

**FINAL REPORT OF THE JOINT GENERAL LAWS
SUBCOMMITTEE STUDYING**

**THE EFFECT OF AUTHORIZING
DESIGN-BUILD AND
CONSTRUCTION MANAGEMENT
CONTRACTS FOR PUBLIC
BODIES (HJR 643)**

**TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA**



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RICHMOND
1996**

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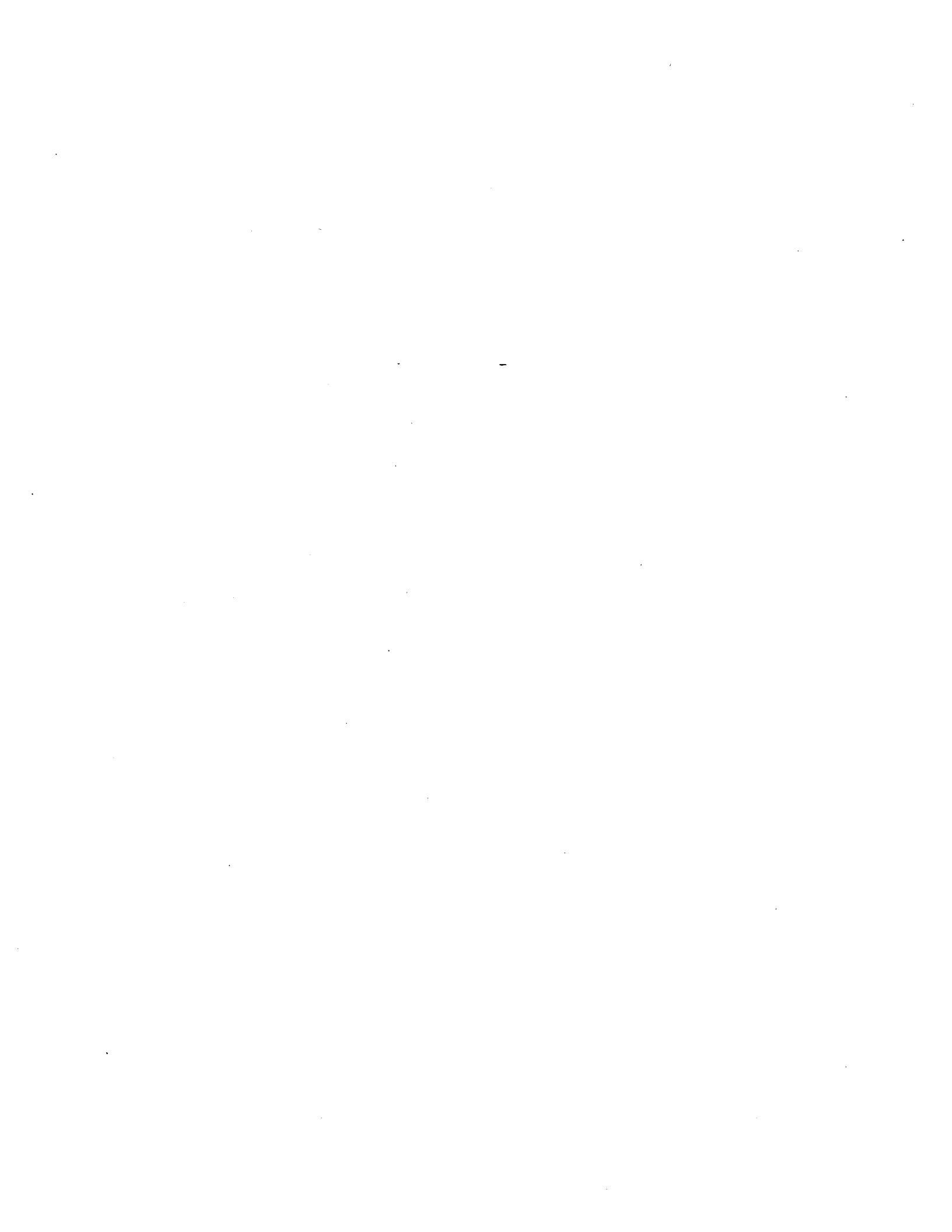
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TABLE OF CONTENTS

I. INTRODUCTION AND OVERVIEW.....	1
A. STUDY AUTHORITY AND SCOPE	1
B. BACKGROUND AND PREVIOUS STUDIES.....	1
C. OVERVIEW OF THE VIRGINIA PUBLIC PROCUREMENT ACT	3
II. WORK OF THE SELECT JOINT SUBCOMMITTEE	12
A. VIEW OF LOCAL GOVERNMENTS.....	13
B. VIEW OF GENERAL CONTRACTORS AND DESIGN PROFESSIONALS	13
III. JOINT SUBCOMMITTEE FINDINGS AND RECOMMENDATIONS.....	14
IV. APPENDICES.....	19
A. HOUSE JOINT RESOLUTION No. 643 (1995)	20
B. DRAFT REPORT OF "WORK GROUP"	22
C. DESIGN-BUILD AND CONSTRUCTION MANAGEMENT PROCEDURES FOR STATE AGENCIES (CH. IV, CAPITAL OUTLAY MANUAL)	29
D. LEGISLATIVE RECOMMENDATION OF THE JOINT SUBCOMMITTEE (HB 336 AS INTRODUCED)	36
E. HOUSE BILL 336 (CH. 962, 1996) AS SIGNED BY THE GOVERNOR	45



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**TO
THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA**

**RICHMOND, VIRGINIA
MAY, 1996**

**TO: THE HONORABLE GEORGE ALLEN, GOVERNOR OF VIRGINIA
AND
THE GENERAL ASSEMBLY OF VIRGINIA**

I. INTRODUCTION AND OVERVIEW

A. STUDY AUTHORITY AND SCOPE

House Joint Resolution No. 643 (Appendix A) agreed to during the 1995 Session of the General Assembly, established a select joint subcommittee of the House and Senate Committees on General Laws to study the effect of authorizing design-build and construction management contracts for public bodies. The resolved clause in the resolution directed the select joint subcommittee to examine the effect of authorizing public bodies other than the Commonwealth to enter into contracts for construction projects on a fixed-price, design-build basis or construction management basis.

The select joint subcommittee was comprised of nine members: five members of the House Committee on General Laws appointed by the Speaker of the House, and four members of the Senate Committee on General Laws appointed by the Senate Committee on Privileges and Elections.

B. BACKGROUND AND PREVIOUS STUDIES

Senate Joint Resolution 148, enacted by the 1979 Session of the General Assembly, directed the then Secretary of Administration and Finance to establish a task force to (i) consider the desirability and feasibility of public contract legislation applying uniformly to the state and counties, cities, and other political subdivisions; (ii) evaluate current and proposed procurement

legislation in light of requirements for federal grants; and (iii) compare Virginia law to other state procurement laws and the Model Procurement Code approved by the American Bar Association in 1979. Senate Joint Resolution 148 required the task force created by the Secretary of Administration and Finance to report to the Committees on General Laws of the Senate and House of Delegates, and required an interim report by December 1, 1979 and a final report by November 1, 1980.

In its interim report, Senate Document 18 (1980), the task force indicated that it was participating in a national development of procurement law which began in the early 1970's with the Commission on Federal Procurement. The report of the Commission on Federal Procurement led to (i) the creation of the Office of Federal Procurement Policy, (ii) a study of state and local government procurement published by the Council of State Governments, and (iii) the adoption by the American Bar Association in 1979 of the Model Procurement Code. The task force examined the statutes under which all public agencies of the Commonwealth purchase materials, services, and construction.

In 1979, the Virginia Public Procurement Act did not exist, instead, public procurement law was sprinkled throughout the Code of Virginia and was conducted on an agency-by-agency basis. At that time, statutory provisions governing public procurement were found in Titles 2.1, 9, 11, 15.1, 22, 33.1, 42.1, 53 and 59 of the Code of Virginia. Procurement of construction, except for highways which was found in Title 33.1, was located in Title 11 (Chapter 4; §§ 11-17 et seq.) and applied only to the Commonwealth and agencies of the Commonwealth. Although the task force in its interim report made no recommendations, it found that in Virginia, procurement law was not centralized and each agency contracted in its own right.¹ Further, prior to 1979, no law required competitive bidding.

The Final Report issued in November, 1980, by the office of the Secretary of Administration and Finance found (i) no uniform, coherent statement of public procurement policy existed in Virginia which led to conflicting interpretations of law, (ii) serious omissions in procurement activities resulted in state and county governments being governed by state law and city governments guided by their charter provisions, (iii) procurement rules changed based on the identity of the contracting agency, and (iv) Virginia procurement laws needed to be overhauled "and that the final product should be a comprehensive statement applicable to all levels and agencies of government, articulating broad fundamental operating policies, the foremost of which is competition".² As a result of these findings, the adoption of a comprehensive public procurement act for Virginia was recommended. The Virginia Public Procurement Act became effective on January 1, 1983 (Chapter 647, 1982 Acts of Assembly).

¹ The Division of Engineering and Buildings of the Department of General Services did have some administrative control of public procurement when construction involved capital outlay funds.

² Virginia Procurement Law Study Final Report dated November 1, 1980, office of the Secretary of Administration and Finance.

C. OVERVIEW OF THE VIRGINIA PUBLIC PROCUREMENT ACT

The Virginia Public Procurement Act (Chapter 7, §§ 11-35 et seq. of Title 11) was enacted by the 1982 Session of the General Assembly and became effective in January, 1983. Section 11-35 expressed the intent of the 1982 Session of the General Assembly:

"To the end that public bodies in the Commonwealth obtain high quality goods and services at reasonable cost, 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 is the intent of the General Assembly that competition be sought to the maximum feasible degree, that individual public bodies enjoy broad flexibility in fashioning details of such competition, that the rules governing contract awards be made clear in advance of the competition, that specifications reflect the procurement needs of the purchasing body rather than being drawn to favor a particular vendor, and that purchaser and vendor freely exchange information concerning what is sought to be procured and what is offered."

For the purposes of this study only those sections relating to design-build and construction management contracts were examined. Specifically, §§ 11-35, 11-37, 11-41, 11-41.2 and 11-41.2:1, which are discussed below.

The purpose of the Virginia Public Procurement Act (VPPA) was discussed earlier in this report. As to its applicability, § 11-35 provides that unless specifically exempted under the VPPA or other provision of law, all activities for the acquisition of goods, services, or construction by public bodies are required to be obtained through a competitive process. The VPPA applies to all contracts entered into on or after January 1, 1983, by a public body. Briefly stated, the VPPA seeks to ensure that (i) public bodies obtain high quality goods and services at reasonable costs, (ii) public procurement is administered in a fair and impartial manner, and (iii) qualified vendors have access to the public's business.

Section 11-37 is the definition section for the VPPA and is a key to understanding how the procurement process works in Virginia. In other words, the law is in the definitions. For the purposes of this study, the important definitions are:

"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 made 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 made 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, 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 discussions, 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 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 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.

"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.

