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HOUSE BILL NO. 1957

Offered January 11, 2023

Prefiled January 10, 2023

A BILL to amend and reenact §§ 2.2-4378 through 2.2-4382 of the Code of Virginia and to amend the Code of Virginia by adding in Article 2 of Chapter 43.1 of Title 2.2 a section numbered 2.2-4380.1, by adding in Article 3 of Chapter 43.1 of Title 2.2 a section numbered 2.2-4381.1, and by adding in Article 4 of Chapter 43.1 of Title 2.2 a section numbered 2.2-4382.1, relating to the Virginia Public Procurement Act; construction management and design-build contracting; applicability.

Patrons—Leftwich and Sickles

Referred to Committee on General Laws

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-4378 through 2.2-4382 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding in Article 2 of Chapter 43.1 of Title 2.2 a section numbered 2.2-4380.1, by adding in Article 3 of Chapter 43.1 of Title 2.2 a section numbered 2.2-4381.1, and by adding in Article 4 of Chapter 43.1 of Title 2.2 a section numbered 2.2-4382.1 as follows:

§ 2.2-4378. Purpose; applicability.

A. The purpose of this chapter is to enunciate the public policies pertaining to governmental procurement of construction utilizing the construction management and design-build procurement methods. *Competitive sealed bidding is the preferred method of procurement for construction services.* Notwithstanding any other provision 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 chapter and § 2.2-1502.

B. Except as provided in subsection C, this chapter shall apply regardless of the source of financing, whether it is general fund, nongeneral fund, federal trust fund, state debt, or institutional debt.

C. The following shall be exempt from the provisions of this chapter:

1. *Projects totaling less than \$5 million;*

2. Projects of a covered institution that are to be funded exclusively by a foundation that (i) exists for the primary purpose of supporting the covered institution and (ii) is exempt from taxation under § 501(c)(3) of the Internal Revenue Code; and

2- 3. Transportation construction projects procured and awarded by the Commonwealth Transportation Board pursuant to subsection B of § 33.2-209; and

4. *Complex projects where an entity has received an exemption from the provisions of this chapter from the Secretary of Administration. If a project totals more than \$125 million, the entity shall not be required to obtain an exemption from the provisions of this chapter from the Secretary of Administration. The Secretary of Administration shall not combine projects or allow projects to surpass the \$125 million threshold.*

D. The provisions of this chapter shall supplement the provisions of the Virginia Public Procurement Act (§ 2.2-4300 et seq.), which provisions shall remain applicable. In the event of any Restructured Higher Education Financial and Administrative Operations Act of 2005 (§ 23.1-1000 et seq.), or any other provision of law, this chapter shall control.

§ 2.2-4379. Definitions.

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

"Competitive sealed bidding" means the same as that term as described in § 2.2-4302.1.

"Complex project" means a construction project that includes ~~one~~ two or more of the following significant components: significantly difficult site location, ~~unique equipment~~, specialized unconventional building systems, ~~multifaceted program~~, accelerated schedule only due to federal or state regulatory mandates, registered historic designation, or substantial and intricate phasing or some other aspect that makes competitive sealed bidding not practical of an occupied building.

"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.

"Covered institution" means a public institution of higher education operating (i) subject to a management agreement set forth in Article 4 (§ 23.1-1004 et seq.) of Chapter 10 of Title 23.1, (ii) under a memorandum of understanding pursuant to § 23.1-1003, or (iii) under the pilot program authorized in the appropriation act.

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59 "Department" means the Department of General Services.

60 "Design-build contract" means a contract between a public body and another party in which the party
61 contracting with the public body agrees to both design and build the structure, or other item specified in
62 the contract.

63 *"Preconstruction contract" means a contract between a public body and another party in which the*
64 *party contracting with the public body agrees to provide preconstruction services for the benefit of the*
65 *public body.*

66 "Public body" means the same as that term is defined in § 2.2-4301.

67 "State public body" means any authority, board, department, instrumentality, agency, or other unit of
68 state government. "State public body" does not include any covered institution; any county, city, or
69 town; or any local or regional governmental authority.

70 **§ 2.2-4380. Construction management or design-build contracts for state public bodies**
71 **authorized; projects totaling more than \$125 million.**

72 A. Any state public body may enter into a contract for construction on a fixed price or not-to-exceed
73 price construction management or design-build basis *for a project totaling more than \$125 million*,
74 provided that such public body complies with the requirements of this article and the procedures adopted
75 by the Secretary of Administration for using construction management or design-build contracts.

