23104014D 1 **SENATE BILL NO. 1491** 2 Offered January 19, 2023 3 A BILL to amend and reenact §§ 2.2-4380, 2.2-4381, and 2.2-4382 of the Code of Virginia, relating to 4 the Virginia Public Procurement Act; construction management; contract requirements. 5 Patron-Bell 6 7 Referred to Committee on General Laws and Technology 8 9 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 10 11 follows: § 2.2-4380. Construction management or design-build contracts for state public bodies 12 13 authorized. 14 A. Any state public body may enter into a contract for construction on a fixed price or not-to-exceed 15 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 16 construction management or design-build contracts. 17 B. Procedures adopted by a state public body pursuant to this article shall include the following 18 19 requirements: 20 1. A written determination is made in advance by the state public body that competitive sealed 21 bidding is not practicable or fiscally advantageous, and such writing shall document the basis for the 22 determination to use construction management or design-build. The determination shall be included in 23 the Request for Qualifications and maintained in the procurement file; 24 2. Prior to making a determination as to the use of construction management or design-build for a 25 specific construction project, a state public body shall have in its employ or under contract a licensed 26 architect or engineer with professional competence appropriate to the project who shall (i) advise the 27 public body regarding the use of construction management or design-build for that project and (ii) assist 28 the public body with the preparation of the Request for Proposal and the evaluation of such proposals; 29 3. Public notice of the Request for Qualifications is posted on the Department's central electronic 30 procurement website, known as eVA, at least 30 days prior to the date set for receipt of qualification 31 proposals; 32 4. For construction management contracts, the contract is entered into no later than the completion of 33 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 34 35 Department's Bureau of Capital Outlay Management shall not be required as a prerequisite for award of 36 a contract. However, in the selection of a contractor, a state public body may consider the experience of each contractor on comparable projects; 37 38 6. Construction management contracts shall require that (i) no more than 10 percent of the 39 construction work, as measured by the cost of the work, be performed by the construction manager with 40 its own forces the state public body or its designated project director shall have the authority to make a 41 determination about whether to allow the construction manager to propose or bid on particular contracts if, given market and other relevant information, the state public body determines that such 42 action may be in the best interest of the project and the Commonwealth and (ii) the remaining 90 43 percent of the construction work, as measured by the cost of the work, be performed by subcontractors 44 45 of the construction manager, which the construction manager shall procure by publicly advertised, 46 competitive sealed bidding to the maximum extent practicable the state public body shall have the 47 option to negotiate particular contracts in an open-book manner with the construction manager at risk 48 or the state public body may require the construction manager to submit a sealed bid or proposal to the 49 state public body or its designated project director or procurement officer consistent with established 50 procurement processes; and 51 7. The procedures allow for a two-step competitive negotiation process. 52 C. The Department shall evaluate the proposed procurement method selected by the state public body 53 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 54 55 consider: 56

- 1. The written determination of the state public body;
- 57 2. The compliance by the state public body with subdivisions B 1, 2, and 7;
- 58 3. The project cost, expected timeline, and use;

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

5. Any other criteria established by the Department to evaluate the proposed procurement method for 60 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 design-build procurement method despite the recommendation of the Department to the contrary, such 66 state public body shall state in writing its reasons therefor and any justification for not following the 67 recommendation of the Department and submit same to the Department. The written statement of a state 68 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.

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

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 requirements: 84

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 procurement website, known as eVA, at least 30 days prior to the date set for receipt of qualification 96 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;

6. Construction management contracts shall require that (i) no more than 10 percent of the 104 105 construction work, as measured by the cost of the work, be performed by the construction manager with its own forces the covered institution or its designated project director shall have the authority to make 106 107 a determination about whether to allow the construction manager to propose or bid on particular 108 contracts if, given market and other relevant information, the covered institution determines that such 109 action may be in the best interest of the project and the Commonwealth and (ii) the remaining 90 percent of the construction work, as measured by the cost of the work, be performed by subcontractors 110 of the construction manager, which the construction manager shall procure by publicly advertised, 111 competitive sealed bidding to the maximum extent practicable the covered institution shall have the 112 113 option to negotiate particular contracts in an open-book manner with the construction manager at risk or the covered institution may require the construction manager to submit a sealed bid or proposal to 114 115 the covered institution or its designated project director or procurement officer consistent with 116 established procurement processes; and 117

