

INTRODUCED: May 8, 2017

AN ORDINANCE No. 2017-099

To amend sections 21-4, 21-42, 21-44, 21-50, 21-63, and 21-67 of the City Code, concerning public procurement, for the purpose of reflecting amendments to state law that Va. Code § 2.2-4343(A)(12) requires the City to follow.

Patron – Mayor Stoney

Approved as to form and legality
by the City Attorney

PUBLIC HEARING: JUN 12 2017 AT 6 P.M.

THE CITY OF RICHMOND HEREBY ORDAINS:

§ 1. That sections 21-4, 21-42, 21-44, 21-50, 21-63, and 21-67 of the Code of the City of Richmond (2015) be and are hereby **amended** and reordained as follows:

Sec. 21-4. Definitions.

The following words, terms and phrases, when used in this chapter, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

Best value, as predetermined in the solicitation, means the overall combination of quality, price, and various elements of required services that in total are optimal relative to the City's needs.

AYES: 8 NOES: 0 ABSTAIN: _____

ADOPTED: JUNE 12 2017 REJECTED: _____ STRICKEN: _____

Business means any corporation, partnership, individual, sole proprietorship, joint stock company, joint venture or any other private legal entity.

Competitive negotiation means a method of contractor selection set forth in Section 21-67 or Section 21-68.

Competitive sealed bidding means a method of contractor selection set forth in Sections 21-47, 21-52, 21-54, and 21-55.

Construction means building, altering, repairing, improving or demolishing any structure, building, road, street or highway, and any draining, dredging, excavation, grading or similar work upon real property.

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

Contract means all types of City agreements, regardless of what they may be called, for the procurement of goods, services, insurance or construction.

Contract modification/supplement means any written alteration in specifications, delivery point, rate of delivery, period of performance, price, quantity or other provision of any contract accomplished by mutual action of the parties to the contract.

Contractor means any person, company, corporation, or partnership having a contract with the City or a using agency thereof.

Cost analysis means the evaluation of cost data for the purpose of arriving at costs actually incurred or estimates of costs to be incurred, prices to be paid, and costs to be reimbursed.

Cost data means factual information concerning the cost of labor, material, overhead, and other cost elements, which are expected to be incurred or which have been actually incurred by the contractor in performing the contract.

Cost reimbursement contract means a contract under which a contractor is reimbursed for costs which are allowable and allocable in accordance with the contract terms and this chapter and a fee or profit, if any.

Design-build contract means a contract between the City and another party in which the party contracting with the City agrees to both design and build the structure, [~~roadway~~] or other item specified in the contract.

Direct or indirect participation means involvement through decision, approval, disapproval, preparation of any part of a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing, or any other advisory capacity.

Director means the Director of Procurement Services of the City.

Disadvantaged business means a business meeting the definitions set forth in the Code of Federal Regulations pertaining to the applicable Federal grant program.

Emerging small business means a business that:

- (1) Has been certified by the Office of Minority Business Development for a period of up to seven years;
- (2) Has annual gross receipts of \$500,000.00 or less for each of its three fiscal years preceding application for such certification if engaged primarily in the construction business or of \$250,000.00 or less if engaged primarily in a nonconstruction business;
- (3) Has fewer than ten full-time, permanent employees;

(4) Is not a subsidiary of another business and does not belong to a group of businesses owned and controlled by the same individuals;

(5) Has its principal place of business entirely within the boundaries of a City enterprise zone;

(6) Possesses a City business license; and

(7) Pays personal property, real estate, and business taxes, as applicable, to the City.

Good faith minority business enterprise and emerging small business participation efforts means the sum total of efforts by a particular business to provide for the equitable participation of minority business enterprises or emerging small business subcontractors. For past efforts, this sum total shall be comprised of the record of participation by minority business enterprises and emerging small businesses through subcontracting or joint ventures. For future efforts, it shall be comprised of such efforts which are proposed to allow equitable participation of minority business enterprises or emerging small business subcontractors.

Goods means all material, equipment, supplies, printing and automated data processing hardware and software.

Informality means a minor defect or variation of a bid or proposal from the exact requirements of the invitation for bids or the request for proposals which does not affect the quality, quantity or delivery schedule for the goods, services or construction being procured.

Insurance means a contract whereby, for a stipulated consideration, one party undertakes to compensate the other for loss on a specified subject by specified perils.

Intent to award means an intent by the City to accept a bid or proposal.

Invitation for bids means all documents, whether attached or incorporated by reference, utilized for soliciting sealed bids.

Job order contracting means a method of procuring construction by establishing a book of unit prices and then obtaining a contractor to perform work as needed using the prices, quantities, and specifications in the book as the basis of its pricing, in which the contractor is selected through either competitive sealed bidding or competitive negotiation depending on the needs of the City, a minimum amount of work may be specified in the contract, and the contract term and the project amount do not exceed the limitations specified in Section 21-73.

Minority business enterprise means a business, at least 51 percent of which is owned and controlled or 51 percent minority-owned and operated by minority group members or, for a stock corporation, at least 51 percent of the stock which is owned and controlled by minority group members.

Minority group members means citizens of the United States who are Blacks, Hispanics, Asians, Indians, Eskimos or Aleuts.

Nominal value means a value so small, slight, or the like, in comparison to what might properly be expected, as scarcely to be entitled to the same, but in no case to be more than \$30.00.

