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HOUSE BILL NO. 1743

Offered January 11, 2023

Prefiled January 9, 2023

A BILL to amend and reenact §§ 2.2-4302.1 and 23.1-1017 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 2.2-4302.1:1, relating to Virginia Public Procurement Act; competitive sealed bidding; Invitation to Bid; required statements.

Patrons—Carr, Kory and Price

Referred to Committee on General Laws

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-4302.1 and 23.1-1017 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 2.2-4302.1:1 as follows:

§ 2.2-4302.1. Process for competitive sealed bidding.

The process for competitive sealed bidding shall include the following:

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 the provisions outlined in § 2.2-4302.1:1 and a statement of any other requisite qualifications of potential contractors. Any locality may include in the Invitation to Bid criteria that may be used in determining whether a bidder who is not prequalified by the Virginia Department of Transportation is a responsible bidder pursuant to § 2.2-4301. Such criteria may include a history or good faith assurances of (i) completion by the bidder and any potential subcontractors of specified safety training programs established by the U.S. Department of Labor, Occupational Safety and Health Administration; (ii) participation by the bidder and any potential subcontractors in apprenticeship training programs approved by state agencies or the U.S. Department of Labor; or (iii) maintenance by the bidder and any potential subcontractors of records of compliance with applicable local, state, and federal laws. No Invitation to Bid for construction services shall condition a successful bidder's eligibility on having a specified experience modification factor. 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 on the Department of General Services' central electronic procurement website or other appropriate websites. In addition, public bodies may publish in a newspaper of general circulation. 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, bids 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;

3. Public opening and announcement of all bids received;

4. Evaluation of bids based upon the requirements set forth in the Invitation to Bid, 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; and

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.

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

§ 2.2-4302.1:1. Invitation to Bid; required statements.

Every written Invitation to Bid issued pursuant to § 2.2-4302.1 shall incorporate the following statements of qualifications for potential contractors:

"1. In the last three years, the contractor has not (i) been fined, (ii) suffered an adverse judgment, (iii) incurred a penalty, (iv) settled an action brought before a court of competent jurisdiction, (v) been found in violation, or (vi) been forced to amend its employment policies because of any violation of state or federal employment or labor laws, including the Fair Labor Standards Act (29 U.S.C. § 201 et

INTRODUCED

HB1743

59 *seq.), prevailing wage laws, occupational safety and health laws, and state wage and hour laws.*

60 *2. The contractor or any officer, director, or owner thereof has not been convicted of a crime related*
61 *to its business operations.*

62 *3. The contractor agrees not to engage in any 1099 independent contractor agreements without prior*
63 *approval from the public body. Such independent contractor agreement may be approved if the public*
64 *body finds that the independent contractor (i) is free from the control and direction of the hiring entity*
65 *in connection with the performance of the work being contracted for; (ii) performs work that is outside*
66 *of the usual course of the hiring entity's business; and (iii) is customarily engaged in an independently*
67 *established trade, occupation, or business of the same nature as that involved in the work being*
68 *contracted for.*

69 *4. The contractor (i) pays the local prevailing wage rate as determined by the U.S. Secretary of*
70 *Labor pursuant to the provisions of the Davis-Bacon Act (40 U.S.C. § 276 et seq.), as amended, to each*
71 *person hired to work on the contract and (ii) understands that if at any time the contractor fails to do*
72 *such, it shall be debarred from the contract.*

73 *5. The contractor shall participate in an apprenticeship program that is registered with the U.S.*
74 *Department of Labor or the Department of Labor and Industry."*

75 **§ 23.1-1017. Covered institutions; operational authority; procurement.**

76 A. Subject to the express provisions of the management agreement, each covered institution may be
77 exempt from the provisions of the Virginia Public Procurement Act (§ 2.2-4300 et seq.), except for §§
78 2.2-4302.1:1, 2.2-4340, 2.2-4340.1, 2.2-4340.2, 2.2-4342, and 2.2-4376.2, which shall not be construed
79 to require compliance with the prequalification application procedures of subsection B of § 2.2-4317,
80 provided, however, that (i) any deviations from the Virginia Public Procurement Act in the management
81 agreement shall be uniform across all covered institutions and (ii) the governing board of the covered
82 institution shall adopt, and the covered institution shall comply with, policies for the procurement of
83 goods and services, including professional services, that shall (a) be based upon competitive principles;
84 (b) in each instance seek competition to the maximum practical degree; (c) implement a system of
85 competitive negotiation for professional services pursuant to §§ 2.2-4303.1 and 2.2-4302.2; (d) prohibit
86 discrimination in the solicitation and award of contracts on the basis of the bidder's or offeror's race,
87 religion, color, sex, sexual orientation, gender identity, national origin, age, or disability or on any other
88 basis prohibited by state or federal law; (e) incorporate the prompt payment principles of §§ 2.2-4350
89 and 2.2-4354; (f) consider the impact on correctional enterprises under § 53.1-47; and (g) provide that
90 whenever solicitations are made seeking competitive procurement of goods or services, it shall be a
91 priority of the institution to provide for fair and reasonable consideration of small, women-owned, and
92 minority-owned businesses and to promote and encourage a diversity of suppliers.

93 B. Such policies may (i) provide for consideration of the dollar amount of the intended procurement,
94 the term of the anticipated contract, and the likely extent of competition; (ii) implement a
95 prequalification procedure for contractors or products; and (iii) include provisions for cooperative
96 arrangements with other covered institutions, other public or private educational institutions, or other
97 public or private organizations or entities, including public-private partnerships, public bodies, charitable
98 organizations, health care provider alliances or purchasing organizations or entities, state agencies or
99 institutions of the Commonwealth or the other states, the District of Columbia, the territories, or the
100 United States, and any combination of such organizations and entities.

101 C. Nothing in this section shall preclude a covered institution from requesting and utilizing the
102 assistance of the Virginia Information Technologies Agency for information technology procurements
103 and covered institutions are encouraged to utilize such assistance.

104 D. Each covered institution shall post on the Department of General Services' central electronic
105 procurement website all Invitations to Bid, Requests for Proposal, sole source award notices, and
106 emergency award notices to ensure visibility and access to the Commonwealth's procurement
107 opportunities on one website.

108 E. As part of any procurement provisions of the management agreement, the governing board of a
109 covered institution shall identify the public, educational, and operational interests served by any
110 procurement rule that deviates from procurement rules in the Virginia Public Procurement Act (§
111 2.2-4300 et seq.).