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

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

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- 121 consider:
- 122 1. The written determination of the covered institution; 123
 - 2. The compliance by the covered institution with subdivisions C 1, 2, and 7;
- 124 3. The project cost, expected timeline, and use; 125
 - 4. Whether the project is a complex project; and

126 5. Any other criteria established by the Department to evaluate the proposed procurement method for 127 the project.

É. The Department shall conduct its review within five working days after receipt of the written 128 129 determination and render its written recommendation within such five-working-day period. The written 130 recommendation of the Department shall be maintained in the procurement file.

131 F. If a covered institution elects to proceed with the project using a construction management or 132 design-build procurement method despite the recommendation of the Department to the contrary, such 133 covered institution shall state in writing its reasons therefor and any justification for not following the 134 recommendation of the Department and submit same to the Department. The written statement of a 135 covered institution's decision to not follow the recommendation of the Department shall be maintained in 136 the procurement file.

137 § 2.2-4382. Design-build or construction management contracts for local public bodies 138 authorized.

139 A. Any local public body may enter into a contract for construction on a fixed price or not-to-exceed 140 price construction management or design-build basis, provided that the local public body (i) complies 141 with the requirements of this article and (ii) has by ordinance or resolution implemented procedures 142 consistent with the procedures adopted by the Secretary of Administration for utilizing construction 143 management or design-build contracts.

144 B. Prior to making a determination as to the use of construction management or design-build for a 145 specific construction project, a local public body shall have in its employ or under contract a licensed 146 architect or engineer with professional competence appropriate to the project who shall (i) advise such 147 public body regarding the use of construction management or design-build for that project and (ii) assist 148 such public body with the preparation of the Request for Proposal and the evaluation of such proposals.

149 C. A written determination shall be made in advance by the local public body that competitive sealed 150 bidding is not practicable or fiscally advantageous, and such writing shall document the basis for the 151 determination to utilize construction management or design-build. The determination shall be included in 152 the Request for Qualifications and be maintained in the procurement file.

153 D. Procedures adopted by a local public body for construction management pursuant to this article 154 shall include the following requirements:

155 1. Construction management may be utilized on projects where the project cost is expected to be less 156 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 157 158 159 the governing body shall be maintained in the procurement file;

160 2. Public notice of the Request for Qualifications is posted on the Department's central electronic 161 procurement website, known as eVA, at least 30 days prior to the date set for receipt of qualification 162 proposals;

163 3. The construction management contract is entered into no later than the completion of the 164 schematic phase of design, unless prohibited by authorization of funding restrictions;

165 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 166 167 a contract. However, in the selection of a contractor, the local public body may consider the experience 168 of each contractor on comparable projects;

5. Construction management contracts shall require that (i) no more than 10 percent of the 169 170 construction work, as measured by the cost of the work, be performed by the construction manager with 171 its own forces the local public body or its designated project director shall have the authority to make a 172 determination about whether to allow the construction manager to propose or bid on particular 173 contracts if, given market and other relevant information, the local public body determines that such 174 action may be in the best interest of the project and the Commonwealth and (ii) the remaining 90 175 percent of the construction work, as measured by the cost of the work, be performed by subcontractors 176 of the construction manager, which the construction manager shall procure by publicly advertised, 177 competitive sealed bidding to the maximum extent practicable the local public body shall have the 178 option to negotiate particular contracts in an open-book manner with the construction manager at risk 179 or the local public body may require the construction manager to submit a sealed bid or proposal to the local public body or its designated project director or procurement officer consistent with established 180 181 procurement processes;

6. The procedures allow for a two-step competitive negotiation process; and7. 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.