Elements of competitive sealed bidding:

- public body seeks goods, services, or construction through invitation to bid
- price is the bottom line
- vendors bid on specifications provided by the public body
- all bidders are bidding on the same contract terms and conditions
- contract awarded to the lowest responsible and responsive bidder

Elements of competitive negotiation:

- public body seeks services and construction under certain circumstances (design-build) through request for proposal
- price is one of many factors to be considered
- "concept" of the needed service provided by the public body
- qualifications of the vendor are very important

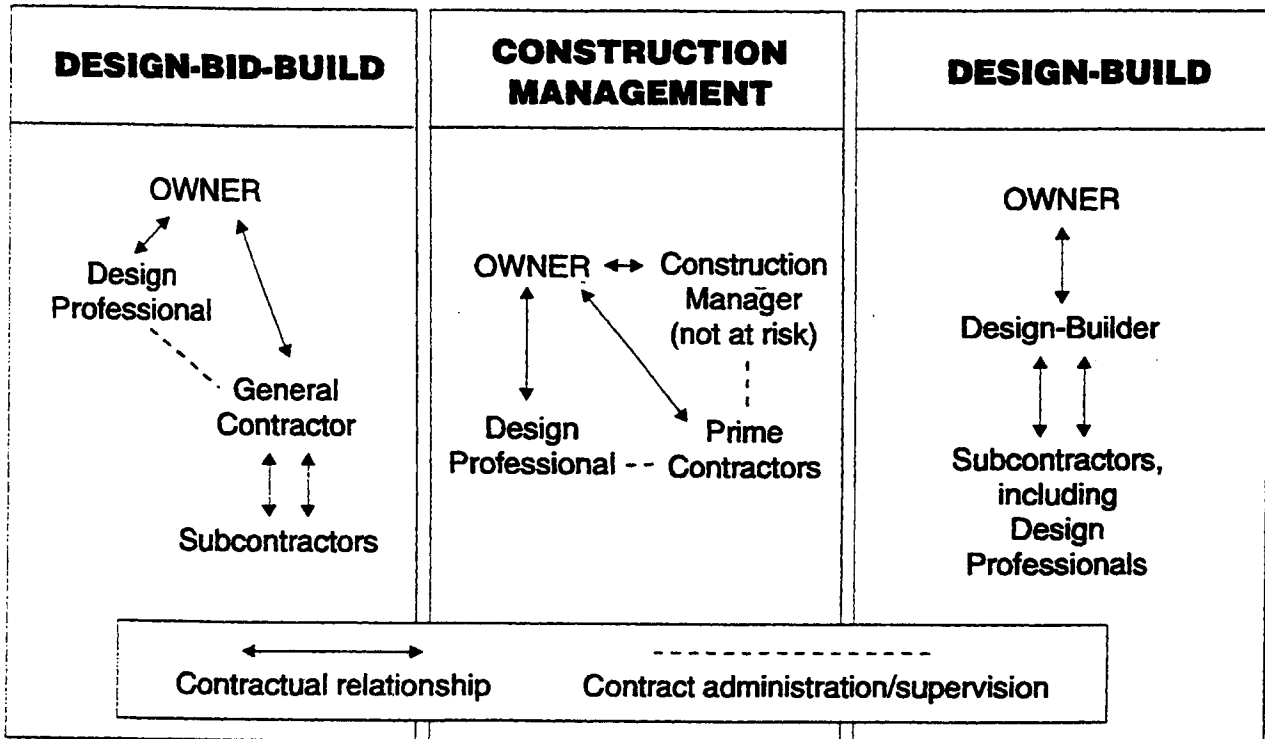
Elements of construction management contracts:

- public body retains services of a firm to coordinate and administer a construction contract
- construction manager is the general contractor
- used primarily for complex construction projects

Elements of design-build contracts for localities:

- public body conducts competitive negotiation
- price is but one factor in the decision
- no award to the lowest responsive and responsible bidder required
- used primarily (in theory) for simpler construction projects

Based on the definitions above, the following diagrams show the various project delivery systems.



Source: Williams, Mullen, Christian & Dobbins, Attorneys at Law.

Section 11-41 provides that all public contracts with nongovernmental contractors for the purchase or lease of goods, or for the purchase of services, or construction shall be awarded after competitive sealed bidding, or competitive negotiation, unless otherwise provided by law. Exceptions are made (i) for emergency circumstances, (ii) where a determination has been made in writing that there is only one practicable source available for what is to be purchased (sole source exception), and (iii) for small purchases not expected to exceed \$15,000.

The procurement of construction is required by §11-41 to be conducted using competitive sealed bidding, except that competitive negotiation may be used in the following instances upon an advance written determination by a public body that competitive sealed bidding is not practicable:

1. By the Commonwealth on a design-build basis or construction management basis;
2. By any public body for the alteration, repair, renovation or demolition of buildings when the contract is not expected to exceed \$500,000;

3. By any public body for "earth work"--highway construction, draining, dredging, excavation; or
4. As otherwise provided in § 11-41.2:1 (Design-build for public bodies other than the Commonwealth).

Pursuant to § 11-41.2, the Commonwealth, its departments, agencies and institutions are authorized to enter into contracts on a fixed price design-build basis or construction management basis. Under § 11-41.2, a two-step competitive negotiation process is required--(i) offerors submit qualifications and (ii) no more than five qualified offerors are requested to submit proposals. The design-build (or construction management) contract is awarded to the offeror who submits an acceptable technical proposal at the lowest cost, unless the state has received the approval of the Director of Engineering and Buildings to award the contract on an alternative basis. The award of a design-build contract is required to follow procedures, including written justification that competitive sealed bidding is not practical and/or fiscally advantageous. If the agency desires to award the contract to someone other than the lowest bidder, a request for an exception must be made to the Director of Engineering and Buildings.³

Use of design-build contracts by state agencies are, however, limited to those types of construction projects designated in Chapter IV of the Capital Outlay Manual adopted in 1988 by the Secretary of Administration after a public hearing and the approval of the House Appropriations and the Senate Finance Committees. The rationale behind the Commonwealth's design-build authority is that state government has a wealth of resources and staff to double check the state's position before a contract is awarded.

The current process for public bodies *other than the Commonwealth* (§ 11-41.2:1) requires the approval of the General Assembly on a case-by-case basis for design-build or construction management authority. Effective July 1, 1987, § 11-41.2:1 grants authority to specific localities to enter into contracts on a fixed price or not-to-exceed price design-build basis or construction management basis in accordance with procedures consistent with those described in the VPPA for the procurement of nonprofessional services through competitive negotiation. The governing body may authorize payment to no more than three responsive bidders who are not awarded the design-build contract if the governing body determines that such payment is necessary to promote competition. The governing body is not required to award a design-build contract to the lowest bidder, but may consider price as one factor in evaluating the proposals received.

As indicated earlier, the elements of design-build contracts for localities are:

- competitive negotiation
- price is but one factor in the decision
- no award to the lowest responsive and responsible bidder required
- used primarily (in theory) for simpler construction projects

³ Procedures for Utilizing Design-Build Contracts, Secretary of Administration, July 1, 1988.

Since 1987, 26 localities have received from the General Assembly an exemption to use design-build contracts for the construction of public projects. A legislative history of these exceptions as contained in § 11-41.2:1 follows indicating when the exemption was granted, the locality granted the exemption and a brief description of the project for which design-build authority was sought.

In the 1995 Session of the General Assembly, legislators considered Senate Bill 1068, which in its original form, authorized the use of design-build or construction management contracts by “any county, city, or school board” without requiring the approval of the General Assembly. As the legislative process went on, however, the focus of SB 1068 changed and it was amended to provide for the construction of two schools in Loudoun County. Clearly, the General Assembly was unwilling to give a blanket grant of design-build authority to local governing bodies. Ultimately, this bill was the vehicle for other design-build exemptions for the City of Martinsville and Prince William County.

**PROJECTS AUTHORIZED PURSUANT TO § 11-41.2:1
FOR PUBLIC BODIES OTHER THAN THE COMMONWEALTH**

Year/Chapter	Locality	Project
1987 (cc. 218, 474)	City of Richmond	Visitor’s Center
1988 (c. 286)	Counties of Fluvanna, Greene, Louisa, Madison, and Orange	Regional jail
1989 (c.37)	Prince William Co. and Cities of Manassas and Manassas Park	Regional jail
1989 (c. 603)	Norfolk	Jail and Public health center
1990 (c. 11)	Winchester and Counties of Clarke and Frederick	Adult regional jail
1990 (c. 178)	Fredericksburg and Counties of King George and Spotsylvania, and member counties of the Rappahannock Regional Jail Board	Regional jail
1991 (c. 660)	Henrico County or Counties of Henrico, Goochland and New Kent	Renovate jail Regional jail

Year/Chapter	Locality	Project
1991 (c. 681)	Counties of King George, Richmond, and Westmoreland	Regional jail
1991 (c. 681)	Counties of Alleghany and Bath, and Cities of Covington and Clifton Forge	Regional jail
1991 (c. 15 SSI)	Albemarle Co. and Charlottesville	Addition to the Albemarle-Charlottesville Joint Security Complex
1991 (c. 634)	Chesapeake	Replace Jordon Bridge ⁴
1992 (c. 78)	Counties of King George, Richmond, Westmoreland, and Town of Warsaw	Regional jail
1992 (c. 368)	Northampton Co.	Jail
1992 (c. 178)	Any political subdivisions individually or jointly	Materials recovery facility or solid waste processing facility
1992 (c. 839)	Virginia Beach	Long-term water supply project from Roanoke River and expansion of Marine Science Museum ⁵
1993 (c. 44)	Chesapeake	Jail renovation and construction

⁴ Expires July 1, 1996 (c. 282, 93 Acts of Assembly).

⁵ Latter provision expires July 1, 1997 (c. 839, 92 Acts of Assembly).

Year/Chapter	Locality	Project
1994 (c. 389)	Town of Vienna	Public works and Maintenance Buildings Project, reconstruction of Town Hall, and improvements to Maple Ave. Business District
1994 (c. 6, SSII)	Frederick Co.	County administrative offices
1994 (c. 6, SSII)	Counties of James City and York, and Cities of Poquoson and Williamsburg	VA Peninsula Regional jail
1994 (c. 6, SSII)	Counties of Essex, Mathews, Middlesex, King & Queen, and King William	Middle Peninsula Regional Security Ctr.
1995 (c. 11)	Powhatan Co.	Renovation of former public school bldg.
1995 (cc. 548, 568)	VA Baseball Stadium Authority	Major league baseball stadium
1995 (c. 616)	Loudoun Co.	Two public schools ⁶
	City of Martinsville	Renovate public school ⁷
	Prince William Co.	Biotechnology lab, office and warehouse ⁸

⁶ Expires July 1, 1997 (c. 616, 95 Acts of Assembly).

⁷ Expires July 1, 1997 (c. 616, 95 Acts of Assembly).

⁸ Expires July 1, 1997 (c. 616, 95 Acts of Assembly).

II. WORK OF THE SELECT JOINT SUBCOMMITTEE

The Joint General Laws Subcommittee held its organizational meeting on July 11, 1995 to consider its charge under HJR 643 (1995) which directed the select joint subcommittee to examine the effect of authorizing public bodies other than the Commonwealth to enter into contracts for construction projects on a fixed-price, design-build basis or construction management basis.

As part of the study, the select joint subcommittee considered the current policy of the VPPA, the reasons for that policy and whether those reasons remain valid in 1995. As contained in § 11-35, the policy of the Commonwealth and the reasons therefore are clearly stated.

“To the end that public bodies in the Commonwealth obtain high quality goods and services at reasonable cost, 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 is the intent of the General Assembly that competition be sought to the maximum feasible degree, that individual public bodies enjoy broad flexibility in fashioning details of such competition, that the rules governing contract awards be made clear in advance of the competition, that specifications reflect the procurement needs of the purchasing body rather than being drawn to favor a particular vendor, and that purchaser and vendor freely exchange information concerning what is sought to be procured and what is offered.”

There was consensus among the joint subcommittee that the reasons for the policy of the VPPA remain valid and, given the divergent sophistication of the various local governments in particular, the provisions of the VPPA remain relevant today. Case law in Virginia provides a significant reason for this conclusion--the Dillon Rule--which defines the exercise of powers by local governments. In Virginia, local governing bodies have those powers expressly granted to them, those powers necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable.⁹

At their initial meeting, the subcommittee heard testimony from Ralph L. “Bill” Axselle, Esquire, Counsel for the Associated General Contractors, Reginald N. Jones, Esquire, Counsel for the Consulting Engineers Council of Virginia, Virginia Society of the American Institute of Architects, and the Virginia Society of Professional Engineers, C. Flippo Hicks, Virginia Association of Counties, The Honorable Charles A. Robinson, Jr., Mayor, Town of Vienna, and Paul N. Proto, Director, Department of General Services for Henrico County, both on behalf of the Virginia Municipal League, and Tanya C. Matthews, Design-build Institute of America. Written testimony from other interested parties was also solicited and received by the joint subcommittee.

⁹ Tabler v. Fairfax County, 221 Va. 200, 269 S.E. 2nd 358 (1980).

The joint subcommittee offered the interested parties an opportunity to come together to identify areas of agreement as well as disagreement, with a goal toward resolving their differences. The offer was welcomed by the participants and they began a series of meetings to identify a middle ground upon which they could agree. Attached as Appendix B is a copy of a draft report considered by the "work group". Although never formally adopted by the parties, the draft report reflects their deliberations and identifies an alternative process for localities to participate in design-build contracts without resorting to the General Assembly for approval.

A. VIEW OF LOCAL GOVERNMENTS

The Virginia Municipal Leagues (VML) and the Virginia Association of Counties (VACO) led the presentation for local governments. They argued that local governing bodies have a responsibility to protect taxpayer investment by constructing public buildings in the most cost effective and timely manner. In order to successfully accomplish these objectives, localities need to be given the flexibility to determine the appropriate method of delivering construction projects, whether that method be on a competitive sealed bidding basis or a design-build basis. Localities indicated that such flexibility is crucial to their goals of saving time and money--in that order. Localities argued that by the time they know they want to use design-build, it is too late to come to the General Assembly for authorization. Currently, design-build authority is sought primarily as a planning tool so when the need arises to build a jail or public school, for example, the project delivery options and the finances are in place and the project can move forward. Recognizing however that design-build does not work for all types of construction projects (i.e. renovations because of the unpredictability of cost) and that each project delivery method has its inherent flaws, localities seek design-build authority to give them the flexibility. They pointed out that design-build in the private sector costs less per square foot than what can be achieved under the traditional competitive sealed bidding process in the public sector.

