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SENATE BILL NO. 18

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Joint Conference Committee
on March 8, 2024)

(Patrons Prior to Substitute—Senators Locke and McPike [SB 249])

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

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-4378 through 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. *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 *of similar complexity and size*;

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 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.*

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 open to public inspection pursuant to § 2.2-4342 that are issued or received by the Department 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 open to public inspection pursuant to § 2.2-4342 that are 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 of similar complexity and size;

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 to all of the unsuccessful proposers, upon request, of the processes used in awarding the contract.

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;

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 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.

F. If a covered institution elects to proceed with the project using a construction management or

design-build procurement method despite the ~~recommendation~~ decision 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 the Department shall present the written denial issued pursuant to subsection E to the board of visitors or governing board of such covered institution and the covered institution shall obtain approval by a majority vote of such board for (i) projects funded by funds other than those provided to such covered institution from the state general fund or (ii) projects of \$65 million or more funded in whole or in part from state general funds. If the project is funded in whole or in part from state general funds, a representative from the Department, to the extent the Department deems practicable, shall be included in the process for the selection of a contractor following such approval by the board of visitors or governing board. For projects under \$65 million funded in whole or in part from state general funds, the covered institution shall obtain approval from the Chairmen of the House Committee on Appropriations and the Senate Committee on Finance and Appropriations, or their designees, and a representative of the Department.

A written statement of a covered institution's decision to not follow the ~~recommendation~~ decision of the Department, its reasons therefor, and the vote of the board of visitors or governing board 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) receives approval, if required, as provided in subsection B, (ii) complies with the requirements of this article, and (iii) 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. If a local public body is required to obtain approval from its local governing body to enter into a contract for construction using construction management or design-build, then the local governing body shall adopt a resolution or motion on a per project basis in a public forum to that effect prior to issuing a Request for Qualifications.

C. 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.

D. A written determination shall be made in advance by the local 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 utilize construction management or design-build, including the determination of the project's complexity. The determination shall be included in the Request for Qualifications and be maintained in the procurement file.

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

1. Construction management or design-build 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 for the project 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, or the local public body's own website, 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 Division shall not be required considered as a prerequisite or factor considered for award prequalification of a contract. However, in the selection of a contractor, the local public body may consider the experience of each contractor on comparable construction management or design-build 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 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. The provisions of this subdivision shall not apply to construction management contracts involving

infrastructure projects;

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

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

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

E. F. 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.

§ 2.2-4383. Reporting requirements.

A. The Department shall report by December 1 of each year to the Governor and the Chairmen of the House Committee on Appropriations, the House Committee on General Laws, the Senate Committee on Finance and Appropriations, and the Senate Committee on General Laws and Technology the following information: (i) the number of projects reviewed pursuant to Articles 2 (§ 2.2-4380) and 3 (§ 2.2-4381) and (ii) for each project (a) the identity of the state public body or covered institution and a description of each such project, (b) the estimated cost of the project at the time of the Department's review, (c) the ~~recommendation~~ *decision* made by the Department concerning the proposed procurement method, ~~and~~ (d) *if such project was a construction management or design-build project, the qualifications that made such project complex, and* (e) 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) *if such project was a construction management or design-build project, the qualifications that made the project complex, and* (vii) 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 the Department of General Services, with the assistance of staff of the House Committee on Appropriations and the Senate Committee on Finance and Appropriations, shall assess the implementation and administration of the provisions of §§ 2.2-4378 through 2.2-4383 of the Code of Virginia, as amended by this act, and report its findings and recommendations to the General Assembly by November 1, 2029.