

23105809D

HOUSE BILL NO. 1957

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee on Appropriations
on February 1, 2023)

(Patron Prior to Substitute—Delegate Leftwich)

A BILL to amend and reenact §§ 2.2-4378, 2.2-4379, 2.2-4380, and 2.2-4383 of the Code of Virginia and to repeal Article 3 (§ 2.2-4381) of Chapter 43.1 of Title 2.2 of the Code of Virginia, relating to construction management and design-build contracting; applicability.

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-4378, 2.2-4379, 2.2-4380, and 2.2-4383 of the Code of Virginia are amended and reenacted 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. ~~Notwithstanding Pursuant to subsection D of § 2.2-4303, construction may be procured only by competitive sealed bidding, except notwithstanding any other provision of law, the Commonwealth public bodies~~ 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 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. Transportation construction projects procured and awarded by the Commonwealth Transportation Board pursuant to subsection B of § 33.2-209.

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 conflict between this chapter and the Virginia Public Procurement Act (§ 2.2-4300 et seq.), the 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 is 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 building systems, multifaceted program, accelerated schedule, historic designation, or substantial and intricate phasing or some other aspect that makes competitive sealed bidding not practical.

"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.

"Department" means the Department of General Services.

"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, or other item specified in the contract.

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

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

§ 2.2-4380. Construction management or design-build contracts for state public bodies authorized.

A. Any state public body may enter into a contract for construction on a fixed price or not-to-exceed price construction management or design-build basis, provided that such public body complies with the requirements of this article and the procedures adopted by the Secretary of Administration for using construction management or design-build contracts.

60 B. Procedures adopted by a state public body pursuant to *State public bodies shall adopt procedures*
61 *to implement the provisions of this article. Such procedures shall include the following requirements:*

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

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

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

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

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

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

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

86 C. ~~The~~ *For projects totaling more than \$52 million, the* Department shall evaluate the proposed
87 procurement method selected by the state public body and make its recommendation as to whether the
88 use of the construction management or design-build procurement method is appropriate for the specific
89 project. *For projects totaling \$52 million or less, state public bodies shall be prohibited from using*
90 *construction management or design-build procurement methods unless granted approval by the*
91 *Department.* In its review, the Department shall also consider:

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

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

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

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

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

98 D. The Department shall conduct its review within five working days after receipt of the written
99 determination and render its written recommendation *or decision regarding approval, as applicable,*
100 *within such five-working-day period. The written recommendation or decision regarding approval of the*
101 *Department shall be maintained in the procurement file.*

102 E. ~~If~~ *For projects totaling more than \$52 million, if* a state public body elects to proceed with the
103 project using a construction management or design-build procurement method despite the
104 recommendation of the Department to the contrary, such state public body shall state in writing its
105 reasons therefor and any justification for not following the recommendation of the Department and
106 submit same to the Department. The written statement of a state public body's decision to not follow the
107 recommendation of the Department shall be maintained in the procurement file.

108 F. *The Secretary of Administration, in his procedures for using construction management and*
109 *design-build contracts, shall increase annually, beginning July 1, 2024, the dollar threshold established*
110 *in subsection C for projects subject to approval by the Department on the basis of the percentage*
111 *increase, if any, in the United States Average Producer Price Index (PPI) for new office building*
112 *construction, as published by the Bureau of Labor Statistics of the U.S. Department of Labor, from its*
113 *monthly average, from one calendar year to another.*

114 **§ 2.2-4383. Reporting requirements.**

115 A. The Department shall report by December 1 of each year to the Governor and the Chairmen of
116 the House Committee on Appropriations, the House Committee on General Laws, the Senate Committee
117 on Finance and Appropriations, and the Senate Committee on General Laws and Technology the
118 following information: (i) the number of projects reviewed pursuant to ~~Articles Article 2~~ (~~§ 2.2-4380~~)
119 ~~and 3~~ (~~§ 2.2-4381~~) and (ii) for each project (a) the identity of the state public body ~~or covered~~
120 ~~institution~~ and a description of each such project, (b) the estimated cost of the project at the time of the
121 Department's review, (c) the recommendation *or decision regarding approval, as applicable,* made by

the Department concerning the proposed procurement method, and (d) *for projects not subject to approval by the Department*, the final procurement method used by the state public body ~~or covered institution~~.

B. All public bodies subject to the provisions of this chapter shall report no later than November 1 of each year to the Director of the Department on all completed capital projects in excess of \$2 million, which report shall include at a minimum (i) the procurement method utilized, (ii) the project budget, (iii) the actual project cost, (iv) the expected timeline, (v) the actual completion time, and (vi) any post-project issues.

The Department shall consolidate received report data and submit the consolidated data to the Governor and Chairmen of the House Committee on Appropriations and the Senate Committee on Finance and Appropriations by December 1 of each year.

2. That Article 3 (§ 2.2-4381) of Chapter 43.1 of Title 2.2 of the Code of Virginia is repealed.

3. That the provisions of this act shall be examined by the public body procurement workgroup, administered by the Department of General Services, and that the workgroup shall provide a report to the Governor and Chairs of the House Appropriations and Senate Finance and Appropriations Committees with any recommended changes by November 1, 2023.

4. That the provisions of the first enactment of this act shall apply to capital construction projects authorized for construction on or after January 1, 2023. Capital construction projects authorized for construction prior to January 1, 2023, shall be governed by the provisions of the law in effect at the time of authorization.