

1 VIRGINIA ACTS OF ASSEMBLY — CHAPTER

2 *An Act to amend and reenact §§ 2.2-1111, 2.2-1118, 2.2-4301, and 2.2-4344, as it is currently effective*
 3 *and as it shall become effective, of the Code of Virginia, relating to the Virginia Public Procurement*
 4 *Act; definition of employment services organization.*

5 [H 1222]

6 Approved

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

8 **1. That §§ 2.2-1111, 2.2-1118, 2.2-4301, and 2.2-4344, as it is currently effective and as it shall**
 9 **become effective, of the Code of Virginia are amended and reenacted as follows:**

10 § 2.2-1111. Purchases to be made in accordance with the Virginia Public Procurement Act
 11 (§ 2.2-4300 et seq.) and regulations of Division; exempt purchases.

12 A. All purchases made by any department, division, officer or agency of the Commonwealth shall be
 13 made in accordance with the Virginia Public Procurement Act (§ 2.2-4300 et seq.) and such regulations
 14 as the Division may prescribe.

15 B. The regulations adopted by the Division shall:

16 1. Include a purchasing plan that shall be on file at the Division and shall be available to the public
 17 upon request;

18 2. Require that before any public body procures any computer system, equipment or software, it shall
 19 consider whether the proposed system, equipment or software is capable of producing products that
 20 facilitate the rights of the public to access official records under the Freedom of Information Act
 21 (§ 2.2-3700 et seq.) or other applicable law;

22 3. Require state public bodies to procure only shielded outdoor light fixtures and provide for waivers
 23 of this requirement when the Division determines that a bona fide operational, temporary, safety or
 24 specific aesthetic need is indicated or that such fixtures are not cost effective over the life cycle of the
 25 fixtures. For the purposes of this subdivision, "shielded outdoor light fixture" means an outdoor light
 26 fixture that is (i) fully shielded so that no light rays are emitted by the installed fixture above the
 27 horizontal plane or (ii) constructed so that no more than two percent of the total luminaire lumens in the
 28 zone of 90 to 180 degrees vertical angle is permitted, if the related output of the luminaire is greater
 29 than 3200 lumens. In adopting regulations under this subdivision, the Division shall consider national
 30 standards for outdoor lighting as adopted by the Illuminating Engineering Society of North America
 31 (IESNA).

32 For any project initiated on or after July 1, 2003, the Virginia Department of Transportation shall
 33 design all lighting systems in accordance with current IESNA standards and recommended practices. The
 34 lighting system shall utilize fixtures that minimize glare, light trespass, and skyglow, all as defined by
 35 the IESNA, while still providing a comfortable, visually effective, safe, and secure outdoor environment
 36 in a cost-effective manner over the life cycle of the lighting system;

37 4. Establish the conditions under which a public body may use, as a basis for the procurement of
 38 goods and nonprofessional services, a particular vendor's contract-pricing that has been negotiated and
 39 accepted by the U.S. General Services Administration;

40 5. Establish procurement preferences for products containing recycled oil (including reprocessed and
 41 rerefined oil products) and recycled antifreeze no later than December 31, 2002;

42 6. Establish conditions under which a public body shall demonstrate a good faith effort to ensure that
 43 state contracts or subcontracts for goods or services that involve the manual packaging of bulk supplies
 44 or the manual assemblage of goods where individual items weigh less than 50 pounds be offered to
 45 ~~nonprofit sheltered workshops or other nonprofit organizations~~ *employment services organizations as*
 46 *defined in § 2.2-4301 that offer transitional or supported employment services serving the handicapped*
 47 *individuals with disabilities;*

48 7. Require that on or before October 1, 2009, and every two years thereafter, the Director of the
 49 Department of General Services shall solicit from each state agency and public institution of higher
 50 education a list of procurements falling under the Department's authority that were competed with the
 51 private sector that appear on the Commonwealth Competition Council's commercial activities list and
 52 were, until that time, being performed by each state agency and public institution of higher education
 53 during the previous two years, and the outcome of that competition. The Director shall make the lists
 54 available to the public on the Department of General Services' website; and

55 8. Establish the conditions under which state public bodies may procure diesel fuel containing, at a
 56 minimum, two percent, by volume, biodiesel fuel or green diesel fuel, as defined in § 59.1-284.25, for

57 use in on-road internal combustion engines. The conditions shall take into consideration the availability
58 of such fuel and the variability in cost of biodiesel fuel with respect to unblended diesel fuel.

