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**HOUSE BILL NO. 1193**

Offered January 18, 2012

A *BILL to amend and reenact §§ 2.2-4301, 2.2-4303, 56-573.1:1, and 56-575.17 of the Code of Virginia, relating to public procurement; posting by local public bodies of procurement opportunities.*

Patron—Villanueva

Referred to Committee on General Laws

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

**1. That §§ 2.2-4301, 2.2-4303, 56-573.1:1, and 56-575.17 of the Code of Virginia are amended and reenacted as follows:**

§ 2.2-4301. Definitions.

As used in this chapter:

"Affiliate" means an individual or business that controls, is controlled by, or is under common control with another individual or business. A person controls an entity if the person owns, directly or indirectly, more than 10 percent of the voting securities of the entity. For the purposes of this definition "voting security" means a security that (i) confers upon the holder the right to vote for the election of members of the board of directors or similar governing body of the business or (ii) is convertible into, or entitles the holder to receive, upon its exercise, a security that confers such a right to vote. A general partnership interest shall be deemed to be a voting security.

"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 a public body's needs.

"Business" means any type of corporation, partnership, limited liability company, association, or sole proprietorship operated for profit.

"Competitive negotiation" is a method of contractor selection that includes the following elements:

1. Issuance of a written Request for Proposal indicating in general terms that which is sought to be procured, specifying the factors that will be used in evaluating the proposal and containing or incorporating by reference the other applicable contractual terms and conditions, including any unique capabilities or qualifications that will be required of the contractor.

2. Public notice of the Request for Proposal at least 10 days prior to the date set for receipt of proposals by posting on the Department of General Services' central electronic procurement website or other appropriate websites. Additionally, public bodies ~~shall~~ *may* publish in a newspaper of general circulation in the area in which the contract is to be performed so as to provide reasonable notice to the maximum number of offerors that can be reasonably anticipated to submit proposals in response to the particular request. Posting on the Department of General Services' central electronic procurement website shall be required of ~~any state all public body bodies. Local public bodies are encouraged to utilize the Department of General Services' central electronic procurement website to provide the public with centralized visibility and access to the Commonwealth's procurement opportunities.~~ In addition, proposals may be solicited directly from potential contractors.

3. a. Procurement of professional services. The public body shall engage in individual discussions with two or more offerors deemed fully qualified, responsible and suitable on the basis of initial responses and with emphasis on professional competence, to provide the required services. Repetitive informal interviews shall be permissible. The offerors shall be encouraged to elaborate on their qualifications and performance data or staff expertise pertinent to the proposed project, as well as alternative concepts. In addition, offerors shall be informed of any ranking criteria that will be used by the public body in addition to the review of the professional competence of the offeror. The Request for Proposal shall not, however, request that offerors furnish estimates of man-hours or cost for services. At the discussion stage, the public body may discuss nonbinding estimates of total project costs, including, but not limited to, life-cycle costing, and where appropriate, nonbinding estimates of price for services. Proprietary information from competing offerors shall not be disclosed to the public or to competitors. At the conclusion of discussion, outlined in this subdivision, on the basis of evaluation factors published in the Request for Proposal and all information developed in the selection process to this point, the public body shall select in the order of preference two or more offerors whose professional qualifications and proposed services are deemed most meritorious. Negotiations shall then be conducted, beginning with the offeror ranked first. If a contract satisfactory and advantageous to the public body can be negotiated at a price considered fair and reasonable, the award shall be made to that offeror. Otherwise, negotiations with the offeror ranked first shall be formally terminated and negotiations conducted with the offeror ranked second, and so on until such a contract can be negotiated at a fair and reasonable

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59 price. Notwithstanding the foregoing, if the terms and conditions for multiple awards are included in the  
60 Request for Proposal, a public body may award contracts to more than one offeror.

61 Should the public body determine in writing and in its sole discretion that only one offeror is fully  
62 qualified, or that one offeror is clearly more highly qualified and suitable than the others under  
63 consideration, a contract may be negotiated and awarded to that offeror.

