

SENATE BILL NO. 249

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on General Laws and Technology

on \_\_\_\_\_)

(Patron Prior to Substitute--Senator McPike)

A BILL to amend and reenact §§ 2.2-4379, 2.2-4380, 2.2-4381, and 2.2-4383 of the Code of Virginia, relating to Virginia Public Procurement Act; construction management and design-build contracting.

**Be it enacted by the General Assembly of Virginia:**

**1. That §§ 2.2-4379, 2.2-4380, 2.2-4381, and 2.2-4383 of the Code of Virginia are amended and reenacted as follows:**

**§ 2.2-4379. Definitions.**

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

"Complex project" means a construction project that includes one or more of the following significant components: difficult site location, unique equipment, specialized building systems, multifaceted program, accelerated schedule, historic designation, or intricate phasing or some other aspect that makes competitive sealed bidding not practical.

"Construction management contract" means a contract in which a party is retained by the owner to coordinate and administer contracts for construction services for the benefit of the owner and may also include, if provided in the contract, the furnishing of construction services to the owner.

"Covered institution" means a public institution of higher education operating (i) subject to a management agreement set forth in Article 4 (§ 23.1-1004 et seq.) of Chapter 10 of Title 23.1, (ii) under a memorandum of understanding pursuant to § 23.1-1003, or (iii) under the pilot program authorized in the appropriation act.

"Department" means the Department of General Services.

26 "Design-build contract" means a contract between a public body and another party in which the  
27 party contracting with the public body agrees to both design and build the structure, or other item specified  
28 in the contract.

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

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

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

35 **§ 2.2-4380. Construction management or design-build contracts for state public bodies**  
36 **authorized.**

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

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

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

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

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

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

58 5. Prior construction management or design-build experience or previous experience with the  
59 ~~Department's Bureau of Capital Outlay Management~~ Division shall not be ~~required~~ considered as a  
60 prerequisite or factor considered for prequalification or award of a contract. However, in the selection of  
61 a contractor, a state public body may consider the experience of each contractor on comparable projects;

62 6. Construction management contracts shall require that (i) no more than 10 percent of the  
63 construction work, as measured by the cost of the work, be performed by the construction manager with  
64 its own forces and (ii) the remaining 90 percent of the construction work, as measured by the cost of the  
65 work, be performed by subcontractors of the construction manager, which the construction manager shall  
66 procure by publicly advertised, competitive sealed bidding to the maximum extent practicable; ~~and~~

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

68 8. The procedures allow the state public body to post on the Department's central electronic  
69 procurement website known as eVA when and where the general contractor plans to advertise bid  
70 packages for subcontracting opportunities when appropriate.

71 C. The Department shall evaluate the proposed procurement method selected by the state public  
72 body and make its recommendation as to whether the use of the construction management or design-build  
73 procurement method is appropriate for the specific project. In its review, the Department shall also  
74 consider:

- 75 1. The written determination of the state public body;
- 76 2. The compliance by the state public body with subdivisions B 1, 2, and 7;
- 77 3. The project cost, expected timeline, and use;
- 78 4. Whether the project is a complex project; and

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

81 D. The Department shall conduct its review within five working days after receipt of the written  
82 determination and render its written ~~recommendation~~ approval or denial within such five-working-day  
83 period. The written ~~recommendation~~ approval or denial of the Department shall be maintained in the  
84 procurement file.

85 E. If a state public body elects to proceed with the project using a construction management or  
86 design-build procurement method despite the recommendation of the Department to the contrary, such  
87 state public body shall state in writing its reasons therefor and any justification for not following the  
88 recommendation of the Department and submit same to the Department. The written statement of a state  
89 public body's decision to not follow the recommendation of the Department shall be maintained in the  
90 procurement file and posted on the Department's central electronic procurement website known as eVA.

91 **§ 2.2-4381. Construction management or design-build contracts for covered institutions**  
92 **authorized.**

93 A. Any covered institution may enter into a contract for construction on a fixed price or not-to-  
94 exceed price construction management or design-build basis, provided that (i) the Department approves  
95 the use of construction management or design-build or, in the case of a denial by the Department, such  
96 institution receives approval as set forth in subsection F and (ii) such institution complies with the  
97 requirements of this article and with the procedures adopted by the Secretary of Administration for using  
98 construction management or design-build contracts.

99 B. Covered institutions shall:

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

102 2. Submit such procedures, and any subsequent changes to adopted procedures, to the Department  
103 for review and comment; and

104 3. Submit Department-reviewed procedures to its board of visitors or governing board for  
105 adoption.

