

VIRGINIA ACTS OF ASSEMBLY -- 1997 RECONVENED SESSION

CHAPTER 864

An Act to amend and reenact §§ 11-65, 11-66, 11-68, and 11-70 of the Code of Virginia, relating to the Public Procurement Act; methods of procurement; remedies.

[H 2331]

Approved April 2, 1997

Be it enacted by the General Assembly of Virginia:

1. That §§ 11-65, 11-66, 11-68, and 11-70 of the Code of Virginia are amended and reenacted as follows:

§ 11-65. Determination of nonresponsibility.

A. Any bidder who, despite being the apparent low bidder, is determined not to be a responsible bidder for a particular contract shall be notified in writing. Such notice shall state the basis for the determination, which shall be final unless the bidder appeals the decision within ten days by invoking administrative procedures meeting the standards of § 11-71, if available, or in the alternative, by instituting legal action as provided in § 11-70. *Following public opening and announcement of bids received on an Invitation to Bid, the public body shall evaluate the bids in accordance with element 4 of the definition of "Competitive sealed bidding" in § 11-37. At the same time, the public body shall determine whether the apparent low bidder is responsible. If the public body so determines, then it may proceed with an award in accordance with element 5 of the definition of "Competitive sealed bidding" in § 11-37. If the public body determines that the apparent low bidder is not responsible, it shall proceed as follows:*

1. Prior to the issuance of a written determination of nonresponsibility, the public body shall (i) notify the apparent low bidder in writing of the results of the evaluation, (ii) disclose the factual support for the determination, and (iii) allow the apparent low bidder an opportunity to inspect any documents which relate to the determination, if so requested by the bidder within five business days after receipt of the notice.

2. Within ten business days after receipt of the notice, the bidder may submit rebuttal information challenging the evaluation. The public body shall issue its written determination of responsibility based on all information in the possession of the public body, including any rebuttal information, within five business days of the date the public body received such rebuttal information. At the same time, the public body shall notify the bidder in writing of its determination.

3. Such notice shall state the basis for the determination, which shall be final unless the bidder appeals the decision within ten days by invoking administrative procedures meeting the standards of § 11-71, if available, or in the alternative by instituting legal action as provided in § 11-70.

4. The provisions of this subsection shall not apply to procurements involving the prequalification of bidders and the rights of any potential bidders under such prequalification to appeal a decision that such bidders are not responsible.

B. If, upon appeal pursuant to § 11-70 or § 11-71, it is determined that the decision of the public body was *not an honest exercise of discretion, but rather was arbitrary or capricious or not in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms or conditions of the Invitation to Bid*, and the award of the contract in question has not been made, the sole relief shall be a finding that the bidder is a responsible bidder for the contract in question. If it is determined that the decision of the public body was *not an honest exercise of discretion, but rather was arbitrary or capricious or not in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms or conditions of the Invitation to Bid*, the relief shall be as set forth in subsection B of § 11-66 B.

C. A bidder contesting a determination that he is not a responsible bidder for a particular contract shall proceed under this section, and may not protest the award or proposed award under § 11-66.

D. Nothing contained in this section shall be construed to require a public body, when procuring by competitive negotiation, to furnish a statement of the reasons why a particular proposal was not deemed to be the most advantageous.

§ 11-66. Protest of award or decision to award.

A. Any bidder or offeror, who desires to protest the award or decision to award a contract shall submit such protest in writing to the public body, or an official designated by the public body, no later than ten days after the award or the announcement of the decision to award, whichever occurs first. Any potential bidder or offeror on a contract negotiated on a sole source or emergency basis who desires to protest the award or decision to award such contract shall submit such protest in the same manner no later than ten days after posting or publication of the notice of such contract as provided in § 11-41. However, if the protest of any actual or potential bidder or offeror depends in whole or in part upon

information contained in public records pertaining to the procurement transaction which are subject to inspection under § 11-52, then the time within which the protest must be submitted shall expire ten days after those records are available for inspection by such bidder or offeror under § 11-52, or at such later time as provided in this section. No protest shall lie for a claim that the selected bidder or offeror is not a responsible bidder or offeror. The written protest shall include the basis for the protest and the relief sought. The public body or designated official shall issue a decision in writing within ten days stating the reasons for the action taken. This decision shall be final unless the bidder or offeror appeals within ten days of the written decision by invoking administrative procedures meeting the standards of § 11-71, if available, or in the alternative by instituting legal action as provided in § 11-70. *Nothing in this subsection shall be construed to permit a bidder to challenge the validity of the terms or conditions of the Invitation to Bid or Request for Proposal.*

