

VIRGINIA ACTS OF ASSEMBLY — CHAPTER

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An Act to amend and reenact §§ 2.2-2012, 2.2-3104.01, 2.2-3106, 2.2-3109, 2.2-4301, 2.2-4303, 2.2-4343, 2.2-4359, 11-34.3, 23-38.110, 30-105, 33.1-391.3, 56-573.1, and 56-575.16 of the Code of Virginia and to amend the Code of Virginia by adding in Article 2 of Chapter 43 of Title 2.2 sections numbered 2.2-4302.1 and 2.2-4302.2, relating to the Virginia Public Procurement Act; methods of procurement.

[H 2079]

Approved

Be it enacted by the General Assembly of Virginia:
1. That §§ 2.2-2012, 2.2-3104.01, 2.2-3106, 2.2-3109, 2.2-4301, 2.2-4303, 2.2-4343, 2.2-4359, 11-34.3, 23-38.110, 30-105, 33.1-391.3, 56-573.1, and 56-575.16 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding in Article 2 of Chapter 43 of Title 2.2 sections numbered 2.2-4302.1 and 2.2-4302.2 as follows:

§ 2.2-2012. Procurement of information technology and telecommunications goods and services; computer equipment to be based on performance-based specifications.

A. Information technology and telecommunications goods and services of every description shall be procured by (i) VITA for its own benefit or on behalf of other state agencies and institutions or (ii) such other agencies or institutions to the extent authorized by VITA. Such procurements shall be made in accordance with the Virginia Public Procurement Act (§ 2.2-4300 et seq.), regulations that implement the electronic and information technology accessibility standards of the Rehabilitation Act of 1973 (29 U.S.C. § 794d), as amended, and any regulations as may be prescribed by VITA. In no case shall such procurements exceed the requirements of the regulations that implement the electronic and information technology accessibility standards of the Rehabilitation Act of 1973, as amended.

The CIO shall disapprove any procurement that does not conform to the Commonwealth strategic plan for information technology developed and approved pursuant to § 2.2-2007 or to the individual strategic plans of state agencies or public institutions of higher education.

B. All statewide contracts and agreements made and entered into by VITA for the purchase of communications services, telecommunications facilities, and information technology goods and services shall provide for the inclusion of counties, cities, and towns in such contracts and agreements. Notwithstanding the provisions of § 2.2-4301, § 2.2-4302.1, or 2.2-4302.2, VITA may enter into multiple vendor contracts for the referenced services, facilities, and goods and services.

C. VITA may establish contracts for the purchase of personal computers and related devices by licensed teachers employed in a full-time teaching capacity in Virginia public schools or in state educational facilities for use outside the classroom. The computers and related devices shall not be purchased with public funds, but shall be paid for and owned by teachers individually provided that no more than one such computer and related device per year shall be so purchased.

D. If VITA, or any agency or institution authorized by VITA, elects to procure personal computers and related peripheral equipment pursuant to any type of blanket purchasing arrangement under which public bodies, as defined in § 2.2-4301, may purchase such goods from any vendor following competitive procurement but without the conduct of an individual procurement by or for the using agency or institution, it shall establish performance-based specifications for the selection of equipment. Establishment of such contracts shall emphasize performance criteria including price, quality, and delivery without regard to "brand name." All vendors meeting the Commonwealth's performance requirements shall be afforded the opportunity to compete for such contracts.

E. This section shall not be construed or applied so as to infringe upon, in any manner, the responsibilities for accounting systems assigned to the Comptroller under § 2.2-803.

§ 2.2-3104.01. Prohibited conduct; bids or proposals under the Virginia Public Procurement Act, Public-Private Transportation Act, and Public-Private Education Facilities and Infrastructure Act.

A. Neither the Governor, his political action committee, or the Governor's Secretaries, if the Secretary is responsible to the Governor for an executive branch agency with jurisdiction over the matters at issue, shall knowingly solicit or accept a contribution, gift, or other item with a value greater than \$50 from any bidder, offeror, or private entity, or from an officer or director of such bidder, offeror, or private entity, who has submitted a bid or proposal to an executive branch agency that is directly responsible to the Governor pursuant to the Virginia Public Procurement Act (§ 2.2-4300 et seq.), the Public-Private Transportation Act of 1995 (§ 56-556 et seq.), or the Public-Private Education

57 Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.) (i) during the period between the
 58 submission of the bid and the award of the public contract under the Virginia Public Procurement Act or
 59 (ii) following the submission of a proposal under the Public-Private Transportation Act of 1995 or the
 60 Public-Private Education Facilities and Infrastructure Act of 2002 until the execution of a comprehensive
 61 agreement thereunder.

62 B. The provisions of this section shall apply only for public contracts, proposals, or comprehensive
 63 agreements where the stated or expected value of the contract is \$5 million or more. The provisions of
 64 this section shall not apply to contracts awarded as the result of competitive sealed bidding as defined
 65 *set forth* in § ~~2.2-4301~~ 2.2-4302.1.

66 C. Any person who knowingly violates this section shall be subject to a civil penalty of \$500 or up
 67 to two times the amount of the contribution or gift, whichever is greater. The attorney for the
 68 Commonwealth shall initiate civil proceedings to enforce the civil penalties. Any civil penalties collected
 69 shall be payable to the State Treasurer for deposit to the general fund.

70 **§ 2.2-3106. Prohibited contracts by officers and employees of state government and Eastern**
 71 **Virginia Medical School.**

72 A. No officer or employee of any governmental agency of state government or Eastern Virginia
 73 Medical School shall have a personal interest in a contract with the governmental agency of which he is
 74 an officer or employee, other than his own contract of employment.

75 B. No officer or employee of any governmental agency of state government or Eastern Virginia
 76 Medical School shall have a personal interest in a contract with any other governmental agency of state
 77 government unless such contract is (i) awarded as a result of competitive sealed bidding or competitive
 78 negotiation as defined *set forth* in § ~~2.2-4301~~ 2.2-4302.1 or 2.2-4302.2 or (ii) is awarded after a finding,
 79 in writing, by the administrative head of the governmental agency that competitive bidding or
 80 negotiation is contrary to the best interest of the public.

