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**SENATE BILL NO. 741**

Offered January 18, 2008

*A BILL to amend and reenact §§ 2.2-1201, 2.2-4317, and 2.2-4343 of the Code of Virginia, relating to the Virginia Public Procurement Act; exemption for certain transactions.*

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Patron—Hanger

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Referred to Committee on General Laws and Technology

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

**1. That §§ 2.2-1201, 2.2-4317, and 2.2-4343 of the Code of Virginia are amended and reenacted as follows:**

§ 2.2-1201. Duties of Department.

The Department shall have the following duties:

1. Make recommendations to the Governor regarding the establishment and maintenance of a classification plan for the service of the Commonwealth, and recommend necessary amendments thereto.

2. Make recommendations to the Governor regarding the establishment and administration of a compensation plan for all employees, and recommend necessary amendments thereto.

3. Design and maintain a personnel information system that shall support the operational needs of the Department and of state agencies, and that shall provide for the management information needs of the Governor, his secretaries, and the General Assembly. The system shall provide at a minimum a roster of all employees in the service of the Commonwealth, in which there shall be set forth as to each employee, the employing agency, the class title, pay, status and such other data as may be deemed desirable to produce significant facts pertaining to personnel administration.

4. Establish and direct a program of employee-management relations designed to improve communications between employees and agencies of the Commonwealth.

5. Establish and administer a system of performance evaluation for all employees in the service of the Commonwealth, based on the quality of service rendered, related where practicable to specific standards of performance. In no event shall workers' compensation leave affect the total number of hours credited during a performance cycle for purposes of calculating incentive increases in salary based on such performance evaluations.

6. Establish and administer a system of recruitment designed to attract high quality employees to the service of the Commonwealth. In administering this system, applicants shall be rated on the basis of relative merit and classified in accordance with their suitability for the various classes of positions in the service of the Commonwealth, and a record thereof shall be maintained in the open register.

7. Design and utilize an application form which shall include, but not be limited to, information on prior volunteer work performed by the applicant.

8. Establish and administer a comprehensive and integrated program of employee training and management development.

9. Establish and administer a program of evaluation of the effectiveness of performance of the personnel activities of the agencies of the Commonwealth.

10. Establish and administer a program to ensure equal employment opportunity to applicants for state employment and to state employees in all incidents of employment.

11. Establish and administer regulations relating to disciplinary actions; however, no disciplinary action shall include the suspension without pay for more than 10 days of any state employee who is under investigation without a hearing conducted either by a level of supervision above the employee's immediate supervisor or by his agency head.

12. Adopt and implement a centralized program to provide awards to employees who propose procedures or ideas that are adopted and that will result in eliminating or reducing state expenditures or improving operations, provided such proposals are placed in effect. The centralized program shall be designed to (i) protect the identity of the individual making the proposal while it is being evaluated for implementation by a state agency, (ii) publicize the acceptance of proposals and financial awards to state employees, and (iii) include a reevaluation process that individuals making proposals may access if their proposals are rejected by the evaluating agency. The reevaluation process must include individuals from the private sector. State employees who make a suggestion or proposal under this section shall receive initial confirmation of receipt within 30 days. A determination of the feasibility of the suggestion or proposal shall occur within 60 days of initial receipt.

13. Develop state personnel policies and, after approval by the Governor, disseminate and interpret state personnel policies and procedures to all agencies. Such personnel policies shall permit an

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59 employee, with the written approval of his agency head, to substitute (i) up to 33 percent of his accrued  
60 paid sick leave, (ii) up to 100 percent of any other paid leave, or (iii) any combination of accrued paid  
61 sick leave and any other paid leave for leave taken pursuant to the Family and Medical Leave Act of  
62 1993 (29 U.S.C. § 2601 et seq.). On and after December 1, 1999, such personnel policy shall include an  
63 acceptable use policy for the Internet. At a minimum, the Department's acceptable use policy shall  
64 contain provisions that (i) prohibit use by state employees of the Commonwealth's computer equipment  
65 and communications services for sending, receiving, viewing, or downloading illegal material via the  
66 Internet and (ii) establish strict disciplinary measures for violation of the acceptable use policy. An  
67 agency head may supplement the Department's acceptable use policy with such other terms, conditions,  
68 and requirements as he deems appropriate. The Director of the Department shall have the final authority  
69 to establish and interpret personnel policies and procedures and shall have the authority to ensure full  
70 compliance with such policies. However, unless specifically authorized by law, the Director of the  
71 Department shall have no authority with respect to the state grievance procedures.