59 C. The Division may make, alter, amend or repeal regulations relating to the purchase of materials,
60 supplies, equipment, nonprofessional services, and printing, and may specifically exempt purchases
61 below a stated amount or particular agencies or specified materials, equipment, nonprofessional services,
62 supplies and printing.

63 § 2.2-1118. Purchases from employment services organizations of Virginia serving individuals with
64 disabilities.

65 A. The Division shall publish annually a list of materials, supplies, services and equipment which, in
66 the opinion of the Division, would be beneficial to the Commonwealth to procure from a ~~sheltered~~
67 ~~workshop~~ *an employment services organization as defined in § 2.2-4301*. The list shall exclude items
68 currently produced by schools or workshops under the supervision of the Virginia Department for the
69 Blind and Vision Impaired or by inmates confined in state correctional institutions.

70 B. Any item or service included on the list required by subsection A may be purchased by the
71 Division from ~~nonprofit sheltered workshops~~ *employment services organizations serving the handicapped*
72 *individuals with disabilities* without competitive procurement, if the Division is satisfied that the items
73 and services (i) can be purchased within ten percent of their fair market value, (ii) will be of acceptable
74 quality, and (iii) can be produced in sufficient quantities within the time required.

75 C. Nothing in this section shall prohibit the Division from amending the list required under
76 subsection A by adding categories to the list after it has been published.

77 § 2.2-4301. Definitions.

78 As used in this chapter:

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

86 "Best value," as predetermined in the solicitation, means the overall combination of quality, price,
87 and various elements of required services that in total are optimal relative to a public body's needs.

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

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

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

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

105 3. a. Procurement of professional services. The public body shall engage in individual discussions
106 with two or more offerors deemed fully qualified, responsible and suitable on the basis of initial
107 responses and with emphasis on professional competence, to provide the required services. Repetitive
108 informal interviews shall be permissible. The offerors shall be encouraged to elaborate on their
109 qualifications and performance data or staff expertise pertinent to the proposed project, as well as
110 alternative concepts. In addition, offerors shall be informed of any ranking criteria that will be used by
111 the public body in addition to the review of the professional competence of the offeror. The Request for
112 Proposal shall not, however, request that offerors furnish estimates of man-hours or cost for services. At
113 the discussion stage, the public body may discuss nonbinding estimates of total project costs, including,
114 but not limited to, life-cycle costing, and where appropriate, nonbinding estimates of price for services.
115 Proprietary information from competing offerors shall not be disclosed to the public or to competitors.
116 At the conclusion of discussion, outlined in this subdivision, on the basis of evaluation factors published
117 in the Request for Proposal and all information developed in the selection process to this point, the

118 public body shall select in the order of preference two or more offerors whose professional qualifications
119 and proposed services are deemed most meritorious. Negotiations shall then be conducted, beginning
120 with the offeror ranked first. If a contract satisfactory and advantageous to the public body can be
121 negotiated at a price considered fair and reasonable, the award shall be made to that offeror. Otherwise,
122 negotiations with the offeror ranked first shall be formally terminated and negotiations conducted with
123 the offeror ranked second, and so on until such a contract can be negotiated at a fair and reasonable
124 price. Notwithstanding the foregoing, if the terms and conditions for multiple awards are included in the
125 Request for Proposal, a public body may award contracts to more than one offeror.