81 C. The provisions of this section shall not apply to:

82 1. An employee's personal interest in additional contracts of employment with his own governmental
 83 agency that accrue to him because of a member of his immediate family, provided the employee does
 84 not exercise any control over the employment or the employment activities of the member of his
 85 immediate family and the employee is not in a position to influence those activities;

86 2. The personal interest of an officer or employee of a state institution of higher education or the
 87 Eastern Virginia Medical School in additional contracts of employment with his own governmental
 88 agency that accrue to him because of a member of his immediate family, provided (i) the officer or
 89 employee and the immediate family member are engaged in teaching, research or administrative support
 90 positions at the educational institution or the Eastern Virginia Medical School, (ii) the governing board
 91 of the educational institution finds that it is in the best interests of the institution or the Eastern Virginia
 92 Medical School and the Commonwealth for such dual employment to exist, and (iii) after such finding,
 93 the governing board of the educational institution or the Eastern Virginia Medical School ensures that
 94 the officer or employee, or the immediate family member, does not have sole authority to supervise,
 95 evaluate or make personnel decisions regarding the other;

96 3. An officer's or employee's personal interest in a contract of employment with any other
 97 governmental agency of state government;

98 4. Contracts for the sale by a governmental agency or the Eastern Virginia Medical School of
 99 services or goods at uniform prices available to the general public;

100 5. An employee's personal interest in a contract between a public institution of higher education in
 101 Virginia or the Eastern Virginia Medical School and a publisher or wholesaler of textbooks or other
 102 educational materials for students, which accrues to him solely because he has authored or otherwise
 103 created such textbooks or materials;

104 6. An employee's personal interest in a contract with his or her employing public institution of higher
 105 education to acquire the collections or scholarly works owned by the employee, including manuscripts,
 106 musical scores, poetry, paintings, books or other materials, writings, or papers of an academic, research,
 107 or cultural value to the institution, provided the president of the institution approves the acquisition of
 108 such collections or scholarly works as being in the best interests of the institution's public mission of
 109 service, research, or education;

110 7. Subject to approval by the board of visitors, an employee's personal interest in a contract between
 111 the Eastern Virginia Medical School or a public institution of higher education in Virginia that operates
 112 a school of medicine or dentistry and a not-for-profit nonstock corporation that operates a clinical
 113 practice within such public institution of higher education or the Eastern Virginia Medical School and of
 114 which such employee is a member or employee;

115 8. Subject to approval by the relevant board of visitors, an employee's personal interest in a contract
 116 for research and development or commercialization of intellectual property between a public institution
 117 of higher education in Virginia or the Eastern Virginia Medical School and a business in which the

118 employee has a personal interest, if (i) the employee's personal interest has been disclosed to and
 119 approved by such public institution of higher education or the Eastern Virginia Medical School prior to
 120 the time at which the contract is entered into; (ii) the employee promptly files a disclosure statement
 121 pursuant to § 2.2-3117 and thereafter files such statement annually on or before January 15; (iii) the
 122 institution has established a formal policy regarding such contracts, approved by the State Council of
 123 Higher Education or, in the case of the Eastern Virginia Medical School, a formal policy regarding such
 124 contracts in conformity with any applicable federal regulations that has been approved by its board of
 125 visitors; and (iv) no later than December 31 of each year, the institution or the Eastern Virginia Medical
 126 School files an annual report with the Secretary of the Commonwealth disclosing each open contract
 127 entered into subject to this provision, the names of the parties to each contract, the date each contract
 128 was executed and its term, the subject of each contractual arrangement, the nature of the conflict of
 129 interest, the institution's or the Eastern Virginia Medical School's employee responsible for administering
 130 each contract, the details of the institution's or the Eastern Virginia Medical School's commitment or
 131 investment of resources or finances for each contract, and any other information requested by the
 132 Secretary of the Commonwealth; or

133 9. Subject to approval by the relevant board of visitors, an employee's personal interest in a contract
 134 between a public institution of higher education in Virginia or the Eastern Virginia Medical School and
 135 a business in which the employee has a personal interest, if (i) the personal interest has been disclosed
 136 to the institution or the Eastern Virginia Medical School prior to the time the contract is entered into;
 137 (ii) the employee files a disclosure statement pursuant to § 2.2-3117 and thereafter annually on or before
 138 January 15; (iii) the employee does not participate in the institution's or the Eastern Virginia Medical
 139 School's decision to contract; (iv) the president of the institution or the Eastern Virginia Medical School
 140 finds and certifies in writing that the contract is for goods and services needed for quality patient care,
 141 including related medical education or research, by the institution's medical center or the Eastern
 142 Virginia Medical School, its affiliated teaching hospitals and other organizations necessary for the
 143 fulfillment of its mission, including the acquisition of drugs, therapies and medical technologies; and (v)
 144 no later than December 31 of each year, the institution or the Eastern Virginia Medical School files an
 145 annual report with the Secretary of the Commonwealth disclosing each open contract entered subject to
 146 this provision, the names of the parties to each contract, the date each contract was executed and its
 147 term, the subject of each contractual arrangement, the nature of the conflict of interest, the institution's
 148 or the Eastern Virginia Medical School's employee responsible for administering each contract, the
 149 details of the institution's or the Eastern Virginia Medical School's commitment or investment of
 150 resources or finances for each contract, and any other information requested by the Secretary of the
 151 Commonwealth.

152 D. Notwithstanding the provisions of subdivisions C 8 and C 9, if the research and development or
 153 commercialization of intellectual property or the employee's personal interest in a contract with a
 154 business is subject to policies and regulations governing conflicts of interest promulgated by any agency
 155 of the United States government, including the adoption of policies requiring the disclosure and
 156 management of such conflicts of interests, the policies established by the Eastern Virginia Medical
 157 School pursuant to such federal requirements shall constitute compliance with subdivisions C 8 and C 9,
 158 upon notification by the Eastern Virginia Medical School to the Secretary of the Commonwealth by
 159 January 31 of each year of evidence of their compliance with such federal policies and regulations.

160 E. The board of visitors may delegate the authority granted under subdivision C 8 to the president of
 161 the institution. If the board elects to delegate such authority, the board shall include this delegation of
 162 authority in the formal policy required by clause (iii) of subdivision C 8. In those instances where the
 163 board has delegated such authority, on or before December 1 of each year, the president of the relevant
 164 institution shall file a report with the relevant board of visitors disclosing each open contract entered
 165 into subject to this provision, the names of the parties to each contract, the date each contract was
 166 executed and its term, the subject of each contractual arrangement, the nature of the conflict of interest,
 167 the institution's or the Eastern Virginia Medical School's employee responsible for administering each
 168 contract, the details of the institution's or the Eastern Virginia Medical School's commitment or
 169 investment of resources or finances for each contract, the details of how revenues are to be dispersed,
 170 and any other information requested by the board of visitors.

171 **§ 2.2-3109. Prohibited contracts by other officers and employees of local governmental agencies.**

172 A. No other officer or employee of any governmental agency of local government shall have a
 173 personal interest in a contract with the agency of which he is an officer or employee other than his own
 174 contract of employment.

