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HOUSE BILL NO. 850

Offered January 26, 1998

A BILL to amend and reenact §§ 11-37, 11-42, 11-53, 11-63, 11-65, and 11-70 of the Code of Virginia, relating to the Public Procurement Act; ineligibility to participate in public contracts; legal actions.

Patrons—Diamonstein and McDonnell

Referred to Committee on General Laws

Be it enacted by the General Assembly of Virginia:

1. That §§ 11-37, 11-42, 11-53, 11-63, 11-65, and 11-70 of the Code of Virginia are amended and reenacted as follows:

§ 11-37. Definitions.

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

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

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

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

3. Public opening and announcement of (i) all bids received and (ii) the public body's bid estimate for the procurement.

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

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

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

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

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

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

3. a. Procurement of professional services. The public body shall engage in individual discussions with two or more offerors deemed fully qualified, responsible and suitable on the basis of initial responses and with emphasis on professional competence, to provide the required services. Repetitive informal interviews shall be permissible. The offerors shall be encouraged to elaborate on their qualifications and performance data or staff expertise pertinent to the proposed project, as well as alternative concepts. The Request for Proposal shall not, however, request that offerors furnish estimates of man-hours or cost for services. At the discussion stage, the public body may discuss nonbinding estimates of total project costs, including, but not limited to, life-cycle costing, and where appropriate, nonbinding estimates of price for services. Proprietary information from competing offerors shall not be disclosed to the public or to competitors. At the conclusion of discussion, outlined in this subdivision, on the basis of evaluation factors published in the Request for Proposal and all information developed in

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60 the selection process to this point, the public body shall select in the order of preference two or more
61 offerors whose professional qualifications and proposed services are deemed most meritorious.
62 Negotiations shall then be conducted, beginning with the offeror ranked first. If a contract satisfactory
63 and advantageous to the public body can be negotiated at a price considered fair and reasonable, the
64 award shall be made to that offeror. Otherwise, negotiations with the offeror ranked first shall be
65 formally terminated and negotiations conducted with the offeror ranked second, and so on until such a
66 contract can be negotiated at a fair and reasonable price. Should the public body determine in writing
67 and in its sole discretion that only one offeror is fully qualified, or that one offeror is clearly more
68 highly qualified and suitable than the others under consideration, a contract may be negotiated and
69 awarded to that offeror.

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

75 b. Procurement of other than professional services. Selection shall be made of two or more offerors
76 deemed to be fully qualified and best suited among those submitting proposals, on the basis of the
77 factors involved in the Request for Proposal, including price if so stated in the Request for Proposal.
78 Negotiations shall then be conducted with each of the offerors so selected. Price shall be considered, but
79 need not be the sole determining factor. After negotiations have been conducted with each offeror so
80 selected, the public body shall select the offeror which, in its opinion, has made the best proposal, and
81 shall award the contract to that offeror. Should the public body determine in writing and in its sole
82 discretion that only one offeror is fully qualified, or that one offeror is clearly more highly qualified
83 than the others under consideration, a contract may be negotiated and awarded to that offeror.

84 "Construction" means building, altering, repairing, improving or demolishing any structure, building
85 or highway, and any draining, dredging, excavation, grading or similar work upon real property.

86 "Construction management contract" means a contract in which a party is retained by the owner to
87 coordinate and administer contracts for construction services for the benefit of the owner, and may also
88 include, if provided in the contract, the furnishing of construction services to the owner.

89 "Design-build contract" means a contract between a public body and another party in which the party
90 contracting with the public body agrees to both design and build the structure, roadway or other item
91 specified in the contract.

92 "Goods" means all material, equipment, supplies, printing, and automated data processing hardware
93 and software.

94 "Informality" means a minor defect or variation of a bid or proposal from the exact requirements of
95 the Invitation to Bid, or the Request for Proposal, which does not affect the price, quality, quantity or
96 delivery schedule for the goods, services or construction being procured.

97 "Multiphase professional services contract" means a contract for the providing of professional
98 services where the total scope of work of the second or subsequent phase of the contract cannot be
99 specified without the results of the first or prior phase of the contract.

100 "Nonprofessional services" means any services not specifically identified as professional services in
101 the definition of professional services.

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

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

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

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

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

121 "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 does not consist primarily of acquisition of equipment or materials, or the rental of equipment, materials and supplies.

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

§ 11-42. Cancellation, rejection of bids; waiver of informalities.

A. ~~An~~ Prior to the public opening and announcement of bids, an Invitation to Bid, a Request for Proposal, any other solicitation, or any and all bids or proposals, may be canceled or rejected. The reasons for cancelation or rejection shall be made part of the contract file.

B. A public body may waive informalities in bids.

C. After bids have been opened, a contract award shall be made to the responsible bidder who submitted the lowest responsive bid, unless there is a compelling reason to reject all bids and cancel the solicitation. The reasons for cancellation or rejection shall be made part of the contract file.

D. Solicitations may be canceled and all bids rejected before the award of a contract but after the opening of the bid when, consistent with subsection C, the public body determines in writing that:

1. The specifications cited in the solicitation were materially inadequate or ambiguous;
2. The supplies or services solicited are no longer required;
3. The bids received indicate that the needs of the public body can be satisfied by less expensive goods or services which are materially different from those solicited;
4. All other responsive bids are at unreasonable prices;
5. Only one bid is received and the public body is unable to determine the reasonableness of the bid price;

6. The bids were submitted in bad faith; or

7. No responsive bid was received from a responsible bidder.

§ 11-53. Negotiation with lowest responsible bidder.

Unless canceled or rejected, a responsive bid from the lowest responsible bidder shall be accepted as submitted, except that if the bid from the lowest responsible bidder exceeds available funds and the public body's bid estimate for the procurement was announced at bid opening in accordance with element 3 of the definition of "Competitive sealed bidding" in § 11-37, the public body may negotiate with the apparent low bidder to obtain a contract price within available funds; however, such negotiation may be undertaken only under conditions and procedures described in writing and approved by the public body prior to issuance of the Invitation to Bid and summarized therein.

§ 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. Prior to the issuance of a written determination of disqualification, the public body shall (i) notify the bidder in writing of the results of the evaluation, (ii) disclose the factual support for the determination, and (iii) allow the 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.~~

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.

If the evaluation reveals that the bidder, offeror or contractor should be allowed permission to participate in the public contract, the public body shall cancel the proposed disqualification action. If the evaluation reveals that the bidder should be refused permission to participate, or disqualified from participation, in the public contract, the public body shall so notify the bidder, offeror or contractor. Such notice shall state the basis for the determination, which shall be final unless the bidder appeals the decision within ten days after receipt of the notice 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, 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 the public contract, the sole relief shall be restoration of eligibility.

§ 11-65. Determination of nonresponsibility.

A. 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 *after receipt of the notice* 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.

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.

§ 11-70. 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, 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.

245 E. A contractor *or any person claiming under him or on behalf of a subcontractor of the contractor,*
246 *or a person furnishing materials for the contract to the contractor* may bring an action involving a
247 contract dispute with a public body in the appropriate circuit court.

248 F. A bidder, offeror or contractor need not utilize administrative procedures meeting the standards of
249 § 11-71, if available, but if those procedures are invoked by the bidder, offeror or contractor, the
250 procedures shall be exhausted prior to instituting legal action concerning the same procurement
251 transaction unless the public body agrees otherwise.

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