Nonprofessional services means any services not specifically identified as professional services in the definition of professional services.

Professional services means work performed by an independent contractor within the scope of the practice of accounting, actuarial services, architecture, land surveying, landscape architecture, law, dentistry, medicine, optometry, pharmacy or professional engineering.

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.

Public contract means an agreement between a public body and a nongovernmental source that is enforceable in a court of law.

Qualified products list means an approved list of goods, services or construction items described by model or catalog number that, prior to competitive solicitation, the City has determined will meet the applicable specification requirements.

Recycled paper means any paper having a total weight consisting of not less than 50 percent recovered materials, as that term is defined for purposes of purchasing paper and paper products in 40 CFR 247.3 (2001), as amended.

Request for proposals means all documents, whether attached or incorporated by reference, utilized for soliciting proposals.

Request for qualifications means all documents, whether attached or incorporated by reference, utilized for soliciting qualification statements.

Responsible bidder and *responsible offeror* mean a person who has the capability, in all respects, to perform fully the contract requirements and the moral and business integrity and reliability which will ensure good faith performance, and who has been prequalified, if required.

Responsive bidder means a person who has submitted a bid which conforms in all material respects to the invitation for bids.

Services means any work performed by an independent contractor which does not consist primarily of acquisition of equipment or materials, or the rental of equipment, materials and supplies.

Specification means any written description of the physical or functional characteristics or of the nature of a good, service or construction item. It may include a description of any requirement for inspecting, testing, or preparing a good, service or construction item for delivery.

Using agency means any department, agency, bureau, board, commission, court, City jail or jail forum or other unit in the City government requiring goods, services, insurance or construction as provided for in this chapter.

Sec. 21-42. Competitive sealed bidding or competitive negotiations of State-aid projects.

No contract for the construction of any building or for an addition to or improvement of an existing building for which State funds of not more than \$50,000.00 in the aggregate or for the sum of all phases of a contract or project, either by appropriation, grant-in-aid or loan, are used or are to be used for all or part of the cost of construction shall be let except after competitive sealed bidding or after competitive negotiation as provided under Section 21-67(a)(3) or Section 21-44. The procedure for the advertising for bids or for proposals and for letting of the contract shall conform, mutatis mutandis, to this chapter.

Sec. 21-44. Design-build and construction management contracts.

~~[(a) Pursuant to Code of Virginia, § 2.2-4308 the]~~ The City [is authorized to] may enter into [contracts] a contract for construction on a fixed-price or not-to-exceed price construction management or design-build [or construction management] basis [in accordance with this section], provided that (i) the City Council, by resolution, has adopted procedures for utilizing construction management or design-build contracts that meet the requirements of Code of Virginia, title 2.2, ch. 43.1, art. 4 (Code of Virginia, § 2.2-4382 et seq.) and (ii) the City complies with the requirements of Code of Virginia, title 2.2, ch. 43.1, art. 4 (Code of Virginia, § 2.2-4382 et seq.) and such procedures adopted by the City Council.

~~[(b) Prior to making a determination to use a design-build or construction management contract for a specific construction project, the City shall have in its employ or under contract an architect or professional engineer with professional competence appropriate to the project who~~

~~will advise the City regarding the use of a design build or construction management contract for that project and assist the City with the preparation of the request for proposals and the evaluation of proposals submitted by interested offerors in response to the request for proposals for that project.~~

~~(c) — Prior to issuing a request for proposals for a design build or construction management contract, the Director shall make a written determination, to be maintained in the file for the procurement, that:~~

~~(1) — Explains why a design build or construction management contract is more advantageous than a competitive sealed bidding contract for the project;~~

~~(2) — Identifies the specific benefits to the City from using the design build or construction management contract; and~~

~~(3) — Finds that competitive sealed bidding is neither practical nor fiscally advantageous to the City for the project.~~

~~(d) — (1) — The selection, evaluation and award of design build and construction management contracts shall conform to the requirements of this section. Requests for proposals for design build and construction management contracts shall include and define the criteria of such construction projects in the areas of:~~

~~a. — Site plans;~~

~~b. — Floor plans;~~

~~c. — Exterior elevations;~~

~~d. — Basic building envelope materials;~~

~~e. — Fire protection information plans;~~

~~f. — Structural, mechanical (HVAC) and electrical systems;~~

~~g. — Special telecommunications; and~~

~~h. — Such other requirements as the using agency determines appropriate for that particular construction project.~~

~~(2) — The procurement of each design-build or construction management contract shall be conducted in two steps. The first step shall consist of a prequalification. The conduct of the prequalification step shall conform to the requirements of Section 21-46. The second step shall consist of a competitive negotiation. The conduct of the competitive negotiation step shall conform to the requirements of Section 21-67. For any guaranteed maximum price construction management contract, the contract shall require that:~~

~~a. — Not more than ten percent of the construction work (measured by cost of the work) shall be performed by the construction manager with its own forces; and~~

~~b. — The remaining 90 percent of the construction work shall be performed by subcontractors of the construction manager which the construction manager shall procure by competitive sealed bidding or competitive negotiations.~~

~~(3) — The Director shall award the contract to the fully qualified offeror who submits an acceptable proposal determined to be the best value in response to the request for proposals.~~

~~(e) — The Director shall issue such rules, regulations and operational procedures pursuant to the authority granted to the Director by Section 2-596 as may be necessary to implement the provisions of this section. Such rules, regulations and operational procedures shall be designed to conform to the requirements of State law and this Code.]~~

Sec. 21-50. Bid bonds on construction contracts.