175 B. No officer or employee of any governmental agency of local government shall have a personal
 176 interest in a contract with any other governmental agency that is a component of the government of his
 177 county, city or town unless such contract is (i) awarded as a result of competitive sealed bidding or
 178 competitive negotiation as defined set forth in § ~~2.2-4301~~ 2.2-4302.1 or 2.2-4302.2 or is awarded as a

179 result of a procedure embodying competitive principles as authorized by subdivisions A 10 or A 11 of
 180 § 2.2-4343 or (ii) is awarded after a finding, in writing, by the administrative head of the governmental
 181 agency that competitive bidding or negotiation is contrary to the best interest of the public.

182 C. The provisions of this section shall not apply to:

183 1. An employee's personal interest in additional contracts for goods or services, or contracts of
 184 employment with his own governmental agency that accrue to him because of a member of his
 185 immediate family, provided the employee does not exercise any control over (i) the employment or the
 186 employment activities of the member of his immediate family and (ii) the employee is not in a position
 187 to influence those activities or the award of the contract for goods or services;

188 2. An officer's or employee's personal interest in a contract of employment with any other
 189 governmental agency that is a component part of the government of his county, city or town;

190 3. Contracts for the sale by a governmental agency of services or goods at uniform prices available
 191 to the general public;

192 4. Members of local governing bodies who are subject to § 2.2-3107;

193 5. Members of local school boards who are subject to § 2.2-3108; or

194 6. Any ownership or financial interest of members of the governing body, administrators, and other
 195 personnel serving in a public charter school in renovating, lending, granting, or leasing public charter
 196 school facilities, as the case may be, provided such interest has been disclosed in the public charter
 197 school application as required by § 22.1-212.8.

198 **§ 2.2-4301. Definitions.**

199 As used in this chapter:

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

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

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

211 "Competitive negotiation" is a *the* method of contractor selection that includes the following
 212 elements: *set forth in § 2.2-4302.2.*

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

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

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

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

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

251 A contract for architectural or professional engineering services relating to construction projects may
 252 be negotiated by a public body, for multiple projects provided (i) the projects require similar experience
 253 and expertise, (ii) the nature of the projects is clearly identified in the Request for Proposal, and (iii) the
 254 contract term is limited to one year or when the cumulative total project fees reach the maximum cost
 255 authorized in this paragraph, whichever occurs first. For state public bodies, such contract, except those
 256 awarded for environmental, location, design and inspection work regarding highways and bridges by the
 257 Commissioner of Highways may be renewable for four additional one-year terms at the option of the
 258 public body. For local public bodies, including metropolitan planning organizations or planning district
 259 commissions, such contract may be renewable for four additional one-year terms at the option of the
 260 public body. Under such contract, (a) the fair and reasonable prices, as negotiated, shall be used in
 261 determining the cost of each project performed, (b) except those awarded for environmental, location,
 262 design and inspection work regarding highways and bridges by the Commissioner of Highways, the sum
 263 of all projects performed in one contract term shall not exceed \$500,000 or, in the case of a state
 264 agency, as defined in § 2-2-4347, such greater amount as may be determined by the Director of the
 265 Department of General Services, not to exceed \$1 million, except that in any locality or any authority,
 266 sanitation district, metropolitan planning organization or planning district commission with a population
 267 in excess of 80,000, the sum of all such projects shall not exceed \$5 million; and (c) except those
 268 awarded for environmental, location, design and inspection work regarding highways and bridges by the
 269 Commissioner of Highways or for architectural and engineering services for rail and public
 270 transportation projects by the Director of the Department of Rail and Public Transportation, the project
 271 fee of any single project shall not exceed \$100,000 or, in the case of a state agency, such greater
 272 amount as may be determined by the Director of the Department of General Services not to exceed
 273 \$200,000, except that in any locality or any authority or sanitation district with a population in excess of
 274 80,000, such fee shall not exceed \$1 million. Any unused amounts from the first contract term shall not
 275 be carried forward to the additional term. Competitive negotiations for such contracts may result in
 276 awards to more than one offeror provided (1) the Request for Proposal so states and (2) the public body
 277 has established procedures for distributing multiple projects among the selected contractors during the
 278 contract term. Notwithstanding any other provision in this section, for contracts for environmental
 279 location, design and inspection work regarding highways and bridges by the Commissioner of Highways,
 280 the initial contract term shall be limited to two years or when the cumulative total project fees reach \$5
 281 million, whichever occurs first. Such contract may be renewable for two additional one-year terms at the
 282 option of the Commissioner, and the sum of all projects in each one-year term shall not exceed \$5
 283 million. For architectural and engineering services for rail and public transportation projects by the
 284 Director of the Department of Rail and Public Transportation, the sum of all projects in one contract
 285 term shall not exceed \$2 million and such contract may be renewable for two additional one-year terms
 286 at the option of the Commissioner.

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

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

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

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

311 "Competitive sealed bidding" is a *the* method of contractor selection, other than for professional
 312 services, which includes the following elements: *set forth in § 2.2-4302.1.*

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

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

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

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

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

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

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

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

344 "Employment services organization" means an organization that provides employment services to
 345 individuals with disabilities that is an approved Commission on the Accreditation of Rehabilitation
 346 Facilities (CARF) accredited vendor of the Department for Aging and Rehabilitative Services.

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

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

352 "*Job order contracting*" means a method of procuring construction services by establishing a book of
 353 unit prices and then obtaining a contractor to perform work as needed using the prices, quantities, and
 354 specifications in the book as the basis of its pricing. The contractor may be selected through either
 355 competitive sealed bidding or competitive negotiation depending on the needs of the public body
 356 procuring the construction services. A minimum amount of work may be specified in the contract. The
 357 contract term and the project amount shall not exceed the limitations specified in § 2.2-4302.2 or
 358 2.2-4303.

