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HOUSE BILL NO. 473

Offered January 10, 2018

Prefiled January 7, 2018

A BILL to amend and reenact §§ 2.2-4300, 2.2-4301, and 2.2-4302.2 of the Code of Virginia and to amend the Code of Virginia by adding in Chapter 43 of Title 2.2 an article numbered 7, consisting of sections numbered 2.2-4377.1, 2.2-4377.2, and 2.2-4377.3, relating to the Virginia Public Procurement Act; use of best value contracting.

Patrons—Reid and Bell, John J.

Referred to Committee on General Laws

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-4300, 2.2-4301, and 2.2-4302.2 of the Code of Virginia is amended and reenacted and that the Code of Virginia is amended by adding in Chapter 43 of Title 2.2 an article numbered 7, consisting of sections numbered 2.2-4377.1, 2.2-4377.2, and 2.2-4377.3, as follows:

§ 2.2-4300. Short title; purpose; declaration of intent.

A. This chapter may be cited as the Virginia Public Procurement Act.

B. The purpose of this chapter is to enunciate the public policies pertaining to governmental procurement from nongovernmental sources, to include governmental procurement that may or may not result in monetary consideration for either party. This chapter shall apply whether the consideration is monetary or nonmonetary and regardless of whether the public body, the contractor, or some third party is providing the consideration.

C. To the end that public bodies in the Commonwealth obtain high quality goods and services at reasonable cost, that all procurement procedures be conducted in a fair and impartial manner with avoidance of any impropriety or appearance of impropriety, that all qualified vendors have access to public business and that no offeror be arbitrarily or capriciously excluded, it is the intent of the General Assembly that competition be sought to the maximum feasible degree, that procurement procedures involve openness and administrative efficiency, that individual public bodies enjoy broad flexibility in fashioning details of such competition, that the rules governing contract awards be made clear in advance of the competition, that specifications reflect the procurement needs of the purchasing body rather than being drawn to favor a particular vendor, and that the purchaser and vendor freely exchange information concerning what is sought to be procured and what is offered. ~~Public bodies may consider best value concepts when procuring goods and nonprofessional services, but not construction or professional services. The criteria, factors, and basis for consideration of best value and the process for the consideration of best value shall be as stated in the procurement solicitation.~~

§ 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. *Objective criteria that may be considered in determining the best value include the best value contractor's (i) financial condition; (ii) quality of performance on previous projects; (iii) timeliness of performance on previous projects; (iv) record of ability to minimize cost overruns; (v) use of local hiring pools; (vi) proven ability to minimize or eliminate change orders; (vii) provision of training or apprenticeship programs; (viii) technical capacities; (ix) provision of health care benefits for workers; (x) use of background checks and voluntary drug testing for employees and workers; (xi) participation in the E-Verify program; (xii) key personnel qualifications; (xiii) safety record, including the ability to minimize workplace safety risks; (xiv) use of small, woman-owned, minority-owned, and veteran-owned contractors and subcontractors; and (xv) environmental sustainability and track record.*

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

"Competitive negotiation" is the method of contractor selection set forth in § 2.2-4302.2.

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59 "Competitive sealed bidding" is the method of contractor selection set forth in § 2.2-4302.1.

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

62 "Construction management contract" means the same as that term is defined in § 2.2-4379.

63 "Design-build contract" means the same as that term is defined in § 2.2-4379.

64 "Employment services organization" means an organization that provides employment services to
65 individuals with disabilities that is an approved Commission on the Accreditation of Rehabilitation
66 Facilities (CARF) accredited vendor of the Department for Aging and Rehabilitative Services.

67 "Experience modification factor" means a value assigned to an employer as determined by a rate
68 service organization in accordance with its uniform experience rating plan required to be filed pursuant
69 to subsection D of § 38.2-1913.

70 "Financial condition" means the financial resources needed to perform the contract. The criteria
71 used to evaluate a bidder's financial condition shall include, at a minimum, capacity to obtain all
72 required payment bonds, performance bonds, and liability insurance.