72 13a. Develop state personnel policies, with the approval of the Governor, that permit any full-time  
73 state employee who is also a member of the organized reserve forces of any of the armed services of  
74 the United States or of the Virginia National Guard to carry forward from year to year the total of his  
75 accrued annual leave time without regard to the regulation or policy of his agency regarding the  
76 maximum number of hours allowed to be carried forward at the end of a calendar year. Any amount  
77 over the usual amount allowed to be carried forward shall be reserved for use only as leave taken  
78 pursuant to active military service as provided by § 2.2-2903.1. Such leave and its use shall be in  
79 addition to leave provided under § 44-93. Any leave carried forward for the purposes described  
80 remaining upon termination of employment with the Commonwealth or any department, institution or  
81 agency thereof that has not been used in accordance with § 2.2-2903.1 shall not be paid or credited in  
82 any way to the employee.

83 14. Ascertain and publish on an annual basis, by agency, the number of employees in the service of  
84 the Commonwealth, including permanent full-time and part-time employees, those employed on a  
85 temporary or contractual basis, and constitutional officers and their employees whose salaries are funded  
86 by the Commonwealth. The publication shall contain the net gain or loss to the agency in personnel  
87 from the previous fiscal year and the net gains and losses in personnel for each agency for a three-year  
88 period.

89 15. Submit a report to the members of the General Assembly on or before September 30 of each  
90 year showing (i) the total number of full- and part-time employees, (ii) contract temporary employees,  
91 (iii) hourly temporary employees, and (iv) the number of employees who voluntarily and involuntarily  
92 terminated their employment with each department, agency or institution in the previous fiscal year.

93 16. Administer the workers' compensation insurance plan for state employees in accordance with  
94 § 2.2-2821.

95 17. *Develop, in consultation with the Department of General Services and the Virginia Information*  
96 *Technologies Agency, guidelines for the procurement of staff augmentation and consulting services to*  
97 *supplement salaried and wage employees of state agencies. Such guidelines shall be based upon*  
98 *competitive principles and shall seek competition to the maximum practical degree.*

99 § 2.2-4317. Prequalification generally; prequalification for construction.

100 A. Prospective contractors may be prequalified for particular types of supplies, services, insurance or  
101 construction, and consideration of bids or proposals limited to prequalified contractors. Any  
102 prequalification procedure shall be established in writing and sufficiently in advance of its  
103 implementation to allow potential contractors a fair opportunity to complete the process.

104 B. Any prequalification of prospective contractors for construction by a public body shall be pursuant  
105 to a prequalification process for construction projects adopted by the public body. The process shall be  
106 consistent with the provisions of this section.

107 The application form used in such process shall set forth the criteria upon which the qualifications of  
108 prospective contractors will be evaluated. The application form shall request of prospective contractors  
109 only such information as is appropriate for an objective evaluation of all prospective contractors  
110 pursuant to such criteria. The form shall allow the prospective contractor seeking prequalification to  
111 request, by checking the appropriate box, that all information voluntarily submitted by the contractor  
112 pursuant to this subsection shall be considered a trade secret or proprietary information subject to the  
113 provisions of subsection D of § 2.2-4342.

114 In all instances in which the public body requires prequalification of potential contractors for  
115 construction projects, advance notice shall be given of the deadline for the submission of  
116 prequalification applications. The deadline for submission shall be sufficiently in advance of the date set  
117 for the submission of bids for such construction so as to allow the procedures set forth in this subsection  
118 to be accomplished.

119 At least thirty days prior to the date established for submission of bids or proposals under the  
120 procurement of the contract for which the prequalification applies, the public body shall advise in

writing each contractor who submitted an application whether that contractor has been prequalified. In the event that a contractor is denied prequalification, the written notification to the contractor shall state the reasons for the denial of prequalification and the factual basis of such reasons.

A decision by a public body denying prequalification under the provisions of this subsection shall be final and conclusive unless the contractor appeals the decision as provided in § 2.2-4357.

C. A public body may deny prequalification to any contractor only if the public body finds one of the following:

1. The contractor does not have sufficient financial ability to perform the contract that would result from such procurement. If a bond is required to ensure performance of a contract, evidence that the contractor can acquire a surety bond from a corporation included on the United States Treasury list of acceptable surety corporations in the amount and type required by the public body shall be sufficient to establish the financial ability of the contractor to perform the contract resulting from such procurement;

2. The contractor does not have appropriate experience to perform the construction project in question;

3. The contractor or any officer, director or owner thereof has had judgments entered against him within the past ten years for the breach of contracts for governmental or nongovernmental construction, including, but not limited to, design-build or construction management;

4. The contractor has been in substantial noncompliance with the terms and conditions of prior construction contracts with a public body without good cause. If the public body has not contracted with a contractor in any prior construction contracts, the public body may deny prequalification if the contractor has been in substantial noncompliance with the terms and conditions of comparable construction contracts with another public body without good cause. A public body may not utilize this provision to deny prequalification unless the facts underlying such substantial noncompliance were documented in writing in the prior construction project file and such information relating thereto given to the contractor at that time, with the opportunity to respond;

