



COMMONWEALTH of VIRGINIA

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February 10, 2012

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Mark D. Stiles, Esquire
City Attorney, City of Virginia Beach
Municipal Center Building 1
2401 Courthouse Drive
Virginia Beach, Virginia 23456-9004

Dear Mr. Stiles:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You ask whether the Virginia Public Procurement Act,¹ as amended by the Virginia General Assembly in Chapter 594 of the 2011 Acts of Assembly, permits localities to adopt design-build construction project procedures that limit prequalification² to no more than five offerors deemed fully qualified and best suited for the project.

Response

It is my opinion that the Public Procurement Act allows localities to adopt design-build procedures that limit the locality to the selection of no more than five offerors deemed fully qualified and best suited for the project.

Background

The General Assembly in 2011 enacted legislation that eliminated the Design-Build/Construction Management Review Board ("the Board").³ Prior to its elimination, the Board, among its other responsibilities, granted approval to localities to use competitive negotiations for the procurement of design-build or construction management contracts. The Board ensured such negotiations proceeded in accord with the Board's regulations for a two-step competitive negotiation process. In light of the Board's elimination, the 2011 legislation made additional changes so that procedures adopted by localities for design-build construction projects now must include a two-step competitive negotiation process that is consistent with standards established by the Division of Engineering and Buildings ("DEB") of the Department of General Services.⁴

¹ VA. CODE ANN. §§ 2.2-4300 through 2.2-4377 (2011).

² "Prequalification" under the Virginia Public Procurement Act is found in § 2.2-4317. Prequalification in this sense is not required by the statutes relating to the selection of an offeror for a design-build construction project.

³ 2011 Va. Acts chs. 594, 681.

⁴ *Id.*; Section 2.2-4308 (2011).

Applicable Law and Discussion

The Virginia Public Procurement Act establishes that the competitive sealed bid process is the preferred method of construction procurement for localities to follow.⁵ Nonetheless, as currently enacted, § 2.2-4303(D)(3) authorizes localities with populations in excess of 100,000, which include the City of Virginia Beach,⁶ to use competitive negotiation when procuring a contractor for design-build construction projects. Specifically, the statute provides that such procurements shall be in compliance with the design-build requirements found in § 2.2-4308 and with the two-step competitive negotiation process established in § 2.2-4301.

Section 2.2-4308, which governs the procurement of design-build contracts by localities, requires that a locality adopt “procedures governing the selection, evaluation and award of design-build . . . contracts [that are] consistent with those described . . . for the procurement of nonprofessional services through competitive negotiation[,]” which are set forth in § 2.2-4301. Pursuant to § 2.2-4301, “[s]election shall be made of two or more offerors deemed to be fully qualified and best suited among those submitting proposals. . . . 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.” Thus, the first step of competitive negotiation involves narrowing the number of offerors deemed to be fully qualified and best suited for the project. The second step involves negotiating with the group selected in the first step and selecting a contractor.

Also relative to your inquiry, § 2.2-4308 further provides, in pertinent part:

Design-build projects shall include a two-step competitive negotiation process consistent with standards established by the Division of Engineering and Buildings of the Department of General Services for state agencies.

DEB’s procedures are governed by § 2.2-4306, which provides that the Commonwealth’s

Procurement of construction by the design-build method shall be a two-step competitive negotiation process. In the first step, offerors shall be requested to submit their qualifications. Based on the information submitted and any other relevant information which the Commonwealth may obtain, no more than five offerors deemed most suitable for the project shall be selected by the Commonwealth and requested to submit proposals.

Under the Dillon Rule, a locality has “only those powers that are expressly granted, those that are necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable.”⁷ Although the General Assembly has not expressly granted localities the specific authority to limit the number of offerors deemed qualified and best suited, the above-cited provisions establish that local government bodies are to adopt procedures consistent with those maintained by DEB. Clearly, given the state’s five-qualified-offeror selection limitation, a procedure adopted by a locality that mirrors that requirement would be consistent with the DEB standard. I therefore conclude that a locality may establish a requirement to select no more than five offerors deemed most suitable for the project with whom it may then negotiate to select a contractor to be awarded design-build contract.

⁵ Section 2.2-4308(A).

⁶ The 2010 United States Census determined the City of Virginia Beach to have a population of 437,994. U.S. Census Bureau State and County QuickFacts for the City of Virginia Beach, Virginia, *available at* <http://quickfacts.census.gov/qfd/states/51/5182000.html>

⁷ *Tabler v. Bd. of Supvrs.*, 220 Va. 200, 202, 269 S.E.2d 358, 359 (1980).

Conclusion

Accordingly, it is my opinion that the Public Procurement Act allows localities to adopt design-build procedures that limit the locality to the selection of no more than five offerors deemed fully qualified and best suited for the project.

With kindest regards, I am

Very truly yours,

A handwritten signature in blue ink, appearing to read "Ken C II". The signature is stylized and written in a cursive-like font.

Kenneth T. Cuccinelli, II
Attorney General