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HOUSE BILL NO. 1108

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee on General Laws
on February 1, 2024)

(Patron Prior to Substitute—Delegates Carr and Lopez [HB 965])

A BILL to amend and reenact §§ 2.2-1519 and 2.2-4378 through 2.2-4383 of the Code of Virginia, relating to Virginia Public Procurement Act; construction management and design-build contracting.

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-1519 and 2.2-4378 through 2.2-4383 of the Code of Virginia are amended and reenacted as follows:

§ 2.2-1519. Implementation of certain capital outlay projects.

A. 1. The Central Capital Planning Fund, the State Agency Capital Account, and the Public Educational Institution Capital Account established pursuant to § 2.2-1520 shall be used to fund capital outlay projects included in the six-year capital outlay plan enacted into law.

2. In addition, public educational institutions and state agencies may request authority and appropriation to conduct pre-planning for any such project using nongeneral fund sources. Such costs may be reimbursed up to the lesser of \$250,000 or one percent of the project construction costs.

B. A Virginia-based contractor who does not have the same number of years of comparable experience under construction management or design-build shall not be penalized for having less comparable experience in construction management or design-build projects, provided such contractor does have significant experience in constructing comparable projects under design-bid-build. The procuring entity shall consider the experience and quality of work that a contractor has done on projects comparable to the project being procured, whether under construction management, design-build, or design-bid-build. These factors shall be considered by the procuring entity in making its decisions in a pre-qualification or a contractor selection process.

C. If at any time during the detailed planning phase the total cost of a capital outlay project is estimated to exceed a threshold amount set forth in the general appropriation act for the required use of value engineering, then value engineering shall be utilized for such project. Each agency and public educational institution shall retain documentation of the value engineering process conducted for any project, including documentation relating to (i) recommendations offered to the agency or institution, (ii) recommendations accepted and rejected by the agency or institution, and (iii) any savings to the agency or institution resulting from the adoption of each recommendation.

D. For capital outlay projects for which an appropriation is made to the State Agency Capital Account or the Public Educational Institution Capital Account, after an agency or public educational institution has received authorization to move to the construction phase of a project, the Director of the Department of Planning and Budget shall transfer sufficient appropriation from the State Agency Capital Account or the Public Educational Institution Capital Account, as appropriate.

E. 1. Prior to an agency or public educational institution awarding a construction contract for a project, the Director of the Department of General Services shall review the lowest bid or best proposal for the project. If the total amount of such bid or proposal, plus previously expended funds and a reasonable allowance for contingencies, does not exceed 105 percent of the general fund-supported resources for the project as determined during the detailed planning phase, the Director of the Department of General Services and the Director of the Department of Planning and Budget may approve the contract. If the total amount of such bid or proposal, plus previously expended funds and a reasonable allowance for contingencies, exceeds 105 percent of the general fund-supported resources for the project, the Directors shall not approve the contract unless funding of that portion of such total project cost in excess of 105 percent of the general fund-supported resources allocated to the project is from nongeneral fund sources such as private funds, gifts, grants, auxiliary funds, or federal funds as appropriate.

2. If an agency or public educational institution is unable to procure funding from nongeneral fund sources for that portion of such total project cost in excess of 105 percent of the general fund-supported resources allocated to the project, then the agency or institution may reduce the size or scope of the project as necessary to remain within 105 percent of the general fund-supported resources allocated to the project, provided that (i) it has completed a value engineering review by or in collaboration with the Department of General Services, (ii) it has provided a written, detailed analysis of the proposed reduction to the Governor and to the Chairmen of the House Appropriations and Senate Finance Committees, and (iii) the project after such reduction in size or scope is substantially similar in quality and functionality to the original project.

3. An agency or public educational institution may request a supplemental allocation of general

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fund-supported resources through the budget process only if it submits a written certification to the Chairmen of the House Appropriations and Senate Finance Committees, the Director of the Department of General Services, the Director of the Department of Planning and Budget, and, for public institutions of higher education only, the Executive Director of the State Council of Higher Education, which certification (i) states that additional funding from nongeneral fund sources as described in subdivision 1 will be insufficient to pay for the full amount of the project cost that is in excess of 105 percent of the general fund-supported resources allocated to the project and (ii) provides a detailed analysis and description of the project as modified for a reduction in size or scope as described in subdivision 2 as well as a justification for why such modifications in size or scope cannot be achieved.

