

# VIRGINIA ACTS OF ASSEMBLY -- 2003 RECONVENED SESSION

## CHAPTER 1006

*An Act to amend and reenact § 2.2-4301 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 2.2-4321.1, relating to the Virginia Public Procurement Act; certain transactions prohibited.*

[S 938]

Approved April 2, 2003

**Be it enacted by the General Assembly of Virginia:**

**1. That § 2.2-4301 of the Code of Virginia is amended and reenacted, and that the Code of Virginia is amended by adding a section numbered 2.2-4321.1 as follows:**

§ 2.2-4301. Definitions.

As used in this chapter:

*"Affiliate" means an individual or business that controls, is controlled by, or is under common control with another individual or business. A person controls an entity if the person owns, directly or indirectly, more than 10 percent of the voting securities of the entity. For the purposes of this definition "voting security" means a security that (i) confers upon the holder the right to vote for the election of members of the board of directors or similar governing body of the business or (ii) is convertible into, or entitles the holder to receive, upon its exercise, a security that confers such a right to vote. A general partnership interest shall be deemed to be a voting security.*

*"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.*

*"Business" means any type of corporation, partnership, limited liability company, association, or sole proprietorship operated for profit.*

*"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~~ 10 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 website and other appropriate websites. Effective July 1, 2002, publishing by state agencies, departments and institutions on the public Internet procurement website 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 defined in § 2.2-4347, such lesser amount as may be determined by the Director of the Department of General Services, except that in any locality or any authority or sanitation district with a population in excess of 80,000, the sum of all such projects shall not exceed ~~one~~ \$1 million dollars; and (c) the project fee of any single project shall not exceed \$100,000 or, in the case of a state agency, such lesser amount as may be determined by the Director of the Department of General Services, except that in any locality or any authority or sanitation district with a population in excess of 80,000, such fee shall not exceed \$200,000. Any unused amounts from the first contract term shall not be carried forward to the additional term. Competitive negotiations for such contracts may result in awards to more than one offeror provided (1) the Request for Proposal so states and (2) the public body has established procedures for distributing multiple projects among the selected contractors during the contract term.

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

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

"Competitive sealed bidding" is a method of contractor selection, other than for professional services, 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~~ 10 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. Public notice may also be published on the Department of General Services' central electronic procurement website and other appropriate websites. Effective July 1, 2002, posting by state agencies, departments and institutions on the public Internet procurement website designated by the Department of General Services shall be required. 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 all bids received.

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 awards are so provided in the Invitation to Bid, awards may be made to more than one bidder.

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

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

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

specified in the contract.

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

"Informality" means a minor defect or variation of a bid or proposal from the exact requirements of 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.

"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.

§ 2.2-4321.1. *Prohibited contracts; exceptions; determination by Department of Taxation; appeal; remedies.*

*A. No state agency shall contract for goods or services with a nongovernmental source if the source, or any affiliate of the source, is subject to the provisions of § 58.1-612 and fails or refuses to collect and remit the tax on its sales delivered by any means to locations within the Commonwealth. For the purposes of this section, "state agency" means any authority, board, department, instrumentality, institution, agency or other unit of state government. State agency shall not include any public institution of higher education or any county, city or town or any local or regional governmental authority.*

*B. A state agency may contract for goods or services with a source prohibited under subsection A in the event of an emergency or where the nongovernmental source is the sole source of such goods or services.*

*C. The determination of whether a source is a prohibited source shall be made by the Department of Taxation after providing the prohibited source with notice and an opportunity to respond to the proposed determination. The Department of Taxation shall notify the Department of General Services of its determination.*

*D. The Department of General Services shall post public notice of all prohibited sources on its public internet procurement website and on other appropriate websites.*

*E. The remedies provided in Article 5 (§ 2.2-4357 et seq.) of this chapter shall not apply to any determination made pursuant to this section and the sole remedy for any adverse determination shall be as provided in subsection F.*

*F. Any source aggrieved by a determination of the Department of Taxation made under this section may apply to the Tax Commissioner for correction of the determination. The Tax Commissioner shall respond within 30 days of receipt of the application for corrective action. Within 10 days after receipt of the Tax Commissioner's response, the aggrieved source may appeal to the Circuit Court for the City of Richmond. If it is determined that the determination of the Department of Taxation was arbitrary, capricious, or not in accordance with law, the sole relief shall be restoration of the source's eligibility to contract with state agencies. No claim for damages or attorney's fees shall be awarded.*

*G. Any action of the Department of Taxation, the Department of General Services, or of any state agency under this section shall be exempt from the provisions of the Administrative Process Act (§ 2.2-4000 et seq.).*