B. VIEW OF GENERAL CONTRACTORS AND DESIGN PROFESSIONALS

As initiators of the study, the Associated General Contractors (AGC), along with the Consulting Engineers Council of Virginia, Virginia Society of the American Institute of Architects, and the Virginia Society of Professional Engineers, opined that the use of design-build in the public sector is not in the taxpayers' best interest and thus should continue to be prohibited as a means for delivery of public construction projects. Use of design-build by the private sector differs significantly from the public sector in that the risk of loss falls to the owner and the shareholders, if any, and not the citizens a public body represents. The essential question is whether the project will deliver long term quality for the citizens. AGC pointed out that a January 1995 survey of the Building Futures Council found that only 13 states allow design-build by localities, and six of these only under limited circumstances.

Anecdotally, it was represented that there are three types work--cheap, quick, and good. A client can have any two: cheap and quick won't be good; cheap and good won't be quick; and quick and good won't be cheap.

In addition, since the enactment of the design-build exception for public bodies other than the Commonwealth in 1987, too many requests by localities have been made for design-build authority and the general prohibition against design-build for localities has been undermined. They opined that currently the rule exists in its exception. Coupled with the haste of the General Assembly Session, authorizations for design-build contracts typically do not receive the requisite review to determine whether this project delivery method is in the public interest. Design-build by local governments has become essentially a political, and not a procurement, process.

Another problem cited is the accountability of the design professional. In design-build, the architect and/or engineer is not employed by the public body. Instead he works for the general contractor and his loyalty is there. Additionally, the public body loses direct control over the design of the project.

III. JOINT SUBCOMMITTEE FINDINGS AND RECOMMENDATIONS

During the course of the study, the joint subcommittee surveyed the various localities to ascertain the status of the projects for which they had been given design-build authority pursuant to § 11-41.2:1. The results of that survey are depicted in Figure 1 below.

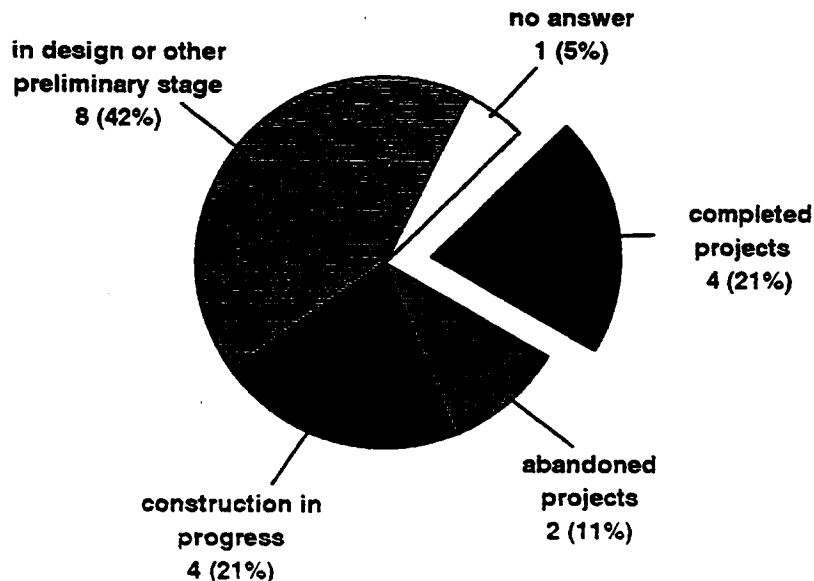


FIGURE 1. § 11-41.2:1 PROJECT STATUS. Chart based on 19 participating localities. 3 of 4 completed projects used design-build. 7 of 12 projects in preliminary stages or under construction plan to use or are using design-build.

The select joint subcommittee by consensus agreed that while historically the General Assembly was reluctant to grant exemptions for design-build to localities, the existence of 26 current exemptions has undermined the general prohibition against design-build contracts by local governing bodies. The joint subcommittee noted, however, that the current statute is in keeping with the Dillon Rule which is followed in Virginia and that it was not their intent to abrogate this rule. The joint subcommittee believed their goal should be to determine a better process, from a policy perspective, than for the General Assembly to grant design-build exemptions.

At its final meeting, a work session, the joint subcommittee concluded that the general prohibition against design-build for public bodies other than the Commonwealth should be revised by eliminating the politicalization of the process. The joint subcommittee noted that currently the state must follow elaborate procedures established by the Secretary of Administration before opting for a design-build contract for state construction projects, even though it has the express authority to enter into design-build contracts. The joint subcommittee felt that any alternative process offered for local governing bodies should, at a minimum, follow the state design-build model. The Design-Build and Construction Management Procedures for State Agencies is attached as Appendix C. The joint subcommittee also noted that although the evidence was divided on the question of whether design-build is a project delivery system which is in the public interest, they opined that whether this method should be employed was a question not for them, but for a panel of experts in the field. The joint subcommittee also noted the apparent absence of compromise between local governments and the design professionals and contractors and offered an alternative process which had been the basis of the discussions between local government officials, AGC, and the design professionals. The alternative process offered by the joint subcommittee is discussed below.

The alternative process offered by the joint subcommittee replaces the General Assembly as the body which determines whether a locality may use design-build contracts in favor of a state review panel. The responsibilities of the review panel include: (i) reviewing submissions of a local governing body desiring to construct a public building using a design-build contract; (ii) approving or disapproving a request for design-build authority; (iii) making post-project evaluations of the authorized projects to determine the value of design-build contracts in the public sector; (iv) conducting a study over a several-year period and reporting to the Governor and the General Assembly its findings on the advisability of design-build contracts for public bodies other than the Commonwealth.

As to localities currently authorized to use design-build contracts pursuant to § 11-41.2:1, the joint subcommittee decided that these localities should be given an appropriate amount of time to enter into the design-build contracts authorized, but that their authority should not be of an unlimited duration. This decision was based in large part on the results of the survey conducted by the joint subcommittee discussed earlier which revealed that although authorized, a significant number of localities did not avail themselves of their design-build exemption.

Other elements of the alternative process include:

- Eligibility requirements for local governments:
 1. Have adopted, by ordinance or resolution, written procedures governing the selection, evaluation and award of design-build contracts which are consistent with the VPPA for procurement of nonprofessional services through competitive negotiation and the Capital Outlay Manual of the Commonwealth (used by state agencies);
 2. Have employed or under contract a licensed architect or professional engineer who shall possess the requisite ability and competence appropriate for the proposed construction project; and
 3. Have documented in writing that for a specific construction project (i) design-build is more advantageous than competitive sealed bidding, (ii) there is a benefit to the public body in using a design-build contract, and (iii) competitive sealed bidding is not practical or fiscally advantageous.

- Creation of 9-member Review Board:
 1. Composition of Review Board to include: Director of Engineering and Buildings of the Department of General Services; 2-Class A contractors recommended by ACG; 2-design professionals recommended by the Consulting Engineers Council of VA, VA Society of the AIA, and the VA Society of Professional Engineers; and 4 representatives of public bodies other than the Commonwealth recommended by VML and VACO.
 2. Review Board members receive no compensation except reasonable expenses; Review Board must meet third Wednesday of each month (so public bodies can meet time tables in advance) and provision made for cancellation of meeting when no business before Board; 5 members of the Board constitute a quorum. Staff to Review Board provided by the Division of Engineering and Buildings.

- Duties of Board:
 1. Review submissions by public bodies other than the Commonwealth to determine if the process for the selection, evaluation and award of a design-build or construction management contract is in compliance with the provisions of the VPPA.

2. Determine whether the public body has complied with the requirements of § 11-41.2:2 (eligibility requirements for localities) and that the determinations made by the public body pursuant to § 11-41.2:2 are reasonable;
 3. Adopt regulations in accordance with the Administrative Process Act (§ 9-6.14:1 et seq.) relating to the form and substance of submissions to be reviewed by the Review Board and any criteria upon which the Review Board shall make a determination of compliance;
 4. Make post-project evaluations of construction projects procured by design-build or construction management contracts entered into by public bodies other than the Commonwealth, including cost and time savings, effectiveness of the selection, evaluation and award of such contracts, and the benefit to the public body; and
 5. Report to the General Assembly and the Governor on or before December 1, 1999, concerning the Review Board's evaluation of and findings regarding all construction undertaken by public bodies other than the Commonwealth since July 1, 1996, and any recommendations relating to future use of design-build or construction management contracts by such public bodies.
- Other provisions:
 1. Once approved by the review panel, the public body may utilize a design-build contract. The contract is required to be awarded to the fully qualified offeror who submits an acceptable proposal at the lowest cost responsive to the RFP. The public body may make an exception to this provided, by resolution, it states the basis for this exception.
 2. Record keeping requirements as directed by the review panel to allow for post project review by the review panel.
 3. Review by Review Board for design-build approval; effect of disapproval and review of Board's decisions. This section is set up to be responsive to time constraints of public bodies. The Board has 60 days from request to render decision, unless public body agrees to different timetable. If the Board determines the proposed use of a design-build contract complies with VPPA--it shall approve such use. If public body not in compliance--the Board shall disapprove. Upon disapproval, the public body is prohibited from using a design-build contract. If Board fails to decide within 60 days, use of design-build contract is presumed approved.

4. Appeal provision from Board's decision in accordance with the Administrative Process Act (§ 9-6.14:1 et seq.).
5. Review Board review is not required for projects authorized pursuant to § 11-41.2:1 on or before July 1, 1996.
6. Repeal of current design-build authorization (§ 11-41.2:1) effective January 1, 1997 to provide smooth, but definitive, transition between old and new design-build process for public bodies other than the Commonwealth.
7. Clarification that even though § 11-41.2:1 is being repealed effective January 1, 1997, this will not affect authority already granted under its provisions except that projects already listed in § 11-41.2:1 have until July 1, 1997 to enter into design-build contracts or else they will lose their authority and have to go through the Review Board.

The joint subcommittee recommended that draft legislation be adopted and introduced in the 1996 Session of General Assembly (Appendix D) which provides an alternative process as discussed above for local governing bodies to obtain authority to enter into design-build contracts.

The members of the joint subcommittee believe that the policies laid down in the Virginia Public Procurement Act must be administered in a fair, impartial, and cost-effective manner to protect taxpayers' investments, and that competition be sought to the maximum feasible degree, with individual public bodies enjoying flexibility in fashioning details of such competition. The joint subcommittee felt that the best method to accomplish this goal as it relates to design-build contracts is to establish a process driven by objective standards, not by political process. In designing the alternative process, the joint subcommittee recognized the prominence of the Dillon Rule in Virginia and declined to abrogate its provisions.

The members of the joint subcommittee received material and heard testimony from a large number of groups and individuals, and the process educated all. The joint subcommittee would like to express its gratitude to all participants for their work and dedication.

Respectfully submitted,

Clifton A. Woodrum, *Chairman*
Madison E. Marye, *Vice Chairman*
Alan A. Diamonstein
James F. Almand
S. Vance Wilkins, Jr.
James K. O'Brien, Jr.
Charles J. Colgan
Walter A. Stosch
Edgar S. Robb

APPENDICES

APPENDIX A

HOUSE JOINT RESOLUTION NO. 643

Establishing a select joint subcommittee of the House Committee on General Laws and the Senate Committee on General Laws to study the effect of authorizing design-build and construction management contracts for public bodies.

Agreed to by the House of Delegates, February 23, 1995

Agreed to by the Senate, February 21, 1995

WHEREAS, the Virginia Public Procurement Act is designed, in part, so that "public bodies in the Commonwealth obtain high quality goods and services at reasonable cost . . ."; and

WHEREAS, the procurement of goods and services by competitive sealed bidding and competitive negotiation fosters competition among qualified vendors and helps ensure that public bodies receive the highest quality for the lowest prices; and

WHEREAS, the Act provides that public bodies shall procure goods and nonprofessional services related to construction through competitive sealed bidding and services of design professionals through competitive negotiation; and

WHEREAS, the Act has been amended on occasion to allow certain public bodies other than the Commonwealth to enter into contracts for specified construction projects on a fixed-price, design-build basis or construction management basis, with the provision that such public bodies are not required to award a design-build contract to the lowest bidder; and

WHEREAS, public bodies annually request the General Assembly to further amend the Act to allow design-build and construction management contracts; and

WHEREAS, there has been no examination of the short-term and long-term consequences of such exceptions for design-build and construction management contracts and the resulting impact on the expenditure of public funds for such construction projects; and

WHEREAS, the authority of public bodies other than the Commonwealth to enter into contracts on a fixed-price, design-build basis or construction management basis should be examined for consistency with the best governmental procurement policies which promote the availability and retention of high quality goods and services at reasonable cost from qualified vendors bidding in a competitive environment and also for consistency with the short-term and long-term interests of public bodies in the expenditure of public funds for construction projects; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That a select joint subcommittee of the House Committee on General Laws and the Senate Committee on General Laws be established to study the effect of authorizing design-build and construction management contracts for public bodies. The select joint subcommittee shall examine the effect of authorizing public bodies other than the Commonwealth to enter into contracts for construction projects on a fixed-price, design-build basis or construction management basis.

