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HOUSE BILL NO. 628

Offered January 9, 2002

Prefiled January 8, 2002

A BILL to amend and reenact § 2.2-4301 of the Code of Virginia, relating to the Public Procurement Act; definition of "responsible bidder" or "offeror."

Patron—O'Brien

Referred to Committee on General Laws**Be it enacted by the General Assembly of Virginia:****1. That § 2.2-4301 of the Code of Virginia is amended and reenacted as follows:**

§ 2.2-4301. Definitions.

As used in this chapter:

"Best value," as predetermined in the solicitation, means the overall combination of quality, price, and various elements of required services that in total are optimal relative to a public body's needs.

"Competitive negotiation" is a method of contractor selection that 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 that 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 that 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. Public notice may also be published on the Department of General Services' central electronic procurement Web site and other appropriate Web sites. Effective July 1, 2002, publishing by state agencies, departments and institutions on the public Internet procurement Web site designated by the Department of General Services shall be required. 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 the selection process to this point, the public body shall select in the order of preference two or more offerors whose professional qualifications and proposed services are deemed most meritorious. Negotiations shall then be conducted, beginning with the offeror ranked first. If a contract satisfactory and advantageous to the public body can be negotiated at a price considered fair and reasonable, the award shall be made to that offeror. Otherwise, negotiations with the offeror ranked first shall be formally terminated and negotiations conducted with the offeror ranked second, and so on until such a contract can be negotiated at a fair and reasonable price. Should the public body determine in writing and in its sole discretion that only one offeror is fully qualified, or that one offeror is clearly more highly qualified and suitable than the others under consideration, a contract may be negotiated and awarded to that offeror.

A contract for architectural or professional engineering services relating to construction projects may be negotiated by a public body, for multiple projects provided (i) the projects require similar experience and expertise, (ii) the nature of the projects is clearly identified in the Request for Proposal, and (iii) the contract term is limited to one year or when the cumulative total project fees reach the maximum cost authorized in this paragraph, whichever occurs first. Such contract may be renewable for two additional one-year terms at the option of the public body. Under such contract, (a) the fair and reasonable prices, as negotiated, shall be used in determining the cost of each project performed, (b) the sum of all projects performed in one contract term shall not exceed \$500,000 or, in the case of a state agency, as

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59 defined in § 2.2-4347, such lesser amount as may be determined by the Director of the Department of
60 General Services, except that in any locality or any authority or sanitation district with a population in
61 excess of 80,000, the sum of all such projects shall not exceed one million dollars; and (c) the project
62 fee of any single project shall not exceed \$100,000 or, in the case of a state agency, such lesser amount
63 as may be determined by the Director of the Department of General Services, except that in any locality
64 or any authority or sanitation district with a population in excess of 80,000, shall not exceed \$200,000.
65 Any unused amounts from the first contract term shall not be carried forward to the additional term.
66 Competitive negotiations for such contracts may result in awards to more than one offeror provided (1)
67 the Request for Proposal so states and (2) the public body has established procedures for distributing
68 multiple projects among the selected contractors during the contract term.

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

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

85 "Competitive sealed bidding" is a method of contractor selection, other than for professional services,
86 which includes the following elements:

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

94 2. Public notice of the Invitation to Bid at least ten days prior to the date set for receipt of bids by
95 posting in a designated public area, or publication in a newspaper of general circulation, or both. Public
96 notice may also be published on the Department of General Services' central electronic procurement
97 Web site and other appropriate Web sites. Effective July 1, 2002, posting by state agencies, departments
98 and institutions on the public Internet procurement Web site designated by the Department of General
99 Services shall be required. In addition, bids may be solicited directly from potential contractors. Any
100 additional solicitations shall include businesses selected from a list made available by the Department of
101 Minority Business Enterprise.

102 3. Public opening and announcement of all bids received.

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

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

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

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

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

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

119 "Informality" means a minor defect or variation of a bid or proposal from the exact requirements of
120 the Invitation to Bid, or the Request for Proposal, which does not affect the price, quality, quantity or

delivery schedule for the goods, services or construction being procured.

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

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

"Potential bidder or offeror" for the purposes of §§ 2.2-4360 and 2.2-4364 means a person who, at the time a public body negotiates and awards or proposes to award a contract, is engaged in the sale or lease of goods, or the sale of services, insurance or construction, of the type to be procured under the contract, and who at such time is eligible and qualified in all respects to perform that contract, and who would have been eligible and qualified to submit a bid or proposal had the contract been procured through competitive sealed bidding or competitive negotiation.

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

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

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

"Responsible bidder" or "offeror" means a person who has the capability, in all respects, to perform fully the contract requirements and the moral and business integrity and reliability that will assure good faith performance, and who has been prequalified, if required. *To be determined responsible, a bidder or offeror shall:*

1. *Have adequate financial resources to perform the contract, or the ability to obtain such resources;*
2. *Be able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments;*

3. *Have a satisfactory performance record. However, a prospective contractor shall not be determined responsible or nonresponsible solely on the basis of a lack of relevant delivery history;*

4. *Have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them, including, as appropriate, such elements as production control procedures, property control systems, quality assurance measures, and safety programs applicable to materials to be produced or services to be performed by the prospective contractor or subcontractor;*

5. *Have the necessary production, construction, and technical equipment and facilities or the ability to obtain them; and*

6. *Be otherwise qualified and eligible to receive the award under applicable laws and regulations.*

"Responsive bidder" means a person who has submitted a bid that conforms in all material respects to the Invitation to Bid.

(Expires July 1, 2003) "Reverse auctioning" means a procurement method wherein bidders are invited to bid on specified goods or nonprofessional services through real-time electronic bidding, with the award being made to the lowest responsive and responsible bidder. During the bidding process, bidders' prices are revealed and bidders shall have the opportunity to modify their bid prices for the duration of the time period established for bid opening.

"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 that utilizes work experience and related services for assisting the handicapped person to progress toward normal living and a productive vocational status.