

COMPETITIVE PROCESSES FOR PROCUREMENT OF CONSTRUCTION

PUBLIC BODY PROCUREMENT WORKGROUP

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TOPICS

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MULTI-YEAR TASK FORCE RECOMMENDATION TO INCLUDE PROCUREMENT OF CONSTRUCTION MANAGEMENT BY COMPETITIVE NEGOTIATION IN VPPA

Prior to passage of the Virginia Public Procurement Act (VPPA) in 1982, the General Assembly created a task force to study Virginia procurement laws and practices. The Task Force was chaired by the Department of General Services and was comprised of members representing the private sector, state, local and federal government entities. The Task Force issued its Final Report in 1980. The two-year study involved an examination of the statutes under which all public agencies purchased materials, services and construction.¹

The Task Force stated the true hallmark of public procurement must be competition.² Regarding procurement of construction, however, the Task Force found the existing Virginia statutes “invariably mention only one method of procurement, competitive bidding...and furnish no guidance on any method to be used if competitive bidding is not practicable.”³

The Task Force noted that “frequently, competition is seen as a shorthand expression for competitive bidding.” However, there are other methods of procurement by competition. “Competition means access to consideration by a public body, and comparison of salient features of an offer by the public body. Competitive bidding is one form of competitive procurement, but not the only one.” The proposed legislation [VPPA] describes two methods of procurement featuring competition: competitive sealed bidding and competitive negotiation.⁴

¹ Virginia Procurement Law Study, Final Report at 1 (Nov. 1, 1980) (Final Report).

² Final Report at 3.

³ Final Report at 1-2.

⁴ Final Report at 3.

To provide flexibility for state entities, competitive negotiation allows the body to consider whatever factors it deems important for the procurement; does not mandate award to the low offer or that cost be considered. It requires only that the availability of the work be made public and that the body identify the factors it will be considering in its evaluation of offers. Construction management contracts are awarded by competitive negotiation.⁵

The Task Force explained that “the essence of competitive negotiation is comparison of proposals from several offerors. It differs from competitive bidding in several important respects. First, while price maybe a factor, it is not necessarily the determinative factor, since quality, service, experience, time of performance or other factors may be sufficient justification for entering a contract for more than the lowest proposal... Second, the specifications are not detailed, since the purpose it to solicit a variety of approaches or alternatives. Third, this method envisions face-to-face discussions and negotiation, unlike competitive bidding.... This definition allows the public body to determine the weight to be given all factors in the selection process.”⁶

⁵ Final Report at 3.

⁶ Final Report at 32-33.

THE VIRGINIA PUBLIC PROCUREMENT ACT

Declaration of Intent (Va. Code §2.2-4300.C) includes:

“That public bodies in the Commonwealth obtain high quality goods and services at reasonable cost.”

“That competition be sought to the maximum feasible degree.”

“That individual public bodies enjoy broad flexibility in fashioning details of such competition.”

Two Competitive Methods of Procurement Generally

Process for Competitive Sealed Bidding (Va. Code §2.2-4302.1)

Process for Competitive Negotiation (Va. Code §2.2-4302.2)

Methods of Procurement of Construction (Va. Code §2.2-4303.D)

Construction may be procured only by competitive sealed bidding, except that competitive negotiation may be used by a public body to procure construction management pursuant to Chapter 43.1, Va. Code §2.2-4378, et seq.

Implementation (Va. Code §2.2-4302)

Public bodies may enact ordinances and regulations consistent with the VPPA to implement the Act’s statutory requirements.

Some state entities are exempt from the requirements of the VPPA, if they adopt procedures designed to procure goods and services upon competitive principles.

The Department of General Services has issued its Construction and Professional Services Manual (CPSM) (2022, Rev. 1), providing its policies and procedures to implement the VPPA provisions and to be followed by state agencies regarding design and construction on property owned by the Commonwealth. The CPSM includes procedures issued by the Secretary of Administration (Jan. 1, 2020) regarding procurement of construction management. Local government entities and some higher education institutions are not subject to the CPSM.

PROCESS FOR COMPETITIVE SEALED BIDDING (VA. CODE §2.2-4302.1)

1. Owner obtains completed construction plans and specifications from its retained architectural and engineering professionals (the A/E).
2. Owner prepares Invitation for Bid (IFB). The IFB is a written solicitation to the public requesting qualified bidders to submit competitive prices or bids for providing the described Work on a Project. The IFB includes or incorporates by reference: (a) the construction plans; (b) specifications regarding the materials and work to be provided; (c) the contract terms and conditions; (d) instructions to bidders about preparing their bids and deadlines for submission; (e) a bid form; and (f) a statement of any requisite qualifications of contractors, unless they were prequalified for the bidding.
3. Owner issues IFB with response period no earlier than 10 days prior to deadline of receipt of bids. Owner posts notice of IFB on procurement website of DGS or as otherwise required by statute regarding type of owner.
4. A pre-bid conference providing access to the site or to answer questions may be held. The A/E is to respond in writing to questions received verbally or in writing from potential bidders and publish its responses to all potential bidders.
5. There is no negotiation concerning any of the desired work, the plans, materials, timing or otherwise.
6. Public opening and announcement of all sealed bids received.
7. Evaluation of bids based on requirements set forth in the IFB to determine the responsive and responsible bidder with lowest bid price. Per Va. Code §2.2-4301, “responsive bidder” means one who has submitted a bid that conforms in all material respects to the IFB. “Responsible bidder” means one who has the capability in all respects to perform fully the contract requirements; the business integrity and reliability to assure good faith performance; and who has been prequalified if necessary. Bidders do not disclose experience, project team, subcontractors to be used.
8. Owner posts notice of intent to award to the low bidder prior to award.
9. Owner awards contract to general contractor, who may perform 100% of the work and obtain subcontracts without public competitive bidding.

