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HOUSE BILL NO. 2393

Offered January 21, 1999

A BILL to amend and reenact §§ 11-64, 11-65, and 11-70 of the Code of Virginia, relating to the Public Procurement Act; decisions of public bodies; standard of review.

Patrons—Cantor, Albo, Davies, McClure and Reid; Senator: Stosch

Referred to Committee on General Laws

Be it enacted by the General Assembly of Virginia:**1. That §§ 11-64, 11-65, and 11-70 of the Code of Virginia are amended and reenacted as follows:**

§ 11-64. Appeal of denial of withdrawal of bid.

A. A decision denying withdrawal of bid under the provisions of § 11-54 shall be final and conclusive unless the bidder appeals the decision within ten days after receipt of the 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 no bid bond was posted, a bidder refused withdrawal of a bid under the provisions of § 11-54, prior to appealing, shall deliver to the public body a certified check or cash bond in the amount of the difference between the bid sought to be withdrawn and the next low bid. Such security shall be released only upon a final determination that the bidder was entitled to withdraw the bid.

C. If, upon appeal, it is determined that the decision refusing withdrawal of the bid 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 sole relief shall be withdrawal of the bid.

§ 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 with return receipt requested 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.

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.

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

63 § 11-70. Legal actions.

64 A. A bidder or offeror, actual or prospective, who is refused permission or disqualified from
65 participation in bidding or competitive negotiation, or who is determined not to be a responsible bidder
66 or offeror for a particular contract, may bring an action in the appropriate circuit court challenging that
67 decision, which shall be reversed only if the petitioner establishes that the decision was not an honest
68 exercise of discretion, but rather was arbitrary or capricious or not in accordance with the Constitution
69 of Virginia, applicable state law or regulation, or the terms or conditions of the Invitation to Bid, or, in
70 the case of denial of prequalification, that the decision to deny prequalification was not based upon the
71 criteria for denial of prequalification set forth in subsection B of § 11-46. In the event the apparent low
72 bidder, having been previously determined by the public body to be not responsible in accordance with
73 § 11-37, is found by the court to be a responsible bidder, the court may direct the public body to award
74 the contract, forthwith, to such bidder in accordance with the requirements of this section and the
75 Invitation to Bid.

76 B. A bidder denied withdrawal of a bid under § 11-64 may bring an action in the appropriate circuit
77 court challenging that decision, which shall be reversed only if the bidder establishes that the decision of
78 the public body was ~~clearly erroneous~~ *not an honest exercise of discretion, but rather was arbitrary or*
79 *capricious or not in accordance with the Constitution of Virginia, applicable state law or regulation, or*
80 *the terms or conditions of the Invitation to Bid.*

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

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

90 E. A contractor may bring an action involving a contract dispute with a public body in the
91 appropriate circuit court. Notwithstanding any other provision of law, the Comptroller shall not be
92 named as a defendant in any action brought pursuant to this chapter or pursuant to § 33.1-387, except
93 for disputes involving contracts of the Office of the Comptroller or the Department of Accounts.

94 F. A bidder, offeror or contractor need not utilize administrative procedures meeting the standards of
95 § 11-71, if available, but if those procedures are invoked by the bidder, offeror or contractor, the
96 procedures shall be exhausted prior to instituting legal action concerning the same procurement
97 transaction unless the public body agrees otherwise.

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