64 A contract for architectural or professional engineering services relating to construction projects may  
65 be negotiated by a public body, for multiple projects provided (i) the projects require similar experience  
66 and expertise, (ii) the nature of the projects is clearly identified in the Request for Proposal, and (iii) the  
67 contract term is limited to one year or when the cumulative total project fees reach the maximum cost  
68 authorized in this paragraph, whichever occurs first. For state public bodies, such contract, except those  
69 awarded for environmental, location, design and inspection work regarding highways and bridges by the  
70 Commissioner of Highways may be renewable for four additional one-year terms at the option of the  
71 public body. For local public bodies, including metropolitan planning organizations or planning district  
72 commissions, such contract may be renewable for four additional one-year terms at the option of the  
73 public body. Under such contract, (a) the fair and reasonable prices, as negotiated, shall be used in  
74 determining the cost of each project performed, (b) except those awarded for environmental, location,  
75 design and inspection work regarding highways and bridges by the Commissioner of Highways, the sum  
76 of all projects performed in one contract term shall not exceed \$500,000 or, in the case of a state  
77 agency, as defined in § 2.2-4347, such greater amount as may be determined by the Director of the  
78 Department of General Services, not to exceed \$1 million, except that in any locality or any authority,  
79 sanitation district, metropolitan planning organization or planning district commission with a population  
80 in excess of 80,000, the sum of all such projects shall not exceed \$5 million; and (c) except those  
81 awarded for environmental, location, design and inspection work regarding highways and bridges by the  
82 Commissioner of Highways or for architectural and engineering services for rail and public  
83 transportation projects by the Director of the Department of Rail and Public Transportation, the project  
84 fee of any single project shall not exceed \$100,000 or, in the case of a state agency, such greater  
85 amount as may be determined by the Director of the Department of General Services not to exceed  
86 \$200,000, except that in any locality or any authority or sanitation district with a population in excess of  
87 80,000, such fee shall not exceed \$1 million. Any unused amounts from the first contract term shall not  
88 be carried forward to the additional term. Competitive negotiations for such contracts may result in  
89 awards to more than one offeror provided (1) the Request for Proposal so states and (2) the public body  
90 has established procedures for distributing multiple projects among the selected contractors during the  
91 contract term. Notwithstanding any other provision in this section, for contracts for environmental  
92 location, design and inspection work regarding highways and bridges by the Commissioner of Highways,  
93 the initial contract term shall be limited to two years or when the cumulative total project fees reach \$5  
94 million, whichever occurs first. Such contract may be renewable for two additional one-year terms at the  
95 option of the Commissioner, and the sum of all projects in each one-year term shall not exceed \$5  
96 million. For architectural and engineering services for rail and public transportation projects by the  
97 Director of the Department of Rail and Public Transportation, the sum of all projects in one contract  
98 term shall not exceed \$2 million and such contract may be renewable for two additional one-year terms  
99 at the option of the Commissioner.

100 Multiphase professional services contracts satisfactory and advantageous to the Department of  
101 Transportation for environmental, location, design and inspection work regarding highways and bridges  
102 may be negotiated and awarded based on a fair and reasonable price for the first phase only, when  
103 completion of the earlier phases is necessary to provide information critical to the negotiation of a fair  
104 and reasonable price for succeeding phases.

105 Multiphase professional services contracts satisfactory and advantageous to a local public body,  
106 including metropolitan planning organizations and planning district commissions, for environmental,  
107 location, design and inspection work regarding construction of infrastructure projects may be negotiated  
108 and awarded based on qualifications at a fair and reasonable price for the first phase only, when  
109 completion of the earlier phases is necessary to provide information critical to the negotiation of a fair  
110 and reasonable price for succeeding phases. Prior to the procurement of any such contract, the local  
111 public body shall state the anticipated intended total scope of the project and determine in writing that  
112 the nature of the work is such that the best interests of such public body require awarding the contract.