4. Nothing in this section shall preclude an agency or public educational institution from providing for re-design or additional value engineering of projects or re-bidding or re-submitting of proposals.

5. No construction contract for a capital outlay project included in the six-year capital outlay plan enacted into law shall be awarded unless first approved by the Director of the Department of General Services and the Director of the Department of Planning and Budget.

F. After a project has been approved by the Director of the Department of General Services and the Director of the Department of Planning and Budget, the Director of the Department of Planning and Budget shall transfer to the project the remaining funds needed for construction from the State Agency Capital Account or the Public Educational Institution Capital Account, as appropriate.

G. *Where a covered institution, as defined in § 2.2-4379, elects to proceed with a project using a construction management or design-build procurement method, despite the recommendation of the Department of General Services to the contrary, the Six-Year Capital Outlay Plan Advisory Committee shall give its approval or denial if required by § 2.2-4381.*

§ 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. *A design-bid-build project delivery method that utilizes competitive sealed bidding is the default method of procurement for construction.* 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 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:

"Complex project" means a construction project that includes one or more of the following significant components: difficult site location, unique equipment, specialized building systems, multifaceted program, accelerated schedule, historic designation, or intricate phasing or some other aspect that makes ~~competitive sealed bidding~~ *the design-bid-build project delivery method* 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-bid-build" means a project delivery method in which a public body sequentially awards two separate contracts, the first for professional services to design the project and the second utilizing competitive sealed bidding for construction of the project according to the design.

"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.

"Division" means the Division of Engineering and Buildings of the Department of General Services as established by § 2.2-1129.

"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. "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 (i) the Department has approved the use of construction management or design-build contracts and (ii) 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 the design-bid-build project delivery method 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 Division shall not be required considered as a prerequisite or factor considered for prequalification or 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;

8. The procedures allow the state public body to post on the Department's central electronic procurement website known as eVA when and where the general contractor plans to advertise bid packages for subcontracting opportunities when appropriate; and

9. The procedures require the state public body to provide documentation of the processes used in awarding the contract to all of 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.

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

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 state public body 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 state public body's decision to not follow the recommendation of the Department shall be maintained in the procurement file. All documents issued or received by the Department pursuant to this section shall be posted on the Department's central electronic procurement website known as eVA.

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

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, provided that (i) the Department approves the use of construction management or design-build or, in the case of a denial by the Department, such institution receives approval as set forth in subsection F and (ii) 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. Post all documents exchanged between the covered institution and the Department on the Department's central electronic procurement website, known as eVA, prior to the date of submission of proposals; and

4. Submit Department-reviewed procedures to its board of visitors or governing board 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~~ the design-bid-build project delivery method 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 Division shall not be required considered as a prerequisite or factor considered for prequalification or 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 allow for a two-step competitive negotiation process;

8. The procedures allow the covered institution to post on the Department's central electronic procurement website known as eVA when and where the general contractor plans to advertise bid packages for subcontracting opportunities when appropriate; and

9. The procedures require the covered institution to provide documentation of the processes used in awarding the contract to all of the unsuccessful proposers, upon request.

D. The Department shall evaluate the proposed procurement method selected by a covered institution and make offer its recommendation approval or denial 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;

245 2. The compliance by the covered institution with subdivisions C 1, 2, and 7;
 246 3. The project cost, expected timeline, and use;
 247 4. Whether the project is a complex project; and
 248 5. Any other criteria established by the Department to evaluate the proposed procurement method for
 249 the project.

250 E. The Department shall conduct its review within five working days after receipt of the written
 251 determination and render its written ~~recommendation~~ *approval or denial* within such five-working-day
 252 period. The written ~~recommendation~~ *approval or denial* of the Department shall be maintained in the
 253 procurement file.

