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HOUSE BILL NO. 1275

Offered January 26, 1998

A BILL to amend and reenact § 11-37 of the Code of Virginia, relating to the Public Procurement Act; procurement of professional services.

Patrons—Orrock; Senator: Houck

Referred to Committee on General Laws

Be it enacted by the General Assembly of Virginia:**1. That § 11-37 of the Code of Virginia is 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 by publication in a newspaper or newspapers of general circulation in the area in which the contract is to be performed 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, may~~ request that offerors furnish *nonbinding* 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 offerors whose professional qualifications and proposed services are deemed

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

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

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

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

84 "Construction management contract" means a contract in which a party is retained by the owner to
85 coordinate and administer contracts for construction services for the benefit of the owner, and may also
86 include, if provided in the contract, the furnishing of construction services to the owner.

87 "Design-build contract" means a contract between a public body and another party in which the party
88 contracting with the public body agrees to both design and build the structure, roadway or other item
89 specified in the contract.

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

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

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

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

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

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

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

114 "Public contract" means an agreement between a public body and a nongovernmental source that is
115 enforceable in a court of law.

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

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

121 "Services" means any work performed by an independent contractor wherein the service rendered

122 does not consist primarily of acquisition of equipment or materials, or the rental of equipment, materials
123 and supplies.
124 "Sheltered workshop" means a work-oriented rehabilitative facility with a controlled working
125 environment and individual goals which utilizes work experience and related services for assisting the
126 handicapped person to progress toward normal living and a productive vocational status.