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HOUSE BILL NO. 1326

Offered January 22, 1996

A BILL to amend and reenact §§ 11-37, 11-41, 11-59, 11-61, 11-66, 11-70 and 11-79 of the Code of Virginia, relating to the Virginia Public Procurement Act.

Patrons—Cantor, Katzen, Nelms, Purkey and Reid

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 11-37, 11-41, 11-59, 11-61, 11-66, 11-70 and 11-79 of the Code of Virginia are amended and reenacted as follows:

§ 11-37. Definitions.

The words defined in this section shall have the meanings set forth below throughout this chapter.

"Competitive sealed bidding" is a method of contractor selection which includes the following elements:

1. Issuance of a written Invitation to Bid containing or incorporating by reference the specifications and contractual terms and conditions applicable to the procurement. Unless the public body has provided for prequalification of bidders, the Invitation to Bid shall include a statement of any requisite qualifications of potential contractors. When it is impractical to prepare initially a purchase description to support an award based on prices, an Invitation to Bid may be issued requesting the submission of unpriced offers to be followed by an Invitation to Bid limited to those bidders whose offers have been qualified under the criteria set forth in the first solicitation.

2. Public notice of the Invitation to Bid at least ten days prior to the date set for receipt of bids by posting in a designated public area, or publication in a newspaper of general circulation, or both. In addition, bids may be solicited directly from potential contractors. Any additional solicitations shall include businesses selected from a list made available by the Department of Minority Business Enterprise.

3. Public opening and announcement of all bids received.

4. Evaluation of bids based upon the requirements set forth in the invitation, which may include special qualifications of potential contractors, life-cycle costing, value analysis, and any other criteria such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose, which are helpful in determining acceptability.

5. Award to the lowest responsive and responsible bidder. When the terms and conditions of multiple bids are so provided in the Invitation to Bid, awards may be made to more than one bidder.

6. Competitive sealed bidding shall not be required for procurement of professional services.

"Competitive negotiation" is a method of contractor selection which includes the following elements:

1. Issuance of a written Request for Proposal indicating in general terms that which is sought to be procured, specifying the factors which will be used in evaluating the proposal and containing or incorporating by reference the other applicable contractual terms and conditions, including any unique capabilities or qualifications which will be required of the contractor.

2. Public notice of the Request for Proposal at least ten days prior to the date set for receipt of proposals by posting in a public area normally used for posting of public notices and or by publication in a newspaper or newspapers of general circulation in the area in which the contract is to be performed, or both, so as to provide reasonable notice to the maximum number of offerors that can be reasonably anticipated to submit proposals in response to the particular request. In addition, proposals may be solicited directly from potential contractors.

3. a. Procurement of professional services. - The public body shall engage in individual discussions with two or more offerors deemed fully qualified, responsible and suitable on the basis of initial responses and with emphasis on professional competence, to provide the required services. Repetitive informal interviews shall be permissible. The offerors shall be encouraged to elaborate on their qualifications and performance data or staff expertise pertinent to the proposed project, as well as alternative concepts. The Request for Proposal shall not, however, request that offerors furnish estimates of man-hours or cost for services. At the discussion stage, the public body may discuss nonbinding estimates of total project costs, including, but not limited to, life-cycle costing, and where appropriate, nonbinding estimates of price for services. Proprietary information from competing offerors shall not be disclosed to the public or to competitors. At the conclusion of discussion, outlined in this subdivision, on the basis of evaluation factors published in the Request for Proposal and all information developed in the selection process to this point, the public body shall select in the order of preference two or more

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offerors whose professional qualifications and proposed services are deemed most meritorious. Negotiations shall then be conducted, beginning with the offeror ranked first. If a contract satisfactory and advantageous to the public body can be negotiated at a price considered fair and reasonable, the award shall be made to that offeror. Otherwise, negotiations with the offeror ranked first shall be formally terminated and negotiations conducted with the offeror ranked second, and so on until such a contract can be negotiated at a fair and reasonable price. Should the public body determine in writing and in its sole discretion that only one offeror is fully qualified, or that one offeror is clearly more highly qualified and suitable than the others under consideration, a contract may be negotiated and awarded to that offeror.