254 F. If a covered institution elects to proceed with the project using a construction management or
 255 design-build procurement method despite the ~~recommendation~~ *decision* of the Department to the
 256 contrary, such covered institution shall ~~state in writing its reasons therefor and any justification for not~~
 257 ~~following the recommendation of the Department and submit same to the Department obtain approval as~~
 258 ~~follows:~~

259 1. *If the project is funded by funds other than those provided to such institution from the state*
 260 *general fund, secure approval from the board of visitors or governing board of such institution; or*

261 2. *If the project is funded by funds provided to such institution from the state general fund, (i) secure*
 262 *approval from the board of visitors or governing board of such institution when the total cost of such*
 263 *project is over \$65 million or (ii) secure approval from the Six-Year Capital Outlay Plan Advisory*
 264 *Committee established by § 2.2-1516 when the total cost of such project is under \$65 million. The A*
 265 *written statement of a covered institution's decision to not follow the ~~recommendation~~ decision of the*
 266 *Department, its reasons therefor, and the vote of the board of visitors or governing board or the*
 267 *Six-Year Capital Outlay Plan Advisory Committee shall be maintained in the procurement file.*

268 **§ 2.2-4382. Design-build or construction management contracts for local public bodies**
 269 **authorized.**

270 A. Any local public body may enter into a contract for construction on a fixed price or not-to-exceed
 271 price construction management or design-build basis, provided that the local public body (i) *receives*
 272 *approval, if required, as provided in subsection B, (ii) complies with the requirements of this article,*
 273 *and (iii) has by ordinance or resolution implemented procedures consistent with the procedures*
 274 *adopted by the Secretary of Administration for utilizing construction management or design-build*
 275 *contracts.*

276 B. *If a local public body is required to obtain approval from its local governing body to enter into a*
 277 *contract for construction using construction management or design-build, then the local governing body*
 278 *shall adopt a resolution or motion on a per project basis in a public forum to that effect prior to*
 279 *issuing a Request for Qualifications.*

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

285 ~~C. D.~~ A written determination shall be made in advance by the local public body that ~~competitive~~
 286 ~~sealed bidding~~ *the design-bid-build project delivery method* is not practicable or fiscally advantageous,
 287 and such writing shall document the basis for the determination to utilize construction management or
 288 design-build, *including the determination of the project's complexity.* The determination shall be included
 289 in the Request for Qualifications and be maintained in the procurement file.

290 ~~D. E.~~ Procedures adopted by a local public body for construction management *or design-build*
 291 pursuant to this article shall include the following requirements:

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

297 2. Public notice of the Request for Qualifications is posted on the Department's central electronic
 298 procurement website, known as eVA, *or the local public body's own website,* at least 30 days prior to
 299 the date set for receipt of qualification proposals;

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

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

306 projects;

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

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

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

316 8. *The procedures allow the local public body to post on the Department's central electronic*
317 *procurement website known as eVA, or the local public body's own website, when and where the*
318 *general contractor plans to advertise bid packages for subcontracting opportunities when appropriate;*
319 *and*

320 9. *The procedures require the local public body to provide documentation for the processes used in*
321 *awarding the contract to all of the unsuccessful proposers, upon request.*

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

325 **§ 2.2-4383. Reporting requirements.**

326 A. The Department shall report by December 1 of each year to the Governor and the Chairmen of
327 the House Committee on Appropriations, the House Committee on General Laws, the Senate Committee
328 on Finance and Appropriations, and the Senate Committee on General Laws and Technology the
329 following information: (i) the number of projects reviewed pursuant to Articles 2 (§ 2.2-4380) and 3
330 (§ 2.2-4381) and (ii) for each project (a) the identity of the state public body or covered institution and a
331 description of each such project, (b) the estimated cost of the project at the time of the Department's
332 review, (c) the ~~recommendation~~ decision made by the Department concerning the proposed procurement
333 method, ~~and~~ (d) *if such project was a construction management or design-build project, the*
334 *qualifications that made such project complex, and (e) the final procurement method used by the state*
335 *public body or covered institution.*

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

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

345 **2. That the Department of General Services, with the assistance of staff of the House Committee**
346 **on Appropriations and the Senate Committee on Finance and Appropriations, shall assess the**
347 **implementation and administration of the provisions of §§ 2.2-4378 through 2.2-4383 of the Code**
348 **of Virginia, as amended by this act, and report its findings and recommendations to the General**
349 **Assembly by November 1, 2029.**