113 b. Procurement of other than professional services. Selection shall be made of two or more offerors  
114 deemed to be fully qualified and best suited among those submitting proposals, on the basis of the  
115 factors involved in the Request for Proposal, including price if so stated in the Request for Proposal.  
116 Negotiations shall then be conducted with each of the offerors so selected. Price shall be considered, but  
117 need not be the sole determining factor. After negotiations have been conducted with each offeror so  
118 selected, the public body shall select the offeror which, in its opinion, has made the best proposal, and  
119 shall award the contract to that offeror. When the terms and conditions of multiple awards are so  
120 provided in the Request for Proposal, awards may be made to more than one offeror. Should the public

body determine in writing and in its 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.

"Competitive sealed bidding" is a method of contractor selection, other than for professional services, which includes the following elements:

1. Issuance of a written Invitation to Bid containing or incorporating by reference the specifications and contractual terms and conditions applicable to the procurement. Unless the public body has provided for prequalification of bidders, the Invitation to Bid shall include a statement of any requisite qualifications of potential contractors. When it is impractical to prepare initially a purchase description to support an award based on prices, an Invitation to Bid may be issued requesting the submission of unpriced offers to be followed by an Invitation to Bid limited to those bidders whose offers have been qualified under the criteria set forth in the first solicitation.

2. Public notice of the Invitation to Bid at least 10 days prior to the date set for receipt of bids by posting on the Department of General Services' central electronic procurement website or other appropriate websites. In addition, public bodies may publish in a newspaper of general circulation. Posting on the Department of General Services' central electronic procurement website shall be required of any state all public body bodies. Local public bodies are encouraged to utilize the Department of General Services' central electronic procurement website to provide the public with centralized visibility and access to the Commonwealth's procurement opportunities. In addition, bids may be solicited directly from potential contractors. Any additional solicitations shall include businesses selected from a list made available by the Department of Minority Business Enterprise.

3. Public opening and announcement of all bids received.

4. Evaluation of bids based upon the requirements set forth in the invitation, which may include special qualifications of potential contractors, life-cycle costing, value analysis, and any other criteria such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose, which are helpful in determining acceptability.

5. Award to the lowest responsive and responsible bidder. When the terms and conditions of multiple awards are so provided in the Invitation to Bid, awards may be made to more than one bidder.

"Construction" means building, altering, repairing, improving or demolishing any structure, building 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 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.

"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, roadway or other item specified in the contract.

"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 to Bid, or the Request for Proposal, which does not affect the price, quality, quantity or delivery schedule for the goods, services or construction being procured.

"Multiphase professional services contract" means a contract for the providing of professional services where the total scope of work of the second or subsequent phase of the contract cannot be specified without the results of the first or prior phase of the contract.

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

"Potential bidder or offeror" for the purposes of §§ 2.2-4360 and 2.2-4364 means a person who, at the time a public body negotiates and awards or proposes to award a contract, is engaged in the sale or lease of goods, or the sale of services, insurance or construction, of the type to be procured under the contract, and who at such time is eligible and qualified in all respects to perform that contract, and who would have been eligible and qualified to submit a bid or proposal had the contract been procured through competitive sealed bidding or competitive negotiation.

"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. "Professional services" shall also include the services of an economist procured by the State Corporation Commission.

"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 body" shall include any metropolitan planning organization or planning district commission which operates exclusively within the Commonwealth of Virginia.

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

184 "Responsible bidder" or "offeror" means a person who has the capability, in all respects, to perform  
185 fully the contract requirements and the moral and business integrity and reliability that will assure good  
186 faith performance, and who has been prequalified, if required.

187 "Responsive bidder" means a person who has submitted a bid that conforms in all material respects  
188 to the Invitation to Bid.

189 "Reverse auctioning" means a procurement method wherein bidders are invited to bid on specified  
190 goods or nonprofessional services through real-time electronic bidding, with the award being made to  
191 the lowest responsive and responsible bidder. During the bidding process, bidders' prices are revealed  
192 and bidders shall have the opportunity to modify their bid prices for the duration of the time period  
193 established for bid opening.