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

129 A contract for architectural or professional engineering services relating to construction projects may
130 be negotiated by a public body, for multiple projects provided (i) the projects require similar experience
131 and expertise, (ii) the nature of the projects is clearly identified in the Request for Proposal, and (iii) the
132 contract term is limited to one year or when the cumulative total project fees reach the maximum cost
133 authorized in this paragraph, whichever occurs first. For state public bodies, such contract, except those
134 awarded for environmental, location, design and inspection work regarding highways and bridges by the
135 Commissioner of Highways may be renewable for four additional one-year terms at the option of the
136 public body. For local public bodies, including metropolitan planning organizations or planning district
137 commissions, such contract may be renewable for four additional one-year terms at the option of the
138 public body. Under such contract, (a) the fair and reasonable prices, as negotiated, shall be used in
139 determining the cost of each project performed, (b) except those awarded for environmental, location,
140 design and inspection work regarding highways and bridges by the Commissioner of Highways, the sum
141 of all projects performed in one contract term shall not exceed \$500,000 or, in the case of a state
142 agency, as defined in § 2.2-4347, such greater amount as may be determined by the Director of the
143 Department of General Services, not to exceed \$1 million, except that in any locality or any authority,
144 sanitation district, metropolitan planning organization or planning district commission with a population
145 in excess of 80,000, the sum of all such projects shall not exceed \$5 million; and (c) except those
146 awarded for environmental, location, design and inspection work regarding highways and bridges by the
147 Commissioner of Highways or for architectural and engineering services for rail and public
148 transportation projects by the Director of the Department of Rail and Public Transportation, the project
149 fee of any single project shall not exceed \$100,000 or, in the case of a state agency, such greater
150 amount as may be determined by the Director of the Department of General Services not to exceed
151 \$200,000, except that in any locality or any authority or sanitation district with a population in excess of
152 80,000, such fee shall not exceed \$1 million. Any unused amounts from the first contract term shall not
153 be carried forward to the additional term. Competitive negotiations for such contracts may result in
154 awards to more than one offeror provided (1) the Request for Proposal so states and (2) the public body
155 has established procedures for distributing multiple projects among the selected contractors during the
156 contract term. Notwithstanding any other provision in this section, for contracts for environmental
157 location, design and inspection work regarding highways and bridges by the Commissioner of Highways,
158 the initial contract term shall be limited to two years or when the cumulative total project fees reach \$5
159 million, whichever occurs first. Such contract may be renewable for two additional one-year terms at the
160 option of the Commissioner, and the sum of all projects in each one-year term shall not exceed \$5
161 million. For architectural and engineering services for rail and public transportation projects by the
162 Director of the Department of Rail and Public Transportation, the sum of all projects in one contract
163 term shall not exceed \$2 million and such contract may be renewable for two additional one-year terms
164 at the option of the Commissioner.

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

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

178 b. Procurement of other than professional services. Selection shall be made of two or more offerors

179 deemed to be fully qualified and best suited among those submitting proposals, on the basis of the
180 factors involved in the Request for Proposal, including price if so stated in the Request for Proposal.
181 Negotiations shall then be conducted with each of the offerors so selected. Price shall be considered, but
182 need not be the sole determining factor. After negotiations have been conducted with each offeror so
183 selected, the public body shall select the offeror which, in its opinion, has made the best proposal, and
184 shall award the contract to that offeror. When the terms and conditions of multiple awards are so
185 provided in the Request for Proposal, awards may be made to more than one offeror. Should the public
186 body determine in writing and in its sole discretion that only one offeror is fully qualified, or that one
187 offeror is clearly more highly qualified than the others under consideration, a contract may be negotiated
188 and awarded to that offeror.

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

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

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

207 3. Public opening and announcement of all bids received.

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

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

214 "Construction" means building, altering, repairing, improving or demolishing any structure, building
215 or highway, and any draining, dredging, excavation, grading or similar work upon real property.

216 "Construction management contract" means a contract in which a party is retained by the owner to
217 coordinate and administer contracts for construction services for the benefit of the owner, and may also
218 include, if provided in the contract, the furnishing of construction services to the owner.

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

222 "*Employment services organization*" means an organization that provides employment services to
223 individuals with disabilities that is an approved Commission on the Accreditation of Rehabilitation
224 Facilities (CARF) accredited vendor of the Department of Rehabilitative Services.

