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HOUSE BILL NO. 2331

Offered January 17, 1997

A BILL to amend and reenact §§ 11-63, 11-65, 11-66, 11-68, and 11-70 of the Code of Virginia, relating to the Public Procurement Act; remedies.

Patrons—Diamonstein, Drake, Howell, McDonnell, Purkey, Tata and Wardrup

Referred to Committee on General Laws

Be it enacted by the General Assembly of Virginia:

1. That §§ 11-63, 11-65, 11-66, 11-68, and 11-70 of the Code of Virginia are amended and reenacted as follows:

§ 11-63. Ineligibility.

A. Any bidder, offeror or contractor refused permission to participate, or disqualified from participation, in public contracts shall be notified in writing. Such notice shall state the reasons for the action taken. This decision shall be final unless the bidder, offeror, or contractor appeals within thirty days of receipt 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.

B. Prior to issuance of the disqualification, the public body shall provide written notice to the bidder, offeror or contractor of the proposed disqualification action. The notice shall state the reasons for the proposed disqualification action. Within five business days after receipt of the notice, the bidder, offeror or contractor may inspect any documents which relate to the proposed action.

C. Within ten business days after receipt of the notice, the bidder, offeror or contractor may submit rebuttal information challenging the proposed disqualification action. The public body shall reexamine the proposed disqualification action based on all information in the possession of the public body, including any rebuttal information.

D. If the reexamination by the public body reveals that the bidder, offeror or contractor should be allowed permission to participate in public contracts, the proposed disqualification action shall be canceled.

If the reexamination by the public body reveals that the bidder, offeror or contractor should be refused permission to participate, or disqualified from participation, in public contracts, the public body shall so notify him. The notice shall state the basis for the disqualification action, which shall be final unless the bidder, offeror or contractor appeals the decision within ten days by invoking administrative procedures meeting the standard of § 11-71, if available, or in the alternative by instituting legal action as provided in § 11-70.

BE. If, upon appeal, it is determined that the action taken was arbitrary or capricious, or not in accordance with the Constitution of Virginia, statutes or regulations bidder, offeror or contractor should not be refused permission to participate, or disqualified from participation, in public contracts, the sole relief shall be restoration of eligibility.

§ 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 bidder is not or may not be 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.

60 3. Any bidder who the public body determines is not responsible shall be notified in writing. Such
61 notice shall state the basis for the determination, which shall be final unless the bidder appeals the
62 decision within ten days by invoking administrative procedures meeting the standards of § 11-71, if
63 available, or in the alternative by instituting legal action as provided in § 11-70.

64 B. If, upon appeal, it is determined that the ~~decision of the public body was arbitrary or capricious~~
65 ~~apparent low bidder satisfies the definition of a responsible bidder contained in § 11-37~~, and the award
66 of the contract in question has not been made, the sole relief shall be a finding that the bidder is a
67 responsible bidder for the contract in question. If it is determined that the ~~decision of the public body~~
68 ~~was arbitrary or capricious~~ ~~bidder is responsible~~, the relief shall be as set forth in *subdivision B of*
69 § 11-66 B.

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

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

75 § 11-66. Protest of award or decision to award.

76 A. Any bidder or offeror, who desires to protest the award or decision to award a contract shall
77 submit such protest in writing to the public body, or an official designated by the public body, no later
78 than ten days after the award or the announcement of the decision to award, whichever occurs first. Any
79 potential bidder or offeror on a contract negotiated on a sole source or emergency basis who desires to
80 protest the award or decision to award such contract shall submit such protest in the same manner no
81 later than ten days after posting or publication of the notice of such contract as provided in § 11-41.
82 However, if the protest of any actual or potential bidder or offeror depends in whole or in part upon
83 information contained in public records pertaining to the procurement transaction which are subject to
84 inspection under § 11-52, then the time within which the protest must be submitted shall expire ten days
85 after those records are available for inspection by such bidder or offeror under § 11-52, or at such later
86 time as provided in this section. No protest shall lie for a claim that the selected bidder or offeror is not
87 a responsible bidder or offeror. The written protest shall include the basis for the protest and the relief
88 sought. The public body or designated official shall issue a decision in writing within ten days stating
89 the reasons for the action taken. This decision shall be final unless the bidder or offeror appeals within
90 ten days of the written decision by invoking administrative procedures meeting the standards of § 11-71,
91 if available, or in the alternative by instituting legal action as provided in § 11-70.

