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HOUSE BILL NO. 1108

Offered January 10, 2024

Prefiled January 10, 2024

A BILL to amend and reenact §§ 2.2-4380 through 2.2-4383 of the Code of Virginia, relating to Virginia Public Procurement Act; construction management and design-build contracting.

Patrons—Carr, Sickles, Lopez and Wiley

Referred to Committee on General Laws

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-4380 through 2.2-4383 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 (i) the project is a complex project, (ii) such public body complies with the requirements of this article, and (iii) such public body complies with 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, including the determination of the project's complexity. 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 considered as a prerequisite or factor 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 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 allow for a two-step competitive negotiation process; and

8. The procedures require the state public body to provide documentation of the processes used for the final selection to all the unsuccessful proposers, upon request.

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;

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.

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

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

68 **§ 2.2-4381. Construction management or design-build contracts for covered institutions**
69 **authorized.**

70 A. Any covered institution may enter into a contract for construction on a fixed price or
71 not-to-exceed price construction management or design-build basis, provided that (i) *the project is a*
72 *complex project*, (ii) such institution complies with the requirements of this article, and (iii) *such*
73 *institution complies* with the procedures adopted by the Secretary of Administration for using
74 construction management or design-build contracts.

75 B. Covered institutions shall:

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

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

80 3. *Post all documents exchanged between the covered institution and the Department on the*
81 *Department's central electronic procurement website, known as eVA, prior to the date of submission of*
82 *proposals; and*

83 4. Submit Department-reviewed procedures to its board of visitors *or governing board* for adoption.

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

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

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

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

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

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

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

111 7. The procedures allow for a two-step competitive negotiation process; *and*

112 8. *The procedures require the covered institution to provide documentation of the processes used for*
113 *the final selection to all the unsuccessful proposers, upon request.*

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

118 1. The written determination of the covered institution;

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

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

121 4. Whether the project is a complex project; and
122 5. Any other criteria established by the Department to evaluate the proposed procurement method for
123 the project.

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

127 F. If a covered institution elects to proceed with the project using a construction management or
128 design-build procurement method despite the recommendation of the Department to the contrary, such
129 covered institution shall state in writing its reasons therefor and any justification for not following the
130 recommendation of the Department ~~and~~, submit same to the Department, *and secure approval from the*
131 *board of visitors or governing board of the covered institution.* The written statement of a covered
132 institution's decision to not follow the recommendation of the Department *and the vote of the board of*
133 *visitors or governing board* shall be maintained in the procurement file.

134 **§ 2.2-4382. Design-build or construction management contracts for local public bodies**
135 **authorized.**

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

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

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

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

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

158 2. ~~Public~~ *A local public body must make the decision to use a construction management or*
159 *design-build method of procurement by adopting a resolution or motion to that effect prior to issuing a*
160 *Request for Qualifications. The local public body shall publish a notice on the Department's central*
161 *electronic procurement website, known as eVA, or its own website, at least 14 days prior to the meeting*
162 *at which such resolution or motion will be considered. The local public body shall also post a notice of*
163 *the Request for Qualifications is posted on the Department's central electronic procurement website,*
164 *known as eVA, or its own website at least 30 days prior to the date set for receipt of qualification*
165 *proposals;*

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

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

172 5. Construction management contracts shall require that (i) no more than 10 percent of the
173 construction work, as measured by the cost of the work, be performed by the construction manager with
174 its own forces and (ii) the remaining 90 percent of the construction work, as measured by the cost of
175 the work, be performed by subcontractors of the construction manager, which the construction manager
176 shall procure by publicly advertised, competitive sealed bidding to the maximum extent practicable. The
177 provisions of this subdivision shall not apply to construction management contracts involving
178 infrastructure projects;

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

180 7. Price is a critical basis for award of the contract; *and*

181 8. *The procedures require the local public body to provide documentation for the processes used for*

182 *the final selection to all the unsuccessful proposers, upon request.*

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

186 **§ 2.2-4383. Reporting requirements.**

187 A. The Department shall report by December 1 of each year to the Governor and the Chairmen of
188 the House Committee on Appropriations, the House Committee on General Laws, the Senate Committee
189 on Finance and Appropriations, and the Senate Committee on General Laws and Technology the
190 following information: (i) the number of projects reviewed pursuant to Articles 2 (§ 2.2-4380) and 3
191 (§ 2.2-4381) and (ii) for each project (a) the identity of the state public body or covered institution and a
192 description of each such project, (b) the estimated cost of the project at the time of the Department's
193 review, (c) the recommendation made by the Department concerning the proposed procurement method,
194 ~~and~~ (d) *if such project was a construction management or design-build project, the qualifications that*
195 *made such project complex, and (e) the final procurement method used by the state public body or*
196 *covered institution.*

197 B. All public bodies subject to the provisions of this chapter shall report no later than November 1
198 of each year to the Director of the Department on all completed capital projects in excess of \$2 million,
199 which report shall include at a minimum (i) the procurement method utilized, (ii) the project budget, (iii)
200 the actual project cost, (iv) the expected timeline, (v) the actual completion time, ~~and~~ (vi) *if such project*
201 *was a construction management or design-build project, the qualifications that made the project*
202 *complex, and (vii) any post-project issues.*

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