225 "Goods" means all material, equipment, supplies, printing, and automated data processing hardware
226 and software.

227 "Informality" means a minor defect or variation of a bid or proposal from the exact requirements of
228 the Invitation to Bid, or the Request for Proposal, which does not affect the price, quality, quantity or
229 delivery schedule for the goods, services or construction being procured.

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

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

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

240 through competitive sealed bidding or competitive negotiation.

241 "Professional services" means work performed by an independent contractor within the scope of the
 242 practice of accounting, actuarial services, architecture, land surveying, landscape architecture, law,
 243 dentistry, medicine, optometry, pharmacy or professional engineering. "Professional services" shall also
 244 include the services of an economist procured by the State Corporation Commission.

245 "Public body" means any legislative, executive or judicial body, agency, office, department, authority,
 246 post, commission, committee, institution, board or political subdivision created by law to exercise some
 247 sovereign power or to perform some governmental duty, and empowered by law to undertake the
 248 activities described in this chapter. "Public body" shall include any metropolitan planning organization or
 249 planning district commission which operates exclusively within the Commonwealth of Virginia.

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

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

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

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

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

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

268 § 2.2-4344. (Effective until July 1, 2012) Exemptions from competition for certain transactions.

269 A. Any public body may enter into contracts without competition for:

270 1. The purchase of goods or services that are produced or performed by:

271 a. Persons, or in schools or workshops, under the supervision of the Virginia Department for the
 272 Blind and Vision Impaired; or

273 b. ~~Nonprofit sheltered workshops or other nonprofit organizations~~ *Employment services organizations*
 274 that offer transitional or supported employment services serving ~~the handicapped individuals with~~
 275 *disabilities*.

276 2. The purchase of legal services, provided that the pertinent provisions of Chapter 5 (§ 2.2-500 et
 277 seq.) of this title remain applicable, or expert witnesses or other services associated with litigation or
 278 regulatory proceedings.

279 B. An industrial development authority or regional industrial facility authority may enter into
 280 contracts without competition with respect to any item of cost of "authority facilities" or "facilities" as
 281 defined in § 15.2-4902 or "facility" as defined in § 15.2-6400.

282 C. A community development authority formed pursuant to Article 6 (§ 15.2-5152 et seq.) of Chapter
 283 51 of Title 15.2, with members selected pursuant to such article, may enter into contracts without
 284 competition with respect to the exercise of any of its powers permitted by § 15.2-5158. However, this
 285 exception shall not apply in cases where any public funds other than special assessments and
 286 incremental real property taxes levied pursuant to § 15.2-5158 are used as payment for such contract.

287 D. The Inspector General for Behavioral Health and Developmental Services may enter into contracts
 288 without competition to obtain the services of licensed health care professionals or other experts to assist
 289 in carrying out the duties of the Office of the Inspector General for Behavioral Health and
 290 Developmental Services.

291 § 2.2-4344. (Effective July 1, 2012) Exemptions from competition for certain transactions.

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 295 Blind and Vision Impaired; or

296 b. ~~Nonprofit sheltered workshops or other nonprofit organizations~~ *Employment services organizations*
 297 that offer transitional or supported employment services serving ~~the handicapped individuals with~~
 298 *disabilities*.

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 300 seq.) remain applicable, or expert witnesses or other services associated with litigation or regulatory

301 proceedings.

302 B. An industrial development authority or regional industrial facility authority may enter into
303 contracts without competition with respect to any item of cost of "authority facilities" or "facilities" as
304 defined in § 15.2-4902 or "facility" as defined in § 15.2-6400.

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306 51 of Title 15.2, with members selected pursuant to such article, may enter into contracts without
307 competition with respect to the exercise of any of its powers permitted by § 15.2-5158. However, this
308 exception shall not apply in cases where any public funds other than special assessments and
309 incremental real property taxes levied pursuant to § 15.2-5158 are used as payment for such contract.

310 D. The State Inspector General may enter into contracts without competition to obtain the services of
311 licensed health care professionals or other experts to assist in carrying out the duties of the Office of the
312 State Inspector General.