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HOUSE BILL NO. 1191

Offered January 10, 2024

Prefiled January 10, 2024

A BILL to amend and reenact §§ 2.2-4378 through 2.2-4382 of the Code of Virginia, relating to Virginia Public Procurement Act; construction management and design-build contracting; applicability.

Patron—Sickles

Referred to Committee on General Laws

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-4378 through 2.2-4382 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. Design-bid-build that utilizes competitive sealed bidding as the preferred method of procurement for construction services. 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; and

3. Complex projects where an entity has received an exemption from the provisions of this chapter from the Division of Engineering and Buildings of the Department of General Services.

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 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.

E. Public bodies shall advertise available subcontracting opportunities on the Department of General Services' central electronic procurement website known as eVA.

§ 2.2-4379. Definitions.

As used in this chapter, unless the context requires a different meaning:

"Competitive sealed bidding" means the same as that term is described in § 2.2-4302.1.

"Complex project" means a construction project that includes one or more of the following significant components: significantly difficult site location, unique equipment, specialized unconventional building systems, multifaceted program, accelerated schedule only due to federal or state regulatory mandates, registered historic designation, or substantial and intricate phasing or some other aspect that makes competitive sealed bidding not practical of an occupied building.

"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 architectural and engineering services to design the project, and the second utilizes 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.

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

61 "Public body" means the same as that term is defined in § 2.2-4301.

62 "State public body" means any authority, board, department, instrumentality, agency, or other unit of  
63 state government. "State public body" does not include any covered institution; any county, city, or  
64 town; or any local or regional governmental authority.

65 **§ 2.2-4380. Construction management or design-build contracts for state public bodies**  
66 **authorized.**

67 A. Any state public body may enter into a contract for construction on a fixed price or not-to-exceed  
68 price construction management or design-build basis, provided that (i) the Division has approved the use  
69 of construction management or design-build and (ii) such public body complies with the requirements of  
70 this article and the procedures adopted by the Secretary of Administration for using construction  
71 management or design-build contracts.

72 B. Procedures adopted by a state public body pursuant to this article shall include the following  
73 requirements:

74 1. A written determination is made in advance by the state public body that competitive sealed  
75 bidding design-bid-build is not practicable or fiscally advantageous, and such writing shall document the  
76 basis for the determination to use construction management or design-build. The determination shall be  
77 included in the Request for Qualifications and maintained in the procurement file;

78 2. Prior to making a determination as to the use of construction management or design-build for a  
79 specific construction project, a state public body shall have in its employ or under contract a licensed  
80 architect or engineer with professional competence appropriate to the project who shall (i) advise the  
81 public body regarding the use of construction management or design-build for that project and (ii) assist  
82 the public body with the preparation of the Request for Proposal and the evaluation of such proposals;

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

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

88 5. Prior construction management or design-build experience or previous experience with the  
89 Department's Bureau of Capital Outlay Management shall not be required as a prerequisite for award of  
90 a contract. However, in the selection of a contractor, a state public body may shall not consider the  
91 prior construction management or design-build experience of each contractor on comparable projects;

92 6. Construction management contracts shall require that (i) no more than 10 percent of the  
93 construction work, as measured by the cost of the work, be performed by the construction manager with  
94 its own forces and (ii) the remaining 90 percent of the construction work, as measured by the cost of  
95 the work, be performed by subcontractors of the construction manager, which the construction manager  
96 shall procure by publicly advertised, including on the Department's central electronic procurement  
97 website known as eVA, competitive sealed bidding to the maximum extent practicable; and

98 7. The procedures shall allow for a two-step competitive negotiation process; and

99 8. Price is a critical basis for award of the contract.

100 C. The Department Division shall evaluate the proposed procurement method selected by the state  
101 public body and make its recommendation as to whether approve or deny the use of the construction  
102 management or design-build procurement method is appropriate for the specific project. In its review,  
103 the Department Division shall also consider:

104 1. The written determination of the state public body;

105 2. The compliance by the state public body with subdivisions B 1, 2, and 7; and

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

107 4. Whether the project is a complex project; and

108 5. Any other criteria established by the Department to evaluate the proposed procurement method for  
109 the project.

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

114 E. If a state public body elects to proceed with the project using a construction management or  
115 design-build procurement method despite the recommendation of the Department to the contrary, such  
116 state public body shall state in writing its reasons therefor and any justification for not following the  
117 recommendation of the Department and submit same to the Department. The written statement of a state  
118 public body's decision to not follow the recommendation of the Department shall be maintained in the  
119 procurement file All documents issued or received by the Division pursuant to this section shall be  
120 posted on the Department's central electronic procurement website known as eVa.

121 § 2.2-4381. Construction management or design-build contracts for covered institutions  
122 authorized.

123 A. Any covered institution may enter into a contract for construction on a fixed price or  
124 not-to-exceed price construction management or design-build basis, provided that (i) *the Division has*  
125 *approved the use of construction management or design-build and (ii) such institution complies with the*  
126 *requirements of this article and with the procedures adopted by the Secretary of Administration for using*  
127 *construction management or design-build contracts.*

128 B. Covered institutions shall:

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

131 2. Submit such procedures, and any subsequent changes to adopted procedures, to the ~~Department~~  
132 *Division* for review and comment; and

133 3. Submit ~~Department-reviewed~~ *Division* procedures to its board of visitors for adoption.