76 B. Procedures adopted by a state public body pursuant to this article shall include the following
77 requirements:

78 1. A written determination is made in advance by the state public body that competitive sealed
79 bidding is not practicable or fiscally advantageous, and such writing shall document the basis for the
80 determination to use construction management or design-build. The determination shall be included in
81 the Request for Qualifications and maintained in the procurement file;

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

87 3. Public notice of the Request for Qualifications is posted on the Department's central electronic
88 procurement website, known as eVA, at least 30 days prior to the date set for receipt of qualification
89 proposals;

90 4. For construction management contracts, the contract is entered into no later than the completion of
91 the schematic phase of design, unless prohibited by authorization of funding restrictions;

92 5. Prior construction management or design-build experience or previous experience with the
93 Department's Bureau of Capital Outlay Management shall not be required as a prerequisite for award of
94 a contract. However, in the selection of a contractor, a state public body may consider the experience of
95 each contractor on comparable projects;

96 6. Construction management contracts shall require that (i) no more than 10 percent of the
97 construction work, as measured by the cost of the work, be performed by the construction manager with
98 its own forces and (ii) the remaining 90 percent of the construction work, as measured by the cost of
99 the work, be performed by subcontractors of the construction manager, which the construction manager
100 shall procure by publicly advertised, competitive sealed bidding to the maximum extent practicable; and

101 7. The procedures *shall* allow for a two-step competitive negotiation process.

102 C. The Department shall evaluate the proposed procurement method selected by the state public body
103 and make its recommendation as to whether the use of the construction management or design-build
104 procurement method is appropriate for the specific project. In its review, the Department shall also
105 consider:

106 1. The written determination of the state public body;

107 2. The compliance by the state public body with subdivisions B 1, 2, and 7;

108 3. The project cost, expected timeline, and use;

109 4. Whether the project is a complex project; and

110 5. Any other criteria established by the Department to evaluate the proposed procurement method for
111 the project.

112 D. The Department shall conduct its review within five working days after receipt of the written
113 determination and render its written recommendation within such five-working-day period. The written
114 recommendation of the Department shall be maintained in the procurement file.

115 E. If a state public body elects to proceed with the project using a construction management or
116 design-build procurement method despite the recommendation of the Department to the contrary, such
117 state public body shall state in writing its reasons therefor and any justification for not following the
118 recommendation of the Department and submit same to the Department. The written statement of a state
119 public body's decision to not follow the recommendation of the Department shall be maintained in the
120 procurement file.

§ 2.2-4380.1. Additional contract requirements for projects totaling less than \$125 million.

For all projects totaling less than \$125 million, in addition to the requirements outlined in subdivisions B 2, 3, and 5 of § 2.2-4380, a state public body that enters into a contract for construction management shall conduct a two-step process beginning with a preconstruction contract. Upon completion of the preconstruction contract, the state public body shall then obtain construction services for the project through competitive sealed bidding.

§ 2.2-4381. Construction management or design-build contracts for covered institutions authorized; projects totaling more than \$125 million.

A. Any covered institution may enter into a contract for construction on a fixed price or not-to-exceed price construction management or design-build basis *for a project totaling more than \$125 million*, provided that such institution complies with the requirements of this article and with the procedures adopted by the Secretary of Administration for using construction management or design-build contracts.

B. Covered institutions shall:

1. Develop procedures for determining the selected procurement method which, at a minimum, shall consider cost, schedule, complexity, and building use;

2. Submit such procedures, and any subsequent changes to adopted procedures, to the Department for review and comment; and

3. Submit Department-reviewed procedures to its board of visitors for adoption.

C. Procedures adopted by a board of visitors pursuant to this article shall include the following requirements:

1. A written determination is made in advance by the covered institution that competitive sealed bidding is not practicable or fiscally advantageous, and such writing shall document the basis for the determination to use construction management or design-build. The determination shall be included in the Request for Qualifications and maintained in the procurement file;

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

3. Public notice of the Request for Qualifications is posted on the Department's central electronic procurement website, known as eVA, at least 30 days prior to the date set for receipt of qualification proposals;

4. For construction management contracts, the contract is entered into no later than the completion of the schematic phase of design, unless prohibited by authorization of funding restrictions;

5. Prior construction management or design-build experience or previous experience with the Department's Bureau of Capital Outlay Management shall not be required as a prerequisite for award of a contract. However, in the selection of a contractor, a covered institution may consider the experience of each contractor on comparable projects;

