



MEMO

To: DGS Public Procurement Workgroup
From: Associated General Contractors of Virginia (AGCVA)
Date: August 21, 2023
Re: Considerations on Procurement

AGCVA's position on the issue of alternative delivery methods used in public procurement remains that competition should be fair and open. Accordingly, owners should select the delivery method based on the circumstances of the project. This past session, AGCVA opposed SB 954 because it created a strong statutory preference for one method and was opposed by a large group of stakeholders in public procurement. It did not represent any consensus or compromise ideas. Further, AGCVA's position is that owners should select the contractor based on the contractor's ability and experience in constructing similar types of projects. Consistent with the express requirement in Virginia law, disqualification should not be placed on a contractor's prior experience with a specific delivery method. AGCVA supports current recommendations that strengthen this statutory requirement. Finally, any decisions on delivery methods and the selection of contractors should be transparent.

Within these guidelines, AGCVA has considered the current statutes and regulations governing alternative delivery methods and recommends consideration of the following. These considerations follow the previous comments AGCVA made at the workgroup on this issue and are combined with the suggestion to eliminate the current dollar threshold of \$26M contained in the DGS Construction Management and Design-Build procedures.

Chapter 43.1. Construction Management and Design-Build Contracting.

Article 1. General Provisions.

§ 2.2-4378. Purpose; applicability.

A. The purpose of this chapter is to enunciate the public policies pertaining to governmental procurement of construction utilizing the construction management and design-build procurement methods. Notwithstanding any other provision of law, the Commonwealth may enter into contracts on a fixed price design-build basis or construction management basis in accordance with the provisions of this chapter and § [2.2-1502](#).

B. Except as provided in subsection C, this chapter shall apply regardless of the source of financing, whether it is general fund, nongeneral fund, federal trust fund, state debt, or institutional debt.

C. The following shall be exempt from the provisions of this chapter:

1. Projects of a covered institution that are to be funded exclusively by a foundation that (i) exists for the primary purpose of supporting the covered institution and (ii) is exempt from taxation under § 501(c)(3) of the Internal Revenue Code; and

2. Transportation construction projects procured and awarded by the Commonwealth Transportation Board pursuant to subsection B of § [33.2-209](#).

D. The provisions of this chapter shall supplement the provisions of the Virginia Public Procurement Act (§ [2.2-4300](#) et seq.), which provisions shall remain applicable. In the event of any conflict between this chapter and the Virginia Public Procurement Act (§ [2.2-4300](#) et seq.), the Restructured Higher Education Financial and Administrative Operations Act of 2005 (§ [23.1-1000](#) et seq.), or any other provision of law, this chapter shall control.

2017, cc. [699](#), [704](#).

§ 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~~ two 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.~~

- The project *involves multiple jurisdictions*, such as federal, state, local, tribal, or foreign entities, and may raise issues of conflict of laws.
- The project *requires specialized or unique equipment, building systems, technology, or expertise* that is not readily available or widely used in the industry.
- The project has a *multifaceted program, intricately phased, or accelerated schedule* that poses challenges for planning, coordination, execution, and a significant financial cost for the owner.
- The project has a *high level of uncertainty or risk*, such as significantly challenging site locations or conditions.
- The project has a *historical significance that requires preservation or restoration* of existing historic structures or features.

"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.

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

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

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

2017, cc. 699, 704.

Article 2. Procedures for State Public Bodies.

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

A. Any state public body may enter into a contract for construction on a fixed price or not-to-exceed price construction management or design-build basis, provided that (i) the project is a complex project, (ii) such public body complies with the requirements of this article, and (iii) the procedures adopted by the Secretary of Administration for using construction management or design-build contracts.

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

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

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

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

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

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

6. Construction management contracts shall require that (i) no more than 10 percent of the construction work, as measured by the cost of the work, be performed by the construction manager with its own

forces and (ii) the remaining 90 percent of the construction work, as measured by the cost of the work, be performed by subcontractors of the construction manager, which the construction manager shall procure by publicly advertised, competitive sealed bidding to the maximum extent practicable; ~~and~~

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

8. The procedures require the state public body to provide documentation of the processes used for the final selection to all the unsuccessful proposers, upon request.

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

1. The written determination of the state public body;
2. The compliance by the state public body with subdivisions B 1, 2, and 7;
3. The project cost, expected timeline, and use;
4. Whether the project is a complex project; and
5. Any other criteria established by the Department to evaluate the proposed procurement method for the project.

D. The Department shall conduct its review within five working days after receipt of the written determination and render its written recommendation within such five-working-day period. The written recommendation of the Department shall be maintained in the procurement file.

E. If a state public body elects to proceed with the project using a construction management or design-build procurement method despite the recommendation of the Department to the contrary, such state public body shall state in writing its reasons therefor and any justification for not following the recommendation of the Department and submit same to the Department. The written statement of a state public body's decision to not follow the recommendation of the Department shall be maintained in the procurement file.

2017, cc. [699](#), [704](#).

Article 3. Procedures for Covered Institutions.

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

A. Any covered institution may enter into a contract for construction on a fixed price or not-to-exceed price construction management or design-build basis, provided that (i) the project is a complex project, (ii) such institution complies with the requirements of this article, and (iii) with the procedures adopted by the Secretary of Administration for using construction management or design-build contracts.

B. Covered institutions shall:

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

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

3. Submit Department-reviewed procedures to its board of visitors for adoption.

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

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

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

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

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

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

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

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

8. The procedures require the state public body to provide documentation of the processes used for the final selection to all the unsuccessful proposers, upon request.