5. The contractor or any officer, director, owner, project manager, procurement manager or chief financial official thereof has been convicted within the past ten years of a crime related to governmental or nongovernmental construction or contracting, including, but not limited to, a violation of (i) Article 6 (§ 2.2-4367 et seq.) of this chapter, (ii) the Virginia Governmental Frauds Act (§ 18.2-498.1 et seq.), (iii) Chapter 4.2 (§ 59.1-68.6 et seq.) of Title 59.1, or (iv) any substantially similar law of the United States or another state;

6. The contractor or any officer, director or owner thereof is currently debarred pursuant to an established debarment procedure from bidding or contracting by any public body, agency of another state or agency of the federal government; and

7. The contractor failed to provide to the public body in a timely manner any information requested by the public body relevant to subdivisions 1 through 6 of this subsection.

D. If a public body has a prequalification ordinance that provides for minority participation in municipal construction contracts, that public body may also deny prequalification based on minority participation criteria. However, nothing herein shall authorize the adoption or enforcement of minority participation criteria except to the extent that such criteria, and the adoption and enforcement thereof, are in accordance with the Constitution and laws of the United States and the Commonwealth.

E. The provisions of subsections B, C, and D shall not apply to prequalification for (i) contracts let under § 33.1-12 and (ii) *staff augmentation services or consulting contracts to supplement salaried and wage employees let by any state agency in compliance with guidelines established by the Department of Human Resources pursuant to subdivision 17 of § 2.2-1201.*

§ 2.2-4343. Exemption from operation of chapter for certain transactions.

A. The provisions of this chapter shall not apply to:

1. The Virginia Port Authority in the exercise of any of its powers in accordance with Chapter 10 (§ 62.1-128 et seq.) of Title 62.1, provided the Authority implements, by policy or regulation adopted by the Board of Commissioners and approved by the Department of General Services, procedures to ensure fairness and competitiveness in the procurement of goods and services and in the administration of its capital outlay program. This exemption shall be applicable only so long as such policies and procedures meeting the requirements remain in effect.

2. The Virginia Retirement System for selection of services related to the management, purchase or sale of authorized investments, actuarial services, and disability determination services. Selection of these services shall be governed by the standard set forth in § 51.1-124.30.

3. The State Treasurer in the selection of investment management services related to the external management of funds shall be governed by the standard set forth in § 2.2-4514, and shall be subject to competitive guidelines and policies that are set by the Commonwealth Treasury Board and approved by the Department of General Services.

4. The Department of Social Services or local departments of social services for the acquisition of

motor vehicles for sale or transfer to Temporary Assistance to Needy Families (TANF) recipients.

5. The University of Virginia in the selection of services related to the management and investment of its endowment funds, endowment income, gifts, all other nongeneral fund reserves and balances, or local funds of or held by the University pursuant to § 23-76.1. However, selection of these services shall be governed by the Uniform Management of Institutional Funds Act (§ 55-268.1 et seq.) as required by § 23-76.1.

6. The Board of the Virginia College Savings Plan for the selection of services related to the operation and administration of the Plan, including, but not limited to, contracts or agreements for the management, purchase, or sale of authorized investments or actuarial, record keeping, or consulting services. However, such selection shall be governed by the standard set forth in § 23-38.80.

7. Public institutions of higher education for the purchase of items for resale at retail bookstores and similar retail outlets operated by such institutions. However, such purchase procedures shall provide for competition where practicable.

8. The purchase of goods and services by agencies of the legislative branch that may be specifically exempted therefrom by the Chairman of the Committee on Rules of either the House of Delegates or the Senate. Nor shall the contract review provisions of § 2.2-2011 apply to such procurements. The exemption shall be in writing and kept on file with the agency's disbursement records.

9. Any town with a population of less than 3,500, except as stipulated in the provisions of §§ 2.2-4305, 2.2-4308, 2.2-4311, 2.2-4315, 2.2-4330, 2.2-4333 through 2.2-4338, 2.2-4343.1, and 2.2-4367 through 2.2-4377.

10. Any county, city or town whose governing body has adopted, by ordinance or resolution, alternative policies and procedures which are (i) based on competitive principles and (ii) generally applicable to procurement of goods and services by such governing body and its agencies, except as stipulated in subdivision 12.

This exemption shall be applicable only so long as such policies and procedures, or other policies and procedures meeting the requirements of § 2.2-4300, remain in effect in such county, city or town. Such policies and standards may provide for incentive contracting that offers a contractor whose bid is accepted the opportunity to share in any cost savings realized by the locality when project costs are reduced by such contractor, without affecting project quality, during construction of the project. The fee, if any, charged by the project engineer or architect for determining such cost savings shall be paid as a separate cost and shall not be calculated as part of any cost savings.