6. Construction management contracts shall require that (i) no more than 10 percent of the construction work, as measured by the cost of the work, be performed by the construction manager with its own forces and (ii) the remaining 90 percent of the construction work, as measured by the cost of the work, be performed by subcontractors of the construction manager, which the construction manager shall procure by publicly advertised, competitive sealed bidding to the maximum extent practicable; and

7. The procedures *shall* allow for a two-step competitive negotiation process.

D. The Department shall evaluate the proposed procurement method selected by a covered institution and make its recommendation as to whether the use of the construction management or design-build procurement method is appropriate for the specific project. In its review, the Department shall also consider:

1. The written determination of the covered institution;

2. The compliance by the covered institution with subdivisions C 1, 2, and 7;

3. The project cost, expected timeline, and use;

4. Whether the project is a complex project; and

5. Any other criteria established by the Department to evaluate the proposed procurement method for the project.

E. The Department shall conduct its review within five working days after receipt of the written determination and render its written recommendation within such five-working-day period. The written recommendation of the Department shall be maintained in the procurement file.

F. If a covered institution elects to proceed with the project using a construction management or design-build procurement method despite the recommendation of the Department to the contrary, such

covered institution shall state in writing its reasons therefor and any justification for not following the recommendation of the Department and submit same to the Department. The written statement of a covered institution's decision to not follow the recommendation of the Department shall be maintained in the procurement file.

§ 2.2-4381.1. Additional contract requirements for projects totaling less than \$125 million.

For all projects totaling less than \$125 million, in addition to the requirements outlined in subsection B and subdivisions C 2, 3, and 5 of § 2.2-4381, a covered institution that enters into a contract for construction management shall conduct a two-step process beginning with a preconstruction contract. Upon completion of the preconstruction contract, the covered institution shall then obtain construction services for the project through competitive sealed bidding.

§ 2.2-4382. Design-build or construction management contracts for local public bodies authorized; projects totaling more than \$125 million.

A. Any local public body may enter into a contract for construction on a fixed price or not-to-exceed price construction management or design-build basis for a project totaling more than \$125 million, provided that the local public body (i) complies with the requirements of this article and (ii) has by ordinance or resolution implemented procedures consistent with the procedures adopted by the Secretary of Administration for utilizing construction management or design-build contracts.

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

C. A written determination shall be made in advance by the local public body that competitive sealed bidding is not practicable or fiscally advantageous, and such writing shall document the basis for the determination to utilize construction management or design-build. The determination shall be included in the Request for Qualifications and be maintained in the procurement file.

D. Procedures adopted by a local public body for construction management pursuant to this article shall include the following requirements:

1. Construction management may be utilized on projects where the project cost is expected to be less than the project cost threshold established in the procedures adopted by the Secretary of Administration for utilizing construction management contracts, provided that (i) the project is a complex project and (ii) the project procurement method is approved by the local governing body. The written approval of the governing body shall be maintained in the procurement file;

2. Public notice of the Request for Qualifications is posted on the Department's central electronic procurement website, known as eVA, at least 30 days prior to the date set for receipt of qualification proposals;

3. The construction management contract is entered into no later than the completion of the schematic phase of design, unless prohibited by authorization of funding restrictions;

4. Prior construction management or design-build experience or previous experience with the Department's Bureau of Capital Outlay Management shall not be required as a prerequisite for award of a contract. However, in the selection of a contractor, the local public body may consider the experience of each contractor on comparable projects;

5. Construction management contracts shall require that (i) no more than 10 percent of the construction work, as measured by the cost of the work, be performed by the construction manager with its own forces and (ii) the remaining 90 percent of the construction work, as measured by the cost of the work, be performed by subcontractors of the construction manager, which the construction manager shall procure by publicly advertised, competitive sealed bidding to the maximum extent practicable;

6. The procedures shall allow for a two-step competitive negotiation process; and

7. Price is a critical basis for award of the contract.

E. Procedures adopted by a local public body for design-build construction projects shall include a two-step competitive negotiation process consistent with the standards established by the Division of Engineering and Buildings of the Department for state public bodies.

§ 2.2-4382.1. Additional contract requirements for projects totaling less than \$125 million.

For all projects totaling less than \$125 million, in addition to the requirements outlined in subsection B and subdivisions D 2, 4, and 7 of § 2.2-4382, a local public body that enters into a contract for construction management shall conduct a two-step process beginning with a preconstruction contract. Upon completion of the preconstruction contract, the local public body shall then obtain construction services for the project through competitive sealed bidding.