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

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

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

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

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

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

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

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

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

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

394 **§ 2.2-4302.1. Process for competitive sealed bidding.**

395 *The process for competitive sealed bidding shall include the following:*

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

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

412 *3. Public opening and announcement of all bids received;*

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

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

419 **§ 2.2-4302.2. Process for competitive negotiation.**

420 *A. The process for competitive negotiation shall include the following:*

421 *1. Issuance of a written Request for Proposal indicating in general terms that which is sought to be*
422 *procured, specifying the factors that will be used in evaluating the proposal and containing or*

423 incorporating by reference the other applicable contractual terms and conditions, including any unique
424 capabilities, specifications or qualifications that will be required;

425 2. Public notice of the Request for Proposal at least 10 days prior to the date set for receipt of
426 proposals by posting on the Department of General Services' central electronic procurement website or
427 other appropriate websites. Additionally, public bodies shall publish in a newspaper of general
428 circulation in the area in which the contract is to be performed so as to provide reasonable notice to
429 the maximum number of offerors that can be reasonably anticipated to submit proposals in response to
430 the particular request. Posting on the Department of General Services' central electronic procurement
431 website shall be required of any state public body. Local public bodies are encouraged to utilize the
432 Department of General Services' central electronic procurement website to provide the public with
433 centralized visibility and access to the Commonwealth's procurement opportunities. In addition,
434 proposals may be solicited directly from potential contractors. Any additional solicitations shall include
435 certified businesses selected from a list made available by the Department of Minority Business
436 Enterprise; and

437 3. For goods, nonprofessional services, and insurance, selection shall be made of two or more
438 offerors deemed to be fully qualified and best suited among those submitting proposals, on the basis of
439 the factors involved in the Request for Proposal, including price if so stated in the Request for
440 Proposal. Negotiations shall then be conducted with each of the offerors so selected. Price shall be
441 considered, but need not be the sole or primary determining factor. After negotiations have been
442 conducted with each offeror so selected, the public body shall select the offeror which, in its opinion,
443 has made the best proposal and provides the best value, and shall award the contract to that offeror.
444 When the terms and conditions of multiple awards are so provided in the Request for Proposal, awards
445 may be made to more than one offeror. Should the public body determine in writing and in its sole
446 discretion that only one offeror is fully qualified, or that one offeror is clearly more highly qualified
447 than the others under consideration, a contract may be negotiated and awarded to that offeror; or

448 4. For professional services, the public body shall engage in individual discussions with two or more
449 offerors deemed fully qualified, responsible and suitable on the basis of initial responses and with
450 emphasis on professional competence, to provide the required services. Repetitive informal interviews
451 shall be permissible. The offerors shall be encouraged to elaborate on their qualifications and
452 performance data or staff expertise pertinent to the proposed project, as well as alternative concepts. In
453 addition, offerors shall be informed of any ranking criteria that will be used by the public body in
454 addition to the review of the professional competence of the offeror. The Request for Proposal shall not,
455 however, request that offerors furnish estimates of man-hours or cost for services. At the discussion
456 stage, the public body may discuss nonbinding estimates of total project costs, including, but not limited
457 to, life-cycle costing, and where appropriate, nonbinding estimates of price for services. In accordance
458 with § 2.2-4342, proprietary information from competing offerors shall not be disclosed to the public or
459 to competitors. At the conclusion of discussion, outlined in this subdivision, on the basis of evaluation
460 factors published in the Request for Proposal and all information developed in the selection process to
461 this point, the public body shall select in the order of preference two or more offerors whose
462 professional qualifications and proposed services are deemed most meritorious.

463 Negotiations shall then be conducted, beginning with the offeror ranked first. If a contract
464 satisfactory and advantageous to the public body can be negotiated at a price considered fair and
465 reasonable, the award shall be made to that offeror. Otherwise, negotiations with the offeror ranked
466 first shall be formally terminated and negotiations conducted with the offeror ranked second, and so on
467 until such a contract can be negotiated at a fair and reasonable price.

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

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

473 B. For multiple projects, a contract for architectural or professional engineering services relating to
474 construction projects, or a contract for job order contracting, may be negotiated by a public body,
475 provided (i) the projects require similar experience and expertise, (ii) the nature of the projects is
476 clearly identified in the Request for Proposal, and (iii) the contract is limited to a one-year term or
477 when the cumulative total project fees reach the maximum cost authorized in this subsection, whichever
478 occurs first.

479 Such contracts may be renewable for four additional one-year terms at the option of the public body.
480 The fair and reasonable prices as negotiated shall be used in determining the cost of each project
481 performed and the sum of all projects performed in a one-year contract term shall not exceed \$500,000,
482 except that for:

483 1. A state agency, as defined in § 2.2-4347, the sum of all projects performed in a one-year contract

484 term shall not exceed \$1 million as may be determined by the Director of the Department of General
485 Services;

486 2. Any locality or any authority, sanitation district, metropolitan planning organization or planning
487 district commission with a population in excess of 80,000, the sum of all projects performed in a
488 one-year contract term shall not exceed \$5 million;

489 3. Architectural and engineering services for rail and public transportation projects by the Director
490 of the Department of Rail and Public Transportation, the sum of all projects in a one-year contract term
491 shall not exceed \$2 million. Such contract may be renewable for two additional one-year terms at the
492 option of the Director;

493 4. Environmental location, design and inspection work regarding highways and bridges by the
494 Commissioner of Highways, the initial contract term shall be limited to two years or when the
495 cumulative total project fees reach \$5 million, whichever occurs first. Such contract may be renewable
496 for two additional one-year terms at the option of the Commissioner, and the sum of all projects in each
497 one-year contract term shall not exceed \$5 million; and

498 5. Job order contracting, the sum of all projects performed in a one-year contract term shall not
499 exceed \$2 million.

500 Competitive negotiations for such contracts may result in awards to more than one offeror provided
501 (i) the Request for Proposal so states and (ii) the public body has established procedures for
502 distributing multiple projects among the selected contractors during the contract term.

503 C. For any single project, for (i) architectural or professional engineering services relating to
504 construction projects, or (ii) job order contracting, the project fee shall not exceed \$100,000, except that
505 for:

506 1. A state agency as defined in § 2.2-4347, the project fee shall not exceed \$200,000, as may be
507 determined by the Director of the Department of General Services;

508 2. Any locality or any authority or sanitation district with a population in excess of 80,000, the
509 project fee shall not exceed \$1 million; and

510 3. Job order contracting, the project fee shall not exceed \$400,000.

511 D. For the purposes of subsections B and C, any unused amounts from the first contract term shall
512 not be carried forward to the additional term.

513 E. Multiphase professional services contracts satisfactory and advantageous to the completion of
514 large, phased, or long term projects may be negotiated and awarded based on a fair and reasonable
515 price for the first phase only, where the completion of the earlier phases is necessary to provide
516 information critical to the negotiation of a fair and reasonable price for succeeding phases. Prior to the
517 entering into any such contract, the public body shall (i) state the anticipated intended total scope of the
518 project and (ii) determine in writing that the nature of the work is such that the best interests of the
519 public body require awarding the contract.

520 **§ 2.2-4303. Methods of procurement.**

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

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

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

529 Upon a written determination made in advance by (i) the Governor or his designee in the case of a
530 procurement by the Commonwealth or by a department, agency or institution thereof or (ii) the local
531 governing body in the case of a procurement by a political subdivision of the Commonwealth, that
532 competitive negotiation is either not practicable or not fiscally advantageous, insurance may be procured
533 through a licensed agent or broker selected in the manner provided for the procurement of things other
534 than professional services in subdivision 3 b of the definition of "competitive negotiation" in set forth in
535 § 2.2-4304 2.2-4302.2. The basis for this determination shall be documented in writing.