(a) Except in cases of emergency, all bids or proposals for nontransportation-related construction contracts in excess of \$500,000.00 or transportation-related projects authorized under Code of Virginia, title 33.2, ch. 2, art. 2 (Code of Virginia, § 33.2-208 et seq.) that are in excess of \$250,000.00 and partially or wholly funded by the Commonwealth shall be accompanied by a bid bond from a surety company selected by the bidder that is authorized to do business in Virginia, as a guarantee that, if the contract is awarded to the bidder, the bidder will enter into the contract for the work mentioned in the bid. The amount of the bid bond shall not exceed five percent of the amount bid.

(b) For nontransportation-related construction contracts in excess of \$100,000.00 but less than \$500,000.00, where the bid bond requirements are waived, prospective contractors shall be prequalified for each individual project in accordance with Section 21-46. However, the Director may waive the requirement for prequalification of a bidder with a current Class A contractor license for contracts in excess of \$100,000.00 but less than \$300,000.00 upon a written determination made in advance by the City Council that waiving the requirement is in the best interests of the City. The City shall not enter into more than ten such contracts per year.

(c) No forfeiture under a bid bond shall exceed the lesser of:

(1) The difference between the bid for which the bond was written and the next low bid; or

(2) The face amount of the bid bond.

(d) Nothing in this section shall preclude the City from requiring bid bonds to accompany bids or proposals for construction contracts anticipated to be less than \$500,000.00 for nontransportation-related projects or \$250,000.00 for transportation-related projects authorized

under Code of Virginia, title 33.2, ch. 2, art. 2 (Code of Virginia, § 33.2-208 et seq.) and partially or wholly funded by the Commonwealth.

Sec. 21-63. Performance and payment bonds.

- (a) Except as provided in subsection (h), upon the award of any:
 - (1) Public construction contract exceeding \$500,000.00 awarded to any prime contractor;
 - (2) Construction contract exceeding \$500,000.00 awarded to any prime contractor requiring the performance of labor or the furnishing of materials for buildings, structures or other improvements to real property owned or leased by a public body;
 - (3) Construction contract exceeding \$500,000.00 in which the performance of labor or the furnishing of materials will be paid with public funds; or
 - (4) Transportation-related projects exceeding \$350,000.00 that are partially or wholly funded by the Commonwealth;

the contractor shall furnish to the City the following bonds:

- (1) A performance bond in the sum of the contract amount conditioned upon the faithful performance of the contract in strict conformity with the plans, specifications and conditions of the contract. For transportation-related projects authorized under Code of Virginia, title 33.2, ch. 2, art. 2, (Code of Virginia, § 33.2-208 et seq.), such bond shall be in a form and amount satisfactory to the Director.
- (2) A payment bond in the sum of the contract amount. The bond shall be for the protection of claimants who have and fulfill contracts to supply labor or materials to the prime contractor to whom the contract was awarded or to any subcontractors, in furtherance of the work provided for in the contract, and shall be conditioned upon the

prompt payment for all such material furnished or labor supplied or performed in furtherance of the work. For transportation-related projects authorized under Code of Virginia, title 33.2, ch. 2, art. 2 (Code of Virginia, § 33.2-208 et seq.), and partially or wholly funded by the Commonwealth, such bond shall be in a form and amount satisfactory to the Director.

The term “labor or materials” [~~shall include~~] includes public utility services and reasonable rentals of equipment, but only for periods when the equipment rented is actually used at the site.

(b) For nontransportation-related construction contracts in excess of \$100,000.00 but less than \$500,000.00, where the [~~bid~~] performance and payment bond requirements are waived, prospective contractors shall be prequalified for each individual project in accordance with Section 21-46. However, the Director may waive the requirement for prequalification of a contractor with a current Class A contractor license for contracts in excess of \$100,000.00 but less than \$300,000.00 upon a written determination made in advance by the City Council that waiving the requirement is in the best interests of the City. The City shall not enter into more than ten such contracts per year.

(c) Each of the bonds shall be executed by one or more surety companies selected by the contractor that are authorized to do business in Virginia.

(d) Bonds shall be payable to the City.

(e) Each of the bonds shall be filed with the Director.

(f) Nothing in this section shall preclude the Director from requiring payment or performance bonds for construction contracts below \$500,000.00 for nontransportation-related projects or \$350,000.00 for transportation-related projects authorized under Code of Virginia, § 33.1-12 and partially or wholly funded by the Commonwealth.

(g) Nothing in this section shall preclude the contractor from requiring each subcontractor to furnish a payment bond with surety thereon in the sum of the full amount of the contract with such subcontractor conditioned upon the payment to all persons who have and fulfill contracts that are directly with the subcontractor for performing labor and furnishing materials in the prosecution of the work provided for in the subcontract.

(h) The performance and payment bond requirements of subsection (a) for transportation-related projects that are valued in excess of \$250,000.00 but less than \$350,000.00 may only be waived by the Director if the bidder provides evidence, satisfactory to the Director, that a surety company has declined an application from the contractor for a performance or payment bond.

Sec. 21-67. Competitive negotiation for goods, nonprofessional services, insurance, and construction.