The select joint subcommittee shall consist of nine members to be appointed as follows: five members of the House Committee on General Laws to be appointed by the Speaker of the House; and four members of the Senate Committee on General Laws to be appointed by the

Senate Committee on Privileges and Elections. The select joint subcommittee may seek technical assistance from Virginia-licensed architects or engineers, general contractors and local public bodies.

The Division of Legislative Services shall provide staff support for the study. All agencies of the Commonwealth shall provide assistance to the select joint subcommittee, upon request.

The direct costs of this study shall not exceed \$4,800.

The select joint subcommittee shall complete its work in time to submit its findings and recommendations to the Governor and the 1996 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents.

Implementation of this resolution is subject to subsequent approval and a certification by the Joint Rules Committee. The Committee may withhold expenditures or delay the period for the conduct of the study.

WILLIAMS, MULLEN,
CHRISTIAN & DOBBINS
ATTORNEYS & COUNSELORS AT LAW

DRAFT
MEMORANDUM

TO: Members, Joint General Laws Subcommittee
Studying Design-Build and Construction Management;
HJR 643

FROM: Associated General Contractors of Virginia
Consulting Engineers Council of Virginia
Virginia Society of American Institute of Architects
Virginia Society of Professional Engineers
Virginia Association of Counties
Virginia Municipal League

DATE: November __, 1995

At the conclusion of your last meeting, Chairman Woodrum asked representatives of the Association of General Contractors ("AGC") and the Consulting Engineers Council of Virginia, Virginia Society of American Institute of Architects, and Virginia Society of Professional Engineers ("Design Professionals") to work with the Virginia Municipal League ("VML") and the Virginia Association of Counties ("VACO") to explore what might be a resolution of the issues presented to the study committee. We are pleased to report that our organizations have reached an agreement on recommendations as set forth herein.

PROCESS

Without going into detail, our working group had a series of meetings these past few months in which we had very candid and good faith discussions of our different perspectives, recognizing and blending the merits of those varying viewpoints. The recommendation that follows is clearly a compromise, but one that we feel is based on good public policy considerations and which is a reasonable accommodation of the strong opposing views on this topic.

We each feel that there are aspects of the proposal that we would have written differently had this been our sole decision; we each have agreed to certain aspects of the proposal not otherwise desired because of the presence of other balancing

features that made the overall proposal acceptable. In a nutshell, this is a carefully balanced proposal, the major components of which we feel should not change during your subsequent legislative deliberations.

PERSPECTIVES

We all accept that the traditional Design-Bid-Build process is the appropriate procedure for most construction projects by public bodies. VML and VACO believe that there may be specific projects in which it is in the best interest of a public body and the taxpayers to deviate from the Design-Bid-Build arrangement and to use Design-Bid or Construction Management in those instances. They recognize such alternatives are not options to be used regularly in construction projects, but they feel that local governing bodies are in the best position to determine the most appropriate project delivery system for a specific project. They desire the flexibility to decide which project delivery system should be used for a specific project. AGC and the Design Professionals feel that Design-Build and Construction Management are not appropriate project delivery systems for the public sector and that leaving this decision to local governing bodies without any required criteria would lead to decisions that have short and long term adverse consequences for the public body and its taxpayers. They recognize, however, that there are specific projects in the public sector where the use of Design-Build or Construction Management may be advantageous.

With those perspectives accepted, we proceeded to see if we could reach some understanding on the terms and conditions under which these alternatives to Design-Bid-Build might be allowed for specific approved projects. We recognized that state government mandates the use of Design-Bid-Build by state agencies for their construction projects, except for those projects that conform with a specified criteria and process. Accompanying this report is an August 26, 1988 memo establishing the current state criteria and procedures under which Design-Build and Construction Management may be used by state agencies. This existing program provided us considerable guidance.

We also came to the ultimate conclusion that we were arguing over concepts and that it might be best to have a period of some documented experience of public bodies using Design-Build and Construction Management and then revisit this issue later with the benefit of that experience in hand.

Basically, we felt it would be advisable to have a four year period where local governing bodies (and other non-state agency public bodies) could use Design-Build or Construction Management for projects that met certain criteria as determined by that public body and a Review Panel to ensure compliance with

the agreed criteria and procedures. The Review Panel would also subsequently report to the General Assembly its conclusions from an analysis of such use during that four year period.

Our thought was that this approach would provide (i) flexibility for local governing bodies under specified criteria and (ii) information for the General Assembly's subsequent deliberations.

OVERVIEW OF PROPOSAL

Accompanying this report is legislation submitted for your consideration. It allows non-state agency public bodies the option of using Design-Build or Construction Management for construction projects if they comply with the established criteria and basic competitive procedures. This opportunity would commence upon the effective date of the statute (July 1, 1996) and terminate four years thereafter (July 1, 2000) when this authorization would sunset, unless re-enacted in some fashion by the General Assembly. The Review Panel referenced in the proposal would provide a report to the General Assembly by December 1, 1999 based on the three and one-half years experience under this arrangement. Obviously, the results during this period would likely be the basis of General Assembly action in 2000.

The proposal has three basic components, each of which are inter-related and mutually dependent: (1) authority of public body; (2) criteria for use of Design-Build or Construction Management; and (3) the role of the Review Panel. While we cover those three items separately, we emphasize that each is a vital segment of this compromise proposal.

AUTHORITY OF PUBLIC BODY

The Commonwealth already has in place the above-referenced criteria and procedures for the use of Design-Build or Construction Management by state agencies. Our recommendations do not change that arrangement in any respect. The recommended procedures would be applicable to all other public bodies in the Commonwealth, including local governments, school boards, authorities, etc. They are collectively referred to hereafter as a "public body".

After the effective date of this arrangement, a public body may determine to use Design-Build or Construction Management for a specified project. No statutory pre-determination is made as to which construction projects may or may not be best suited for these alternative arrangements. This will be left to the discretion of the public body, consistent with the process and criteria provided. The procedures for state agencies limits the applicability of these alternatives to certain type projects as

set forth in the attached state policies. Here, the public bodies are provided more latitude and less restrictions in this respect under our recommendation.

To use a Design-Build or Construction Management alternative, a public body would be required to have either on staff or under contract a licensed architect or engineer, which design professional must have the requisite ability to supervise that specific project and who must be involved prior to and during the procedure to be used in the solicitation and award of such Design-Build or Construction Management contract. That design professional will also be the individual having responsible charge for the resulting project.

The public body shall adopt written procedures governing the selection, evaluation and award of a Design-Build or Construction Management contract, with the procedures being consistent with those described in the Virginia Public Procurement Act ("Act") for the procurement of non-professional services through competitive negotiation. The procedures applicable to state agencies sets forth in some detail the steps to be taken in such selection, evaluation and award process. Here, discretion is left to the public body as to the details of that selection/evaluation/award process with the mandate that it must be consistent with the Act as set forth above and that such compliance will be reviewed by the Review Panel. The thought here was not to burden the public body with a specific procedure, but to only require compliance with the competitive procurement requirements of the Act.

Prior to making its determination that an alternative project delivery system other than Design-Bid-Build should be employed for a specified project, the public body would conduct a public hearing on the proposal to use either Design-Build or Construction Management for that project. This public hearing would take place after two weeks notice (one notice per week), providing at least 14 days notice of such hearing. This is consistent with what most public bodies do and provides an opportunity for public input prior to the public body embarking on an alternative arrangement.

In summary, this segment of the proposal allows public bodies the alternative of using Design-Build or Construction Management that they do not now enjoy, with only modest restrictions on the local process of that selection, evaluation and award. It provides them an opportunity now not available to them.

CRITERIA FOR USE OF DESIGN-BUILD OR
CONSTRUCTION MANAGEMENT

For this component of our proposal, we followed faithfully the criteria applicable to state agencies regarding the use of Design-Build or Construction Management. These are the criteria established by the Commonwealth as approved by the Senate Finance and House Appropriations committees. The thought was that other public bodies should likewise comply with those criteria. The below criteria are taken almost verbatim from the requirements applicable to state agencies. (See paragraph C of Commonwealth's August 26, 1988 memo dealing with Design-Build.)

In determining whether to use a Design-Build or Construction Management contract, a public body shall make a determination that Design-Build or Construction Management is more advantageous than a competitive sealed bid construction contract with a general contractor and shall indicate how the public body will benefit from using Design-Build or Construction Management for that specific project. The determination by the public body to use Design-Build or Construction Management for a specific project shall also include a written justification that sealed bidding is not practical and/or fiscally advantageous.

In making its award of a Design-Build or Construction Management contract, the public body will make such award to the fully qualified offeror who submits the lowest cost acceptable Proposal in response to a Request for a Proposal. If the public body desires to make an exception to this requirement that such contract be awarded to the fully qualified offeror which has submitted the lowest cost acceptable Proposal, the public body must state the basis for such an exception.

As stated earlier, these are the same criteria applicable to state agencies desiring to use Design-Build or Construction Management.

In summary, here we are providing that the decision of the public body on the deviation from Design-Bid-Build to use Design-Build or Construction Management shall be based on the same criteria that have been in place for the past eight years for the agencies of the Commonwealth. The Review Panel would review that determination as set forth below.

ROLE OF REVIEW PANEL

There shall be established a Public Body Design-Build/Construction Management Review Panel ("Review Panel") consisting of nine individuals as follows: two general contractors selected from recommendations from the AGC, two design professionals selected from recommendations from the Design Professionals, four representatives of public bodies

selected from recommendations by VML and VACO, with the ninth member being the Director of the Division of Engineering and Buildings of the Department of General Services, or his designee. The Review Panel would be selected by the Governor. It would be staffed by and operate under the Division of Engineering and Buildings. This is the state agency division responsible for coordination of construction of state agencies and employs the individuals in state government most knowledgeable regarding construction projects.

After the public body has made a determination of an intent to award a Design-Build or Construction Management contract, the public body shall submit to the Review Panel a request for review and shall provide information necessary to assist the Review Panel in determining if the selection, evaluation and award of such contract is in compliance with the provisions of the Act and the above criteria. The Review Panel shall meet within 30 days of the receipt of such a request, unless a different timetable is agreed to by the public body. The Review Panel shall conduct such inquiry it determines appropriate regarding the request and shall make its decision within 60 days of the receipt of such request, unless a different timetable is agreed to by the public body.

If the Review Panel determines that the proposed contract complies with the applicable criteria and the process used was consistent with the Act, it shall approve such contract. If the Review Panel determines that the proposed contract does not comply with the applicable criteria or the process was not consistent with the Act, then it shall not approve such contract; in that instance, the public body may not enter into such contract.

There are other administrative aspects of the operation of the Review Panel in the proposed legislation that are not set forth in this report.

The public body shall provide to the Review Panel whatever information the Review Panel determines appropriate during its review of the request by the public body. Similarly, the public body shall provide whatever information the Review Panel determines appropriate regarding the contract implementation and the construction undertaken per such contract.

The Review Panel shall provide to the General Assembly by December 1, 1999 its evaluation of and findings regarding all construction undertaken per approved Design-Build or Construction Management contracts, as well as its recommendations regarding the terms and conditions of future use of Design-Build or Construction Management contracts by public bodies, if any.

This segment of the proposal basically does three things. First. It gives a public body the ability to have a Design-Build or Construction Management contract approved in a timely fashion, rather than waiting for General Assembly action and the delayed effective date of that legislation. Second. The Review Panel ensures that the public body determination and the process it used are in compliance with the agreed criteria and procedures. Third. It ultimately will provide an independent source of information, analysis and recommendation to assist the General Assembly in its subsequent deliberations.

EXISTING STATUTE

§ 11-41.2:1 is the section by which the General Assembly over the years has granted authorizations to various public bodies to award Design-Build or Construction Management contracts. It is suggested that such section be repealed as any project covered under that section will now be included in the more comprehensive approach set forth in this proposal.

(NOTE TO WORKING GROUP FROM AXSELLE: Until I reached this subject, I felt that any additional specificity or assumptions made was based upon our deliberations, existing state policies or standard practices. My suggestion regarding the repeal of the existing statute admittedly goes beyond such deliberations, policies and practices. I set it forth here as it does seem logical. It would appear to make sense to have everyone under the same agreed approach. My only concern is with localities who have only recently received their authorization and which may not have implemented their construction prior to July 1, 1996. We need to discuss.)