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

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

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

544 3. By any governing body of a locality with a population in excess of 100,000, provided that the

545 locality has the personnel, procedures, and expertise to enter into a contract for construction on a fixed
546 price or not-to-exceed price design-build or construction management basis and shall otherwise be in
547 compliance with the provisions of this section, § 2.2-4308, and other applicable law governing
548 design-build or construction management contracts for public bodies other than the Commonwealth. The
549 procedures of the local governing body shall be consistent with the two-step competitive negotiation
550 process established in § ~~2.2-4304~~ 2.2-4302.2; or

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

552 E. Upon a determination in writing that there is only one source practicably available for that which
553 is to be procured, a contract may be negotiated and awarded to that source without competitive sealed
554 bidding or competitive negotiation. The writing shall document the basis for this determination. The
555 public body shall issue a written notice stating that only one source was determined to be practicably
556 available, and identifying that which is being procured, the contractor selected, and the date on which
557 the contract was or will be awarded. This notice shall be posted on the Department of General Services'
558 central electronic procurement website or other appropriate websites, and in addition, public bodies may
559 publish in a newspaper of general circulation on the day the public body awards or announces its
560 decision to award the contract, whichever occurs first. Posting on the Department of General Services'
561 central electronic procurement website shall be required of any state public body. Local public bodies
562 are encouraged to utilize the Department of General Services' central electronic procurement website to
563 provide the public with centralized visibility and access to the Commonwealth's procurement
564 opportunities.

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

579 G. A public body may establish purchase procedures, if adopted in writing, not requiring competitive
580 sealed bids or competitive negotiation for single or term contracts for goods and services other than
581 professional services if the aggregate or the sum of all phases is not expected to exceed \$100,000;
582 however, such small purchase procedures shall provide for competition wherever practicable. For local
583 public bodies, such purchase procedures may allow for single or term contracts for professional services
584 without requiring competitive negotiation, provided the aggregate or the sum of all phases is not
585 expected to exceed \$60,000.

586 For state public bodies, purchases under this subsection that are expected to exceed \$30,000 shall
587 require the written informal solicitation of a minimum of four bidders or offerors. All public bodies
588 proceeding with purchases under this subsection shall post a public notice on the Department of General
589 Services' central electronic procurement website or other appropriate websites. Posting on the
590 Department of General Services' central electronic procurement website shall be required of any state
591 public body. Local public bodies are encouraged to utilize the Department of General Services' central
592 electronic procurement website to provide the public with centralized visibility and access to the
593 Commonwealth's procurement opportunities.

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

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

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

609 **§ 2.2-4343. Exemption from operation of chapter for certain transactions.**

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

611 1. The Virginia Port Authority in the exercise of any of its powers in accordance with Chapter 10
 612 (§ 62.1-128 et seq.) of Title 62.1, provided the Authority implements, by policy or regulation adopted by
 613 the Board of Commissioners and approved by the Department of General Services, procedures to ensure
 614 fairness and competitiveness in the procurement of goods and services and in the administration of its
 615 capital outlay program. This exemption shall be applicable only so long as such policies and procedures
 616 meeting the requirements remain in effect.

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

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

624 4. The Department of Social Services or local departments of social services for the acquisition of
 625 motor vehicles for sale or transfer to Temporary Assistance to Needy Families (TANF) recipients.

626 5. The College of William and Mary in Virginia, Virginia Commonwealth University, the University
 627 of Virginia, and Virginia Polytechnic Institute and State University in the selection of services related to
 628 the management and investment of their endowment funds, endowment income, gifts, all other
 629 nongeneral fund reserves and balances, or local funds of or held by the College or Universities pursuant
 630 to § 23-44.1, 23-50.10:01, 23-76.1, or 23-122.1. However, selection of these services shall be governed
 631 by the Uniform Prudent Management of Institutional Funds Act (§ 55-268.11 et seq.) as required by
 632 §§ 23-44.1, 23-50.10:01, 23-76.1, and 23-122.1.

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

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

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

644 9. Any town with a population of less than 3,500, except as stipulated in the provisions of
 645 §§ 2.2-4305, 2.2-4308, 2.2-4311, 2.2-4315, 2.2-4330, 2.2-4333 through 2.2-4338, 2.2-4343.1, and
 646 2.2-4367 through 2.2-4377.

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

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

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

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

665 12. Notwithstanding the exemptions set forth in subdivisions 9 through 11, the provisions of
 666 subsections C and D of § 2.2-4303, and §§ 2.2-4305, 2.2-4308, 2.2-4311, 2.2-4315, 2.2-4317, 2.2-4330,

2.2-4333 through 2.2-4338, 2.2-4343.1, and 2.2-4367 through 2.2-4377 shall apply to all counties, cities and school divisions, and to all towns having a population greater than 3,500 in the Commonwealth.

The method for procurement of professional services *through competitive negotiation* set forth in subdivision 3 a of § ~~2.2-4301~~ in the definition of *competitive negotiation subsection B of § 2.2-4302.2* shall also apply to all counties, cities and school divisions, and to all towns having a population greater than 3,500, where the cost of the professional service is expected to exceed \$60,000 in the aggregate or for the sum of all phases of a contract or project. A school board that makes purchases through its public school foundation or purchases educational technology through its educational technology foundation, either as may be established pursuant to § 22.1-212.2:2 shall be exempt from the provisions of this chapter, except, relative to such purchases, the school board shall comply with the provisions of §§ 2.2-4311 and 2.2-4367 through 2.2-4377.

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

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

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

16. The Eastern Virginia Medical School in the selection of services related to the management and investment of its endowment and other institutional funds. The selection of these services shall, however, be governed by the Uniform Prudent Management of Institutional Funds Act (§ 55-268.11 et seq.).

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

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

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

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

21. (Contingent expiration date, see note.) Procurement of any construction or planning and design services and contracts with or assigned to George Mason University by the corporation or other legal entity created by the board of visitors of George Mason University for the establishment and operation of the branch campus of George Mason University in the Republic of Korea, pursuant to § 23-91.29:1.

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

§ 2.2-4359. Determination of nonresponsibility.