(a) *Conditions for use.* Conditions for use of competitive negotiation as set forth in this section shall be as follows:

(1) The Director may allow the use of either competitive sealed bidding as set forth in Sections 21-47 and 21-52 through 21-56 or competitive negotiation as set forth in this section to procure any public contract with a nongovernmental contractor for the purchase or lease of goods or for the purchase of nonprofessional services or insurance.

(2) Upon a determination made in advance by the Director and set forth in writing that competitive sealed bidding or competitive negotiation is either not practicable or not fiscally advantageous, insurance may be procured through a licensed agent or broker selected in the manner provided for in this section. The basis for this determination shall be documented in writing.

(3) Construction may be procured only by competitive sealed bidding, except that~~[, upon a determination made in advance by the Director and set forth in writing by the Director that competitive sealed bidding is either not practicable or not fiscally advantageous to the public, which writing shall document the basis for this determination,]~~ competitive negotiation may be used in the following instances:

a. On a fixed price design-build basis or construction management basis as provided in Section 21-44;

b. For the construction of highways and any draining, dredging, excavation, grading or similar work upon real property upon a determination made in advance by the Director and set forth in writing by the Director that competitive sealed bidding is either not practicable or not fiscally advantageous to the public, which writing shall document the basis for this determination; ~~and~~ or

~~[b.]~~ c. Pursuant to ~~[Section 21-44 or]~~ Article IX of this chapter.

No request for proposals for construction authorized by this chapter shall condition a successful offeror's eligibility on having a specified experience modification factor. For the purposes of this Section 21-67(a)(3), "experience modification factor" means a value assigned to an employer as determined by a rate service organization in accordance with its uniform experience rating plan required to be filed pursuant to Code of Virginia, § 38.2-1913(D).

(b) *Request for proposals.* A request for proposals shall be in writing and indicate in general terms what is sought to be procured, specifying the factors which will be used in evaluating the proposal, indicating whether a numerical scoring system will be used in evaluation of the proposal, and containing or incorporating by reference the other applicable contractual terms and

conditions, including any unique capabilities, specifications, or qualifications that will be required. In the event that a numerical scoring system will be used in the evaluation of proposals, the point values assigned to each of the evaluation criteria shall be included in the request for proposals or posted at the location designated for public posting of procurement notices prior to the due date and time for receiving proposals.

(c) *Public notice.* At least ten days prior to the date set for receipt of proposals, public notice shall be given by posting on the City's internet website. In addition, the Director shall publish the notice in a newspaper of general circulation in the city so as to provide reasonable notice to the maximum number of offerors that can be reasonably expected to submit proposals in response to the particular request and may publish the notice on the Virginia Department of General Services' central electronic procurement website. In addition, proposals may be solicited directly from potential contractors. Any additional solicitations shall include certified businesses selected from a list made available by the Virginia Department of Small Business and Supplier Diversity and shall include minority business enterprises or emerging small businesses, or both, selected from a list made available by the Office of Minority Business Development.

(d) *Procedures for evaluation and award.* No proposals shall be handled so as to permit disclosure of the identity of any offeror or the contents of any proposal to competing offerors during the process of negotiation. 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 proposals, including price if so stated in the request for proposals. In the case of a proposal for information technology, as defined in Code of Virginia, § 2.2-2006, the Director shall not require an offeror to state in a proposal any exception to any liability provisions contained in the request for proposals. Negotiations shall then be conducted with each of the

offerors so selected. The offeror shall state any exception to any liability provisions contained in the request for proposals in writing at the beginning of negotiations, and such exceptions shall be considered during negotiation. Price shall be considered, but need not be the sole or primary determining factor. After negotiations have been conducted with each offeror so selected, the Director shall select the offeror which, in the Director's opinion, has made the best proposal and provides the best value, and shall award the contract to that offeror. When the terms and conditions of multiple awards are so provided in the request for proposals, awards may be made to more than one offeror. Should the Director determine in writing and in the Director's 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.

(e) *Evaluation factors.* The request for proposals shall state the relative importance of price and other evaluation factors. One evaluation factor shall be good faith minority business enterprise and emerging small business participation efforts. Such good faith minority business enterprise and emerging small business participation efforts shall comprise 30 percent of the total evaluation. The Office of Minority Business Development shall develop criteria to assess an offeror's good faith minority business enterprise and emerging small business participation efforts and shall evaluate the offeror's response based on those criteria. No offeror receiving less than 50 percent of the possible good faith minority business enterprise and emerging small business participation efforts percentage points from the Office of Minority Business Development shall receive a contract award under competitive negotiation unless granted a waiver by the Chief Administrative Officer. The Chief Administrative Officer may allow a waiver only when:

- (1) No other qualified, willing, and able offerors have submitted proposals; and

(2) Either the Director of the Office of Minority Business Development certifies that the offeror is unable due to circumstances beyond its control to make good faith minority business enterprise and emerging small business participation efforts that would achieve a higher number of percentage points or the Chief Administrative Officer determines that the City will suffer substantial cost, financial or otherwise, if a waiver is not granted.

§ 2. This ordinance shall be in force and effect on July 1, 2017.



