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HOUSE BILL NO. 2450

Offered January 20, 2023

A BILL to amend and reenact §§ 2.2-4380, 2.2-4381, and 2.2-4382 of the Code of Virginia, relating to Virginia Public Procurement Act; construction management; construction manager allowed to bid on certain contracts.

 Patron—Campbell, J.L.

 Referred to Committee on General Laws

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-4380, 2.2-4381, and 2.2-4382 of the Code of Virginia are amended and reenacted as follows:

§ 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.

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

1. A written determination is made in advance by the state public body 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 state 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 the public body regarding the use of construction management or design-build for that project and (ii) assist the public body 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 state public body 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~~ the state public body, or its designated project director, have the authority to determine whether to allow the construction manager to propose or bid on particular contracts if, given market conditions and other relevant information, he determines that such action is in the best interests of the project and of the Commonwealth of Virginia 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 state public body shall have the option to either negotiate particular contracts in an open-book manner with the construction manager or require the construction manager to submit a sealed bid or proposal to the state public body or its designated project director or procurement officer consistent with established procurement processes; and

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

C. The Department shall evaluate the proposed procurement method selected by the state public body 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 state public body;

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

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

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59 4. Whether the project is a complex project; and
60 5. Any other criteria established by the Department to evaluate the proposed procurement method for
61 the project.

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

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

71 **§ 2.2-4381. Construction management or design-build contracts for covered institutions**
72 **authorized.**

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

77 B. Covered institutions shall:

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

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

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

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

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

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

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

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

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

104 6. Construction management contracts shall require that (i) ~~no more than 10 percent of the~~
105 ~~construction work, as measured by the cost of the work, be performed by the construction manager with~~
106 ~~its own forces the covered institution, or its designated project director, have the authority to determine~~
107 ~~whether to allow the construction manager to propose or bid on particular contracts if, given market~~
108 ~~conditions and other relevant information, it determines that such action is in the best interests of the~~
109 ~~project and of the Commonwealth of Virginia and (ii) the remaining 90 percent of the construction~~
110 ~~work, as measured by the cost of the work, be performed by subcontractors of the construction manager,~~
111 ~~which the construction manager shall procure by publicly advertised, competitive sealed bidding to the~~
112 ~~maximum extent practicable covered institution shall have the option to either negotiate particular~~
113 ~~contracts in an open-book manner with the construction manager at risk or require the construction~~
114 ~~manager to submit a sealed bid or proposal to the state public body or its designated project director~~
115 ~~or procurement officer consistent with established procurement processes; and~~

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

117 D. The Department shall evaluate the proposed procurement method selected by a covered institution
118 and make its recommendation as to whether the use of the construction management or design-build
119 procurement method is appropriate for the specific project. In its review, the Department shall also
120 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.

§ 2.2-4382. Design-build or construction management contracts for local public bodies authorized.

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, 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 the local public body, or its designated project director, have the authority to determine whether to allow the construction manager to propose or bid on particular contracts if, given market conditions and other relevant information, he determines that such action is in the best interests of the project and of the Commonwealth of Virginia~~ 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~~ local public body shall have the option to either negotiate particular contracts in an open-book manner with the construction manager at risk or require the construction manager to submit a sealed bid or proposal to the state public body or its designated project director or procurement officer consistent with established procurement processes;

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

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

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