

**POINT 1 – THE VIRGINIA PUBLIC PROCUREMENT ACT PROVIDES THAT COMPETITIVE SEALED BIDDING IS THE PREFERRED METHOD OF PROCURING CONSTRUCTION. THE USE OF COMPETITIVE NEGOTIATION IS THE EXCEPTION (§§ 2.2-4303(D) & 4308(A)). DESPITE THESE PROVISIONS, COMPETITIVE NEGOTIATION IS BEING USED TO PROCURE CONSTRUCTION IN CASES WHERE IT IS NOT WARRANTED.**

- § 2.2-4300 in establishing the intent of the Act provides, “. . . that all procurement procedures be conducted in a fair and impartial manner with avoidance of any impropriety or appearance of impropriety, that all qualified vendors have access to public business and that no offeror be arbitrarily or capriciously excluded . . .” It further states, “. . . it is the intent of the General Assembly that competition be sought to the maximum feasible degree . . .”
- Using competitive negotiation on projects where its use is not justified means not all qualified contractors have access to the public business and many are arbitrarily and capriciously excluded by irrelevant prequalification criteria (such as location of offices in relation to the project).
- Furthermore, competition is not maximized when choosing from a small number of offerors, as opposed to a large pool of bidders.

**POINT 2 – THE CODE CURRENTLY PROVIDES NO EFFECTIVE MEANS FOR AN OFFEROR OR POTENTIAL OFFEROR TO CHALLENGE A PUBLIC BODY’S USE OF COMPETITIVE NEGOTIATION TO PROCURE CONSTRUCTION. ACCORDINGLY, THE USE OF THIS MEANS OF PROCUREMENT CONTINUES UNABATED.**

- The only existing means to challenge a public body’s use of competitive negotiation is to seek a writ of mandamus and an injunction.
- The lack of an effective method to challenge a public body’s use of competitive negotiation allows public bodies to use this form of procurement in contravention of the intent of the VPPA.

**POINT 3 – THE USE OF ALTERNATIVE PROCUREMENT METHODS (THOSE OTHER THAN COMPETITIVE SEALED BIDDING) IS NEGATIVELY IMPACTING SMALL BUSINESS IN VIRGINIA. WHEN USING THE COMPETITIVE NEGOTIATION FORM OF PROCUREMENT, PUBLIC BODIES ARE CONSISTENTLY AWARDED PROJECTS TO THE LARGEST CONTRACTORS IN VIRGINIA AND TO THE LARGE OUT OF STATE CONTRACTORS.**

- Committee should review all public projects delivered by CM or CM @ Risk to determine to which contractors they were awarded.
- Committee should gather data on cost of use of CM and CM @ Risk versus competitive sealed bidding.

- To qualify for a project to be delivered by competitive negotiation, public bodies are sometimes requiring that all offerors have previous CM or CM @ Risk experience. This significantly limits competition and is not always relevant to the procurement decision.
- Some public bodies are favorably scoring offerors based upon their close proximity to the project. In most cases, proximity to the project has little if any impact on project delivery.

**POINT 4 - THE USE OF ALTERNATIVE PROCUREMENT METHODS (THOSE OTHER THAN COMPETITIVE SEALED BIDDING) IS NEGATIVELY IMPACTING TAXPAYERS IN VIRGINIA. IN MOST CASES, PROCURING CONSTRUCTION THROUGH COMPETITIVE NEGOTIATION WILL RESULT IN INCREASED PROJECT COSTS FOR THE PUBLIC OWNER. THE ARGUMENT THAT COMPETITIVE NEGOTIATION SAVES COSTS BY ELIMINATING THE CHANGE ORDER PROCESS IS A RED HERRING.**

- The use of competitive negotiation often results in awarding projects to very large contractors. Inherent in their operations are layers of overhead that do not exist in smaller, but capable, firms. The cost of this overhead gets passed through to owners.
  - Example – School renovation projects with three double-wide office trailers on site. Staffing level is not justified for project of that nature.
- Many projects procured through competitive negotiation afford the contractor a project contingency. This is an amount, in excess of the budget that a contractor can dip into for what would otherwise be paid through a change order. In some cases, the contractor and the public owner agree to split any amount of the contingency fund not expended during the prosecution of the work. In other cases, the contractor is awarded for delivering a project under budget by the public owner agreeing to split the savings with the contractor. This is problematic, given that the contractor is heavily involved in establishing the project budget.
  - Question – If you hire a contractor to renovate your home and you allow the contractor to establish the budget, is the budget likely to be lower or higher than a budget developed objectively?
- In addition to acknowledged contingency reserves, contractors delivering by CM, CM @ Risk and Design Build generally build in an additional contingency reserve, in addition to the agreed upon mark-up profit, to hedge against cost risks.

**POINT 5 – SIMPLE CHANGES TO THE PUBLIC PROCUREMENT ACT, SUCH AS THOSE CONTAINED IN HB 2078 LAST SESSION, CAN ADDRESS THESE CONCERNS BY ADDING CHECKS AND BALANCES, TRANSPARENCY AND ACCOUNTABILITY TO THE ACT.**

- They included:
  - Establishing a \$10 million dollar floor for the use of competitive negotiation to procure construction of run of the mill projects. In other words, if a project's

cost is expected to be less than \$10 million, it can only be procured via competitive sealed bidding, unless the project is unusually complex or extraordinary circumstances exist.

- Requiring public bodies to give significant consideration to price. In the event a public body selects an offeror who was not the lowest priced, requiring the public body to justify in writing why it failed to contract with the lowest priced offeror.
- Restricting the use of the construction management method of project delivery to only those projects where it is necessary due to the need for real time value engineering or constructability analysis. Requiring the public body to document in writing these circumstances. The bill contained similar restrictions on a public body's use of the design-build method of project delivery.
- Restricting public bodies from excluding otherwise qualified contractors from public construction work, simply because they lack prior construction management experience or project type similar design-build experience.
- In the event a public body utilizes the construction manager method of project delivery, the bill requiring the construction manager to become involved early in the project to ensure an actual benefit from that delivery method flows to the public body.
- Affording an offeror or potential offeror the right to appeal a public body's decision to use competitive negotiation to procure construction.
- Increasing the amount of time, that contractors have to respond to requests for proposals (except in the case of emergency).
- Requiring local public bodies to post all requests for proposals on the DGS' electronic procurement website (eVA).
- Bringing colleges and universities, who are otherwise exempt, back under the requirements of the VPPA for projects that are not expected to exceed \$10 million in cost.