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SENATE BILL NO. 188

Senate Amendments in [] — January 25, 2018

A *BILL to amend and reenact § 2.2-4302.2 of the Code of Virginia, relating to the Virginia Public Procurement Act; competitive negotiation; professional services; simultaneous negotiation.*

Patron Prior to Engrossment—Senator Favola

Referred to Committee on General Laws and Technology

Be it enacted by the General Assembly of Virginia:**1. That § 2.2-4302.2 of the Code of Virginia is amended and reenacted as follows:****§ 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

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60 with § 2.2-4342, proprietary information from competing offerors shall not be disclosed to the public or
61 to competitors. For architectural or engineering services, the public body shall not request or require
62 offerors to list any exceptions to proposed contractual terms and conditions, unless such terms and
63 conditions are required by statute, regulation, ordinance, or standards developed pursuant to § 2.2-1132,
64 until after the qualified offerors are ranked for negotiations. At the conclusion of discussion, outlined in
65 this subdivision, on the basis of evaluation factors published in the Request for Proposal and all
66 information developed in the selection process to this point, the public body shall select in the order of
67 preference two or more offerors whose professional qualifications and proposed services are deemed
68 most meritorious.

69 Negotiations shall then be conducted, beginning with the offeror ranked first. If a contract
70 satisfactory and advantageous to the public body can be negotiated at a price considered fair and
71 reasonable and pursuant to contractual terms and conditions acceptable to the public body, the award
72 shall be made to that offeror. Otherwise, negotiations with the offeror ranked first shall be formally
73 terminated and negotiations conducted with the offeror ranked second, and so on until such a contract
74 can be negotiated at a fair and reasonable price.

75 Notwithstanding the foregoing, (i) if the terms and conditions for multiple awards are included in the
76 Request for Proposal, a public body may award contracts to more than one offeror and (ii) *[except in*
77 *the case of the procurement of architectural or engineering services,] if the public body does not*
78 *request or discuss nonbinding estimates of total project costs at the discussion stage under this*
79 *subdivision, the public body may conduct negotiations with the top two ranked offerors as long as such*
80 *process is set forth in the Request for Proposal.*

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

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

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