A. Following public opening and announcement of bids received on an Invitation to Bid, the public body shall evaluate the bids in accordance with element 4 of the ~~definition of "Competitive process for competitive sealed bidding"~~ set forth in § ~~2.2-4301~~ 2.2-4302.1. At the same time, the public body shall determine whether the apparent low bidder is responsible. If the public body so determines, then it may proceed with an award in accordance with element 5 of the ~~definition of "Competitive process for competitive sealed bidding"~~ set forth in § ~~2.2-4301~~ 2.2-4302.1. If the public body determines that the apparent low bidder is not responsible, it shall proceed as follows:

1. Prior to the issuance of a written determination of nonresponsibility, the public body shall (i) notify the apparent low bidder in writing of the results of the evaluation, (ii) disclose the factual support for the determination, and (iii) allow the apparent low bidder an opportunity to inspect any documents

728 that relate to the determination, if so requested by the bidder within five business days after receipt of
729 the notice.

730 2. Within ten business days after receipt of the notice, the bidder may submit rebuttal information
731 challenging the evaluation. The public body shall issue its written determination of responsibility based
732 on all information in the possession of the public body, including any rebuttal information, within five
733 business days of the date the public body received the rebuttal information. At the same time, the public
734 body shall notify, with return receipt requested, the bidder in writing of its determination.

735 3. Such notice shall state the basis for the determination, which shall be final unless the bidder
736 appeals the decision within ten days after receipt of the notice by invoking administrative procedures
737 meeting the standards of § 2.2-4365, if available, or in the alternative by instituting legal action as
738 provided in § 2.2-4364.

739 The provisions of this subsection shall not apply to procurements involving the prequalification of
740 bidders and the rights of any potential bidders under such prequalification to appeal a decision that such
741 bidders are not responsible.

742 B. If, upon appeal pursuant to § 2.2-4364 or § 2.2-4365, it is determined that the decision of the
743 public body was not (i) an honest exercise of discretion, but rather was arbitrary or capricious or (ii) in
744 accordance with the Constitution of Virginia, applicable state law or regulation, or the terms or
745 conditions of the Invitation to Bid, and the award of the contract in question has not been made, the
746 sole relief shall be a finding that the bidder is a responsible bidder for the contract in question or
747 directed award as provided in subsection A of § 2.2-4364 or both.

748 If it is determined that the decision of the public body was not an honest exercise of discretion, but
749 rather was arbitrary or capricious or not in accordance with the Constitution of Virginia, applicable state
750 law or regulation, or the terms or conditions of the Invitation to Bid, and an award of the contract has
751 been made, the relief shall be as set forth in subsection B of § 2.2-4360.

752 C. A bidder contesting a determination that he is not a responsible bidder for a particular contract
753 shall proceed under this section, and may not protest the award or proposed award under the provisions
754 of § 2.2-4360.

755 D. Nothing contained in this section shall be construed to require a public body, when procuring by
756 competitive negotiation, to furnish a statement of the reasons why a particular proposal was not deemed
757 to be the most advantageous.

758 **§ 11-34.3. Energy Performance-Based Contract Procedures; required contract provisions.**

759 A. Any contracting entity may enter into an energy performance-based contract with an energy
760 performance contractor to significantly reduce energy costs to a level established by the public body or
761 operating costs of a facility through one or more energy conservation or operational efficiency measures.

762 B. The energy performance contractor shall be selected through competitive sealed bidding or
763 competitive negotiation as defined set forth in § ~~2.2-4301~~ 2.2-4302.1 or 2.2-4302.2. The evaluation of
764 the request for proposal shall analyze the estimates of all costs of installation, maintenance, repairs, debt
765 service, post installation project monitoring and reporting.

766 C. Before entering into a contract for energy conservation measures and facility technology
767 infrastructure upgrades and modernization measures, the contracting entity shall require the performance
768 contractor to provide a payment and performance bond relating to the installation of energy conservation
769 measures and facility technology infrastructure upgrades and modernization measures in the amount the
770 contracting entity finds reasonable and necessary to protect its interests.

771 D. Prior to the design and installation of the energy conservation measure, the contracting entity shall
772 obtain from the energy performance contractor a report disclosing all costs associated with the energy
773 conservation measure and providing an estimate of the amount of the energy cost savings. After
774 reviewing the report, the contracting entity may enter into an energy performance-based contract if it
775 finds (i) the amount the entity would spend on the energy conservation measures and facility and
776 technology infrastructure upgrades and modernization measures recommended in the report will not
777 exceed the amount to be saved in energy and operation costs more than 20 years from the date of
778 installation, based on life-cycle costing calculations, if the recommendations in the report were followed
779 and (ii) the energy performance contractor provides a written guarantee that the energy and operating
780 cost savings will meet or exceed the costs of the system. The contract may provide for payments over a
781 period of time not to exceed 20 years.

782 E. The term of any energy performance-based contract shall expire at the end of each fiscal year but
783 may be renewed annually up to 20 years, subject to the contracting entity making sufficient annual
784 appropriations based upon continued realized cost savings. Such contracts shall stipulate that the
785 agreement does not constitute a debt, liability, or obligation of the contracting entity, or a pledge of the
786 faith and credit of the contracting entity. Such contract may also provide capital contributions for the
787 purchase and installation of energy conservation and facility and technology infrastructure upgrades and
788 modernization measures that cannot be totally funded by the energy and operational savings.

789 F. An energy performance-based contract shall include the following provisions:

790 1. A guarantee by the energy performance contractor that annual energy and operational cost savings
791 will meet or exceed the amortized cost of energy conservation measures. The guaranteed energy savings
792 contract shall include a written guarantee of the qualified provider that either the energy or operational
793 cost savings, or both, will meet or exceed within 20 years the costs of the energy and operational
794 savings measures. The qualified provider shall reimburse the contracting entity for any shortfall of
795 guaranteed energy savings projected in the contract.

796 2. A requirement that the energy performance contractor to whom the contract is awarded provide a
797 100 percent performance guarantee bond to the contracting entity for the installation and faithful
798 performance of the installed energy savings measures as outlined in the contract document.

799 3. A requirement that the energy performance contractor provide to the contracting entity an annual
800 reconciliation of the guaranteed energy cost savings. The energy performance contractor shall be liable
801 for any annual savings shortfall that may occur.

802 G. The Department of Mines, Minerals and Energy (the Department) shall make a reasonable effort,
803 as long as workload permits, to:

804 1. Provide general advice, upon request, to local governments that wish to consider pursuit of an
805 energy performance-based contract pursuant to this section;

806 2. Annually compile a list of performance-based contracts entered into by local governments of
807 which the Department may become aware.

