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SENATE BILL NO. 1126

Offered January 12, 2011

Prefiled January 11, 2011

A BILL to amend and reenact §§ 2.2-4301 and 2.2-4337 of the Code of Virginia, relating to Virginia Public Procurement Act; transportation-related construction projects.

 Patron—Stosch

 Referred to Committee on General Laws and Technology

Be it enacted by the General Assembly of Virginia:**1. That §§ 2.2-4301 and 2.2-4337 of the Code of Virginia are amended and reenacted 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 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. In addition, offerors shall be informed of any ranking criteria that will be used by the public body in addition to the review of the professional competence of the offeror. 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. Notwithstanding the foregoing, if the terms and conditions for multiple awards are included in the

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59 Request for Proposal, a public body may award contracts to more than one offeror.

60 Should the public body determine in writing and in its sole discretion that only one offeror is fully
61 qualified, or that one offeror is clearly more highly qualified and suitable than the others under
62 consideration, a contract may be negotiated and awarded to that offeror.

63 A contract for architectural or professional engineering services relating to construction projects may
64 be negotiated by a public body, for multiple projects provided (i) the projects require similar experience
65 and expertise, (ii) the nature of the projects is clearly identified in the Request for Proposal, and (iii) the
66 contract term is limited to one year or when the cumulative total project fees reach the maximum cost
67 authorized in this paragraph, whichever occurs first. For state public bodies, such contract, except those
68 awarded for environmental, location, design and inspection work regarding highways and bridges by the
69 Commonwealth Transportation Commissioner may be renewable for four additional one-year terms at
70 the option of the public body. For local public bodies, such contract may be renewable for four
71 additional one-year terms at the option of the public body. Under such contract, (a) the fair and
72 reasonable prices, as negotiated, shall be used in determining the cost of each project performed, (b)
73 except those awarded for environmental, location, design and inspection work regarding highways and
74 bridges by the Commonwealth Transportation Commissioner, the sum of all projects performed in one
75 contract term shall not exceed \$500,000 or, in the case of a state agency, as defined in § 2.2-4347, such
76 greater amount as may be determined by the Director of the Department of General Services, not to
77 exceed \$1 million, except that in any locality or any authority or sanitation district with a population in
78 excess of 80,000, the sum of all such projects shall not exceed \$5 million; and (c) except those awarded
79 for environmental, location, design and inspection work regarding highways and bridges by the
80 Commonwealth Transportation Commissioner or for architectural and engineering services for rail and
81 public transportation projects by the Director of the Department of Rail and Public Transportation, the
82 project fee of any single project shall not exceed \$100,000 or, in the case of a state agency, such greater
83 amount as may be determined by the Director of the Department of General Services not to exceed
84 \$200,000, except that in any locality or any authority or sanitation district with a population in excess of
85 80,000, such fee shall not exceed \$1 million. Any unused amounts from the first contract term shall not
86 be carried forward to the additional term. Competitive negotiations for such contracts may result in
87 awards to more than one offeror provided (1) the Request for Proposal so states and (2) the public body
88 has established procedures for distributing multiple projects among the selected contractors during the
89 contract term. ~~For Notwithstanding any other provision in this section, for contracts for environmental~~
90 location, design and inspection work regarding highways and bridges by the Commonwealth
91 Transportation Commissioner, the ~~sum of all projects in one initial~~ contract term shall ~~not exceed \$5~~
92 ~~million and such be limited to two years or when the cumulative total project fees reach \$5 million,~~
93 ~~whichever occurs first.~~ Such contract may be renewable for two additional one-year terms at the option
94 of the Commissioner, ~~and the sum of all projects in each one-year term shall not exceed \$5 million.~~ For
95 architectural and engineering services for rail and public transportation projects by the Director of the
96 Department of Rail and Public Transportation, the sum of all projects in one contract term shall not
97 exceed \$2 million and such contract may be renewable for two additional one-year terms at the option
98 of the Commissioner.