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

75 "Informality" means a minor defect or variation of a bid or proposal from the exact requirements of
76 the Invitation to Bid, or the Request for Proposal, which does not affect the price, quality, quantity or
77 delivery schedule for the goods, services or construction being procured.

78 "Job order contracting" means a method of procuring construction by establishing a book of unit
79 prices and then obtaining a contractor to perform work as needed using the prices, quantities, and
80 specifications in the book as the basis of its pricing. The contractor may be selected through either
81 competitive sealed bidding or competitive negotiation depending on the needs of the public body
82 procuring the construction services. A minimum amount of work may be specified in the contract. The
83 contract term and the project amount shall not exceed the limitations specified in § 2.2-4303.2.

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

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

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

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

99 "Public body" means any legislative, executive or judicial body, agency, office, department, authority,
100 post, commission, committee, institution, board or political subdivision created by law to exercise some
101 sovereign power or to perform some governmental duty, and empowered by law to undertake the
102 activities described in this chapter. "Public body" shall include (i) any independent agency of the
103 Commonwealth, and (ii) any metropolitan planning organization or planning district commission which
104 operates exclusively within the Commonwealth of Virginia.

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

107 "Responsible bidder" or "offeror" means a person who has the capability, in all respects, to perform
108 fully the contract requirements and the moral and business integrity and reliability that will assure good
109 faith performance, and who has been prequalified, if required.

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

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

117 "Safety record" means the prior history concerning the safe performance of construction contracts.
118 The criteria used to evaluate a bidder's safety record shall include, at a minimum, its experience
119 modification factor for the most recent three-year period and its average total recordable injury or
120 illness rate and average lost work rate for the most recent three-year period.

"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.

§ 2.2-4302.2. Process for competitive negotiation.

A. The process for competitive negotiation shall include the following:

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, indicating whether a numerical scoring system will be used in evaluation of the proposal, and containing or incorporating by reference the other applicable contractual terms and conditions, including any unique capabilities, specifications or qualifications that will be required. In the event that a numerical scoring system will be used in the evaluation of proposals, the point values assigned to each of the evaluation criteria shall be included in the Request for Proposal or posted at the location designated for public posting of procurement notices prior to the due date and time for receiving proposals. No Request for Proposal for construction authorized by this chapter shall condition a successful offeror's eligibility on having a specified experience modification factor;

2. Public notice of the Request for Proposal at least 10 days prior to the date set for receipt of proposals by posting on the Department of General Services' central electronic procurement website or other appropriate websites. Additionally, public bodies shall publish in a newspaper 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. Posting on the Department of General Services' central electronic procurement website shall be required of any state public body. Local public bodies are encouraged to utilize the Department of General Services' central electronic procurement website to provide the public with centralized visibility and access to the Commonwealth's procurement opportunities. In addition, proposals may be solicited directly from potential contractors. Any additional solicitations shall include certified businesses selected from a list made available by the Department of Small Business and Supplier Diversity; and

3. For goods, nonprofessional services, and insurance, 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. In the case of a proposal for information technology, as defined in § 2.2-2006, a public body shall not require an offeror to state in a proposal any exception to any liability provisions contained in the Request for Proposal. Negotiations shall then be conducted with each of the offerors so selected. The offeror shall state any exception to any liability provisions contained in the Request for Proposal in writing at the beginning of negotiations, and such exceptions shall be considered during negotiation. Price shall be considered, but need not be the sole or primary 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 provides the best value, 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; or

4. For 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. In accordance with § 2.2-4342, proprietary information from competing offerors shall not be disclosed to the public or to competitors. For architectural or engineering services, the public body shall not request or require offerors to list any exceptions to proposed contractual terms and conditions, unless such terms and conditions are required by statute, regulation, ordinance, or standards developed pursuant to § 2.2-1132, until after the qualified offerors are ranked for negotiations. 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

182 satisfactory and advantageous to the public body can be negotiated at a price considered fair and
183 reasonable and pursuant to contractual terms and conditions acceptable to the public body, the award
184 shall be made to that offeror. Otherwise, negotiations with the offeror ranked first shall be formally
185 terminated and negotiations conducted with the offeror ranked second, and so on until such a contract
186 can be negotiated at a fair and reasonable price.

