

OP. NO. 03-076

ADMINISTRATION OF GOVERNMENT: VIRGINIA PUBLIC PROCUREMENT ACT.

LIBRARIES: LOCAL AND REGIONAL LIBRARIES.

Board of trustees of county public library, when using competitive sealed bidding method of procurement, must award contract to lowest responsive and responsible bidder, regardless of source of funding used to pay for procurement.

The Honorable Jackie T. Stump
Member, House of Delegates
September 22, 2003

Issue Presented

You ask whether the board of trustees for a county public library ("library board") is required to contract with the lowest responsible bidder for construction services that will be funded by a private tax-exempt entity, or may the board elect to accept a higher bidder.

Response

It is my opinion that awards of contracts under the competitive sealed bidding method of procurement must be made to the lowest responsive and responsible bidder, regardless of the source of funding that will be used to pay for the procurement.

Background

You indicate that a wing will be added to a county public library and that funds almost sufficient to pay for the addition have been raised by a private tax-exempt entity. From the enclosure to your letter, it appears that the library board is conducting a procurement for these construction services, and that the board, among other things, has scheduled a prebid meeting for potential bidders.

Applicable Law and Discussion

I assume that the county public library referenced in your letter and the library board were established pursuant to §§ 42.1-33 and 42.1-35.¹ The Virginia Public Procurement Act, §§ 2.2-4300 through 2.2-4377, sets forth rules applicable to the award of contracts by public

bodies.² A library board established pursuant to §§ 42.1-33 and 42.1-35 is a "public body"³ for purposes of the Act.

The Virginia Public Procurement Act describes two main methods of procurement: competitive negotiation and competitive sealed bidding.⁴ The enclosure to your letter refers to "bidders" and indicates that a "prebid meeting" has been scheduled. I, therefore, conclude that the library board is conducting this procurement pursuant to the competitive sealed bidding method of procurement.⁵ This is consistent with the general practice for procurement of construction services.⁶

The definition of "competitive sealed bidding" in the Virginia Public Procurement Act requires that contractor selection be awarded to the "lowest responsive and responsible bidder"⁷ and, thus, precludes award to a higher bidder. The fact that the funds for procurement will be provided by a third party does not affect the applicability of the Act.⁸

Conclusion

Accordingly, it is my opinion that the library board, when using the competitive sealed bidding method of procurement, must award the contract to the lowest responsive and responsible bidder, regardless of the source of funding that will be used to pay for the procurement.

¹Section 42.1-33 provides that "[t]he governing body of any city, county or town shall have the power to establish a free public library for the use and benefit of its residents." Section 42.1-35(A) provides that "[t]he management and control of a free public library system shall be vested in a board of not less than five members or trustees."

²See, e.g., Va. Code Ann. § 2.2-4303(A) (LexisNexis Supp. 2003) ("All public contracts with nongovernmental contractors ... for the purchase of services, insurance, or construction, shall be awarded after competitive sealed bidding, or competitive negotiation as provided in this section, unless otherwise authorized by law.").

³The Virginia Public Procurement Act defines "public body" as "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 [the Act]." Section 2.2-4301 (LexisNexis Supp. 2003).

⁴See § 2.2-4301 (defining "competitive negotiation," "competitive sealed bidding").

⁵The Virginia Public Procurement Act refers to competing vendors as "bidders" in the competitive sealed bidding method, and as "offerors" in the competitive negotiation method. See § 2.2-4301 (defining "competitive negotiation," "competitive sealed bidding").

⁶See § 2.2-4303(D) (providing generally that "[c]onstruction may be procured only by competitive sealed bidding," and listing four exceptions where competitive negotiation may be used); *see also* Va. Code Ann. § 56-575.16 (LexisNexis Repl. Vol. 2003) (requiring that procurements conducted under Public-Private Education Facilities and Infrastructure Act of 2002, §§ 56-575.1 to 56-575.16, generally must use procedures consistent with competitive sealed bidding, and listing exceptions where a competitive negotiation procedure may be used).

⁷Section 2.2-4301 (defining "competitive sealed bidding"). Section 2.2-4301 further defines "responsive bidder" as "a person who has submitted a bid that conforms in all material respects to the Invitation to Bid," and "responsible bidder" as "a person who has the capability, in all respects, to perform fully the contract requirements and the moral and business integrity and reliability that will assure good faith performance, and who has been prequalified, if required."

⁸See § 2.2-4300(B) (LexisNexis Repl. Vol. 2001) ("[The Virginia Public Procurement Act] shall apply ... regardless of whether the public body, the contractor, or some third party is providing the consideration."); 1987-1988 Op. Va. Att'y Gen. 117, 118 (concluding that source of funding does not govern application of Act).

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