Multiphase professional services contracts satisfactory and advantageous to the Department of Transportation for environmental, location, design and inspection work regarding highways and bridges may be negotiated and awarded based on a fair and reasonable price for the first phase only, when completion of the earlier phases is necessary to provide information critical to the negotiation of a fair and reasonable price for succeeding phases.

b. Procurement of other than professional services. - Selection shall be made of two or more offerors deemed to be fully qualified and best suited among those submitting proposals, on the basis of the factors involved in the Request for Proposal, including price if so stated in the Request for Proposal. Negotiations shall then be conducted with each of the offerors so selected. Price shall be considered, but need not be the sole determining factor. After negotiations have been conducted with each offeror so selected, the public body shall select the offeror which, in its opinion, has made the best proposal, and shall award the contract to that offeror. Should the public body determine in writing and in its sole discretion that only one offeror is fully qualified, or that one offeror is clearly more highly qualified than the others under consideration, a contract may be negotiated and awarded to that offeror.

"Construction" means building, altering, repairing, improving or demolishing any structure, building or highway, and any draining, dredging, excavation, grading or similar work upon real property.

"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.

"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, roadway or other item specified in the contract.

"Goods" means all material, equipment, supplies, printing, and automated data processing hardware and software.

"Informality" means a minor defect or variation of a bid or proposal from the exact requirements of the Invitation to Bid, or the Request for Proposal, which does not affect the price, quality, quantity or delivery schedule for the goods, services or construction being procured.

"Multiphase professional services contract" means a contract for the providing of professional services where the total scope of work of the second or subsequent phase of the contract cannot be specified without the results of the first or prior phase of the contract.

"Nonprofessional services" means any services not specifically identified as professional services in the definition of professional services.

"Potential bidder or offeror" for the purposes of §§ 11-66 and 11-70 means a person who, at the time a public body negotiates and awards or proposes to award a contract, is engaged in the sale or lease of goods, or the sale of services, insurance or construction, of the type to be procured under such contract, and who at such time is eligible and qualified in all respects to perform that contract, and who would have been eligible and qualified to submit a bid or proposal had the contract been procured through competitive sealed bidding or competitive negotiation.

"Professional services" means work performed by an independent contractor within the scope of the practice of accounting, actuarial services, architecture, land surveying, landscape architecture, law, medicine, optometry, pharmacy or professional engineering. "Professional services" shall also include the services of an economist procured by the State Corporation Commission.

"Public body" means any legislative, executive or judicial body, agency, office, department, authority, post, commission, committee, institution, board or political subdivision created by law to exercise some sovereign power or to perform some governmental duty, and empowered by law to undertake the activities described in this chapter.

"Responsible bidder" or "offeror" means a person who has the capability, in all respects, to perform fully the contract requirements and the moral and business integrity and reliability which will assure good faith performance, and who has been prequalified, if required.

"Responsive bidder" means a person who has submitted a bid which conforms in all material respects to the Invitation to Bid.

"Services" means any work performed by an independent contractor wherein the service rendered does not consist primarily of acquisition of equipment or materials, or the rental of equipment, materials

and supplies.

"Sheltered workshop" means a work-oriented rehabilitative facility with a controlled working environment and individual goals which utilizes work experience and related services for assisting the handicapped person to progress toward normal living and a productive vocational status.

§ 11-41. Methods of procurement.

A. All public contracts with nongovernmental contractors for the purchase or lease of goods, or for the purchase of services, insurance, or construction, shall be awarded after competitive sealed bidding, or competitive negotiation as provided in this section, unless otherwise authorized by law.

B. Professional services shall be procured by competitive negotiation.

C. 1. Upon a determination made in advance by the public body and set forth in writing that competitive sealed bidding is either not practicable or not fiscally advantageous to the public, goods, services, or insurance may be procured by competitive negotiation. The writing shall document the basis for this determination.

Upon a written determination made in advance by (i) the Governor or his designee in the case of a procurement by the Commonwealth or by a department, agency or institution thereof or (ii) the local governing body in the case of a procurement by a political subdivision of the Commonwealth, that competitive negotiation is either not practicable or not fiscally advantageous, insurance may be procured through a licensed agent or broker selected in the manner provided for the procurement of things other than professional services in subdivision 3 b of the definition of "competitive negotiation" in § 11-37. The basis for this determination shall be documented in writing.

2. Construction may be procured only by competitive sealed bidding, except that competitive negotiation may be used in the following instances upon a determination made in advance by the public body and set forth in writing that competitive sealed bidding is either not practicable or not fiscally advantageous to the public, which writing shall document the basis for this determination:

(i) By the Commonwealth, its departments, agencies and institutions on a fixed price design-build basis or construction management basis under § 11-41.2;

(ii) By any public body for the alteration, repair, renovation or demolition of buildings when the contract is not expected to cost more than \$500,000;

(iii) By any public body for the construction of highways and any draining, dredging, excavation, grading or similar work upon real property; or

(iv) As otherwise provided in § 11-41.2:1.