194 "Services" means any work performed by an independent contractor wherein the service rendered  
195 does not consist primarily of acquisition of equipment or materials, or the rental of equipment, materials  
196 and supplies.

197 "Sheltered workshop" means a work-oriented rehabilitative facility with a controlled working  
198 environment and individual goals that utilizes work experience and related services for assisting the  
199 handicapped person to progress toward normal living and a productive vocational status.

200 § 2.2-4303. Methods of procurement.

201 A. All public contracts with nongovernmental contractors for the purchase or lease of goods, or for  
202 the purchase of services, insurance, or construction, shall be awarded after competitive sealed bidding, or  
203 competitive negotiation as provided in this section, unless otherwise authorized by law.

204 B. Professional services shall be procured by competitive negotiation.

205 C. Upon a determination made in advance by the public body and set forth in writing that  
206 competitive sealed bidding is either not practicable or not fiscally advantageous to the public, goods,  
207 services, or insurance may be procured by competitive negotiation. The writing shall document the basis  
208 for this determination.

209 Upon a written determination made in advance by (i) the Governor or his designee in the case of a  
210 procurement by the Commonwealth or by a department, agency or institution thereof or (ii) the local  
211 governing body in the case of a procurement by a political subdivision of the Commonwealth, that  
212 competitive negotiation is either not practicable or not fiscally advantageous, insurance may be procured  
213 through a licensed agent or broker selected in the manner provided for the procurement of things other  
214 than professional services in subdivision 3 b of the definition of "competitive negotiation" in § 2.2-4301.  
215 The basis for this determination shall be documented in writing.

216 D. Construction may be procured only by competitive sealed bidding, except that competitive  
217 negotiation may be used in the following instances upon a determination made in advance by the public  
218 body and set forth in writing that competitive sealed bidding is either not practicable or not fiscally  
219 advantageous to the public, which writing shall document the basis for this determination:

220 1. By the Commonwealth, its departments, agencies and institutions on a fixed price design-build  
221 basis or construction management basis under § 2.2-4306;

222 2. By any public body for the construction of highways and any draining, dredging, excavation,  
223 grading or similar work upon real property;

224 3. By any governing body of a locality with a population in excess of 100,000, provided that the  
225 locality has the personnel, procedures, and expertise to enter into a contract for construction on a fixed  
226 price or not-to-exceed price design-build or construction management basis and shall otherwise be in  
227 compliance with the provisions of this section, § 2.2-4308, and other applicable law governing  
228 design-build or construction management contracts for public bodies other than the Commonwealth. The  
229 procedures of the local governing body shall be consistent with the two-step competitive negotiation  
230 process established in § 2.2-4301; or

231 4. As otherwise provided in § 2.2-4308.

232 E. Upon a determination in writing that there is only one source practicably available for that which  
233 is to be procured, a contract may be negotiated and awarded to that source without competitive sealed  
234 bidding or competitive negotiation. The writing shall document the basis for this determination. The  
235 public body shall issue a written notice stating that only one source was determined to be practicably  
236 available, and identifying that which is being procured, the contractor selected, and the date on which  
237 the contract was or will be awarded. This notice shall be posted on the Department of General Services'  
238 central electronic procurement website or other appropriate websites, and in addition, public bodies may  
239 publish in a newspaper of general circulation on the day the public body awards or announces its  
240 decision to award the contract, whichever occurs first. Posting on the Department of General Services'  
241 central electronic procurement website shall be required of any state all public body bodies. Local public  
242 bodies are encouraged to utilize the Department of General Services' central electronic procurement  
243 website to provide the public with centralized visibility and access to the Commonwealth's procurement

opportunities.

F. In case of emergency, a contract may be awarded without competitive sealed bidding or competitive negotiation; however, such procurement shall be made with such competition as is practicable under the circumstances. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file. The public body shall issue a written notice stating that the contract is being awarded on an emergency basis, and identifying that which is being procured, the contractor selected, and the date on which the contract was or will be awarded. This notice shall be posted on the Department of General Services' central electronic procurement website or other appropriate websites, and in addition, public bodies may publish in a newspaper of general circulation on the day the public body awards or announces its decision to award the contract, whichever occurs first, or as soon thereafter as is practicable. Posting on the Department of General Services' central electronic procurement website shall be required of any state ~~all~~ public body ~~bodies~~. Local public bodies are encouraged to utilize the Department of General Services' central electronic procurement website to provide the public with centralized visibility and access to the Commonwealth's procurement opportunities.

