

# VIRGINIA ACTS OF ASSEMBLY -- 2009 SESSION

## CHAPTER 737

*An Act to amend and reenact § 2.2-4343 of the Code of Virginia and to amend the Code of Virginia by adding sections numbered 23-44.1, 23-50.10:01, and 23-122.1, relating to the boards of visitors of the College of William and Mary in Virginia, Virginia Commonwealth University, and Virginia Polytechnic Institute and State University.*

[H 1725]

Approved March 30, 2009

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

**1. That § 2.2-4343 of the Code of Virginia is amended and reenacted and that the Code of Virginia is amended by adding sections numbered 23-44.1, 23-50.10:01, and 23-122.1 as follows:**

§ 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 *College of William and Mary in Virginia, Virginia Commonwealth University, the University of Virginia, and Virginia Polytechnic Institute and State University* in the selection of services related to the management and investment of ~~its~~ *their* endowment funds, endowment income, gifts, all other nongeneral fund reserves and balances, or local funds of or held by the ~~University College or Universities~~ pursuant to § 23-44.1, 23-50.10:01, 23-76.1, or 23-122.1. However, selection of these services shall be governed by the Uniform Prudent Management of Institutional Funds Act (§ 55-268.11 et seq.) as required by §§ 23-44.1, 23-50.10:01, 23-76.1, and 23-122.1.

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 Prudent Management of Institutional Funds Act (§ 55-268.11 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.

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.

*§ 23-44.1. Investment of endowment funds, endowment income, and gifts; standard of care; liability; exemption from the Virginia Public Procurement Act.*

*A. The board of visitors shall invest and manage the endowment funds, endowment income, gifts, all*

*other nongeneral fund reserves and balances, and local funds of or held by the College in accordance with this section and the provisions of the Uniform Prudent Management of Institutional Funds Act (§ 55-268.11 et seq.).*

*B. No member of the board of visitors shall be personally liable for losses suffered by an endowment fund, endowment income, gifts, all other nongeneral fund reserves and balances, or local funds of or held by the College, arising from investments made pursuant to the provisions of subsection A.*

*C. The investment and management of endowment funds, endowment income, gifts, all other nongeneral fund reserves and balances, or local funds of or held by the College shall not be subject to the provisions of the Virginia Public Procurement Act (§ 2.2-4300 et seq.).*

*D. In addition to the investment practices authorized by the Uniform Prudent Management of Institutional Funds Act (§ 55-268.11 et seq.), the board of visitors may also invest or reinvest the endowment funds, endowment income, gifts, all other nongeneral fund reserves and balances, and local funds of or held by the College in derivatives, options, and financial securities.*

*1. In this section, "derivative" means a contract or financial instrument or a combination of contracts and financial instruments, including, without limitation, any contract commonly known as a "swap," which gives the College the right or obligation to deliver or receive delivery of, or make or receive payments based on, changes in the price, value, yield, or other characteristic of a tangible or intangible asset or group of assets, or changes in a rate, an index of prices or rates, or other market indicator for an asset or a group of assets.*

*2. In this section, an "option" means an agreement or contract whereby the College may grant or receive the right to purchase or sell, or pay or receive the value of, any personal property asset including, without limitation, any agreement or contract that relates to any security, contract, or agreement.*

*3. In this section, "financial security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest, collateral-trust certificate, preorganization certificate of subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim security for, receipt for, guarantee of, or warrant or right to subscribe to or purchase any of the foregoing.*

*E. The authority as provided in this section as it relates to nongeneral fund reserves and balances of or held by the College is predicated upon an approved management agreement between the College and the Commonwealth of Virginia.*

*§ 23-50.10:01. Investment of endowment funds, endowment income, and gifts; standard of care; liability; exemption from the Virginia Public Procurement Act.*

*A. The board of visitors shall invest and manage the endowment funds, endowment income, gifts, all other nongeneral fund reserves and balances, and local funds of or held by the University in accordance with this section and the provisions of the Uniform Prudent Management of Institutional Funds Act (§ 55-268.11 et seq.).*