B. If prior to an award it is determined that the decision to award is arbitrary or capricious, then the sole relief shall be a finding to that effect. The public body shall cancel the proposed award or revise it to comply with the law. If, after an award, it is determined that an award of a contract was arbitrary or capricious, then the sole relief shall be as hereinafter provided. Where the award has been made but performance has not begun, the performance of the contract may be enjoined. Where the award has been made and performance has begun, the public body may declare the contract void upon a finding that this action is in the best interest of the public. Where a contract is declared void, the performing contractor shall be compensated for the cost of performance up to the time of such declaration. In no event shall the performing contractor be entitled to lost profits.

C. Where a public body, an official designated by that public body, or an appeals board determines, after a hearing held following reasonable notice to all bidders, that there is probable cause to believe that a decision to award was based on fraud or corruption or on an act in violation of Article 4 (§ 11-72 et seq.) of this chapter, the public body, designated official or appeals board may enjoin the award of the contract to a particular bidder.

§ 11-68. Stay of award during protest.

An award need not be delayed for the period allowed a bidder or offeror to protest, but in the event of a timely protest *as provided in § 11-66, or the filing of a timely legal action as provided in § 11-70*, no further action to award the contract will be taken unless there is a written determination that proceeding without delay is necessary to protect the public interest or unless the bid or offer would expire.

§ 11-70. Legal actions.

A. A bidder or offeror, actual or prospective, who is refused permission or disqualified from participation in bidding or competitive negotiation, or who is determined not to be a responsible bidder or offeror for a particular contract, may bring an action in the appropriate circuit court challenging that decision, which shall be reversed only if the petitioner establishes that the decision was *not an honest exercise of discretion, but rather was arbitrary or capricious or not in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms or conditions of the Invitation to Bid*, or, in the case of denial of prequalification, that the decision to deny prequalification was not based upon the criteria for denial of prequalification set forth in subsection B of § 11-46. *In the event the apparent low bidder, having been previously determined by the public body to be not responsible in accordance with § 11-37, is found by the court to be a responsible bidder, the court may direct the public body to award the contract, forthwith, to such bidder in accordance with the requirements of this section and the Invitation to Bid. The provisions of subsection B of § 11-66 shall apply to any such award directed by the court.*

B. A bidder denied withdrawal of a bid under § 11-64 may bring an action in the appropriate circuit court challenging that decision, which shall be reversed only if the bidder establishes that the decision of the public body was clearly erroneous.

C. A bidder, offeror or contractor, or a potential bidder or offeror on a contract negotiated on a sole source or emergency basis in the manner provided in § 11-41, whose protest of an award or decision to award under § 11-66 is denied, may bring an action in the appropriate circuit court challenging a proposed award or the award of a contract, which shall be reversed only if the petitioner establishes that the proposed award or the award is not an honest exercise of discretion, but rather is arbitrary or capricious or not in accordance with the Constitution of Virginia, ~~statutes, regulations~~ *applicable state law or regulation*, or the terms and conditions of the Invitation to Bid or Request for Proposal.

D. If injunctive relief is granted, the court, upon request of the public body, shall require the posting of reasonable security to protect the public body.

E. A contractor may bring an action involving a contract dispute with a public body in the appropriate circuit court.

F. A bidder, offeror or contractor need not utilize administrative procedures meeting the standards of § 11-71, if available, but if those procedures are invoked by the bidder, offeror or contractor, the procedures shall be exhausted prior to instituting legal action concerning the same procurement transaction unless the public body agrees otherwise.

G. Nothing herein shall be construed to prevent a public body from instituting legal action against a

contractor.