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HOUSE BILL NO. 416

Offered January 17, 1996

A BILL to amend and reenact §§ 11-35, 11-37, and 11-41.3 of the Code of Virginia, relating to the Public Procurement Act.

Patrons—Cantor, Katzen and Nelms; Senator: Stosch

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 11-35, 11-37, and 11-41.3 of the Code of Virginia are amended and reenacted as follows:

§ 11-35. (Effective July 1, 1996) Title; purpose; applicability.

A. This chapter may be cited as the Virginia Public Procurement Act.

B. The purpose of this chapter is to enunciate the public policies pertaining to governmental procurement from nongovernmental sources, *to include governmental procurement which may or may not result in monetary consideration for either party. This chapter shall apply whether the consideration is monetary or nonmonetary and regardless of whether the public body, the contractor, or some third party is providing the consideration.*

C. The provisions of this chapter, however, shall not apply, except as stipulated in the provisions of §§ 11-41.1, 11-49, 11-51, 11-54, 11-56 through 11-61 and 11-72 through 11-80, to any town with a population of less than 3,500 as determined by the last official United States census.

D. Except to the extent adopted by such governing body, the provisions of this chapter also shall not apply, except as stipulated in subsection E, to any county, city or town whose governing body adopts by ordinance or resolution alternative policies and procedures which are based on competitive principles and which are generally applicable to procurement of goods and services by such governing body and the agencies thereof. This exemption shall be applicable only so long as such policies and procedures, or other policies and procedures meeting the requirements of this section, remain in effect in such county, city or town. Such policies and standards may provide for incentive contracting which offers a contractor whose bid is accepted the opportunity to share in any cost savings realized by the locality when project costs are reduced by such contractor, without affecting project quality, during construction of the project. The fee, if any, charged by the project engineer or architect for determining such cost savings shall be paid as a separate cost and shall not be calculated as part of any cost savings.

Except to the extent adopted by such school board, the provisions of this chapter shall not apply, except as stipulated in subsection E, to any school division whose school board adopts by policy or regulation alternative policies and procedures which are based on competitive principles and which are generally applicable to procurement of goods and services by such school board. This exemption shall be applicable only so long as such policies and procedures, or other policies or procedures meeting the requirements of this section, remain in effect in such school division. This provision shall not exempt any school division from any centralized purchasing ordinance duly adopted by a local governing body.

E. Notwithstanding the exemptions set forth in subsection D, the provisions of §§ 11-37, 11-39, 11-40 A, 11-41 A, B, D, E, F, and H, 11-41 C, 11-41.1, 11-41.2:1, 11-42, 11-43, 11-44, 11-45 A, B, C, F, G, 11-46 B, 11-46.1, 11-46.3, 11-47.3, 11-47.4, 11-48, 11-49, 11-50, 11-51, 11-52, 11-53, 11-54, 11-55, 11-56 through 11-61, 11-62, 11-62.1 through 11-71, 11-71.1, and 11-72 through 11-80 shall apply to all counties, cities and school divisions, and to all towns having a population greater than 3,500 in the Commonwealth. The method for procurement of professional services set forth in subdivision 3 a of § 11-37 in the definition of competitive negotiation shall also apply to all counties, cities and school divisions, and to all towns having a population greater than 3,500, where the cost of the professional service is expected to exceed \$20,000.

F. The provisions of this chapter shall not apply to those contracts entered into prior to January 1, 1983, which shall continue to be governed by the laws in effect at the time those contracts were executed.

G. To the end that public bodies in the Commonwealth obtain high quality goods and services at reasonable cost, that all procurement procedures be conducted in a fair and impartial manner with avoidance of any impropriety or appearance of impropriety, that all qualified vendors have access to public business and that no offeror be arbitrarily or capriciously excluded, it is the intent of the General Assembly that competition be sought to the maximum feasible degree, that individual public bodies enjoy broad flexibility in fashioning details of such competition, that the rules governing contract awards be made clear in advance of the competition, that specifications reflect the procurement needs of the

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60 purchasing body rather than being drawn to favor a particular vendor, and that purchaser and vendor
61 freely exchange information concerning what is sought to be procured and what is offered.

62 H. Notwithstanding the foregoing provisions of this section, the selection of services by the Virginia
63 Retirement System and the Board of the Virginia Higher Education Tuition Trust Fund related to the
64 management, purchase or sale of authorized investments, including but not limited to actuarial services,
65 shall be governed by the standards set forth in §§ 51.1-124.30 and 23-38.80, respectively, and shall not
66 be subject to the provisions of this chapter.

67 I. The provisions of this chapter shall apply to procurement of any construction or planning and
68 design services for construction by a Virginia not-for-profit corporation or organization not otherwise
69 specifically exempted when the planning, design or construction is funded by state appropriations greater
70 than \$10,000 unless the Virginia not-for-profit corporation or organization is obligated to conform to
71 procurement procedures which are established by federal statutes or regulations, whether or not those
72 federal procedures are in conformance with the provisions of this chapter.