CITY OF RICHMOND
INTRACITY CORRESPONDENCE

O & R REQUEST
4-6485
APR 27 2017
Office of the Chief Administrative Officer

O&R REQUEST

DATE: April 26, 2017 EDITION: 1

TO: The Honorable Members of City Council

THROUGH: The Honorable Levar M. Stoney, Mayor

Handwritten initials and date: 2/14/17

THROUGH: Selena Cuffee-Glenn, Chief Administrative Officer

Handwritten initials: SCG

THROUGH: Lenora Reid, Deputy Chief Administrative Officer for Finance and Administration

Handwritten initials: LR

FROM: C. Edward Gibbs, Director of Procurement Services

Handwritten initials: EG

RE: State-Mandated Amendments to City's Public Procurement Laws

ORD. OR RES. No. _____

PURPOSE: To amend sections 21-4, 21-42, 21-44, 21-50, 21-63, and 21-67 of the City Code, concerning public procurement, for the purpose of reflecting amendments to state law that Va. Code § 2.2-4343(A)(12) requires the City to follow.

REASON: The proposed ordinance would conform certain sections of the City Code with their parallel provisions in the Virginia Public Procurement Act, Va. Code §§ 2.2-4300—2.2-4377 (the "VPPA"), as well as the new Va. Code §§ 2.2-4378—2.2-4383 concerning construction management and design-build contracting, as required by Va. Code § 2.2-4343(A)(12).

RECOMMENDATION: The City Administration recommends adoption of this ordinance.

BACKGROUND: Pursuant to Va. Code § 2.2-4343(A)(10), the City has "opted out" of the VPPA, by adopting alternative policies and procedures in the form of Chapter 21 ("Public Procurement") of the Code of the City of Richmond which are (i) based on competitive principles and (ii) generally applicable to the procurement of goods and services by the City. However, pursuant to Va. Code § 2.2-4343(A)(12), certain mandatory provisions of the VPPA still apply to the City.

RECEIVED

MAY 04 2017

OFFICE OF CITY ATTORNEY

The last major revision to the City's public procurement laws occurred in 2016, by Ord. No. 2016-197, adopted Sept. 12, 2016. During its 2017 session, the General Assembly made several changes to the VPPA, including the mandatory provisions set forth in Va. Code § 2.2-4343(A)(12). While the City must follow the requirements of these mandatory provisions anyway, updating the City Code to properly reflect those requirements aligns the City Code with required practices for training, dispute-related, and audit purposes.

The changes proposed in this ordinance reflect only those changes that the City is required to make to its procurement laws pursuant to state law. These changes are shown, with appropriate explanatory notes, in the attachment to this O&R request. In addition, the City Administration intends to propose a resolution to implement the procedures for utilizing construction management and design-build contracting required by Va. Code § 2.2-4382(A) at a later date.

FISCAL IMPACT / COST: This proposed ordinance should not have any cost in the upcoming fiscal year or succeeding fiscal years.

FISCAL IMPLICATIONS: This proposed ordinance should not impose any costs on the City in the foreseeable future.

BUDGET AMENDMENT NECESSARY: No budget amendment is necessary if this proposed ordinance is adopted.

REVENUE TO CITY: None.

DESIRED EFFECTIVE DATE: July 1, 2017.

REQUESTED INTRODUCTION DATE: May 8, 2017.

CITY COUNCIL PUBLIC HEARING DATE: June 12, 2017.

REQUESTED AGENDA: Consent.

RECOMMENDED COUNCIL COMMITTEE: Governmental Operations (May 25, 2017).

CONSIDERATION BY OTHER GOVERNMENTAL ENTITIES: None.

AFFECTED AGENCIES: Department of Procurement Services, Office of the City Attorney.

RELATIONSHIP TO EXISTING ORD. OR RES.: Amends City Code §§ 21-4, 21-42, 21-44, 21-50, 21-63, and 21-67.

REQUIRED CHANGES TO WORK PROGRAM(S): No changes to work programs are required.

ATTACHMENTS: Draft Amendments to City Code Chapter 21.

STAFF: C. Edward Gibbs, Director of Procurement Services, 646-5798.

DRAFT AMENDMENTS TO CITY CODE CHAPTER 21

Sec. 21-4. Definitions.

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Invitation for bids means all documents, whether attached or incorporated by reference, utilized for soliciting sealed bids.

Job order contracting means a method of procuring construction by establishing a book of unit prices and then obtaining a contractor to perform work as needed using the prices, quantities, and specifications in the book as the basis of its pricing, in which the contractor is selected through either competitive sealed bidding or competitive negotiation depending on the needs of the City, a minimum amount of work may be specified in the contract, and the contract term and the project amount do not exceed the limitations specified in Section 21-73.

Minority business enterprise means a business, at least 51 percent of which is owned and controlled or 51 percent minority-owned and operated by minority group members or, for a stock corporation, at least 51 percent of the stock which is owned and controlled by minority group members.

Minority group members means citizens of the United States who are Blacks, Hispanics, Asians, Indians, Eskimos or Aleuts.

Nominal value means a value so small, slight, or the like, in comparison to what might properly be expected, as scarcely to be entitled to the same, but in no case to be more than \$30.00.

Nonprofessional services means any services not specifically identified as professional services in the definition of professional services.

Professional services means work performed by an independent contractor within the scope of the practice of accounting, actuarial services, architecture, land surveying, landscape architecture, law, dentistry, medicine, optometry, pharmacy or professional engineering.

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.

Public contract means an agreement between a public body and a nongovernmental source that is enforceable in a court of law.

Qualified products list means an approved list of goods, services or construction items described by model or catalog number that, prior to competitive solicitation, the City has determined will meet the applicable specification requirements.