106 C. Procedures adopted by a board of visitors or governing board pursuant to this article shall  
107 include the following requirements:

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

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

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

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

123 5. Prior construction management or design-build experience or previous experience with the  
124 ~~Department's Bureau of Capital Outlay Management~~ Division shall not be ~~required~~ considered as a  
125 prerequisite or factor considered for prequalification or award of a contract. However, in the selection of  
126 a contractor, a covered institution may consider the experience of each contractor on comparable projects;

127 6. Construction management contracts shall require that (i) no more than 10 percent of the  
128 construction work, as measured by the cost of the work, be performed by the construction manager with  
129 its own forces and (ii) the remaining 90 percent of the construction work, as measured by the cost of the  
130 work, be performed by subcontractors of the construction manager, which the construction manager shall  
131 procure by publicly advertised, competitive sealed bidding to the maximum extent practicable; ~~and~~

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

133 8. The procedures allow the covered institution to post on the Department's central electronic  
134 procurement website known as eVA when and where the general contractor plans to advertise bid  
135 packages for subcontracting opportunities when appropriate.

136 D. The Department shall evaluate the proposed procurement method selected by a covered  
137 institution and ~~make offer its recommendation~~ approval or denial as to whether the use of the construction  
138 management or design-build procurement method is appropriate for the specific project. In its review, the  
139 Department shall also consider:

- 140 1. The written determination of the covered institution;
- 141 2. The compliance by the covered institution with subdivisions C 1, 2, and 7;
- 142 3. The project cost, expected timeline, and use;
- 143 4. Whether the project is a complex project; and
- 144 5. Any other criteria established by the Department to evaluate the proposed procurement method  
145 for the project.

146 E. The Department shall conduct its review within five working days after receipt of the written  
147 determination and render its written ~~recommendation~~ approval or denial within such five-working-day  
148 period. The written ~~recommendation~~ approval or denial of the Department shall be maintained in the  
149 procurement file.

150 F. If a covered institution elects to proceed with the project using a construction management or  
151 design-build procurement method despite the ~~recommendation~~ decision of the Department to the contrary,  
152 such covered institution shall ~~state in writing its reasons therefor and any justification for not following~~  
153 ~~the recommendation of the Department and submit same to the Department~~ obtain approval from the board  
154 of visitors or governing board of such institution. ~~The~~ A written statement of a covered institution's  
155 decision to not follow the ~~recommendation~~ decision of the Department, its reasons therefor, and the vote  
156 of the board of visitors or governing board shall be maintained in the procurement file and posted on the  
157 Department's central electronic procurement website known as eVA.

158 **§ 2.2-4383. Reporting requirements.**

159 A. The Department shall report by December 1 of each year to the Governor and the Chairmen of  
160 the House Committee on Appropriations, the House Committee on General Laws, the Senate Committee  
161 on Finance and Appropriations, and the Senate Committee on General Laws and Technology the following  
162 information: (i) the number of projects reviewed pursuant to Articles 2 (§ 2.2-4380) and 3 (§ 2.2-4381)  
163 and (ii) for each project (a) the identity of the state public body or covered institution and a description of  
164 each such project, (b) the estimated cost of the project at the time of the Department's review, (c) the  
165 ~~recommendation~~ decision made by the Department concerning the proposed procurement method, ~~and~~ (d)  
166 if such project was a construction management or design-build project, the qualifications that made such  
167 project complex, and (e) the final procurement method used by the state public body or covered institution.

168 B. All public bodies subject to the provisions of this chapter shall report no later than November  
169 1 of each year to the Director of the Department on all completed capital projects in excess of \$2 million,  
170 which report shall include at a minimum (i) the procurement method utilized, (ii) the project budget, (iii)  
171 the actual project cost, (iv) the expected timeline, (v) the actual completion time, ~~and~~ (vi) if such project  
172 was a construction management or design-build project, the qualifications that made the project complex,  
173 and (vii) any post-project issues.

174 The Department shall consolidate received report data and submit the consolidated data to the  
175 Governor and Chairmen of the House Committee on Appropriations and the Senate Committee on Finance  
176 and Appropriations by December 1 of each year.

177 **2. That the Department of General Services, with the assistance of staff of the House Committee on**  
178 **Appropriations and the Senate Committee on Finance and Appropriations, shall assess the**  
179 **implementation and administration of the provisions of §§ 2.2-4379, 2.2-4380, 2.2-4381, and 2.2-**  
180 **4383 of the Code of Virginia, as amended by this act, and report its findings and recommendations**  
181 **to the General Assembly by November 1, 2029.**

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