808 **§ 23-38.110. Procurement; discrimination prohibited; participation of small, women-owned, and**
809 **minority-owned business enterprises.**

810 A. Subject to the express provisions of the management agreement described in § 23-38.88, covered
811 institutions may be exempt from the provisions of the Virginia Public Procurement Act (§ 2.2-4300 et
812 seq.), except for § 2.2-4342 (which section shall not be construed to require compliance with the
813 prequalification application procedures of subsection B of § 2.2-4317); provided, however, that any
814 deviations from the Virginia Public Procurement Act approved in a Management Agreement shall be
815 uniform across all covered institutions; and provided further that the governing body of a covered
816 institution shall adopt, and the covered institution shall comply with, policies for the procurement of
817 goods and services, including professional services, that shall be based upon competitive principles and
818 shall in each instance seek competition to the maximum practical degree. The policies shall implement a
819 system of competitive negotiation for professional services pursuant to ~~subdivisions 1, 2, and 3 a of the~~
820 ~~defined term "competitive negotiation" under subsections A, B, and E of § 2.2-4301~~ 2.2-4302.2, shall
821 prohibit discrimination because of race, religion, color, sex or national origin of the bidder or offeror in
822 the solicitation or award of contracts, shall incorporate the prompt payment principles of §§ 2.2-4350
823 and 2.2-4354, and shall consider the impact on correctional enterprises under § 53.1-47.

824 B. Such policies may, among other things, (i) provide for consideration of the dollar amount of the
825 intended procurement, the term of the anticipated contract, and the likely extent of competition; (ii)
826 implement a prequalification procedure for contractors or products; and (iii) include provisions for
827 cooperative arrangements with other covered institutions, other public or private educational institutions,
828 other public or private organizations or entities, including public-private partnerships, public bodies,
829 charitable organizations, health care provider alliances or purchasing organizations or entities, state
830 agencies or institutions of the Commonwealth or the several states, the District of Columbia, the
831 territories and the United States, and any combination thereof. Nothing in this section shall preclude a
832 covered institution from requesting and utilizing, and covered institutions are hereby encouraged to
833 utilize, the assistance of the Virginia Information Technologies Agency in information technology
834 procurements.

835 C. In the solicitation and awarding of contracts, no covered institution shall discriminate against a
836 bidder or offeror because of race, religion, color, sex, national origin, age, disability, or any other basis
837 prohibited by state or federal law. The procurement policies of a covered institution shall provide that,
838 whenever solicitations are made seeking competitive procurement of goods or services, it shall be a
839 priority of the institution to provide for fair and reasonable consideration of small, women-owned, and
840 minority-owned businesses and to promote and encourage a diversity of suppliers. The institution shall
841 post on the Department of General Services' central electronic procurement website all Invitations to
842 Bid, Requests for Proposal, sole source award notices, and emergency award notices to ensure visibility
843 and access to the Commonwealth's procurement opportunities on one website.

844 D. As part of any procurement provisions of a management agreement, the governing board of a
845 covered institution shall identify the public, educational, and operational interests served by any
846 procurement rule or rules that deviate from those in the Virginia Public Procurement Act.

847 **§ 30-105. Prohibited contracts by legislators.**

848 A. No legislator shall have a personal interest in a contract with the legislative branch of state
849 government.

850 B. No legislator shall have a personal interest in a contract with any governmental agency of the
 851 executive or judicial branches of state government, other than in a contract of regular employment,
 852 unless such contract is awarded as a result of competitive sealed bidding or competitive negotiation as
 853 defined *set forth* in § ~~2.2-4301~~ 2.2-4302.1 or 2.2-4302.2.

854 C. No legislator shall have a personal interest in a contract with any governmental agency of local
 855 government, other than in a contract of regular employment, unless such contract is (i) awarded as a
 856 result of competitive sealed bidding or competitive negotiation as defined *set forth* in § ~~2.2-4301~~
 857 2.2-4302.1 or 2.2-4302.2 or is awarded as a result of a procedure embodying competitive principles as
 858 authorized by subdivision A 10 or A 11 of § 2.2-4343, or (ii) is awarded after a finding, in writing, by
 859 the administrative head of the local governmental agency that competitive bidding or negotiation is
 860 contrary to the best interest of the public.

861 D. The provisions of this section shall not apply to contracts for the sale by a governmental agency
 862 of services or goods at uniform prices available to the general public.

863 E. The provisions of this section shall not apply to a legislator's personal interest in a contract
 864 between a public institution of higher education in Virginia and a publisher or wholesaler of textbooks
 865 or other educational materials for students, which accrues to him solely because he has authored or
 866 otherwise created such textbooks or materials.

867 **§ 33.1-391.3. Powers and duties of the Director.**

868 Except such powers as are conferred by law upon the Commonwealth Transportation Board, or such
 869 services as are performed by the Department of Transportation pursuant to law, the Director of the
 870 Department of Rail and Public Transportation shall have the power to do all acts necessary or
 871 convenient for establishing, maintaining, improving, and promoting public transportation, transportation
 872 demand management, ridesharing, and passenger and freight rail transportation in the Commonwealth
 873 and to procure architectural and engineering services for rail and public transportation projects as
 874 specified in § ~~2.2-4301~~ 2.2-4302.2.

875 **§ 56-573.1. Procurement.**

876 The Virginia Public Procurement Act (§ 2.2-4300 et seq.) shall not apply to this chapter; however, a
 877 responsible public entity may enter into an interim or a comprehensive agreement only in accordance
 878 with guidelines adopted by it as follows:

879 1. A responsible public entity may enter into an interim or a comprehensive agreement in accordance
 880 with guidelines adopted by it that are consistent with procurement through "competitive sealed bidding"
 881 as defined *set forth* in § ~~2.2-4301~~ 2.2-4302.1 and subsection B of § 2.2-4310.

882 2. A responsible public entity may enter into an interim or a comprehensive agreement in accordance
 883 with guidelines adopted by it that are consistent with the procurement of "other than professional
 884 services" through competitive negotiation as defined *set forth* in § ~~2.2-4301~~ 2.2-4302.2 and subsection B
 885 of § 2.2-4310. Such responsible public entity shall not be required to select the proposal with the lowest
 886 price offer, but may consider price as one factor in evaluating the proposals received. Other factors that
 887 may be considered include (i) the proposed cost of the qualifying transportation facility; (ii) the general
 888 reputation, qualifications, industry experience, and financial capacity of the private entity; (iii) the
 889 proposed design, operation, and feasibility of the qualifying transportation facility; (iv) the eligibility of
 890 the facility for priority selection, review, and documentation timelines under the responsible public
 891 entity's guidelines; (v) local citizen and public entity comments; (vi) benefits to the public; (vii) the
 892 private entity's compliance with a minority business enterprise participation plan or good faith effort to
 893 comply with the goals of such plan; (viii) the private entity's plans to employ local contractors and
 894 residents; (ix) the safety record of the private entity; (x) the ability of the facility to address the needs
 895 identified in the appropriate state, regional or local transportation plan by improving safety, reducing
 896 congestion, increasing capacity, and/or enhancing economic efficiency; and (xi) other criteria that the
 897 responsible public entity deems appropriate.