Recycled paper means any paper having a total weight consisting of not less than 50 percent recovered materials, as that term is defined for purposes of purchasing paper and paper products in 40 CFR 247.3 (2001), as amended.

Request for proposals means all documents, whether attached or incorporated by reference, utilized for soliciting proposals.

Request for qualifications means all documents, whether attached or incorporated by reference, utilized for soliciting qualification statements.

Responsible bidder and *responsible offeror* mean a person who has the capability, in all respects, to perform fully the contract requirements and the moral and business integrity and reliability which will ensure good faith performance, and who has been prequalified, if required.

Responsive bidder means a person who has submitted a bid which conforms in all material respects to the invitation for bids.

Services means any work performed by an independent contractor which does not consist primarily of acquisition of equipment or materials, or the rental of equipment, materials and supplies.

Specification means any written description of the physical or functional characteristics or of the nature of a good, service or construction item. It may include a description of any requirement for inspecting, testing, or preparing a good, service or construction item for delivery.

Using agency means any department, agency, bureau, board, commission, court, City jail or jail forum or other unit in the City government requiring goods, services, insurance or construction as provided for in this chapter.

COMMENTARY: The only change conforms the definition of "design-build contract" to that established by the new Va. Code § 2.2-4379.

Sec. 21-42. Competitive sealed bidding or competitive negotiations of State-aid projects.

No contract for the construction of any building or for an addition to or improvement of an existing building for which State funds of not more than \$50,000.00 in the aggregate or for the sum of all phases of a contract or project, either by appropriation, grant-in-aid or loan, are

used or are to be used for all or part of the cost of construction shall be let except after competitive sealed bidding or after competitive negotiation as provided under Section 21-67(a)(3) or Section 21-44. The procedure for the advertising for bids or for proposals and for letting of the contract shall conform, mutatis mutandis, to this chapter.

COMMENTARY: The change conforms City Code § 21-42 to the mandatory provisions of Va. Code § 2.2-4305.

Sec. 21-44. Design-build and construction management contracts.

~~[(a) Pursuant to Code of Virginia, § 2.2-4308 the] The City [is authorized to] may enter into [contracts] a contract for construction on a fixed-price or not-to-exceed price construction management or design-build [or construction management] basis [in accordance with this section], provided that (i) the City Council, by resolution, has adopted procedures for utilizing construction management or design-build contracts that meet the requirements of Code of Virginia, title 2.2, ch. 43.1, art. 4 (Code of Virginia, § 2.2-4382 et seq.) and (ii) the City complies with the requirements of Code of Virginia, title 2.2, ch. 43.1, art. 4 (Code of Virginia, § 2.2-4382 et seq.) and such procedures adopted by the City Council.~~

~~[(b) Prior to making a determination to use a design build or construction management contract for a specific construction project, the City shall have in its employ or under contract an architect or professional engineer with professional competence appropriate to the project who will advise the City regarding the use of a design build or construction management contract for that project and assist the City with the preparation of the request for proposals and the evaluation of proposals submitted by interested offerors in response to the request for proposals for that project.~~

~~(c) Prior to issuing a request for proposals for a design build or construction management contract, the Director shall make a written determination, to be maintained in the file for the procurement, that:~~

~~(1) Explains why a design build or construction management contract is more advantageous than a competitive sealed bidding contract for the project;~~

~~(2) Identifies the specific benefits to the City from using the design build or construction management contract; and~~

~~(3) Finds that competitive sealed bidding is neither practical nor fiscally advantageous to the City for the project.~~

~~(d) (1) The selection, evaluation and award of design build and construction management contracts shall conform to the requirements of this section. Requests for proposals for design build and construction management contracts shall include and define the criteria of such construction projects in the areas of:~~

~~a. Site plans;~~

~~b. Floor plans;~~

~~c. Exterior elevations;~~

~~d. Basic building envelope materials;~~

~~e. Fire protection information plans;~~

~~f. Structural, mechanical (HVAC) and electrical systems;~~

~~g. Special telecommunications; and~~

~~h. Such other requirements as the using agency determines appropriate for that particular construction project.~~

~~(2) — The procurement of each design-build or construction management contract shall be conducted in two steps. The first step shall consist of a prequalification. The conduct of the prequalification step shall conform to the requirements of Section 21-46. The second step shall consist of a competitive negotiation. The conduct of the competitive negotiation step shall conform to the requirements of Section 21-67. For any guaranteed maximum price construction management contract, the contract shall require that:~~

~~a. — Not more than ten percent of the construction work (measured by cost of the work) shall be performed by the construction manager with its own forces; and~~

~~b. — The remaining 90 percent of the construction work shall be performed by subcontractors of the construction manager which the construction manager shall procure by competitive sealed bidding or competitive negotiations.~~

~~(3) — The Director shall award the contract to the fully qualified offeror who submits an acceptable proposal determined to be the best value in response to the request for proposals.~~

~~(e) — The Director shall issue such rules, regulations and operational procedures pursuant to the authority granted to the Director by Section 2-596 as may be necessary to implement the provisions of this section. Such rules, regulations and operational procedures shall be designed to conform to the requirements of State law and this Code.]~~

COMMENTARY: The revisions to City Code § 21-44 make the City's provision concerning construction management and design-build contracts consistent with the new state laws governing local use of this contracting method found in the new Va. Code § 2.2-4382. Among other requirements, this new law requires the City Council to adopt procedures governing construction management and design-build contracting that are consistent with state law and the procedures established by the state Secretary of Administration. The Department of Procurement Services will propose procedures to be adopted by resolution at a later date.