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

104 Multiphase professional services contracts satisfactory and advantageous to a local public body for
105 environmental, location, design and inspection work regarding construction of infrastructure projects may
106 be negotiated and awarded based on qualifications at a fair and reasonable price for the first phase only,
107 when completion of the earlier phases is necessary to provide information critical to the negotiation of a
108 fair and reasonable price for succeeding phases. Prior to the procurement of any such contract, the local
109 public body shall state the anticipated intended total scope of the project and determine in writing that
110 the nature of the work is such that the best interests of such public body require awarding the contract.

111 b. Procurement of other than professional services. Selection shall be made of two or more offerors
112 deemed to be fully qualified and best suited among those submitting proposals, on the basis of the
113 factors involved in the Request for Proposal, including price if so stated in the Request for Proposal.
114 Negotiations shall then be conducted with each of the offerors so selected. Price shall be considered, but
115 need not be the sole determining factor. After negotiations have been conducted with each offeror so
116 selected, the public body shall select the offeror which, in its opinion, has made the best proposal, and
117 shall award the contract to that offeror. When the terms and conditions of multiple awards are so
118 provided in the Request for Proposal, awards may be made to more than one offeror. Should the public
119 body determine in writing and in its sole discretion that only one offeror is fully qualified, or that one
120 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 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

182 faith performance, and who has been prequalified, if required.

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

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

190 "Services" means any work performed by an independent contractor wherein the service rendered
191 does not consist primarily of acquisition of equipment or materials, or the rental of equipment, materials
192 and supplies.

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

196 § 2.2-4337. Performance and payment bonds.

197 A. Upon the award of any (i) public construction contract exceeding \$100,000 awarded to any prime
198 contractor; (ii) construction contract exceeding \$100,000 awarded to any prime contractor requiring the
199 performance of labor or the furnishing of materials for buildings, structures or other improvements to
200 real property owned or leased by a public body; (iii) construction contract exceeding \$100,000 in which
201 the performance of labor or the furnishing of materials will be paid with public funds; or (iv)
202 transportation-related projects exceeding ~~\$250,000~~ \$500,000 that are partially or wholly funded by the
203 Commonwealth, the contractor shall furnish to the public body the following bonds:

204 1. A performance bond in the sum of the contract amount conditioned upon the faithful performance
205 of the contract in strict conformity with the plans, specifications and conditions of the contract. For
206 transportation-related projects authorized under § 33.1-12, such bond shall be in a form and amount
207 satisfactory to the public body.

208 2. A payment bond in the sum of the contract amount. The bond shall be for the protection of
209 claimants who have and fulfill contracts to supply labor or materials to the prime contractor to whom
210 the contract was awarded, or to any subcontractors, in furtherance of the work provided for in the
211 contract, and shall be conditioned upon the prompt payment for all materials furnished or labor supplied
212 or performed in the furtherance of the work. For transportation-related projects authorized under
213 § 33.1-12 and partially or wholly funded by the Commonwealth, such bond shall be in a form and
214 amount satisfactory to the public body.

215 "Labor or materials" shall include public utility services and reasonable rentals of equipment, but
216 only for periods when the equipment rented is actually used at the site.

217 B. Each of the bonds shall be executed by one or more surety companies selected by the contractor
218 that are authorized to do business in Virginia.

219 C. If the public body is the Commonwealth, or any agency or institution thereof, the bonds shall be
220 payable to the Commonwealth of Virginia, naming also the agency or institution thereof. Bonds required
221 for the contracts of other public bodies shall be payable to such public body.

222 D. Each of the bonds shall be filed with the public body that awarded the contract, or a designated
223 office or official thereof.

224 E. Nothing in this section shall preclude a public body from requiring payment or performance bonds
225 for construction contracts below \$100,000 for nontransportation-related projects or ~~\$250,000~~ \$500,000 for
226 transportation-related projects authorized under § 33.1-12 and partially or wholly funded by the
227 Commonwealth.

228 F. Nothing in this section shall preclude the contractor from requiring each subcontractor to furnish a
229 payment bond with surety thereon in the sum of the full amount of the contract with such subcontractor
230 conditioned upon the payment to all persons who have and fulfill contracts that are directly with the
231 subcontractor for performing labor and furnishing materials in the prosecution of the work provided for
232 in the subcontract.