D. Upon a determination in writing that there is only one source practicably available for that which is to be procured, a contract may be negotiated and awarded to that source without competitive sealed bidding or competitive negotiation. The writing shall document the basis for this determination. The public body shall issue a written notice stating that only one source was determined to be practicably available, and identifying that which is being procured, the contractor selected, and the date on which the contract was or will be awarded. This notice shall be posted in a designated public area or published in a newspaper of general circulation on the day the public body awards or announces its decision to award the contract, whichever occurs first.

E. In case of emergency, a contract may be awarded without competitive sealed bidding or competitive negotiation; however, such procurement shall be made with such competition as is practicable under the circumstances. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file. The public body shall issue a written notice stating that the contract is being awarded on an emergency basis, and identifying that which is being procured, the contractor selected, and the date on which the contract was or will be awarded. This notice shall be posted in a designated public area or published in a newspaper of general circulation on the day the public body awards or announces its decision to award the contract, whichever occurs first, or as soon thereafter as is practicable.

F. A public body may establish purchase procedures, if adopted in writing, not requiring competitive sealed bids or competitive negotiation for single or term contracts not expected to exceed \$15,000 and for contracts for microcomputers and related peripheral equipment and services not expected to exceed \$30,000; however, such small purchase procedures shall provide for competition wherever practicable.

G. Any local school board may authorize any of its public schools or its school division to enter into contracts providing that caps and gowns, photographs, class rings, yearbooks and graduation announcements will be available for purchase or rental by students, parents, faculty or other persons using nonpublic money through the use of competitive negotiation as provided in this chapter, competitive sealed bidding not necessarily being required for such contracts. The Superintendent of Public Instruction may provide assistance to public school systems regarding this chapter and other related laws.

H. Upon a determination made in advance by the local governing body and set forth in writing that

183 the purchase of goods, products or commodities from a public auction sale is in the best interests of the
184 public, such items may be purchased at the auction. The writing shall document the basis for this
185 determination.

186 § 11-59. Action on performance bond.

187 No action against the surety on a performance bond shall be brought unless within five years after
188 completion of the work on the project to the satisfaction of the ~~chief engineer~~, Department of
189 Transportation, in cases where the public body is the Department of Transportation, or within one year
190 after (i) completion of the contract, including the expiration of all warranties and guarantees, or (ii)
191 discovery of the defect or breach of warranty, if the action be for such, in all other cases.

192 § 11-61. Alternative forms of security.

193 A. In lieu of a bid, payment, or performance bond, a bidder may furnish a certified check or cash
194 escrow in the face amount required for the bond.

195 B. If approved by the Attorney General in the case of state agencies, or the attorney for the political
196 subdivision in the case of political subdivisions, a bidder may furnish a personal bond, property bond, or
197 bank or savings and loan association's letter of credit on certain designated funds in the face amount
198 required for the bid, payment or performance bond. Approval shall be granted only upon a determination
199 that the alternative form of security proffered affords protection to the public body equivalent to a
200 corporate surety's bond.

201 *C. The provisions of subsections A and B shall not apply for the Department of Transportation.*

202 § 11-66. Protest of award or decision to award.

203 A. Any bidder or offeror, who desires to protest the award or decision to award a contract shall
204 submit such protest in writing to the public body, or an official designated by the public body, no later
205 than ten days after the award or the announcement of the decision to award, whichever occurs first. Any
206 potential bidder or offeror on a contract negotiated on a sole source or emergency basis who desires to
207 protest the award or decision to award such contract shall submit such protest in the same manner no
208 later than ten days after posting or publication of the notice of such contract as provided in § 11-41.
209 However, if the protest of any actual or potential bidder or offeror depends in whole or in part upon
210 information contained in public records pertaining to the procurement transaction which are subject to
211 inspection under § 11-52, then the time within which the protest must be submitted shall expire ten days
212 after those records are available for inspection by such bidder or offeror under § 11-52, or at such later
213 time as provided in this section. No protest shall lie for a claim that the selected bidder or offeror is not
214 a responsible bidder or offeror. The written protest shall include the basis for the protest and the relief
215 sought. The public body or designated official shall issue a decision in writing within ten days stating
216 the reasons for the action taken. This decision shall be final unless the bidder or offeror appeals within
217 ten days of the written decision by invoking administrative procedures meeting the standards of § 11-71,
218 if available, or in the alternative by instituting legal action as provided in § 11-70.