187 Notwithstanding the foregoing, if the terms and conditions for multiple awards are included in the
188 Request for Proposal, a public body may award contracts to more than one offeror.

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

192 B. Multiphase professional services contracts satisfactory and advantageous to the completion of
193 large, phased, or long-term projects may be negotiated and awarded based on a fair and reasonable price
194 for the first phase only, where the completion of the earlier phases is necessary to provide information
195 critical to the negotiation of a fair and reasonable price for succeeding phases. Prior to entering into any
196 such contract, the public body shall (i) state the anticipated intended total scope of the project and (ii)
197 determine in writing that the nature of the work is such that the best interests of the public body require
198 awarding the contract.

199 For the purposes of subdivision A 1, "experience modification factor" means a value assigned to an
200 employer as determined by a rate service organization in accordance with its uniform experience rating
201 plan required to be filed pursuant to subsection D of § 38.2-1913.

202 *Article 7.*

203 *Best Value Contracting.*

204 **§ 2.2-4377.1. Definitions.**

205 *As used in this article, unless the context requires a different meaning:*

206 *"Best value contract" means a contract entered into pursuant to the provisions of this article.*

207 *"Best value contractor" means a properly licensed person, firm, or corporation that submits a bid
208 for, or is awarded, a best value contract.*

209 *"Demonstrated management competency" means the experience, competency, capability, and capacity
210 of the proposed management staffing to complete projects of similar size, scope, or complexity.*

211 *"Qualifications" means the financial condition, relevant experience, demonstrated management
212 competency, labor compliance, and safety record of the bidder and, if required by the bidding
213 documents, any of the preceding qualifications as they pertain to subcontractors proposed to be used by
214 the bidder for designated portions of the work.*

215 *"Relevant experience" means the experience, competency, capability, and capacity to complete
216 projects of similar size, scope, or complexity.*

217 **§ 2.2-4377.2. Use of best value contracting by state and local government.**

218 A. Notwithstanding any provision of this chapter to the contrary, any public body may consider best
219 value concepts during the process for the procurement of goods, services, or construction in accordance
220 with this article.

221 B. The public body shall include in every Invitation to Bid or Request for Proposal a notice to
222 potential best value contractors that the procurement decision shall be made on the basis of best value.
223 In addition, the Invitation to Bid or Request for Proposal for each best value contract shall include a
224 section identifying and describing the (i) criteria that will be considered in evaluating bids, (ii)
225 methodology and rating or weighting system that will be used in evaluating bids, and (iii) relative
226 importance or weight assigned to the criteria identified in the Invitation to Bid or Request for Proposal.

227 **§ 2.2-4377.3. Selection of the best value contractor.**

228 A. Selection of the best value contractor shall be made as follows:

229 1. The public body shall evaluate the qualifications of the bidders solely on the basis of the criteria
230 set forth in the Invitation to Bid or Request for Proposal and shall assign a qualifications score to each
231 bid.

232 2. The award of the contract shall be made to the bidder whose bid is determined by the public body
233 to be the best value. To determine the best value contractor, the public body shall divide each bidder's
234 price by its qualifications score. The lowest resulting cost per quality point will represent the best value
235 bid.

236 3. The public body shall issue a written decision of its contract award.

237 B. Upon issuance of a contract award, the public body shall announce its award identifying the best
238 value contractor to which the award is made, the project, the project price, and the selected best value
239 contractor's score based on the evaluation criteria listed in the Invitation to Bid or Request for
240 Proposal. The notice of award shall be made public and include the score of the selected best value
241 contractor in relation to all other responsive bidders and their respective prices. The contract file shall
242 include documentation sufficient to support the decision to award.