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HOUSE BILL NO. 2039

Offered January 12, 2011

Prefiled January 11, 2011

A BILL to amend and reenact §§ 2.2-4306, 2.2-4308, and 56-575.1 of the Code of Virginia, relating to procurement by public bodies; use of certain contracting processes.

Patrons—Cox, J.A. and Peace; Senator: McDougle

Referred to Committee on General Laws

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-4306, 2.2-4308, and 56-575.1 of the Code of Virginia are amended and reenacted as follows:

§ 2.2-4306. Design-build or construction management contracts for Commonwealth authorized.

A. Notwithstanding any other provisions of law, the Commonwealth may enter into contracts on a fixed price design-build basis or construction management basis in accordance with the provisions of this section and § 2.2-1502. Procedures to implement this section and any changes to such procedures shall be adopted by the Secretary of Administration after a public hearing and reviewed by the House Committee on Appropriations and the Senate Committee on Finance.

B. Procurement of construction by the design-build method shall be a two-step competitive negotiation process. In the first step, offerors shall be requested to submit their qualifications. Based upon the information submitted and any other relevant information which the Commonwealth may obtain, no more than five offerors deemed most suitable for the project shall be selected by the Commonwealth and requested to submit proposals.

C. Design-build contracts may be used by the Commonwealth only for those types of construction projects designated in the procedures adopted by the Secretary of Administration to implement this section.

D. Construction management shall only be used for projects with a total value of \$25 million or more.

§ 2.2-4308. Design-build or construction management contracts for public bodies other than the Commonwealth; eligibility requirements; award of contract; records to be kept.

A. While the competitive sealed bid process remains the preferred method of construction procurement for public bodies in the Commonwealth, any public body other than the Commonwealth may enter into a contract for construction on a fixed price or not-to-exceed price design-build or construction management basis provided the public body complies with the requirements of this section and has obtained the approval of the Design-Build/Construction Management Review Board (the Review Board) pursuant to § 2.2-2406. Provided, however, that projects undertaken pursuant to subdivision D 2 or D 4 of § 2.2-4303 shall be exempt from approval of the Review Board.

Prior to making a determination as to the use of design-build or construction management for a specific construction project, the public body shall have in its employ or under contract a licensed architect or engineer with professional competence appropriate to the project who shall advise the public body regarding the use of design-build or construction management for that project and who shall assist the public body with the preparation of the Request for Proposal and the evaluation of such proposals.

Prior to issuing a Request for Proposal for any design-build or construction management contract for a specific construction project, the public body shall:

1. Have adopted, by ordinance or resolution, written procedures governing the selection, evaluation and award of design-build and construction management contracts. Such procedures shall be consistent with those described in this chapter for the procurement of nonprofessional services through competitive negotiation. Such procedures shall also require Requests for Proposals to include and define the criteria of such construction project in areas such as site plans; floor plans; exterior elevations; basic building envelope materials; fire protection information plans; structural, mechanical (HVAC), and electrical systems; and special telecommunications; and may define such other requirements as the public body determines appropriate for that particular construction project. Except as may otherwise be approved by the Review Board, such procedures for:

a. Design-build construction projects shall include a two-step competitive negotiation process consistent with the Review Board's regulations.

b. Construction management projects shall include selection procedures and required construction management contract terms consistent with the Review Board's regulations.

c. Construction management at-risk shall only be used for projects with a total value of \$25 million

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59 *or more.*

60 2. Have documented in writing that for a specific construction project (i) a design-build or
61 construction management contract is more advantageous than a competitive sealed bid construction
62 contract; (ii) there is a benefit to the public body by using a design-build or construction management
63 contract; and (iii) competitive sealed bidding is not practical or fiscally advantageous.

64 B. Once approved by the Review Board in accordance with § 2.2-2406, the public body may procure
65 a design-build or construction management contract for the specific construction project presented to the
66 Review Board. Unless otherwise specified in the Request for Proposal, the contract shall be awarded to
67 the fully qualified offeror who submits an acceptable proposal determined to be the best value in
68 response to the Request for Proposal.

