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HOUSE BILL NO. 1222

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee on General Laws on February 7, 2012)

(Patron Prior to Substitute—Delegate Hope)

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

Be it enacted by the General Assembly of Virginia:

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

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

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

B. The regulations adopted by the Division shall:

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

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

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

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

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

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

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

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

8. Establish the conditions under which state public bodies may procure diesel fuel containing, at a minimum, two percent, by volume, biodiesel fuel or green diesel fuel, as defined in § 59.1-284.25, for use in on-road internal combustion engines. The conditions shall take into consideration the availability

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60 of such fuel and the variability in cost of biodiesel fuel with respect to unblended diesel fuel.

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

65 § 2.2-1118. Purchases from employment services organizations of Virginia serving individuals with
66 disabilities.

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

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

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

79 § 2.2-4301. Definitions.

80 As used in this chapter:

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

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

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

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

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

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

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

122 with the offeror ranked first. If a contract satisfactory and advantageous to the public body can be
123 negotiated at a price considered fair and reasonable, the award shall be made to that offeror. Otherwise,
124 negotiations with the offeror ranked first shall be formally terminated and negotiations conducted with
125 the offeror ranked second, and so on until such a contract can be negotiated at a fair and reasonable
126 price. Notwithstanding the foregoing, if the terms and conditions for multiple awards are included in the
127 Request for Proposal, a public body may award contracts to more than one offeror.

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

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

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

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

180 b. Procurement of other than professional services. Selection shall be made of two or more offerors
181 deemed to be fully qualified and best suited among those submitting proposals, on the basis of the
182 factors involved in the Request for Proposal, including price if so stated in the Request for Proposal.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

243 "Professional services" means work performed by an independent contractor within the scope of the
244 practice of accounting, actuarial services, architecture, land surveying, landscape architecture, law,

245 dentistry, medicine, optometry, pharmacy or professional engineering. "Professional services" shall also
246 include the services of an economist procured by the State Corporation Commission.

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

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

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

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

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

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

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

270 § 2.2-4344. (Effective until July 1, 2012) Exemptions from competition for certain transactions.

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

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

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

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

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

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

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

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

293 § 2.2-4344. (Effective July 1, 2012) Exemptions from competition for certain transactions.

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

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

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

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

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

304 B. An industrial development authority or regional industrial facility authority may enter into
305 contracts without competition with respect to any item of cost of "authority facilities" or "facilities" as

306 defined in § 15.2-4902 or "facility" as defined in § 15.2-6400.

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

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