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

1. The written determination of the covered institution;

2. The compliance by the covered institution with subdivisions C 1, 2, and 7;
3. The project cost, expected timeline, and use;
4. Whether the project is a complex project; and
5. Any other criteria established by the Department to evaluate the proposed procurement method for the project.

E. The Department shall conduct its review within five working days after receipt of the written determination and render its written recommendation within such five-working-day period. The written recommendation of the Department shall be maintained in the procurement file.

F. If a covered institution elects to proceed with the project using a construction management or design-build procurement method despite the recommendation of the Department to the contrary, such covered institution shall state in writing its reasons therefor and any justification for not following the recommendation of the Department and submit same to the Department. The written statement of a covered institution's decision to not follow the recommendation of the Department shall be maintained in the procurement file.

2017, cc. [699](#), [704](#).

Article 4. Procedures for Local Public Bodies.

§ 2.2-4382. Design-build or construction management contracts for local public bodies authorized.

A. Any local public body may enter into a contract for construction on a fixed price or not-to-exceed price construction management or design-build basis, provided that the local public body (i) complies with the requirements of this article and (ii) has by ordinance or resolution implemented procedures consistent with the procedures adopted by the Secretary of Administration for utilizing construction management or design-build contracts.

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

C. A written determination shall be made in advance by the local public body that competitive sealed bidding is not practicable or fiscally advantageous, and such writing shall document the basis for the determination to utilize construction management or design-build including the determination of the project's complexity. The determination shall be included in the Request for Qualifications and be maintained in the procurement file.

D. Procedures adopted by a local public body for construction management pursuant to this article shall include the following requirements:

1. Construction management may be utilized on projects ~~where the project cost is expected to be less than the project cost threshold established in the procedures adopted by the Secretary of Administration for utilizing construction management contracts,~~ provided that (i) the project is a complex project and (ii)

the project procurement method is approved by the local governing body. The written approval of the governing body shall be maintained in the procurement file;

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

3. The construction management contract is entered into no later than the completion of the schematic phase of design, unless prohibited by authorization of funding restrictions;

4. Prior construction management or design-build experience or previous experience with the Department's Bureau of Capital Outlay Management shall not be required as a prerequisite for award of a contract. However, in the selection of a contractor, the local public body may consider the experience of each contractor on comparable projects;

5. Construction management contracts shall require that (i) no more than 10 percent of the construction work, as measured by the cost of the work, be performed by the construction manager with its own forces and (ii) the remaining 90 percent of the construction work, as measured by the cost of the work, be performed by subcontractors of the construction manager, which the construction manager shall procure by publicly advertised, competitive sealed bidding to the maximum extent practicable. The provisions of this subdivision shall not apply to construction management contracts involving infrastructure projects;

6. The procedures allow for a two-step competitive negotiation process;~~and~~

7. Price is a critical basis for award of the contract; ~~and~~

8. The procedures require the state public body to provide documentation of the processes used for the final selection to all the unsuccessful proposers, upon request.

E. Procedures adopted by a local public body for design-build construction projects shall include a two-step competitive negotiation process consistent with the standards established by the Division of Engineering and Buildings of the Department for state public bodies.

2017, cc. [699](#), [704](#); 2020, cc. [162](#), [163](#); 2023, cc. [726](#), [727](#).

Article 5. Reporting Requirements for All Public Bodies.

§ 2.2-4383. Reporting requirements.

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

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

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

2017, cc. [699](#), [704](#).



August 18, 2023

The Honorable Members of the DGS, Procurement Workgroup

By email

RE: Senate Bill 954, Construction Management

Dear Procurement Workgroup Members:

On behalf of the Virginia Contractor Procurement Alliance (VCPA), we thank you for your attention to the discussion in support of the rationale behind Senate Bill 954.

The VCPA fully and unanimously supports the Department of General Services (DGS) recommendations with the following suggestions:

- 1) The VCPA supports DGS recommendation (1) and (2) to reinstate DBB as the default and preferred method of procurement for all state, local bodies and tier three institutions as well as require all state entities including tier three institutions of higher education to obtain approval from DEB for use of CM or DB on every project. These items are critical to protecting the interests of Virginia's taxpayers.
- 2) The VCPA supports DGS recommendation (1) which includes the requirement that all local public bodies hold a public hearing of its governing body to approve the use of CM or DB on each project and as a separate agenda item at least 45 days before issuance of any request for proposal.
- 3) The VCPA supports DGS recommendation (3) requiring all, "public bodies to advertise available subcontracting opportunities." The VCPA also requests an amendment to Code that clarifies that all subcontracting opportunities must be competitively-sealed-bid and all invitations and received proposals be reviewed and evaluated by the public body along with the CM or General Contractor in establishing the GMP.

The VCPA asks that the Workgroup fully support and vote for the DGS recommendations.

We look forward to further opportunities to work together with all the stakeholders to develop consensus legislation including the following matters:

- a) VCPA recommends that CM experience shall not be a prerequisite or used for either prequalification or award of a CM or DB project. Procurement qualifications and award should be based on construction experience not project delivery method.

- b) VCPA requests that all public bodies send information to DGS regarding the use of CM or DB which shall be made available by DGS to the public on its website.
- c) VCPA requests that the definition of complexity of projects be refined.
- d) VCPA requests that the threshold and other requirements under which DEB or local public bodies determines approval of CM or DB usage be adjusted and clarified.

Thank you very much and please feel free to contact me at any time.

Sincerely,



Matt Benka

CC: The Honorable Glenn Youngkin
The Honorable Lyn McDermid
The Honorable Members of the House Appropriations Committee
The Honorable Members of the Senate Finance Committee
The Honorable Members of the House General Laws Committees
The Honorable Members of the Senate General Laws Committee