Sec. 21-50. Bid bonds on construction contracts.

(a) Except in cases of emergency, all bids or proposals for nontransportation-related construction contracts in excess of \$500,000.00 or transportation-related projects authorized under Code of Virginia, title 33.2, ch. 2, art. 2 (Code of Virginia, § 33.2-208 et seq.) that are in excess of \$250,000.00 and partially or wholly funded by the Commonwealth shall be accompanied by a bid bond from a surety company selected by the bidder that is authorized to do business in Virginia, as a guarantee that, if the contract is awarded to the bidder, the bidder will enter into the contract for the work mentioned in the bid. The amount of the bid bond shall not exceed five percent of the amount bid.

(b) For nontransportation-related construction contracts in excess of \$100,000.00 but less than \$500,000.00, where the bid bond requirements are waived, prospective contractors shall be prequalified for each individual project in accordance with Section 21-46. However, the Director may waive the requirement for prequalification of a bidder with a current Class A contractor license for contracts in excess of \$100,000.00 but less than \$300,000.00 upon a written determination made in advance by the City Council that waiving the requirement is in the best interests of the City. The City shall not enter into more than ten such contracts per year.

(c) No forfeiture under a bid bond shall exceed the lesser of:

(1) The difference between the bid for which the bond was written and the next low bid; or

(2) The face amount of the bid bond.

(d) Nothing in this section shall preclude the City from requiring bid bonds to accompany bids or proposals for construction contracts anticipated to be less than \$500,000.00 for nontransportation-related projects or \$250,000.00 for transportation-related projects authorized under Code of Virginia, title 33.2, ch. 2, art. 2 (Code of Virginia, § 33.2-208 et seq.) and partially or wholly funded by the Commonwealth.

COMMENTARY: City Code § 21-50 reflect the 2017 amendments to the mandatory provisions of Va. Code § 2.2-4336.

Sec. 21-63. Performance and payment bonds.

(a) Except as provided in subsection (h), upon the award of any:

(1) Public construction contract exceeding \$500,000.00 awarded to any prime contractor;

(2) Construction contract exceeding \$500,000.00 awarded to any prime contractor requiring the performance of labor or the furnishing of materials for buildings, structures or other improvements to real property owned or leased by a public body;

(3) Construction contract exceeding \$500,000.00 in which the performance of labor or the furnishing of materials will be paid with public funds; or

(4) Transportation-related projects exceeding \$350,000.00 that are partially or wholly funded by the Commonwealth;

the contractor shall furnish to the City the following bonds:

(1) A performance bond in the sum of the contract amount conditioned upon the faithful performance of the contract in strict conformity with the plans, specifications and conditions of the contract. For transportation-related projects authorized under Code of Virginia, title 33.2, ch. 2, art. 2, (Code of Virginia, § 33.2-208 et seq.), such bond shall be in a form and amount satisfactory to the Director.

(2) A payment bond in the sum of the contract amount. The bond shall be for the protection of claimants who have and fulfill contracts to supply labor or materials to the prime contractor to whom the contract was awarded or to any subcontractors, in furtherance of the work provided for in the contract, and shall be conditioned upon the prompt payment for all such material furnished or labor supplied or performed in furtherance of the work. For transportation-related projects authorized under Code of Virginia, title 33.2, ch. 2, art. 2 (Code of Virginia, § 33.2-208 et seq.), and partially or wholly funded by the Commonwealth, such bond shall be in a form and amount satisfactory to the Director.

The term "labor or materials" [~~shall include~~] includes public utility services and reasonable rentals of equipment, but only for periods when the equipment rented is actually used at the site.

(b) For nontransportation-related construction contracts in excess of \$100,000.00 but less than \$500,000.00, where the [~~bid~~] performance and payment bond requirements are waived, prospective contractors shall be prequalified for each individual project in accordance with Section 21-46. However, the Director may waive the requirement for prequalification of a contractor with a current Class A contractor license for contracts in excess of \$100,000.00 but less than \$300,000.00 upon a written determination made in advance by the City Council that waiving the

requirement is in the best interests of the City. The City shall not enter into more than ten such contracts per year.

(c) Each of the bonds shall be executed by one or more surety companies selected by the contractor that are authorized to do business in Virginia.

(d) Bonds shall be payable to the City.

(e) Each of the bonds shall be filed with the Director.

(f) Nothing in this section shall preclude the Director from requiring payment or performance bonds for construction contracts below \$500,000.00 for nontransportation-related projects or \$350,000.00 for transportation-related projects authorized under Code of Virginia, § 33.1-12 and partially or wholly funded by the Commonwealth.

(g) Nothing in this section shall preclude the contractor from requiring each subcontractor to furnish a payment bond with surety thereon in the sum of the full amount of the contract with such subcontractor conditioned upon the payment to all persons who have and fulfill contracts that are directly with the subcontractor for performing labor and furnishing materials in the prosecution of the work provided for in the subcontract.

(h) The performance and payment bond requirements of subsection (a) for transportation-related projects that are valued in excess of \$250,000.00 but less than \$350,000.00 may only be waived by the Director if the bidder provides evidence, satisfactory to the Director, that a surety company has declined an application from the contractor for a performance or payment bond.