73 § 11-37. Definitions.

74 The words defined in this section shall have the meanings set forth below throughout this chapter.

75 "Competitive sealed bidding" is a method of contractor selection which includes the following
76 elements:

77 1. Issuance of a written Invitation to Bid containing or incorporating by reference the specifications
78 and contractual terms and conditions applicable to the procurement. Unless the public body has provided
79 for prequalification of bidders, the Invitation to Bid shall include a statement of any requisite
80 qualifications of potential contractors. When it is impractical to prepare initially a purchase description
81 to support an award based on prices, an Invitation to Bid may be issued requesting the submission of
82 unpriced offers to be followed by an Invitation to Bid limited to those bidders whose offers have been
83 qualified under the criteria set forth in the first solicitation.

84 2. Public notice of the Invitation to Bid at least ten days prior to the date set for receipt of bids by
85 posting in a designated public area, or publication in a newspaper of general circulation, or both. In
86 addition, bids may be solicited directly from potential contractors. Any additional solicitations shall
87 include businesses selected from a list made available by the Department of Minority Business
88 Enterprise.

89 3. Public opening and announcement of all bids received.

90 4. Evaluation of bids based upon the requirements set forth in the invitation, which may include
91 special qualifications of potential contractors, life-cycle costing, value analysis, and any other criteria
92 such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose, which
93 are helpful in determining acceptability.

94 5. Award to the lowest responsive and responsible bidder. When the terms and conditions of multiple
95 bids are so provided in the Invitation to Bid, awards may be made to more than one bidder.

96 6. Competitive sealed bidding shall not be required for procurement of professional services.

97 "Competitive negotiation" is a method of contractor selection which includes the following elements:

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

102 2. Public notice of the Request for Proposal at least ten days prior to the date set for receipt of
103 proposals by posting in a public area normally used for posting of public notices and by publication in a
104 newspaper or newspapers of general circulation in the area in which the contract is to be performed so
105 as to provide reasonable notice to the maximum number of offerors that can be reasonably anticipated to
106 submit proposals in response to the particular request. In addition, proposals may be solicited directly
107 from potential contractors.

108 3. a. Procurement of professional services. - The public body shall engage in individual discussions
109 with two or more offerors deemed fully qualified, responsible and suitable on the basis of initial
110 responses and with emphasis on professional competence, to provide the required services. Repetitive
111 informal interviews shall be permissible. The offerors shall be encouraged to elaborate on their
112 qualifications and performance data or staff expertise pertinent to the proposed project, as well as
113 alternative concepts. The Request for Proposal shall not, however, request that offerors furnish estimates
114 of man-hours or cost for services. At the discussion stage, the public body may discuss nonbinding
115 estimates of total project costs, including, but not limited to, life-cycle costing, and where appropriate,
116 nonbinding estimates of price for services. Proprietary information from competing offerors shall not be
117 disclosed to the public or to competitors. At the conclusion of discussion, outlined in this subdivision,
118 on the basis of evaluation factors published in the Request for Proposal and all information developed in
119 the selection process to this point, the public body shall select in the order of preference two or more
120 offerors whose professional qualifications and proposed services are deemed most meritorious.
121 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~~ *suspended* and negotiations conducted with the offeror ranked second, and so on until such a contract can be negotiated at a fair and reasonable price. 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.

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

b. Procurement of other than professional services. - 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 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. 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.

"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.

"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.

"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 the definition of professional services.

"Potential bidder or offeror" for the purposes of §§ 11-66 and 11-70 means a person who, at the time a public body negotiates and awards or proposes to award a contract, is engaged in the sale or lease of goods, or the sale of services, insurance or construction, of the type to be procured under such contract, and who at such time is eligible and qualified in all respects to perform that contract, and who would have been eligible and qualified to submit a bid or proposal had the contract been procured through competitive sealed bidding or competitive negotiation.

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

"Public body" means any legislative, executive or judicial body, agency, office, department, authority, post, commission, committee, institution, board or political subdivision created by law to exercise some sovereign power or to perform some governmental duty, and empowered by law to undertake the activities described in this chapter.

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

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

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

"Services" means any work performed by an independent contractor wherein the service rendered

183 does not consist primarily of acquisition of equipment or materials, or the rental of equipment, materials
184 and supplies.

185 "Sheltered workshop" means a work-oriented rehabilitative facility with a controlled working
186 environment and individual goals which utilizes work experience and related services for assisting the
187 handicapped person to progress toward normal living and a productive vocational status.

188 § 11-41.3. Purchase of certain software exempt from competition.

189 Institutions of higher education may enter into separate agreements, without competition, with
190 software developers who offer their product for instructional use to all such institutions on equal terms
191 at a price which is at least twenty-five percent below the price of the product on the ~~Department of~~
192 ~~Information Technology's competitively bid Hardware/Software Contract List~~ *Department of General*
193 *Service's applicable contract list*. Any such agreements and applicable software license agreements shall
194 be approved by the office of the Attorney General prior to acceptance by the institution.