CONCLUSION

The General Assembly has adopted the policy of requiring Design-Bid-Build procedures in construction contracts. This proposal allows public bodies other alternatives under appropriate procedures and circumstances. It will also provide some practical experience with Design-Build or Construction Management in the public sector for contractors, design-professionals and public bodies. That experience and the report of the Review Panel will assist the General Assembly in their subsequent deliberations.

We hope you will find our suggestions helpful.

RLAJr./rjs
Enclosures

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APPENDIX C

COMMONWEALTH of VIRGINIA

DEPARTMENT OF GENERAL SERVICES

DIVISION OF ENGINEERING AND BUILDINGS

805 EAST BROAD STREET, ROOM 10
RICHMOND, VIRGINIA 23219
(804) 786-3261



August 26, 1988

MEMORANDUM

TO: The Honorable Carolyn J. Moss
Secretary of Administration

THROUGH: Wendell L. Seldon *Wendell L. Seldon*

FROM: Nathan I. Broocke *N. Broocke*

RE: Design-Build and Construction Management Procedures

The last hurdle leading to adoption of the attached procedures was cleared with the House Appropriations Committee's approval of the procedures on August 26, 1988.

The procedures are ready for your signature. We are preparing a memorandum to all state agencies announcing their availability for use. The approved procedures and implementing instructions will become Chapter IV of the new Capital Outlay Manual.

Please return the signed procedure direct to Henry Shirley in the Bureau of Capital Outlay Management.

~~WCS~~
WCS/bl
Attachment

PROCEDURES FOR UTILIZING DESIGN-BUILD (D/B) CONTRACTS

In accordance with the provisions of Section 11-41.2 of the Code of Virginia I hereby adopt the following procedures for the procurement of Design-Build contracts, which shall be followed by all departments, agencies and institutions of the Commonwealth. These procedures shall be effective July 1, 1988.

A. LEGISLATIVE AUTHORITY

Under authority of Section 11-41.2 of the Code of Virginia, the Commonwealth may contract to secure Design-Build (D/B) projects on a fixed price basis in accordance with these procedures. Under authority of Section 11-41(C)(2) of the Code of Virginia, the Commonwealth is authorized to use competitive negotiations to procure Design-Build contracts.

B. CRITERIA FOR USE OF DESIGN-BUILD CONTRACTS (D/B): Design-Build contracts may be approved for use on building projects in the following general categories: warehouse/storage buildings, garage/maintenance shops, general mercantile buildings, single-story administrative buildings, recreational and concession buildings, exhibition and agricultural buildings and housing.

C. PROCEDURE FOR APPROVAL TO USE D/B: The Agency shall request authority, in writing, to use a D/B contract. Normally the written request will be submitted with the Capital Project Request for the project. (See the Commonwealth Planning and Budgeting System Manual.)

The request shall justify and substantiate that Design Build is more advantageous than a competitive sealed bid construction contract with a general contractor and shall indicate how the Commonwealth will benefit from using D/B. The request shall also include a written justification that sealed bidding is not practical and/or fiscally advantageous. If the Agency desires an exception to the rule set forth in Paragraph D.3(g) hereof, that the contract be awarded to the lowest cost offeror which has submitted an acceptable Technical Proposal, the Agency must submit a request for an exception along with its request for authority to use Design-Build Contract. Exceptions may be granted by the Director, Division of Engineering and Buildings.

The Director, Division of Engineering and Buildings, is the approving authority for requests to use D/B procedures.

D. DESIGN-BUILD SELECTION PROCEDURES: On projects approved for Design-Build, procurement of the contract shall be a two step competitive negotiation process. The following procedures shall be used in selecting a Design-Builder and awarding a contract:

1. The Agency shall appoint an Evaluation Committee which shall

include a licensed professional engineer or architect from the Division of Engineering and Buildings. Agency members should include licensed professional engineers/architects if possible.

2. Selection of Qualified Offerors (STEP I)

- a. The Agency shall publish notice of its invitation for Design-Builders to submit qualifications. The notice shall appear in at least two daily newspapers and in the Virginia Business Opportunities (VBO). The requirement to publish in the VBO may be waived by the Director of Engineering and Buildings in order to expedite the process.
- b. The Committee shall evaluate each responding firm's submittals and any other relevant information and shall select no more than five offerors deemed most suitable for the project.

3. Selection of Design-Build Contractor (STEP II)

- a) The Agency shall prepare a Request for Proposal (RFP) containing the Agency's Facility Requirements, building and site criteria, site and survey data, the criteria to be used to evaluate submittals and other relevant information.
- b) The Agency will invite a minimum of two and a maximum of five D/B offerors deemed most suitable for the project, from those selected by the Committee to submit Technical and Cost Proposals. Sealed Technical Proposals will be submitted to the Evaluation Committee. Separately sealed Cost Proposals will be submitted to the Agency Treasurer/Fiscal Officer, and secured by him and kept sealed until evaluation of the Technical Proposals and the design development negotiations are completed.
- c) The Evaluation Committee will evaluate the Technical Proposals based on the criteria contained in the RFP. It will inform each D/B offeror of any adjustments necessary to make its Technical Proposal fully comply with the requirements of the RFP. In addition, the Agency may require that offerors make design adjustments necessary to incorporate project improvements and/or additional detail identified by the Committee during design development.
- d) Based on the revisions made to the Technical Proposals, the Committee and an offeror may negotiate additive and deductive amendments to the offeror's Cost Proposals. In addition, an offeror may submit cost deductions from its original sealed cost proposal which are not based upon revisions to the Technical Proposals.

- e) At the conclusion of Design Development, the Evaluation Committee shall publicly open, read aloud, and tabulate the Cost Proposals. It shall add to or subtract from the Cost Proposal any cost adjustments contained in amendments submitted by a D/B offeror.
- f) The Committee shall make its recommendation on the selection of a Design-Builder to the agency head based on its evaluation and negotiations. The agency head shall select the Design-Builder.
- g) Award of the D/B contract shall be made to the offeror which submits an acceptable Technical Proposal at the lowest cost, unless the Agency has received the approval of the Director of Engineering and Buildings to award on an alternate basis.
- h) The Agency shall notify the Division of Engineering and Buildings of the Agency head's selection of the Design-Builder and shall request authority to award a contract by submission of GS Form E&B CO-8 and supporting documents for the Governor's approval.
- i) Upon receipt of the Governor's approval to award the contract, the Agency will notify all offerors who submitted proposals which offeror was selected for the project. In the alternative, the Agency may notify all offerors who submitted proposals of the Agency's intent to award the contract to a particular offeror at any time after the Agency has selected a Design-Builder, without waiting for the Governor's approval.


Secretary of Administration

SEP 07 1988

Date

PROCEDURES FOR UTILIZING CONSTRUCTION MANAGEMENT (CM) CONTRACTS

In accordance with the provision of Sec. 11-41.2 of the Code of Virginia, I hereby adopt the following procedures for the procurement of construction management contracts which shall be followed by all departments, agencies and institutions of the Commonwealth (each of which is hereinafter referred to as the "Agency"). These procedures shall be effective July 1, 1988.

- A. **LEGISLATIVE AUTHORITY:** Under authority of Section 11-41.2 of the Code of Virginia, the Commonwealth may enter into a contract with a Construction Manager in accordance with these procedures. Under authority of Section 11-41(C)(2) of the Code of Virginia, the Commonwealth is authorized to use competitive negotiation to procure Construction Management contracts.
- B. **CRITERIA FOR USE OF CONSTRUCTION MANAGEMENT:** Construction management (CM) contracts may be approved for use on projects with an estimated construction cost in excess of \$10,000,000 where 1) fast tracking of construction is needed to meet Agency program requirements and/or 2) where value engineering and/or constructability analyses concurrent with design are required.
- C. **PROCEDURE FOR APPROVAL TO USE CONSTRUCTION MANAGEMENT:** The Agency shall request authority, in writing, to use a CM contract. Normally, the written request will be submitted with the Preplanning Study (See the Commonwealth Planning and Budgeting System Manual).

The request shall justify and substantiate that a CM contract is more fiscally advantageous than a competitive sealed bid construction contract with a general contractor and shall indicate how the Commonwealth will benefit from using CM. The request will also include a written justification that competitive sealed bidding is not practicable and/or fiscally advantageous for the procurement of a Construction Manager.

The Director of the Division of Engineering and Buildings is the approving authority for requests to use CM.

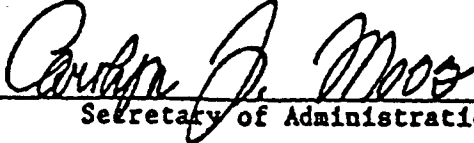
- D. **PREQUALIFICATION PROCEDURES:** On projects approved for CM, the Agency shall proceed as follows to prequalify offerors who may submit proposals.
1. The Agency shall appoint an Evaluation Committee which shall include a licensed professional engineer or architect provided by the Division of Engineering and Buildings. Agency members shall include licensed design professionals, if possible.
 2. The Agency shall publish an invitation to prequalify in at least two daily newspapers and in the "Virginia Business Opportunities." The requirement to publish in the "Virginia Business Opportunities" may be waived by the Director of the Division of Engineering and Buildings in order to expedite the process.

3. The Committee shall evaluate each responding firm's submittals and any other relevant information and shall determine those deemed qualified with respect to the criteria established for the project.
4. In addition to the procedures described above for prequalifying firms for individual CM projects, the Division of Engineering and Buildings may establish prequalification procedures for particular types of construction projects in accordance with Section 11-46 of the Code of Virginia and firms qualified under that procedure may compete for projects of the type for which they were qualified unless the Director of the Division of Engineering and Buildings determines that further prequalification for a particular project is desirable.

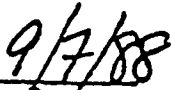
E. SELECTION PROCEDURES:

1. The Evaluation Committee will send Request for Proposals (RFP) to the prequalified firms and request submission of formal proposals from them.
2. The Committee will evaluate and rank the proposals and conduct negotiations with two or more offerers submitting the best proposals. Should the Agency determine in writing and at its sole discretion that only one offeror is fully qualified, or that one offeror is clearly more highly qualified than the others under consideration, then, with the consent of the Director of the Division Engineering and Buildings, a contract may be negotiated with and awarded to that offeror.
3. The Committee shall make its recommendations on the selection of a Construction Manager to the Agency head based on its evaluation and negotiations. The Agency head shall select the Construction Manager.
4. The Agency shall notify the Division of Engineering and Buildings of the Agency head's selection of the Construction Manager and shall request authority to award a contract by submission of GS Form E&B CO-8 and supporting documents for the Governor's approval.
5. Upon receipt of the Governor's approval to award the contract, the Agency will notify all offerors who submitted proposals which offeror was selected for the project. In the alternative, the Agency may notify all offerors who submitted proposals of the Agency's intent to award the contract to a particular offeror at any time after the Agency head has selected the Construction Manager without waiting for the Governor's approval.

F. **REQUIRED CONSTRUCTION MANAGEMENT CONTRACT TERMS:** Any Guarantee Maximum Price construction management contract entered into by any department, agency or institution of the Commonwealth will contain provisions requiring that (1) not more than 10% of the construction work (measured by cost of the work) will be performed by the CM with its own forces and (2) that the remaining 90% of the construction work will be performed by subcontractors of the CM which the CM must procure by publicly advertised, competitive sealed bidding. In extraordinary circumstances the Director of Division of Engineering may grant a waiver of these contractual requirements in whole or in part.



Secretary of Administration



Date

1 APPENDIX D

2
3 HOUSE BILL NO. 336

4 Offered January 15, 1996

5 A BILL to amend and reenact §§ 2.1-1.6 and 9-6.25:2 of the Code of Virginia; to amend the
6 Code of Virginia by adding sections numbered 2.1-483.1:2, and 11-41.2:2 through 11-
7 41.2:5; and to repeal § 11-41.2:1 of the Code of Virginia effective January 1, 1997,
8 relating to the Virginia Public Procurement Act; design-build authority for public bodies
9 other than the Commonwealth.

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11 _____
12 Patrons--Woodrum, Almand and Wilkins; Senators: Marye and Stosch

13
14 _____
15 Referred to Committee on General Laws

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17 _____
18 Be it enacted by the General Assembly of Virginia:

19 1. That §§ 2.1-1.6 and 9-6.25:2 of the Code of Virginia are amended and reenacted and
20 that the Code of Virginia is amended by adding sections numbered 2.1-483.1:2 and 11-
21 41.2:2 through 11-41.2:5 as follows:

22 § 2.1-1.6. State boards.