69 C. The public body shall provide information as requested by the Review Board to allow post-project
70 evaluation by the Review Board.

71 § 56-575.1. Definitions.

72 As used in this chapter, unless the context requires a different meaning:

73 "Affected jurisdiction" means any county, city or town in which all or a portion of a qualifying
74 project is located.

75 "Appropriating body" means the body responsible for appropriating or authorizing funding to pay for
76 a qualifying project.

77 "Commission" means the State Corporation Commission.

78 "Comprehensive agreement" means the comprehensive agreement between the private entity and the
79 responsible public entity required by § 56-575.9.

80 "Develop" or "development" means to plan, design, develop, finance, lease, acquire, install, construct,
81 or expand.

82 "Interim agreement" means an agreement between a private entity and a responsible public entity that
83 provides for phasing of the development or operation, or both, of a qualifying project. Such phases may
84 include, but are not limited to, design, planning, engineering, environmental analysis and mitigation,
85 financial and revenue analysis, or any other phase of the project that constitutes activity on any part of
86 the qualifying project.

87 "Lease payment" means any form of payment, including a land lease, by a public entity to the
88 private entity for the use of a qualifying project.

89 "Material default" means any default by the private entity in the performance of its duties under
90 subsection E of § 56-575.8 that jeopardizes adequate service to the public from a qualifying project.

91 "Operate" means to finance, maintain, improve, equip, modify, repair, or operate.

92 "Private entity" means any natural person, corporation, general partnership, limited liability company,
93 limited partnership, joint venture, business trust, public benefit corporation, non-profit entity, or other
94 business entity.

95 "Public entity" means the Commonwealth and any agency or authority thereof, any county, city or
96 town and any other political subdivision of the Commonwealth, any public body politic and corporate,
97 or any regional entity that serves a public purpose.

98 "Qualifying project" means *any project totally supported by private funds and may include* (i) any
99 education facility, including, but not limited to a school building, any functionally related and
100 subordinate facility and land to a school building (including any stadium or other facility primarily used
101 for school events), and any depreciable property provided for use in a school facility that is operated as
102 part of the public school system or as an institution of higher education; (ii) any building or facility that
103 meets a public purpose and is developed or operated by or for any public entity; (iii) any improvements,
104 together with equipment, necessary to enhance public safety and security of buildings to be principally
105 used by a public entity; (iv) utility and telecommunications and other communications infrastructure; (v)
106 a recreational facility; (vi) technology infrastructure, services, and applications, including, but not limited
107 to, telecommunications, automated data processing, word processing and management information
108 systems, and related information, equipment, goods and services; (vii) any services designed to increase
109 the productivity or efficiency of the responsible public entity through the use of technology or other
110 means, (viii) any technology, equipment, or infrastructure designed to deploy wireless broadband
111 services to schools, businesses, or residential areas; (ix) any improvements necessary or desirable to any
112 unimproved locally- or state-owned real estate; or (x) any solid waste management facility as defined in
113 § 10.1-1400 that produces electric energy derived from solid waste.

114 "Responsible public entity" means a public entity that has the power to develop or operate the
115 applicable qualifying project.

116 "Revenues" means all revenues, income, earnings, user fees, lease payments, or other service
117 payments arising out of or in connection with supporting the development or operation of a qualifying
118 project, including without limitation, money received as grants or otherwise from the United States of
119 America, from any public entity, or from any agency or instrumentality of the foregoing in aid of such
120 facility.

121 "Service contract" means a contract entered into between a public entity and the private entity
122 pursuant to § 56-575.5.
123 "Service payments" means payments to the private entity of a qualifying project pursuant to a service
124 contract.
125 "State" means the Commonwealth of Virginia.
126 "User fees" mean the rates, fees or other charges imposed by the private entity of a qualifying
127 project for use of all or a portion of such qualifying project pursuant to the comprehensive agreement
128 pursuant to § 56-575.9.