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

136 1. A written determination is made in advance by the covered institution that competitive sealed  
137 bidding is not practicable or fiscally advantageous, and such writing shall document the basis for the  
138 determination to use construction management or design-build. The determination shall be included in  
139 the Request for Qualifications and maintained in the procurement file;

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

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

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

151 5. Prior construction management or design-build experience or previous experience with the  
152 Department's Bureau of Capital Outlay Management shall not be required as a prerequisite for award of  
153 a contract. ~~However, in~~ *In* the selection of a contractor, a covered institution ~~may~~ *shall not* consider the  
154 *prior construction management or design-build* experience of each contractor on comparable projects;

155 6. Construction management contracts shall require that (i) no more than 10 percent of the  
156 construction work, as measured by the cost of the work, be performed by the construction manager with  
157 its own forces and (ii) the remaining 90 percent of the construction work, as measured by the cost of  
158 the work, be performed by subcontractors of the construction manager, which the construction manager  
159 shall procure by publicly advertised, *including on the Department's central electronic procurement*  
160 *website known as eVA*, competitive sealed bidding to the maximum extent practicable; ~~and~~

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

162 8. *Price is a critical basis for award of the contract.*

163 D. The ~~Department~~ *Division* shall evaluate the proposed procurement method selected by a covered  
164 institution and ~~make its recommendation as to whether approve or deny~~ *approve or deny* the use of the construction  
165 management or design-build procurement method is ~~appropriate~~ *appropriate* for the specific project. In its review,  
166 the ~~Department~~ *Division* shall also consider:

167 1. The written determination of the covered institution;

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

169 3. ~~The project cost, expected timeline, and use;~~

170 4. Whether the project is a complex project; ~~and~~

171 5. ~~Any other criteria established by the Department to evaluate the proposed procurement method for~~  
172 ~~the project.~~

173 E. The ~~Department~~ *Division* shall conduct its review within five working days after receipt of the  
174 written determination and render its written ~~recommendation approval or denial~~ *approval or denial* within such  
175 five-working-day period. The written ~~recommendation approval or denial~~ *approval or denial* of the ~~Department~~ *Division*  
176 shall be maintained in the procurement file.

177 F. If a covered institution elects to proceed with the project using a construction management or  
178 design-build procurement method despite the recommendation of the Department to the contrary, such  
179 covered institution shall state in writing its reasons therefor and any justification for not following the  
180 recommendation of the Department and submit same to the Department. The written statement of a  
181 covered institution's decision to not follow the recommendation of the Department shall be maintained in

182 the procurement file *All documents issued or received by the Division pursuant to this section shall be*  
 183 *posted on the Department's central electronic procurement website known as eVa.*

184 **§ 2.2-4382. Design-build or construction management contracts for local public bodies**  
 185 **authorized.**

186 A. Any local public body may enter into a contract for construction on a fixed price or not-to-exceed  
 187 price construction management or design-build basis, provided that the local public body (i) *receives*  
 188 *approval from its local governing body as provided in subsection B*, (ii) complies with the requirements  
 189 of this article, and ~~(ii)~~ (iii) has by ordinance or resolution implemented procedures ~~consistent~~ *complying*  
 190 with the procedures adopted by the Secretary of Administration for utilizing construction management or  
 191 design-build contracts.

192 B. *A local public body shall seek approval from its local governing body prior to using any*  
 193 *alternative procurement method, including construction management and design-build for any*  
 194 *construction project. Such approval is required prior to the issuance of any request for qualifications or*  
 195 *proposals or any other solicitation request and shall be voted on as a specific item on the agenda by*  
 196 *the local governing body at a regular public meeting of the local governing body. All documents issued*  
 197 *or received by the local public body pursuant to this section shall be posted on the Department's central*  
 198 *electronic procurement website known as eVA.*

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

204 ~~C. D.~~ A written determination shall be made in advance by the local public body that ~~competitive~~  
 205 ~~sealed bidding~~ *design-bid-build* is not practicable or fiscally advantageous, and such writing shall  
 206 document the basis for the determination to utilize construction management or design-build. The  
 207 determination shall be included in the Request for Qualifications and be maintained in the procurement  
 208 file.

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

211 1. Construction management *or design-build* may be utilized on projects where the project cost is  
 212 expected to be less than the project cost threshold established in the procedures adopted by the Secretary  
 213 of Administration for utilizing construction management contracts, provided that (i) the project is a  
 214 complex project and, (ii) the project procurement method *for the project* is approved by the local  
 215 governing body, and (iii) *the project complies with the procedures adopted by the Secretary of*  
 216 *Administration for using construction management or design-build contracts.* The written approval of the  
 217 governing body shall be maintained in the procurement file;

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

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

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

227 5. Construction management contracts shall require that (i) no more than 10 percent of the  
 228 construction work, as measured by the cost of the work, be performed by the construction manager with  
 229 its own forces and (ii) the remaining 90 percent of the construction work, as measured by the cost of  
 230 the work, be performed by subcontractors of the construction manager, which the construction manager  
 231 shall procure by publicly advertised, *including on the Department's central electronic procurement*  
 232 *website known as eVA*, competitive sealed bidding to the maximum extent practicable;

233 6. The *adopted* procedures shall allow for a two-step competitive negotiation process *consistent with*  
 234 *the procedures for state public bodies as provided in § 2.2-4380*; and

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

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