COMMENTARY: City Code § 21-63 reflect the 2017 amendments to the mandatory provisions of Va. Code § 2.2-4337.

Sec. 21-67. Competitive negotiation for goods, nonprofessional services, insurance, and construction.

(a) *Conditions for use.* Conditions for use of competitive negotiation as set forth in this section shall be as follows:

(1) The Director may allow the use of either competitive sealed bidding as set forth in Sections 21-47 and 21-52 through 21-56 or competitive negotiation as set forth in this section to procure any public contract with a nongovernmental contractor for the purchase or lease of goods or for the purchase of nonprofessional services or insurance.

(2) Upon a determination made in advance by the Director and set forth in writing that competitive sealed bidding or competitive negotiation is either not practicable or not fiscally advantageous, insurance may be procured through a licensed agent or broker selected in the manner provided for in this section. The basis for this determination shall be documented in writing.

(3) Construction may be procured only by competitive sealed bidding, except that ~~that[, upon a determination made in advance by the Director and set forth in writing by the Director that competitive sealed bidding is either not practicable or not fiscally advantageous to the public, which writing shall document the basis for this determination,]~~ competitive negotiation may be used in the following instances:

a. On a fixed price design-build basis or construction management basis as provided in Section 21-44;

b. For the construction of highways and any draining, dredging, excavation, grading or similar work upon real property upon a determination made

in advance by the Director and set forth in writing by the Director that competitive sealed bidding is either not practicable or not fiscally advantageous to the public, which writing shall document the basis for this determination; [and] or

[b:] c. Pursuant to [Section 21-44 or] Article IX of this chapter.

No request for proposals for construction authorized by this chapter shall condition a successful offeror's eligibility on having a specified experience modification factor. For the purposes of this Section 21-67(a)(3), "experience modification factor" means a value assigned to an employer as determined by a rate service organization in accordance with its uniform experience rating plan required to be filed pursuant to Code of Virginia, § 38.2-1913(D).

(b) *Request for proposals.* A request for proposals shall be in writing and indicate in general terms what is sought to be procured, specifying the factors which will be used in evaluating the proposal, indicating whether a numerical scoring system will be used in evaluation of the proposal, and containing or incorporating by reference the other applicable contractual terms and conditions, including any unique capabilities, specifications, or qualifications that will be required. In the event that a numerical scoring system will be used in the evaluation of proposals, the point values assigned to each of the evaluation criteria shall be included in the request for proposals or posted at the location designated for public posting of procurement notices prior to the due date and time for receiving proposals.

(c) *Public notice.* At least ten days prior to the date set for receipt of proposals, public notice shall be given by posting on the City's internet website. In addition, the Director shall publish the notice in a newspaper of general circulation in the city so as to provide reasonable notice to the maximum number of offerors that can be reasonably expected to submit proposals in response to the particular request and may publish the notice on the Virginia Department of General Services' central electronic procurement website. In addition, proposals may be solicited directly from potential contractors. Any additional solicitations shall include certified businesses selected from a list made available by the Virginia Department of Small Business and Supplier Diversity and shall include minority business enterprises or emerging small businesses, or both, selected from a list made available by the Office of Minority Business Development.

(d) *Procedures for evaluation and award.* No proposals shall be handled so as to permit disclosure of the identity of any offeror or the contents of any proposal to competing offerors during the process of negotiation. 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 proposals, including price if so stated in the request for proposals. In the case of a proposal for information technology, as defined in Code of Virginia, § 2.2-2006, the Director shall not require an offeror to state in a proposal any exception to any liability provisions contained in the request for proposals. Negotiations shall then be conducted with each of the offerors so selected. The offeror shall state any exception to any liability provisions contained in the request for proposals in writing at the beginning of negotiations, and such exceptions shall be considered during negotiation. Price shall be considered, but need not be the sole or primary determining factor. After negotiations have been conducted with each offeror so selected, the Director shall select the offeror which, in the Director's opinion, has made the best proposal and provides the best value, and shall award the contract to that offeror. When the terms and conditions of multiple awards are so provided in the request for proposals, awards may be made to more than one offeror. Should the Director determine in writing and in the Director's 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.

(e) *Evaluation factors.* The request for proposals shall state the relative importance of price and other evaluation factors. One evaluation factor shall be good faith minority business enterprise and emerging small business participation efforts. Such good faith minority business enterprise and emerging small business participation efforts shall comprise 30 percent of the total evaluation. The Office of Minority Business Development shall develop criteria to assess an offeror's good faith minority business enterprise and emerging small business participation efforts and shall evaluate the offeror's response based on those criteria. No offeror receiving less than 50 percent of the possible good faith minority business enterprise and emerging small business participation efforts percentage points from the Office of Minority Business Development shall receive a contract award under competitive negotiation unless granted a waiver by the Chief Administrative Officer. The Chief Administrative Officer may allow a waiver only when:

- (1) No other qualified, willing, and able offerors have submitted proposals;
and
- (2) Either the Director of the Office of Minority Business Development certifies that the offeror is unable due to circumstances beyond its control to make good faith minority business enterprise and emerging small business participation efforts that would achieve a higher number of percentage points or the Chief Administrative Officer determines that the City will suffer substantial cost, financial or otherwise, if a waiver is not granted.

COMMENTARY: The changes to City Code § 21-67 reflect the 2017 amendments to Va. Code § 2.2-4303(D).