DIFFERENT NATURE OF CONTRACT FOR CONSTRUCTION MANAGEMENT

Procurement of construction using construction management differs from procuring construction to be performed by a general contractor, including:

- “Construction management contract” means a contract in which one is retained by the project owner to coordinate and administer contracts for construction services for the benefit of the owner and may include furnishing of construction services to the owner. (Va. Code §2.2-4379)
- No more than 10% of the value of construction work may be performed by the CM. At least 90% must be performed by subcontractors of the CM procured via publicly advertised competitive sealed bidding to the extent practical. Owner has input on qualifications for subcontractors. (Va. Code §2.2-4380.B.6)
- Part 1 of the CM Contract for Pre-Construction services must be awarded no later than completion of the schematic phase of design. It includes services to be given to assist the owner and design team in developing the plans, specifications and project approach within a budget. Services may include ongoing review of plans for constructability, consideration of project duration and sequencing, comment on materials to be utilized for development of the specifications and cost estimating. (Va. Code §2.2-4380.B.4; CPSM §7.2.1)
- Part 2 of the CM Contract for Construction Services is entered only if the agency and CM, upon completion of the working drawings, agree to a Guaranteed Maximum Price within an approved budget for the CM to continue as CM for the construction phase. The CM is “at risk” to complete the project scope on time and within the GMP. The final cost may not reach the GMP and remaining funds are retained by the agency.
- Agency procurement is subject to requirements of Va. Code §2.2-4380. A body’s implementing procedures shall comply with procedures of the Secretary of Administration, which provide for a two-step competitive negotiation process.

COMPETITIVE NEGOTIATION TO PROCURE CONSTRUCTION MANAGEMENT SERVICES (VA. CODE §§2.2-4302.2; 2.2-4380 [State Bodies], CPSM §7.2)

1. The Agency shall appoint an Evaluation Committee ("Committee") with at least three members from the Agency, including a licensed design professional, if possible, and a licensed professional engineer or architect provided by the Division of Engineering and Buildings.
2. Conduct a two-step selection process: (Step I) Prequalification via evaluation of responses to Request for Qualifications (RFQ) to determine which offerors shall receive Requests for Proposals (RFP); then (Step II) evaluate RFPs and negotiation with offerors.
3. (Step I). The Committee shall prepare the RFQ to include the agency's project overview, project requirements, site and building criteria, justification for use of CM services. Committee to include a list of qualification criteria to be evaluated, and numerical scoring for each criteria. At a minimum, the qualification criteria shall include the following: 1. Appropriately licensed and in good standing as a Class A General Contractor in the Commonwealth of Virginia; 2. Ability to obtain appropriate insurance coverage for the project; 3. Appropriate bonding capacity; 4. A listing of company and proposed project team members' experience of at least three (3) projects of similar scope and complexity within the past ten (10) years, including construction cost, schedule, and Owner or architect representative's contact information; and 5. A list of at least three (3) professional references including contact information.
4. Committee issues RFQ, which is publicly posted.
5. Committee evaluates RFQ responses via numerical scoring for the greatest conformance with the requirements set forth in the RFQ. Committee creates a short list of between three (3) and five (5) offerors best suited to receive Request for Proposals, including a Certified Small Business that met minimum requirements contained in RFQ.
6. Agency advises in writing offerors who were not prequalified and the reasons for such denial.
7. (Step II). Committee prepares RFP, including evaluation criteria and scoring to be used. Prior CM or Bureau of Capital Outlay Management experience are not requirements for award.

8. At a minimum, all RFP's shall request the following information: 1. A lump sum fee for Pre-construction Services in accordance with the scope of services included in the RFP. 2. A General Conditions Fee based upon an anticipated duration set by the agency detailed in a specific listing of General Conditions items and their associated cost. 3. The Insurance and Taxes Fee which shall be stated as a percentage of the Cost of the Construction Work, for general liability insurance, builders risk insurance, payment and performance bonds, local business licenses, any local municipal taxes, and any other similar costs identified in the definition of the Insurance and Taxes Fee per the General Conditions. 4. A CM/GC Fee to include all home office expenses, overhead and profit during the construction phase of the Contract. RFPs request project approach and subcontractor/SWAM participation plan.
9. Agency prohibited from requesting budget estimates in RFP.
10. Committee issues RFPs to short-listed offerors and posts per law.
11. Committee evaluates RFPs, conducts interviews and ranks proposals using combined scores of RFQ and RFP.
12. Committee negotiates with two or more offerors submitting highest ranked proposals.
13. Based on evaluations and negotiations, Committee recommends selection of one offeror to the agency head.
14. CM contract, Part 1 for pre-construction services is awarded to offeror which is fully qualified and determined to be providing best value.
15. Agency advises other offerors submitting proposals of the CM selected.
16. Part 2 of the CM Contract for Construction Services is entered only if the agency and CM, upon completion of the working drawings, agree to a Guaranteed Maximum Price within an approved budget for the CM to continue as CM for the construction phase. GMP proposal includes all subcontractor bids, breakdown of bids and material estimates and specific SWAM participation rates. The parties negotiate to reach GMP.
17. Agency requests DEB approval to award CM Contract for Construction.
18. Agency awards CM Contract Part 2 if approved.