23 A. There shall be, in addition to such others as may be established by law, the following
24 permanent collegial bodies affiliated with a state agency within the executive branch:

- 25 Accountancy, Board for
- 26 Aging, Advisory Board on the
- 27 Agriculture and Consumer Services, Board of
- 28 Air Pollution, State Advisory Board on
- 29 Alcoholic Beverage Control Board, Virginia
- 30 Apple Board, Virginia State
- 31 Appomattox State Scenic River Advisory Board
- 32 Aquaculture Advisory Board
- 33 Architects, Professional Engineers, Land Surveyors and Landscape Architects, State
- 34 Board for
- 35 Art and Architectural Review Board
- 36 Athletic Board, Virginia
- 37 Auctioneers Board
- 38 Audiology and Speech-Language Pathology, Board of
- 39 Aviation Board, Virginia
- 40 Barbers, Board for
- 41 Branch Pilots, Board for
- 42 Bright Flue-Cured Tobacco Board, Virginia
- 43 Building Code Technical Review Board, State
- 44 Catoctin Creek State Scenic River Advisory Board
- 45 Cattle Industry Board, Virginia
- 46 Cave Board

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- Certified Seed Board, State
- Chesapeake Bay Local Assistance Board
- Chickahominy State Scenic River Advisory Board
- Child Abuse and Neglect, Advisory Board on
- Chippokes Plantation Farm Foundation, Board of Trustees
- Clinch Scenic River Advisory Board
- Coal Mining Examiners, Board of
- Coal Research and Development Advisory Board, Virginia
- Coal Surface Mining Reclamation Fund Advisory Board
- Coastal Land Management Advisory Council, Virginia
- Conservation and Development of Public Beaches, Board on
- Conservation and Recreation, Board of
- Contractors, Board for
- Corn Board, Virginia
- Correctional Education, Board of
- Corrections, State Board of
- Cosmetology, Board for
- Criminal Justice Services Board
- Dark-Fired Tobacco Board, Virginia
- Deaf and Hard-of-Hearing, Advisory Board for the Department for the
- Dentistry, Board of
- Design-Build/Construction Management Review Board*
- Education, State Board of
- Egg Board, Virginia
- Emergency Medical Services Advisory Board
- Employment Agency Advisory Board
- Farmers Market Board, Virginia
- Film Office Advisory Board
- Fire Services Board, Virginia
- Forensic Science Advisory Board
- Forestry, Board of
- Funeral Directors and Embalmers, Board of
- Game and Inland Fisheries, Board of
- Geology, Board for
- Goose Creek Scenic River Advisory Board
- Health Planning Board, Virginia
- Health Professions, Board of
- Health, State Board of
- Hearing Aid Specialists, Board for
- Hemophilia Advisory Board
- Historic Resources, Board of
- Housing and Community Development, Board of
- Industrial Development Services Advisory Board

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- 3 Insurance Advisory Board, State
- 4 Irish Potato Board, Virginia
- 5 Laboratory Services Advisory Board
- 6 (Effective July 1, 1996) Litter Control and Recycling Fund Advisory Board
- 7 Marine Products Board, Virginia
- 8 Medical Advisory Board, Department of Motor Vehicles
- 9 Medical Board of the Virginia Retirement System
- 10 Medicare and Medicaid, Advisory Board on
- 11 Medicine, Board of
- 12 Mental Health, Mental Retardation and Substance Abuse Services Board, State
- 13 Migrant and Seasonal Farmworkers Board
- 14 Military Affairs, Board of
- 15 Mineral Mining Examiners, Board of
- 16 Minority Business Enterprise, Interdepartmental Board of the Department of
- 17 Networking Users Advisory Board, State
- 18 Nottoway State Scenic River Advisory Board
- 19 Nursing, Board of
- 20 Nursing Home Administrators, Board of
- 21 Occupational Therapy, Advisory Board on
- 22 Oil and Gas Conservation Board, Virginia
- 23 Opticians, Board for
- 24 Optometry, Board of
- 25 Peanut Board, Virginia
- 26 Personnel Advisory Board
- 27 Pesticide Control Board
- 28 Pharmacy, Board of
- 29 Physical Therapy to the Board of Medicine, Advisory Board on
- 30 Plant Pollination Advisory Board
- 31 Polygraph Examiners Advisory Board
- 32 Pork Industry Board, Virginia
- 33 Poultry Products Board, Virginia
- 34 Private College Advisory Board
- 35 Private Security Services Advisory Board
- 36 Professional and Occupational Regulation, Board for
- 37 Professional Counselors, Board of
- 38 Professional Soil Scientists, Board for
- 39 Psychiatric Advisory Board
- 40 Psychology, Board of
- 41 Public Buildings Board, Virginia
- 42 Public Telecommunications Board, Virginia
- 43 Radiation Advisory Board
- 44 Real Estate Appraiser Board
- 45 Real Estate Board

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- 3 Reciprocity Board, Department of Motor Vehicles
- 4 Recreational Fishing Advisory Board, Virginia
- 5 Recreation Specialists, Board of
- 6 Reforestation Board
- 7 Rehabilitation Providers, Advisory Board on
- 8 Rehabilitative Services, Board of
- 9 Respiratory Therapy, Advisory Board on
- 10 Retirement System Review Board
- 11 Rockfish State Scenic River Advisory Board
- 12 Safety and Health Codes Board
- 13 Seed Potato Board
- 14 Sewage Handling and Disposal Appeal Review Board, State Health Department
- 15 Shenandoah State Scenic River Advisory Board
- 16 Small Business Advisory Board
- 17 Small Business Environmental Compliance Advisory Board
- 18 Small Grains Board, Virginia
- 19 Social Services, Board of
- 20 Social Work, Board of
- 21 Soil and Water Conservation Board, Virginia
- 22 Soybean Board, Virginia
- State Air Pollution Control Board
- Substance Abuse Certification Board
- 25 Surface Mining Review, Board of
- 26 Sweet Potato Board, Virginia
- 27 T & M Vehicle Dealers' Advisory Board
- 28 Teacher Education and Licensure, Advisory Board on
- 29 Tourism and Travel Services Advisory Board
- 30 Transportation Board, Commonwealth
- 31 Transportation Safety, Board of
- 32 Treasury Board, The, Department of the Treasury
- 33 Veterans' Affairs, Board on
- 34 Veterinary Medicine, Board of
- 35 Virginia Board for Asbestos Licensing
- 36 Virginia Coal Mine Safety Board
- 37 Virginia Correctional Enterprises Advisory Board
- 38 Virginia Employment Commission, State Advisory Board for the
- 39 (Effective July 1, 1996) Virginia Higher Education Tuition Trust Fund, Board of the
- 40 Virginia Horse Industry Board
- 41 Virginia Manufactured Housing Board
- 42 Virginia Retirement System, Board of Trustees
- 43 (For effective date - See Editor's note) Virginia Sheep Industry Board
- 44 Virginia Veterans Cemetery Board
- Virginia Waste Management Board

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3 Visually Handicapped, Virginia Board for the
4 Voluntary Formulary Board, Virginia
5 War Memorial Foundation, Virginia, Board of Trustees
6 (Contingently repealed - See Editor's note) Waste Management Facility Operators, Board
7 for
8 Water Resources Research Center Statewide Advisory Board, Virginia
9 Waterworks and Wastewater Works Operators, Board for
10 Well Review Board, Virginia
11 Youth and Family Services, State Board of.

12 B. Notwithstanding the definition for "board" as provided in § 2.1-1.2, the following
13 entities shall be referred to as boards:

14 Compensation Board
15 State Board of Elections
16 State Water Control Board
17 Virginia Parole Board
18 Virginia Veterans Care Center Board of Trustees.

19 § 2.1-483.1:2. *Assistance to the Design-Build/Construction Management Review Board.*
20 *The Director of the Division of Engineering and Buildings or his designee shall serve as*
21 *a member of the Design-Build/Construction Management Review Board (the Review Board)*
22 *created pursuant to § 11.41.2:3. The Division shall provide staff support to the Review Board in*
23 *the conduct of its duties in accordance with § 11-41.2:4.*

24 § 9-6.25:2. Policy boards, commissions and councils.

25 There shall be, in addition to such others as may be designated in accordance with § 9-
26 6.25, the following policy boards, commissions and councils:

27 Apprenticeship Council
28 Athletic Board
29 Auctioneers Board
30 Blue Ridge Regional Education and Training Council
31 Board for Accountancy
32 Board for Architects, Professional Engineers, Land Surveyors and Landscape Architects
33 Board for Barbers
34 Board for Contractors
35 Board for Cosmetology
36 Board for Geology
37 Board for Hearing Aid Specialists
38 Board for Opticians
39 Board for Professional and Occupational Regulation
40 Board for Professional Soil Scientists
41 Board for Waterworks and Wastewater Works Operators
42 Board of Agriculture and Consumer Services
43 Board of Audiology and Speech-Language Pathology
44 Board of Coal Mining Examiners
45 Board of Conservation and Recreation

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- 2 Board of Correctional Education
- 3 Board of Dentistry
- 4 Board of Directors, Virginia Student Assistance Authorities
- 5 Board of Funeral Directors and Embalmers
- 6 Board of Health Professions
- 7 Board of Historic Resources
- 8 Board of Housing and Community Development
- 9 Board of Medical Assistance Services
- 10 Board of Medicine
- 11 Board of Mineral Mining Examiners
- 12 Board of Nursing
- 13 Board of Nursing Home Administrators
- 14 Board of Optometry
- 15 Board of Pharmacy
- 16 Board of Professional Counselors
- 17 Board of Psychology
- 18 Board of Recreation Specialists
- 19 Board of Social Services
- 20 Board of Social Work
- 21 Board of Surface Mining Review
- 22 Board of Veterinary Medicine
- 23 Board on Conservation and Development of Public Beaches
- 24 Chesapeake Bay Local Assistance Board
- 25 Child Day Care and Early Childhood Programs, Virginia Council on
- 26 Child Day-Care Council
- 27 Commission on Local Government
- 28 Commonwealth Transportation Board
- 29 Council on Human Rights
- 30 Council on Information Management
- 31 Criminal Justice Services Board
- 32 *Design-Build/Construction Management Review Board*
- 33 Disability Services Council
- 34 Farmers Market Board, Virginia
- 35 Immigrant and Refugee Policy Council
- 36 Interdepartmental Council on Rate-setting for Children's Facilities
- 37 Library Board, the Library of Virginia
- 38 Marine Resources Commission
- 39 Milk Commission
- 40 Pesticide Control Board
- 41 Real Estate Appraiser Board
- 42 Real Estate Board
- 43 Reciprocity Board, Department of Motor Vehicles
- 44 Safety and Health Codes Board

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3 Seed Potato Board
4 Southside Virginia Marketing Council
5 Specialized Transportation Council
6 State Air Pollution Control Board
7 State Board of Corrections
8 State Board of Elections
9 State Board of Health
10 State Board of Youth and Family Services
11 State Health Department, Sewage Handling and Disposal Appeal Review Board
12 State Library Board
13 State Mental Health, Mental Retardation and Substance Abuse Services Board
14 State Water Control Board
15 Substance Abuse Certification Board
16 Treasury Board, The, Department of the Treasury
17 Virginia Aviation Board
18 Virginia Board for Asbestos Licensing
19 Virginia Fire Services Board
20 Virginia Gas and Oil Board
21 Virginia Health Planning Board
22 Virginia Health Services Cost Review Council
23 Virginia Manufactured Housing Board
24 Virginia Parole Board
25 Virginia Public Telecommunications Board
26 Virginia Soil and Water Conservation Board
27 Virginia Voluntary Formulary Board
28 Virginia Waste Management Board
29 Virginia World Trade Council.

30 § 11-41.2:2. *Design-build or construction management contracts for public bodies other*
31 *than the Commonwealth; eligibility requirements; award of contract; records to be kept.*

32 A. *Any public body other than the Commonwealth may enter into a contract for*
33 *construction on a fixed price or not-to-exceed price design-build or construction management*
34 *basis provided the public body complies with the requirements of this section and has obtained*
35 *the approval of the Design-Build/Construction Management Review Board (the Review Board)*
36 *pursuant to § 11-41.2:5. Prior to the procurement of any design-build or construction*
37 *management contract for a specific construction project, the public body shall submit a request*
38 *for review to and receive approval from the Review Board. Prior to such request, the public*
39 *body shall:*

40 1. *Have adopted, by ordinance or resolution, written procedures governing the selection,*
41 *evaluation and award of design-build and construction management contracts. Such procedures*
42 *shall be consistent with those described in this chapter for the procurement of nonprofessional*
43 *services through competitive negotiation and the provisions of the Capital Outlay Manual of the*
44 *Commonwealth for design-build and construction management;*

3 2. Have in its employ or under contract a licensed architect or engineer who shall
4 possess the requisite ability and competence appropriate for such construction project; and

5 3. Have documented in writing that for a specific construction project (i) a design-build
6 or construction management contract is more advantageous than a competitive sealed bid
7 construction contract; (ii) there is a benefit to the public body by using a design-build or
8 construction management contract; and (iii) competitive sealed bidding is not practical or
9 fiscally advantageous.