G. A public body may establish purchase procedures, if adopted in writing, not requiring competitive sealed bids or competitive negotiation for single or term contracts for goods and services other than professional services if the aggregate or the sum of all phases is not expected to exceed \$100,000; however, such small purchase procedures shall provide for competition wherever practicable. Purchases under this subsection that are expected to exceed \$30,000 shall require the (i) written informal solicitation of a minimum of four bidders or offerors and (ii) posting of a public notice on the Department of General Services' central electronic procurement website ~~or other appropriate websites~~. Posting on the Department of General Services' central electronic procurement website shall be required of any state public body. Local public bodies are encouraged to utilize the Department of General Services' central electronic procurement website to provide the public with centralized visibility and access to the Commonwealth's procurement opportunities.

H. A public body may establish purchase procedures, if adopted in writing, not requiring competitive negotiation for single or term contracts for professional services if the aggregate or the sum of all phases is not expected to exceed \$50,000; however such small purchase procedures shall provide for competition wherever practicable.

I. Upon a determination made in advance by a public body and set forth in writing that the purchase of goods, products or commodities from a public auction sale is in the best interests of the public, such items may be purchased at the auction, including online public auctions. Purchase of information technology and telecommunications goods and nonprofessional services from a public auction sale shall be permitted by any authority, department, agency, or institution of the Commonwealth if approved by the Chief Information Officer of the Commonwealth. The writing shall document the basis for this determination. However, bulk purchases of commodities used in road and highway construction and maintenance, and aggregates shall not be made by online public auctions.

J. The purchase of goods or nonprofessional services, but not construction or professional services, may be made by reverse auctioning. However, bulk purchases of commodities used in road and highway construction and maintenance, and aggregates shall not be made by reverse auctioning.

§ 56-573.1:1. Posting of conceptual proposals; public comment; public access to procurement records.

A. Conceptual proposals submitted in accordance with subsection A or B of § 56-560 to a responsible public entity shall be posted by the responsible public entity within 10 working days after acceptance of such proposals as follows:

1. For responsible public entities that are state agencies, authorities, departments, institutions, and other units of state government, posting shall be on the Department of General Services' central electronic procurement website; and

2. For responsible public entities that are local public bodies, posting shall be on the responsible public entity's website ~~or on the~~ Department of General Services' central electronic procurement website. In addition, such public bodies may publish in a newspaper of general circulation in the area in which the contract is to be performed a summary of the proposals and the location where copies of the proposals are available for public inspection. ~~Such local public bodies are encouraged to utilize the Department of General Services' central electronic procurement website to provide the public with centralized visibility and access to the Commonwealth's procurement opportunities.~~

In addition to the posting requirements, at least one copy of the proposals shall be made available for public inspection. Nothing in this section shall be construed to prohibit the posting of the conceptual proposals by additional means deemed appropriate by the responsible public entity so as to provide maximum notice to the public of the opportunity to inspect the proposals. Trade secrets, financial records, or other records of the private entity excluded from disclosure under the provisions of subdivision 11 of § 2.2-3705.6 shall not be required to be posted, except as otherwise agreed to by the

305 responsible public entity and the private entity.

306 B. In addition to the posting requirements of subsection A, for 30 days prior to entering into an  
307 interim or comprehensive agreement, a responsible public entity shall provide an opportunity for public  
308 comment on the proposals. The public comment period required by this subsection may include a public  
309 hearing in the sole discretion of the responsible public entity. After the end of the public comment  
310 period, no additional posting shall be required.