*B. No member of the board of visitors shall be personally liable for losses suffered by an endowment fund, endowment income, gifts, all other nongeneral fund reserves and balances, or local funds of or held by the University, arising from investments made pursuant to the provisions of subsection A.*

*C. The investment and management of endowment funds, endowment income, gifts, all other nongeneral fund reserves and balances, or local funds of or held by the University shall not be subject to the provisions of the Virginia Public Procurement Act (§ 2.2-4300 et seq.).*

*D. In addition to the investment practices authorized by the Uniform Prudent Management of Institutional Funds Act (§ 55-268.11 et seq.), the board of visitors may also invest or reinvest the endowment funds, endowment income, gifts, all other nongeneral fund reserves and balances, and local funds of or held by the University in derivatives, options, and financial securities.*

*1. In this section, "derivative" means a contract or financial instrument or a combination of contracts and financial instruments, including, without limitation, any contract commonly known as a "swap," which gives the University the right or obligation to deliver or receive delivery of, or make or receive payments based on, changes in the price, value, yield or other characteristic of a tangible or intangible asset or group of assets, or changes in a rate, an index of prices or rates, or other market indicator for an asset or a group of assets.*

*2. In this section, an "option" means an agreement or contract whereby the University may grant or receive the right to purchase or sell, or pay or receive the value of, any personal property asset including, without limitation, any agreement or contract that relates to any security, contract, or agreement.*

*3. In this section, "financial security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest, collateral-trust certificate, preorganization certificate of*

subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim security for, receipt for, guarantee of, or warrant or right to subscribe to or purchase any of the foregoing.

E. The authority as provided in this section as it relates to nongeneral fund reserves and balances of or held by the University is predicated upon an approved management agreement between the University and the Commonwealth of Virginia.

§ 23-122.1. Investment of endowment funds, endowment income, and gifts; standard of care; liability; exemption from the Virginia Public Procurement Act.

A. The board of visitors shall invest and manage the endowment funds, endowment income, gifts, all other nongeneral fund reserves and balances, and local funds of or held by the University in accordance with this section and the provisions of the Uniform Prudent Management of Institutional Funds Act (§ 55-268.11 et seq.).

B. No member of the board of visitors shall be personally liable for losses suffered by an endowment fund, endowment income, gifts, all other nongeneral fund reserves and balances, or local funds of or held by the University, arising from investments made pursuant to the provisions of subsection A.

C. The investment and management of endowment funds, endowment income, gifts, all other nongeneral fund reserves and balances, or local funds of or held by the University shall not be subject to the provisions of the Virginia Public Procurement Act (§ 2.2-4300 et seq.).

D. In addition to the investment practices authorized by the Uniform Prudent Management of Institutional Funds Act (§ 55-268.11 et seq.), the board of visitors may also invest or reinvest the endowment funds, endowment income, gifts, all other nongeneral fund reserves and balances, and local funds of or held by the University in derivatives, options, and financial securities.

1. In this section, "derivative" means a contract or financial instrument or a combination of contracts and financial instruments, including, without limitation, any contract commonly known as a "swap," which gives the University the right or obligation to deliver or receive delivery of, or make or receive payments based on, changes in the price, value, yield or other characteristic of a tangible or intangible asset or group of assets, or changes in a rate, an index of prices or rates, or other market indicator for an asset or a group of assets.

2. In this section, an "option" means an agreement or contract whereby the University may grant or receive the right to purchase or sell, or pay or receive the value of, any personal property asset including, without limitation, any agreement or contract that relates to any security, contract, or agreement.

3. In this section, "financial security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest, collateral-trust certificate, preorganization certificate of subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim security for, receipt for, guarantee of, or warrant or right to subscribe to or purchase any of the foregoing.

E. The authority as provided in this section as it relates to nongeneral fund reserves and balances of or held by the University is predicated upon an approved management agreement between the University and the Commonwealth of Virginia.

**2. That the provisions of this act shall not be construed or interpreted to permit or allow the College of William and Mary, Virginia Commonwealth University, or Virginia Polytechnic Institute and State University to invest revenues from tuition and educational fees that are used or required for the day-to-day operations of the College or Universities in other than cash accounts and fixed income securities.**