92 B. If prior to an award it is determined that the decision to award is arbitrary or capricious *or not in*
93 *accordance with the Constitution of Virginia, state law or regulations or the terms and conditions of the*
94 *Invitation to Bid or Request for Proposal*, then the sole relief shall be a finding to that effect. The
95 public body shall cancel the proposed award or revise it to comply with the law. If, after an award, it is
96 determined that an award of a contract was arbitrary or capricious *or not in accordance with the*
97 *Constitution of Virginia, state law or regulations or the terms and conditions of the Invitation to Bid or*
98 *Request for Proposal*, then the sole relief shall be as hereinafter provided. Where the award has been
99 made but performance has not begun, the performance of the contract may be enjoined. Where the
100 award has been made and performance has begun, the public body may declare the contract void upon a
101 finding that this action is in the best interest of the public. Where a contract is declared void, the
102 performing contractor shall be compensated for the cost of performance up to the time of such
103 declaration. In no event shall the performing contractor be entitled to lost profits.

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

109 § 11-68. Stay of award during protest.

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

115 § 11-70. Legal actions.

116 A. A bidder or offeror, actual or prospective, who is refused permission *to participate*, or disqualified
117 from participation, in bidding or competitive negotiation, or who is determined not to be a responsible
118 bidder or offeror for a particular contract, may bring an action in the appropriate circuit court
119 challenging ~~that the public body's decision, which~~. *In any such action, the public body's decision shall*
120 *be reversed only if the petitioner establishes that the decision was arbitrary or capricious, based on all of*
121 *the information in the possession of the public body at the time, the bidder or offeror was (i) refused*

122 *permission to participate, or disqualified from participation in bidding, or determined not to be*
123 *responsible, (ii) qualified for participation under the terms and conditions of the Invitation to Bid or*
124 *Request for Proposal, or (iii) a responsible bidder as defined in § 11-37 or, in the case of denial of*
125 *prequalification, that the decision to deny prequalification was not based upon the criteria for denial of*
126 *prequalification set forth in subsection B of § 11-46.*

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

130 C. A bidder, offeror or contractor, or a potential bidder or offeror on a contract negotiated on a sole
131 source or emergency basis in the manner provided in § 11-41, whose protest of an award or decision to
132 award under § 11-66 is denied, may bring an action in the appropriate circuit court challenging a
133 proposed award or the award of a contract, which shall be reversed only if the petitioner establishes that
134 the proposed award or the award is not an honest exercise of discretion, but rather is arbitrary or
135 capricious or not in accordance with the Constitution of Virginia, ~~statutes~~, *state law or regulations* or the
136 terms and conditions of the Invitation to Bid or Request for Proposal. *In the event that the proposed or*
137 *actual award is reversed, the court may direct the award of the contract to the lowest responsible and*
138 *responsive bidder under the requirement of this section and the Invitation to Bid or Request for*
139 *Proposal.*

140 D. If injunctive relief is granted, the court, upon request of the public body, shall require the posting
141 of reasonable security to protect the public body. *In the event the decision of the public body is later*
142 *reversed by the court, the court may direct the public body to reimburse the bidder, offeror or*
143 *contractor for the costs incurred in posting such security.*

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

146 F. A bidder, offeror or contractor need not utilize administrative procedures meeting the standards of
147 § 11-71, if available, but if those procedures are invoked by the bidder, offeror or contractor, the
148 procedures shall be exhausted prior to instituting legal action concerning the same procurement
149 transaction unless the public body agrees otherwise.

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