311 C. Once the negotiation phase for the development of an interim or a comprehensive agreement is  
312 complete and a decision to award has been made by a responsible public entity, the responsible public  
313 entity shall present the major business points of the interim or comprehensive agreement, including the  
314 use of any public funds, to its oversight board at a regularly scheduled meeting of the board that is open  
315 to the public.

316 D. Once an interim agreement or a comprehensive agreement has been entered into, a responsible  
317 public entity shall make procurement records available for public inspection, in accordance with the  
318 Virginia Freedom of Information Act (§ 2.2-3700 et seq.). For the purposes of this subsection,  
319 procurement records shall not be interpreted to include (i) trade secrets of the private entity as defined in  
320 the Uniform Trade Secrets Act (§ 59.1-336 et seq.) or (ii) financial records, including balance sheets or  
321 financial statements of the private entity that are not generally available to the public through regulatory  
322 disclosure or otherwise.

323 E. Cost estimates relating to a proposed procurement transaction prepared by or for a responsible  
324 public entity shall not be open to public inspection.

325 F. Any inspection of procurement transaction records under this section shall be subject to reasonable  
326 restrictions to ensure the security and integrity of the records.

327 G. The provisions of this section shall apply to accepted proposals regardless of whether the process  
328 of bargaining will result in an interim or a comprehensive agreement.

329 § 56-575.17. Posting of conceptual proposals; public comment; public access to procurement records.

330 A. Conceptual proposals submitted in accordance with subsection A or B of § 56-575.4 to a  
331 responsible public entity shall be posted by the responsible public entity within 10 working days after  
332 acceptance of such proposals as follows:

333 1. For responsible public entities that are state agencies, authorities, departments, institutions, and  
334 other units of state government, posting shall be on the Department of General Services' centralized  
335 electronic procurement website; and

336 2. For responsible public entities that are local bodies, posting shall be on the ~~responsible public~~  
337 ~~entity's website or on the~~ Department of General Services' central electronic procurement website. In  
338 addition, such public bodies may publish in a newspaper of general circulation in the area in which the  
339 contract is to be performed a summary of the proposals and the location where copies of the proposals  
340 are available for public inspection. ~~Such local public bodies are encouraged to utilize the Department of~~  
341 ~~General Services' central electronic procurement website to provide the public with centralized visibility~~  
342 ~~and access to the Commonwealth's procurement opportunities.~~

343 In addition to the posting requirements, at least one copy of the proposals shall be made available for  
344 public inspection. Nothing in this section shall be construed to prohibit the posting of the conceptual  
345 proposals by additional means deemed appropriate by the responsible public entity so as to provide  
346 maximum notice to the public of the opportunity to inspect the proposals. Trade secrets, financial  
347 records, or other records of the private entity excluded from disclosure under the provisions of  
348 subdivision 11 of § 2.2-3705.6 shall not be required to be posted, except as otherwise agreed to by the  
349 responsible public entity and the private entity.

350 B. The responsible public entity shall hold a public hearing on the proposals during the proposal  
351 review process, but not later than 30 days prior to entering into an interim or comprehensive agreement.

352 C. Once the negotiation phase for the development of an interim or a comprehensive agreement is  
353 complete, but before an interim agreement or a comprehensive agreement is entered into, a responsible  
354 public entity shall make available the proposed agreement in a manner provided in subsection A.

355 D. Once an interim agreement or a comprehensive agreement has been entered into, a responsible  
356 public entity shall make procurement records available for public inspection, upon request. For the  
357 purposes of this subsection, procurement records shall not be interpreted to include (i) trade secrets of  
358 the private entity as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.) or (ii) financial  
359 records, including balance sheets or financial statements of the private entity that are not generally  
360 available to the public through regulatory disclosure or otherwise.

361 E. Cost estimates relating to a proposed procurement transaction prepared by or for a responsible  
362 public entity shall not be open to public inspection.

363 F. Any inspection of procurement transaction records under this section shall be subject to reasonable  
364 restrictions to ensure the security and integrity of the records.

365 G. The provisions of this section shall apply to accepted proposals regardless of whether the process  
366 of bargaining will result in an interim or a comprehensive agreement.