898 A responsible public entity shall proceed in accordance with the guidelines adopted by it pursuant to
 899 subdivision 1 unless it determines that proceeding in accordance with the guidelines adopted by it
 900 pursuant to this subdivision is likely to be advantageous to the responsible public entity and the public,
 901 based on (i) the probable scope, complexity, or urgency of a project; (ii) risk sharing including
 902 guaranteed cost or completion guarantees, added value, or debt or equity investments proposed by the
 903 private entity; or (iii) an increase in funding, dedicated revenue source or other economic benefit that
 904 would not otherwise be available. When the responsible public entity determines to proceed according to
 905 the guidelines adopted by it pursuant to this subdivision, it shall state the reasons for its determination in
 906 writing. If a state agency is the responsible public entity, the approval of the Secretary of Transportation
 907 shall be required as more specifically set forth in the guidelines before the comprehensive agreement is
 908 signed.

909 3. Interim or comprehensive agreements for maintenance or asset management services for a
 910 transportation facility that is a highway, bridge, tunnel, or overpass, and any amendment or change order

911 thereto that increases the highway lane-miles receiving services under such an agreement, shall be
 912 procured in accordance with guidelines that are consistent with procurement through "competitive sealed
 913 bidding" as defined set forth in § ~~2.2-4304~~ 2.2-4302.1 and subsection B of § 2.2-4310. Furthermore,
 914 such contracts shall be of a size and scope to encourage maximum competition and participation by
 915 agency prequalified contractors and otherwise qualified contractors.

916 4. The provisions of subdivision 3 shall not apply to maintenance or asset management services
 917 agreed to as part of the initial provisions of any interim or comprehensive agreement entered into for the
 918 original construction, reconstruction, or improvement of any highway pursuant to Chapter 22 (§ 56-556
 919 et seq.) of Title 56 and shall not apply to any concession that, at a minimum, provides for (i) the
 920 construction, reconstruction, or improvement of any transportation facility or (ii) the operation and
 921 maintenance of any transportation facility with existing toll facilities.

922 5. Nothing in this section shall require that professional services be procured by any method other
 923 than competitive negotiation in accordance with the Virginia Public Procurement Act (§ 2.2-4300 et
 924 seq.).

925 **§ 56-575.16. Procurement.**

926 The Virginia Public Procurement Act (§ 2.2-4300 et seq.) and any interpretations, regulations, or
 927 guidelines of the Division of Engineering and Buildings of the Department of General Services or the
 928 Virginia Information Technologies Agency, including the Capital Outlay Manual and those
 929 interpretations, regulations or guidelines developed pursuant to §§ 2.2-1131, 2.2-1132, 2.2-1133,
 930 2.2-1149, and 2.2-1502, except those developed by the Division or the Virginia Information
 931 Technologies Agency in accordance with this chapter when the Commonwealth is the responsible public
 932 entity, shall not apply to this chapter. However, a responsible public entity may enter into a
 933 comprehensive agreement only in accordance with guidelines adopted by it as follows:

934 1. A responsible public entity may enter into a comprehensive agreement in accordance with
 935 guidelines adopted by it that are consistent with procurement through competitive sealed bidding as
 936 defined set forth in § ~~2.2-4304~~ 2.2-4302.1 and subsection B of § 2.2-4310.

937 2. A responsible public entity may enter into a comprehensive agreement in accordance with
 938 guidelines adopted by it that are consistent with the procurement of "other than professional services"
 939 through competitive negotiation as defined set forth in § ~~2.2-4304~~ 2.2-4302.2 and subsection B of
 940 § 2.2-4310. Such responsible public entity shall not be required to select the proposal with the lowest
 941 price offer, but may consider price as one factor in evaluating the proposals received. Other factors that
 942 may be considered include (i) the proposed cost of the qualifying facility; (ii) the general reputation,
 943 industry experience, and financial capacity of the private entity; (iii) the proposed design of the
 944 qualifying project; (iv) the eligibility of the facility for accelerated selection, review, and documentation
 945 timelines under the responsible public entity's guidelines; (v) local citizen and government comments;
 946 (vi) benefits to the public; (vii) the private entity's compliance with a minority business enterprise
 947 participation plan or good faith effort to comply with the goals of such plan; (viii) the private entity's
 948 plans to employ local contractors and residents; and (ix) other criteria that the responsible public entity
 949 deems appropriate.

950 A responsible public entity shall proceed in accordance with the guidelines adopted by it pursuant to
 951 subdivision 1 unless it determines that proceeding in accordance with the guidelines adopted by it
 952 pursuant to this subdivision is likely to be advantageous to the responsible public entity and the public,
 953 based on (i) the probable scope, complexity, or priority of the project; (ii) risk sharing including
 954 guaranteed cost or completion guarantees, added value or debt or equity investments proposed by the
 955 private entity; or (iii) an increase in funding, dedicated revenue source or other economic benefit that
 956 would not otherwise be available. When the responsible public entity determines to proceed according to
 957 the guidelines adopted by it pursuant to this subdivision, it shall state the reasons for its determination in
 958 writing. If a state agency is the responsible public entity, the approval of the responsible Governor's
 959 Secretary, or the Governor, shall be required before the responsible public entity may enter into a
 960 comprehensive agreement pursuant to this subdivision.

961 3. Nothing in this chapter shall authorize or require that a responsible public entity obtain
 962 professional services through any process except in accordance with guidelines adopted by it that are
 963 consistent with the procurement of "professional services" through competitive negotiation as defined set
 964 forth in § ~~2.2-4304~~ 2.2-4302.2 and subsection B of § 2.2-4310.

965 4. A responsible public entity shall not proceed to consider any request by a private entity for
 966 approval of a qualifying project until the responsible public entity has adopted and made publicly
 967 available guidelines pursuant to § 56-575.3:1 that are sufficient to enable the responsible public entity to
 968 comply with this chapter.

969 5. A responsible public entity that is a school board or a county, city, or town may enter into an
 970 interim or comprehensive agreement under this chapter only with the approval of the local governing
 971 body.

972 2. That the provisions of the first enactment of this act shall become effective on July 1, 2014.
973 3. That the Chairmen of the House Committee on General Laws and the Senate Committee on
974 General Laws and Technology shall convene a working group consisting of representatives of the
975 Department of General Services and the contracting community, local government procurement
976 officials, professional service contractors, and other interested parties to examine the provisions of
977 the Virginia Public Procurement Act (§ 2.2-4300 et seq.) of the Code of Virginia and report its
978 findings and recommendations for changes in the law, to the Chairmen of the House Committee
979 on General Laws and the Senate Committee on General Laws and Technology on or before
980 December 1, 2013.

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