10 B. Once approved by the Review Board in accordance with § 11-41.2:5, the public body
11 may award a design-build or construction management contract. Such contract shall be
12 awarded to the fully qualified offeror who submits an acceptable proposal at the lowest cost in
13 response to a Request for Proposal. If the public body desires to make an exception to this
14 requirement, the public body, by resolution, shall state the basis for the exception.

15 C. The public body shall maintain records as prescribed by the Review Board to allow
16 post project evaluation by the Review Board.

17 § 11-41.2:3. Design-Build/Construction Management Review Board created;
18 membership; terms; staffing; seal.

19 A. There is hereby created the Design-Build/Construction Management Review Board,
20 hereinafter referred to as the Review Board, which shall be composed of nine members to be
21 appointed by the Governor as follows: the Director of the Division of Engineering and
22 Buildings of the Department of General Services, or his designee; two Class A general
23 contractors selected from a list recommended by the Associated General Contractors; two design
24 professionals selected from a list recommended by the Consulting Engineers Council of Virginia,
25 the Virginia Society

26 of the American Institute of Architects, and the Virginia Society of Professional Engineers; and
27 four representatives of public bodies other than the Commonwealth selected from a list
28 recommended by the Virginia Municipal League and the Virginia Association of Counties.

29 B. The initial terms of the Review Board shall be as follows: two members shall be
30 appointed for two-year terms, three members shall be appointed for three-year terms and three
31 members shall be appointed for four-year terms. Thereafter, all appointments shall be for terms
32 of four years, except that appointments to fill vacancies shall be for the unexpired terms. No
33 person shall be eligible to serve for more than two successive terms, except the Director of the
34 Division of Engineering and Buildings, who shall serve until a successor qualifies.

35 C. The Review Board shall elect its chairman and vice-chairman from among its
36 members. Members shall receive no compensation for their services as members of the Review
37 Board, but the nongovernmental members shall receive reasonable expenses.

38 D. The Review Board shall meet on the third Wednesday of each month to conduct its
39 business as required by § 11-41.2:4. However, monthly meetings may be cancelled by the
40 chairman if there is no business before the Review Board. Five members shall constitute a
41 quorum.

42 E. Such staff support as is necessary for the conduct of the Review Board's business
43 shall be furnished by the Division of Engineering and Buildings of the Department of General
44 Services pursuant to § 2.1-483.1:2.

45 F. The Review Board shall adopt a seal by which it shall authenticate its proceedings.

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3 *§ 11-41.2:4. Duties of the Design-Build/Construction Management Review Board.*

4 *The Review Board shall have the following duties:*

5 *1. Review submissions by public bodies other than the Commonwealth to determine if the*
6 *process for the selection, evaluation and award of a design-build or construction management*
7 *contract is in compliance with the provisions of this chapter;*

8 *2. Determine whether the public body has complied with the requirements of § 11-41.2:2*
9 *and that the determinations made by the public body pursuant to § 11-41.2:2 are reasonable ;*

10 *3. Adopt regulations in accordance with the Administrative Process Act (§ 9 -6.14:1 et*
11 *seq.) relating to the form and substance of submissions to be reviewed by the Review Board and*
12 *any criteria upon which the Review Board shall make a determination of compliance;*

13 *4. Make post project evaluations of construction projects procured by design-build or*
14 *construction management contracts entered into by public bodies other than the Commonwealth,*
15 *including cost and time savings, effectiveness of the selection, evaluation and award of such*
16 *contracts, and the benefit to the public body; and*

17 *5. Report to the General Assembly and the Governor on or before December 1, 1999,*
18 *concerning the Review Board's evaluation of and findings regarding all construction undertaken*
19 *by public bodies other than the Commonwealth since July 1, 1996, and any recommendations*
20 *relating to future use of design-build or construction management contracts by such public*
21 *bodies.*

22 *§ 11-41.2:5. Review by the Review Board for design-build or construction management*
23 *approval; effect of disapproval; review of Review Board decision.*

24 *The Review Board shall conduct such inquiry it deems appropriate and may require the*
25 *submission of additional documents or information by the public body, in a form prescribed by*
26 *the Review Board, to determine if the public body has complied with the provisions of this*
27 *chapter.*

28 *Within sixty working days of the receipt of the request for review, the Review Board shall*
29 *render a decision, unless a different timetable is agreed to by the public body. If the Review*
30 *Board determines that the proposed use of a design-build or construction management contract*
31 *complies with the provisions of this chapter, it shall approve such use. If the Review Board*
32 *determines that the proposed use of a design-build or construction management contract does*
33 *not comply with the provisions of this chapter, then it shall disapprove such use, and the public*
34 *body shall be precluded from procuring construction of the proposed project using a design-*
35 *build or construction management contract. If no decision is made by the Review Board within*
36 *the sixty-day period or as otherwise agreed to by the public body, the proposed use of a design-*
37 *build or construction management contract shall be deemed approved.*

38 *Any public body other than the Commonwealth which has been aggrieved by any action*
39 *of the Review Board shall be entitled to a review of such action. Appeals from such actions shall*
40 *be in accordance with the provisions of the Administrative Process Act (§ 9-6.14:1 et seq.).*

41 **2. That the provisions of § 11-41.2:2 shall not apply to any project authorized pursuant to**
42 **§ 11-41.2:1 on or before July 1, 1996.**

43 **3. That § 11-41.2:1 of the Code of Virginia is repealed, effective January 1, 1997.**

44 **4. That notwithstanding the repeal of § 11-41.2:1, authority granted public bodies pursuant**
45 **to § 11-41.2:1 shall continue until July 1, 1997, provided contracts for design-build or**
46 **construction management projects have been awarded on or before that date.**

47 #

APPENDIX E

CHAPTER 962

An Act to amend and reenact §§ 2.1-1.6 and 9-6.25:2 of the Code of Virginia; to amend the Code of Virginia by adding sections numbered 2.1-483.1:2 and 11-41.2:2 through 11-41.2:5; and to repeal § 11-41.2:1 of the Code of Virginia effective January 1, 1997, relating to the Virginia Public Procurement Act; design-build authority for public bodies other than the Commonwealth.

[H 336]

Approved April 17, 1996

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.1-1.6 and 9-6.25:2 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding sections numbered 2.1-483.1:2 and 11-41.2:2 through 11-41.2:5 as follows:

§ 2.1-1.6. State boards.

A. There shall be, in addition to such others as may be established by law, the following permanent collegial bodies affiliated with a state agency within the executive branch:

Accountancy, Board for
Aging, Advisory Board on the
Agriculture and Consumer Services, Board of
Air Pollution, State Advisory Board on
Alcoholic Beverage Control Board, Virginia
Apple Board, Virginia State
Appomattox State Scenic River Advisory Board
Aquaculture Advisory Board
Architects, Professional Engineers, Land Surveyors and Landscape Architects, State Board
for
Art and Architectural Review Board
Athletic Board, Virginia
Auctioneers Board
Audiology and Speech-Language Pathology, Board of
Aviation Board, Virginia
Barbers, Board for
Branch Pilots, Board for
Bright Flue-Cured Tobacco Board, Virginia
Building Code Technical Review Board, State
Catocin Creek State Scenic River Advisory Board
Cattle Industry Board, Virginia
Cave Board
Certified Seed Board, State
Chesapeake Bay Local Assistance Board
Chickahominy State Scenic River Advisory Board

Child Abuse and Neglect, Advisory Board on
Chippokes Plantation Farm Foundation, Board of Trustees
Clinch Scenic River Advisory Board
Coal Mining Examiners, Board of
Coal Research and Development Advisory Board, Virginia
Coal Surface Mining Reclamation Fund Advisory Board
Coastal Land Management Advisory Council, Virginia
Conservation and Development of Public Beaches, Board on
Conservation and Recreation, Board of
Contractors, Board for
Corn Board, Virginia
Correctional Education, Board of
Corrections, State Board of
Cosmetology, Board for
Criminal Justice Services Board
Dark-Fired Tobacco Board, Virginia
Deaf and Hard-of-Hearing, Advisory Board for the Department for the
Dentistry, Board of
Design-Build/Construction Management Review Board
Education, State Board of
Egg Board, Virginia
Emergency Medical Services Advisory Board
Employment Agency Advisory Board
Farmers Market Board, Virginia
Film Office Advisory Board
Fire Services Board, Virginia
Forensic Science Advisory Board
Forestry, Board of
Funeral Directors and Embalmers, Board of
Game and Inland Fisheries, Board of
Geology, Board for
Goose Creek Scenic River Advisory Board
Health Planning Board, Virginia
Health Professions, Board of
Health, State Board of
Hearing Aid Specialists, Board for
Hemophilia Advisory Board
Historic Resources, Board of
Housing and Community Development, Board of
Industrial Development Services Advisory Board
Insurance Advisory Board, State
Irish Potato Board, Virginia
Laboratory Services Advisory Board

Litter Control and Recycling Fund Advisory Board
Marine Products Board, Virginia
Medical Advisory Board, Department of Motor Vehicles
Medical Board of the Virginia Retirement System
Medicare and Medicaid, Advisory Board on
Medicine, Board of
Mental Health, Mental Retardation and Substance Abuse Services Board, State
Migrant and Seasonal Farmworkers Board
Military Affairs, Board of
Mineral Mining Examiners, Board of
Minority Business Enterprise, Interdepartmental Board of the Department of
Networking Users Advisory Board, State
Nottoway State Scenic River Advisory Board
Nursing, Board of
Nursing Home Administrators, Board of
Occupational Therapy, Advisory Board on
Oil and Gas Conservation Board, Virginia
Opticians, Board for
Optometry, Board of
Peanut Board, Virginia
Personnel Advisory Board
Pesticide Control Board
Pharmacy, Board of
Physical Therapy to the Board of Medicine, Advisory Board on
Plant Pollination Advisory Board
Polygraph Examiners Advisory Board
Pork Industry Board, Virginia
Poultry Products Board, Virginia
Private College Advisory Board
Private Security Services Advisory Board
Professional and Occupational Regulation, Board for
Professional Counselors, Board of
Professional Soil Scientists, Board for
Psychiatric Advisory Board
Psychology, Board of
Public Buildings Board, Virginia
Public Telecommunications Board, Virginia
Radiation Advisory Board
Real Estate Appraiser Board
Real Estate Board
Reciprocity Board, Department of Motor Vehicles
Recreational Fishing Advisory Board, Virginia
Recreation Specialists, Board of

Reforestation Board
Rehabilitation Providers, Advisory Board on
Rehabilitative Services, Board of
Respiratory Therapy, Advisory Board on
Retirement System Review Board
Rockfish State Scenic River Advisory Board
Safety and Health Codes Board
Seed Potato Board
Sewage Handling and Disposal Appeal Review Board, State Health Department
Shenandoah State Scenic River Advisory Board
Small Business Advisory Board
Small Business Environmental Compliance Advisory Board
Small Grains Board, Virginia
Social Services, Board of
Social Work, Board of
Soil and Water Conservation Board, Virginia
Soybean Board, Virginia
State Air Pollution Control Board
Substance Abuse Certification Board
Surface Mining Review, Board of
Sweet Potato Board, Virginia
T & M Vehicle Dealers' Advisory Board
Teacher Education and Licensure, Advisory Board on
Tourism and Travel Services Advisory Board
Transportation Board, Commonwealth
Transportation Safety, Board of
Treasury Board, The, Department of the Treasury
Veterans' Affairs, Board on
Veterinary Medicine, Board of
Virginia Board for Asbestos Licensing
Virginia Coal Mine Safety Board
Virginia Correctional Enterprises Advisory Board
Virginia Employment Commission, State Advisory Board for the
Virginia Higher Education Tuition Trust Fund, Board of the
Virginia Horse Industry Board
Virginia Manufactured Housing Board
Virginia Retirement System, Board of Trustees
Virginia Sheep Industry Board
Virginia Veterans Cemetery Board
Virginia Waste Management Board
Visually Handicapped, Virginia Board for the
Voluntary Formulary Board, Virginia
War Memorial Foundation, Virginia, Board of Trustees

(Contingently repealed) Waste Management Facility Operators, Board for
Water Resources Research Center Statewide Advisory Board, Virginia
Waterworks and Wastewater Works Operators, Board for
Well Review Board, Virginia
Youth and Family Services, State Board of.

