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HOUSE BILL NO. 2331

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Joint Conference Committee
on February 22, 1997)

(Patron Prior to Substitute—Delegate Diamonstein)

A BILL to amend and reenact §§ 11-41, 11-65, 11-66, 11-68, and 11-70 of the Code of Virginia, relating to the Public Procurement Act; methods of procurement; remedies.

Be it enacted by the General Assembly of Virginia:

1. That §§ 11-41, 11-65, 11-66, 11-68, and 11-70 of the Code of Virginia are amended and reenacted as follows:

§ 11-41. Methods of procurement.

A. All public contracts with nongovernmental contractors for the purchase or lease of goods, or for the purchase of services, insurance, or construction, shall be awarded after competitive sealed bidding, or competitive negotiation as provided in this section, unless otherwise authorized by law.

B. Professional services shall be procured by competitive negotiation.

C. 1. Upon a determination made in advance by the public body and set forth in writing that competitive sealed bidding is either not practicable or not fiscally advantageous to the public, goods, services, or insurance may be procured by competitive negotiation. The writing shall document the basis for this determination.

Upon a written determination made in advance by (i) the Governor or his designee in the case of a procurement by the Commonwealth or by a department, agency or institution thereof or (ii) the local governing body in the case of a procurement by a political subdivision of the Commonwealth, that competitive negotiation is either not practicable or not fiscally advantageous, insurance may be procured through a licensed agent or broker selected in the manner provided for the procurement of things other than professional services in subdivision 3 b of the definition of "competitive negotiation" in § 11-37. The basis for this determination shall be documented in writing.

2. Construction may be procured only by competitive sealed bidding, except that competitive negotiation may be used in the following instances upon a determination made in advance by the public body and set forth in writing that competitive sealed bidding is either not practicable or not fiscally advantageous to the public, which writing shall document the basis for this determination:

(i) By the Commonwealth, its departments, agencies and institutions on a fixed price design-build basis or construction management basis under § 11-41.2;

(ii) By any public body for the alteration, repair, renovation or demolition of buildings when the contract is not expected to cost more than \$500,000;

(iii) By any public body for the construction of highways and any draining, dredging, excavation, grading or similar work upon real property; or

(iv) As otherwise provided in § 11-41.2:1.

D. Upon a determination in writing that there is only one source practicably available for that which is to be procured, a contract may be negotiated and awarded to that source without competitive sealed bidding or competitive negotiation. The writing shall document the basis for this determination. The public body shall issue a written notice stating that only one source was determined to be practicably available, and identifying that which is being procured, the contractor selected, and the date on which the contract was or will be awarded. This notice shall be posted in a designated public area or published in a newspaper of general circulation on the day the public body awards or announces its decision to award the contract, whichever occurs first.

E. In case of emergency, a contract may be awarded without competitive sealed bidding or competitive negotiation; however, such procurement shall be made with such competition as is practicable under the circumstances. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file. The public body shall issue a written notice stating that the contract is being awarded on an emergency basis, and identifying that which is being procured, the contractor selected, and the date on which the contract was or will be awarded. This notice shall be posted in a designated public area or published in a newspaper of general circulation on the day the public body awards or announces its decision to award the contract, whichever occurs first, or as soon thereafter as is practicable.

F. A public body may establish purchase procedures, if adopted in writing, not requiring competitive sealed bids or competitive negotiation for single or term contracts if the aggregate or the sum of all phases is not expected to exceed \$30,000; however, such small purchase procedures shall provide for competition wherever practicable. *Those senior institutions of higher education which confer doctoral degrees in more than two fields of study and have received authority to (i) make sole source*

60 *procurements or (ii) develop purchasing policies locally as approved by the Department of General*
61 *Services, may establish purchase procedures, if adopted in writing and approved by the Department of*
62 *General Services, not requiring competitive sealed bids or competitive negotiation for single or term*
63 *contracts that in the aggregate or the sum of all phases are not reasonably expected to exceed*
64 *\$100,000.*

65 G. Any local school board may authorize any of its public schools or its school division to enter into
66 contracts providing that caps and gowns, photographs, class rings, yearbooks and graduation
67 announcements will be available for purchase or rental by students, parents, faculty or other persons
68 using nonpublic money through the use of competitive negotiation as provided in this chapter,
69 competitive sealed bidding not necessarily being required for such contracts. The Superintendent of
70 Public Instruction may provide assistance to public school systems regarding this chapter and other
71 related laws.

72 H. Upon a determination made in advance by the local governing body and set forth in writing that
73 the purchase of goods, products or commodities from a public auction sale is in the best interests of the
74 public, such items may be purchased at the auction. The writing shall document the basis for this
75 determination.

76 § 11-65. Determination of nonresponsibility.

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

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

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

98 3. Such notice shall state the basis for the determination, which shall be final unless the bidder
99 appeals the decision within ten days by invoking administrative procedures meeting the standards of
100 § 11-71, if available, or in the alternative by instituting legal action as provided in § 11-70.

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

104 B. If, upon appeal pursuant to § 11-70 or § 11-71, it is determined that the decision of the public
105 body was arbitrary or capricious, and the award of the contract in question has not been made, the sole
106 relief shall be a finding that the bidder is a responsible bidder for the contract in question. If it is
107 determined that the decision of the public body was arbitrary or capricious, the relief shall be as set
108 forth in subsection B of § 11-66 B.

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

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

114 § 11-66. Protest of award or decision to award.

115 A. Any bidder or offeror, who desires to protest the award or decision to award a contract shall
116 submit such protest in writing to the public body, or an official designated by the public body, no later
117 than ten days after the award or the announcement of the decision to award, whichever occurs first. Any
118 potential bidder or offeror on a contract negotiated on a sole source or emergency basis who desires to
119 protest the award or decision to award such contract shall submit such protest in the same manner no
120 later than ten days after posting or publication of the notice of such contract as provided in § 11-41.
121 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.

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.

A decision to award shall be deemed to be arbitrary and capricious if it is not in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms and conditions of the Invitation to Bid or Request for Proposal. Nothing in this subsection shall be construed to permit a bidder to challenge the validity of the terms and conditions of the Invitation to Bid or Request for Proposal.

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 arbitrary or capricious, 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.

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. *In the event the apparent low bidder, having been previously determined by the public body to be not responsible, is found by the court to be responsible, the court may direct the award of the contract to such bidder in accordance with the requirements of this section and the Invitation to Bid or Request for Proposal. The provisions of subsection B of § 11-66 shall apply to any such award.*

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

183 procedures shall be exhausted prior to instituting legal action concerning the same procurement
184 transaction unless the public body agrees otherwise.
185 G. Nothing herein shall be construed to prevent a public body from instituting legal action against a
186 contractor.