219 B. If prior to an award it is determined that the decision to award is arbitrary or capricious, then the
220 sole relief shall be a finding to that effect. The public body shall cancel the proposed award or revise it
221 to comply with the law. ~~If, after an award, it is determined that an award of a contract was arbitrary or~~
222 ~~capricious, then the sole relief shall be as hereinafter provided. Where the award has been made but~~
223 ~~performance has not begun, the performance of the contract may be enjoined. Where the award has been~~
224 ~~made and performance has begun, the public body may declare the contract void upon a finding that this~~
225 ~~action is in the best interest of the public. Where a contract is declared void, the performing contractor~~
226 ~~shall be compensated for the cost of performance up to the time of such declaration. In no event shall~~
227 ~~the performing contractor be entitled to lost profits.~~

228 C. Where a public body, an official designated by that public body, or an appeals board determines,
229 after a hearing held following reasonable notice to all bidders, that there is probable cause to believe
230 that a decision to award was based on fraud or corruption or on an act in violation of Article 4 (§ 11-72
231 et seq.) of this chapter, the public body, designated official or appeals board may enjoin the award of
232 the contract to a particular bidder.

233 § 11-70. Legal actions.

234 A. A bidder or offeror, actual or prospective, who is refused permission or disqualified from
235 participation in bidding or competitive negotiation, or who is determined not to be a responsible bidder
236 or offeror for a particular contract, may bring an action in the appropriate circuit court challenging that
237 decision, which shall be reversed only if the petitioner establishes that the decision was arbitrary or
238 capricious, or, in the case of denial of prequalification, that the decision to deny prequalification was not
239 based upon the criteria for denial of prequalification set forth in subsection B of § 11-46.

240 B. A bidder denied withdrawal of a bid under § 11-64 may bring an action in the appropriate circuit
241 court challenging that decision, which shall be reversed only if the bidder establishes that the decision of
242 the public body was clearly erroneous.

243 C. A bidder, offeror or contractor, or a potential bidder or offeror on a contract negotiated on a sole
244 source or emergency basis in the manner provided in § 11-41, whose protest of an award or decision to

award under § 11-66 is denied, may bring an action in the appropriate circuit court challenging a proposed award or the award of a contract, which shall be reversed only if the petitioner establishes that the proposed award or the award is not an honest exercise of discretion, but rather is arbitrary or capricious or not in accordance with the Constitution of Virginia, statutes, regulations or the terms and conditions of the Invitation to Bid or Request for Proposal.

D. If, after an award, it is determined that an award of a contract was arbitrary or capricious, then the sole relief shall be as hereinafter provided. Where the award has been made but performance has not begun, the performance of the contract may be enjoined. Where the award has been made and performance has begun, the public body may declare the contract void upon a finding that this action is in the best interest of the public; however, the contract shall not be enjoined. Where a contract is declared void, the performing contractor shall be compensated for the cost of performance up to the time of such declaration. In no event shall the performing contractor be entitled to lost profits.

~~D.~~ E. If injunctive relief is granted, the court, upon request of the public body, shall require the posting of reasonable security to protect the public body.

~~E.F.~~ A contractor may bring an action involving a contract dispute with a public body in the appropriate circuit court.

~~E.G.~~ A bidder, offeror or contractor need not utilize administrative procedures meeting the standards of § 11-71, if available, but if those procedures are invoked by the bidder, offeror or contractor, the procedures shall be exhausted prior to instituting legal action concerning the same procurement transaction unless the public body agrees otherwise.

~~G.H.~~ Nothing herein shall be construed to prevent a public body from instituting legal action against a contractor.

§ 11-79. Purchase of building materials, etc., from architect or engineer prohibited.

A. No building materials, supplies or equipment for any building or structure constructed by or for a public body shall be sold by or purchased from any person employed as an independent contractor by the public body to furnish architectural or engineering services, but not construction, for such building or structure or from any partnership, association or corporation in which such architect or engineer has a personal interest as defined in § 2.1-639.2.

B. No building materials, supplies or equipment for any building or structure constructed by or for a public body shall be sold by or purchased from any person which has provided or is currently providing design services specifying a sole source for such materials, supplies or equipment to be used in such building or structure to the independent contractor employed by the public body to furnish architectural or engineering services in which such person has a personal interest as defined in § 2.1-639.2.

C. The provisions of subsections A and B shall not apply in cases of emergency or for highway-related projects conducted by the Department of Transportation and the Virginia Port Authority.