B. Notwithstanding the definition for "board" as provided in § 2.1-1.2, the following entities shall be referred to as boards:

Compensation Board
State Board of Elections
State Water Control Board
Virginia Parole Board
Virginia Veterans Care Center Board of Trustees.

§ 2.1-483.1:2. *Assistance to the Design-Build/Construction Management Review Board.*

The Director of the Division of Engineering and Buildings or his designee shall serve as a member of the Design-Build/Construction Management Review Board (the Review Board) created pursuant to § 11-41.2:3. The Division shall provide staff support to the Review Board in the conduct of its duties in accordance with § 11-41.2:4.

§ 9-6.25:2. Policy boards, commissions and councils.

There shall be, in addition to such others as may be designated in accordance with § 9-6.25, the following policy boards, commissions and councils:

Apprenticeship Council
Athletic Board
Auctioneers Board
Blue Ridge Regional Education and Training Council
Board for Accountancy
Board for Architects, Professional Engineers, Land Surveyors and Landscape Architects
Board for Barbers
Board for Contractors
Board for Cosmetology
Board for Geology
Board for Hearing Aid Specialists
Board for Opticians
Board for Professional and Occupational Regulation
Board for Professional Soil Scientists
Board for Waterworks and Wastewater Works Operators
Board of Agriculture and Consumer Services
Board of Audiology and Speech-Language Pathology
Board of Coal Mining Examiners
Board of Conservation and Recreation
Board of Correctional Education
Board of Dentistry
Board of Directors, Virginia Student Assistance Authorities
Board of Funeral Directors and Embalmers

Board of Health Professions
Board of Historic Resources
Board of Housing and Community Development
Board of Medical Assistance Services
Board of Medicine
Board of Mineral Mining Examiners
Board of Nursing
Board of Nursing Home Administrators
Board of Optometry
Board of Pharmacy
Board of Professional Counselors
Board of Psychology
Board of Recreation Specialists
Board of Social Services
Board of Social Work
Board of Surface Mining Review
Board of Veterinary Medicine
Board on Conservation and Development of Public Beaches
Chesapeake Bay Local Assistance Board
Child Day Care and Early Childhood Programs, Virginia Council on
Child Day-Care Council
Commission on Local Government
Commonwealth Transportation Board
Council on Human Rights
Council on Information Management
Criminal Justice Services Board
Design-Build/Construction Management Review Board
Disability Services Council
Farmers Market Board, Virginia
Immigrant and Refugee Policy Council
Interdepartmental Council on Rate-setting for Children's Facilities
Library Board, The Library of Virginia
Marine Resources Commission
Milk Commission
Pesticide Control Board
Real Estate Appraiser Board
Real Estate Board
Reciprocity Board, Department of Motor Vehicles
Safety and Health Codes Board
Seed Potato Board
Southside Virginia Marketing Council
Specialized Transportation Council
State Air Pollution Control Board

State Board of Corrections
State Board of Elections
State Board of Health
State Board of Youth and Family Services
State Health Department, Sewage Handling and Disposal Appeal Review Board
State Library Board
State Mental Health, Mental Retardation and Substance Abuse Services Board
State Water Control Board
Substance Abuse Certification Board
Treasury Board, The, Department of the Treasury
Virginia Aviation Board
Virginia Board for Asbestos Licensing
Virginia Fire Services Board
Virginia Gas and Oil Board
Virginia Health Planning Board
Virginia Health Services Cost Review Council
Virginia Manufactured Housing Board
Virginia Parole Board
Virginia Public Telecommunications Board
Virginia Soil and Water Conservation Board
Virginia Voluntary Formulary Board
Virginia Waste Management Board
Virginia World Trade Council

(Contingently repealed) Waste Management Facility Operators, Board for.

§ 11-41.2:2. Design-build or construction management contracts for public bodies other than the Commonwealth; eligibility requirements; award of contract; records to be kept.

A. While the competitive sealed bid process remains the preferred method of construction procurement for public bodies in the Commonwealth, any public body other than the Commonwealth may enter into a contract for construction on a fixed price or not-to-exceed price design-build or construction management basis provided the public body complies with the requirements of this section and has obtained the approval of the Design-Build/Construction Management Review Board (the Review Board) pursuant to § 11-41.2:5.

Prior to making a determination as to the use of design-build or construction management for a specific construction project, the public body shall have in its employ or under contract a licensed architect or engineer with professional competence appropriate to the project who shall advise the public body regarding the use of design-build or construction management for that project and who shall assist the public body with the preparation of the Request for Proposal.

Prior to issuing a Request for Proposal for any design-build or construction management contract for a specific construction project, the public body shall:

1. Have adopted, by ordinance or resolution, written procedures governing the selection, evaluation and award of design-build and construction management contracts. Such procedures shall be consistent with those described in this chapter for the procurement of nonprofessional

services through competitive negotiation. Such procedures shall also require Requests for Proposals to include and define the criteria of such construction project in areas such as site plans; floor plans; exterior elevations; basic building envelope materials; fire protection information plans; structural, mechanical (HVAC), and electrical systems; and special telecommunications; and may define such other requirements as the public body determines appropriate for that particular construction project. Except as may otherwise be approved by the Review Board, such procedures for:

a. Design-build construction projects shall include a two-step competitive negotiation process consistent with the applicable provisions of the Design-Build Selection Procedures of paragraph D of Chapter IX (Special Construction Procedures) of the Capital Outlay Manual of the Commonwealth developed by the Department of General Services through the Division of Engineering and Buildings. The provisions of the Capital Outlay Manual shall apply, *mutatis mutandis*, to such procedures for design-build construction projects.

b. Construction management projects shall include (i) selection procedures consistent with the applicable provisions of the Selection Procedures of paragraphs D and E of Chapter IX (Special Construction Procedures) of the Capital Outlay Manual of the Commonwealth and (ii) required construction management contract terms consistent with applicable provisions of the Required Construction Management Contract Terms of paragraph F of Chapter IX (Special Construction Procedures) of the Capital Outlay Manual. The provisions of the Capital Outlay Manual shall apply, *mutatis mutandis*, to such procedures for construction management projects.

2. Have documented in writing that for a specific construction project (i) a design-build or construction management contract is more advantageous than a competitive sealed bid construction contract; (ii) there is a benefit to the public body by using a design-build or construction management contract; and (iii) competitive sealed bidding is not practical or fiscally advantageous.

B. Once approved by the Review Board in accordance with § 11-41.2:5, the public body may award a design-build or construction management contract. Unless otherwise specified in the Request for Proposal, such contract shall be awarded to the fully qualified offeror who submits an acceptable proposal at the lowest cost in response to the Request for Proposal. The provisions of this subsection shall supersede any related provision in the Capital Outlay Manual.

C. The public body shall provide information as requested by the Review Board to allow post-project evaluation by the Review Board.

§ 11-41.2:3. Design-Build/Construction Management Review Board created; membership; terms; staffing; seal.

A. There is hereby created the Design-Build/Construction Management Review Board, hereinafter referred to as the Review Board, which shall be composed of nine members to be appointed by the Governor as follows: the Director of the Division of Engineering and Buildings of the Department of General Services, or his designee; two Class A general contractors selected from a list recommended by the Associated General Contractors; one architect and one engineer selected from a list recommended by the Consulting Engineers Council of Virginia, the Virginia Society of the American Institute of Architects, and the Virginia Society of Professional Engineers; and four representatives of public bodies other than the

Commonwealth selected from a list recommended by the Virginia Municipal League and the Virginia Association of Counties. Each such list shall include the names of at least four persons who are experienced in competitive sealed bidding or competitive negotiation and in design-build or construction management procedures. The Director of the Division of Engineering and Buildings or his designee shall be a nonvoting member of the Review Board, except in the event of a tie vote of the Review Board.

B. The initial terms of the Review Board shall be as follows: three members shall be appointed for two-year terms, three members shall be appointed for three-year terms and three members shall be appointed for four-year terms. Thereafter, all appointments shall be for terms of four years, except that appointments to fill vacancies shall be for the unexpired terms. No person shall be eligible to serve for more than two successive full terms, except the Director of the Division of Engineering and Buildings, who shall serve until a successor qualifies.

C. The Review Board shall elect its chairman and vice-chairman from among its members. Members shall receive no compensation for their services as members of the Review Board, but shall receive reasonable expenses.

D. The Review Board shall meet monthly to conduct its business as required by § 11-41.2:4. However, monthly meetings may be canceled by the chairman if there is no business before the Review Board. Five members shall constitute a quorum.

E. Such staff support as is necessary for the conduct of the Review Board's business shall be furnished by the Division of Engineering and Buildings of the Department of General Services pursuant to § 2.1-483.1:2.

F. The Review Board shall adopt a seal by which it shall authenticate its proceedings.

§ 11-41.2:4. Duties of the Design-Build/Construction Management Review Board; transitional provisions relating to regulations.

A. The Review Board shall have the following duties:

1. Review submissions by public bodies other than the Commonwealth of draft or adopted ordinances or resolutions to determine if the process for the selection, evaluation and award of a design-build or construction management contract is in compliance with the provisions of subdivision A 1 of § 11-41.2:2;

2. Determine if the public body has complied with the provisions of § 11-41.2:2 relating to the retention of a licensed architect or engineer;

3. Review the findings and the basis of such findings submitted by the public body to determine if the public body has complied with the requirements of § 11-41.2:2 and that the findings made by the public body pursuant to § 11-41.2:2 are not unreasonable;

4. Develop guidelines relating to the documents and information to be reviewed by the Review Board;

5. Make post-project evaluations of construction projects procured by design-build or construction management contracts entered into by public bodies other than the Commonwealth, including cost and time savings, effectiveness of the selection, evaluation and award of such contracts, and the benefit to the public body; and

6. Report to the General Assembly and the Governor on or before December 1, 1999, concerning the Review Board's evaluation of and findings regarding all design-build and construction management construction undertaken by public bodies other than the

Commonwealth since July 1, 1996, and any recommendations relating to future use of design-build or construction management contracts by such public bodies.

B. On or before July 1, 1997, the Review Board shall adopt regulations, as it deems appropriate, based on the substantive requirements of Chapter IX of the Capital Outlay Manual of the Commonwealth, for a two-step competitive negotiation process which shall be applied to design-build and construction management projects undertaken by public bodies other than the Commonwealth. For construction management projects, such regulations shall also include applicable provisions of the Required Construction Management Contract Terms of the Capital Outlay Manual. Such regulations shall also allow the Review Board to approve deviations from provisions of the Capital Outlay Manual that it deems appropriate. Such regulations, upon final adoption, shall supersede the provisions of subdivisions A 1 a and A 1 b of § 11-41.2:2. Regulations of the Review Board shall be adopted in accordance with the Administrative Process Act (§ 9-6.14:1 et seq.), except that regulations adopted pursuant to this subsection during the Review Board's first year of operation shall not be subject to the Administrative Process Act. Thereafter, all regulations shall be adopted in accordance with the Administrative Process Act.

§ 11-41.2:5. Review by the Review Board for design-build or construction management approval; effect of disapproval; review of Review Board decision.

The Review Board shall conduct such inquiry it deems appropriate and may require the submission of additional documents or information by the public body, in a form prescribed by the Review Board, to determine if the public body has complied with the provisions of § 11-41.2:2.

Within sixty days of the receipt of the request for review, the Review Board shall render a decision, unless a different timetable is agreed to by the public body. If the Review Board determines that the public body has complied with the provisions of § 11-41.2:2 and the findings made by the public body pursuant to subdivision A 2 of § 11-41.2:2 are not unreasonable, the Review Board shall approve such use. If the Review Board determines that (i) the public body has not complied with the provisions of § 11-41.2:2 or (ii) the findings made by the public body pursuant to subdivision A 2 of § 11-41.2:2 are unreasonable, it shall disapprove such use, and the public body shall not use a design-build or construction management contract to procure construction for the proposed project. If no decision is made by the Review Board within the sixty-day period or as otherwise agreed to by the public body, the proposed use of a design-build or construction management contract shall be deemed approved.

Any public body other than the Commonwealth which has been aggrieved by any action of the Review Board shall be entitled to a review of such action. Appeals from such actions shall be in accordance with the provisions of the Administrative Process Act (§ 9-6.14:1 et seq.).

2. That the provisions of §§ 11-41.2:2 through 11-41.2:5 shall not apply to any project authorized pursuant to § 11-41.2:1 on or before July 1, 1996, except to the extent such provisions relate to post-project evaluations by the Review Board of projects for which a construction contract is entered into by the public body on or after July 1, 1996.

3. That § 11-41.2:1 of the Code of Virginia is repealed, effective January 1, 1997.

4. That the authority granted to public bodies other than the Commonwealth pursuant to § 11-41.2:1 for projects listed therein shall continue notwithstanding the repeal of § 11-41.2:1 on January 1, 1997.

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