11. Any school division whose school board has adopted, by policy or regulation, alternative policies and procedures that are (i) based on competitive principles and (ii) generally applicable to procurement of goods and services by the school board, except as stipulated in subdivision 12.

This exemption shall be applicable only so long as such policies and procedures, or other policies or procedures meeting the requirements of § 2.2-4300, remain in effect in such school division. This provision shall not exempt any school division from any centralized purchasing ordinance duly adopted by a local governing body.

12. Notwithstanding the exemptions set forth in subdivisions 9 through 11, the provisions of subsections C and D of § 2.2-4303, and §§ 2.2-4305, 2.2-4308, 2.2-4311, 2.2-4315, 2.2-4317, 2.2-4330, 2.2-4333 through 2.2-4338, 2.2-4343.1, and 2.2-4367 through 2.2-4377 shall apply to all counties, cities and school divisions, and to all towns having a population greater than 3,500 in the Commonwealth.

The method for procurement of professional services set forth in subdivision 3 a of § 2.2-4301 in the definition of competitive negotiation shall also apply to all counties, cities and school divisions, and to all towns having a population greater than 3,500, where the cost of the professional service is expected to exceed \$30,000 in the aggregate or for the sum of all phases of a contract or project. A school board that makes purchases through its public school foundation or purchases educational technology through its educational technology foundation, either as may be established pursuant to § 22.1-212.2:2 shall be exempt from the provisions of this chapter, except, relative to such purchases, the school board shall comply with the provisions of §§ 2.2-4311 and 2.2-4367 through 2.2-4377.

13. A public body that is also a utility operator may purchase services through or participate in contracts awarded by one or more utility operators that are not public bodies for utility marking services as required by the Underground Utility Damage Prevention Act (§ 56-265.14 et seq.). A purchase of services under this subdivision may deviate from the procurement procedures set forth in this chapter upon a determination made in advance by the public body and set forth in writing that competitive sealed bidding is either not practicable or not fiscally advantageous to the public, and the contract is awarded based on competitive principles.

14. Procurement of any construction or planning and design services for construction by a Virginia nonprofit corporation or organization not otherwise specifically exempted when (i) the planning, design or construction is funded by state appropriations of \$10,000 or less or (ii) the Virginia nonprofit corporation or organization is obligated to conform to procurement procedures that are established by federal statutes or regulations, whether those federal procedures are in conformance with the provisions

of this chapter.

15. Purchases, exchanges, gifts or sales by the Citizens' Advisory Council on Furnishing and Interpreting the Executive Mansion.

16. The Eastern Virginia Medical School in the selection of services related to the management and investment of its endowment and other institutional funds. The selection of these services shall, however, be governed by the Uniform Management of Institutional Funds Act (§ 55-268.1 et seq.).

17. The Department of Corrections in the selection of pre-release and post-incarceration services.

18. The Board of the Chippokes Plantation Farm Foundation in entering into agreements with persons for the construction, operation, and maintenance of projects consistent with the Chippokes Plantation State Park Master Plan approved by the Director of the Department of Conservation and Recreation pursuant to the requirements of § 10.1-200.1 and designed to further an appreciation for rural living and the contributions of the agricultural, forestry, and natural resource based industries of the Commonwealth, provided such projects are supported solely by private or nonstate funding.

19. The University of Virginia Medical Center to the extent provided by subdivision B 3 of § 23-77.4.

20. The purchase of goods and services by a local governing body or any authority, board, department, instrumentality, institution, agency or other unit of state government when such purchases are made under a remedial plan established by the Governor pursuant to subsection C of § 2.2-4310 or by a chief administrative officer of a county, city or town pursuant to § 15.2-965.1.

21. The contract by community services boards or behavioral health authorities with an administrator or management body pursuant to a joint agreement authorized by § 37.2-512 or 37.2-615.

22. *The procurement of staff augmentation and consulting services to supplement salaried and wage employees of a state agency in compliance with guidelines developed by the Department of Human Resource Management pursuant to subdivision 17 of § 2.2-1201.*

B. Where a procurement transaction involves the expenditure of federal assistance or contract funds, the receipt of which is conditioned upon compliance with mandatory requirements in federal laws or regulations not in conformance with the provisions of this chapter, a public body may comply with such federal requirements, notwithstanding the provisions of this chapter, only upon the written determination of the Governor, in the case of state agencies, or the governing body, in the case of political subdivisions, that acceptance of the grant or contract funds under the applicable conditions is in the public interest. Such determination shall state the specific provision of this chapter in conflict with the conditions of the grant or contract.