement file.

F. If a covered institution elects to proceed with the project using a construction management or design-build procurement method despite the recommendation of the Department to the contrary, such covered institution shall state in writing its reasons therefor and any justification for not following the recommendation of the Department and submit same to the Department. The written statement of a covered institution's decision to not follow the recommendation of the Department shall be maintained in the procurement file.

§ 2.2-4382. Design-build or construction management contracts for local public bodies authorized.

A. Any local public body may enter into a contract for construction on a fixed price or not-to-exceed price construction management or design-build basis, provided that the local public body (i) complies with the requirements of this article and (ii) has by ordinance or resolution implemented procedures consistent with the procedures adopted by the Secretary of Administration for utilizing construction management or design-build contracts.

B. Prior to making a determination as to the use of construction management or design-build for a specific construction project, a local public body shall have in its employ or under contract a licensed architect or engineer with professional competence appropriate to the project who shall (i) advise such public body regarding the use of construction management or design-build for that project and (ii) assist such public body with the preparation of the Request for Proposal and the evaluation of such proposals.

C. A written determination shall be made in advance by the local public body that competitive sealed bidding is not practicable or fiscally advantageous, and such writing shall document the basis for the determination to utilize construction management or design-build. The determination shall be included in the Request for Qualifications and be maintained in the procurement file.

D. Procedures adopted by a local public body for construction management pursuant to this article shall include the following requirements:

1. Construction management contracts may be utilized for projects where the project cost is expected to be more than ~~\$10~~ *\$40 million of actual construction costs*;

2. Construction management may be utilized on projects where the project cost is expected to be less than ~~\$10~~ *\$40 million of actual construction costs*, provided that (i) the project is a complex project and (ii) the project procurement method is approved by the local governing body. The written approval of the governing body shall be maintained in the procurement file;

3. Public notice of the Request for Qualifications is posted on the Department's central electronic procurement website, known as eVA, at least 30 days prior to the date set for receipt of qualification proposals;

4. The construction management contract is entered into no later than the completion of the

182 schematic phase of design, unless prohibited by authorization of funding restrictions;

183 5. Prior construction management or design-build experience or previous experience with the
184 Department's Bureau of Capital Outlay Management shall not be required as a prerequisite for award of
185 a contract. However, in the selection of a contractor, the local public body may consider the experience
186 of each contractor on comparable projects;

187 6. Construction management contracts shall require that (i) no more than 10 percent of the
188 construction work, as measured by the cost of the work, be performed by the construction manager with
189 its own forces and (ii) the remaining 90 percent of the construction work, as measured by the cost of
190 the work, be performed by subcontractors of the construction manager, which the construction manager
191 shall procure by publicly advertised, competitive sealed bidding to the maximum extent practicable;

192 7. The procedures allow for a two-step competitive negotiation process; and

193 8. Price is a critical basis for award of the contract.

194 E. Procedures adopted by a local public body for design-build construction projects shall include a
195 two-step competitive negotiation process consistent with the standards established by the Division of
196 Engineering and Buildings of the Department for state public bodies.