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HOUSE BILL NO. 888

Offered January 13, 2016

Prefiled January 12, 2016

A BILL to amend and reenact §§ 2.2-4302, 2.2-4306, 2.2-4307, 2.2-4308, and 23-38.88 of the Code of Virginia, to amend the Code of Virginia by adding a section numbered 2.2-4308.01, and to repeal the fourth and fifth enactments of Chapters 760 and 776 of the Acts of Assembly of 2015, relating to public procurement; construction management contracts.

Patron—Albo

Referred to Committee on General Laws

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-4302, 2.2-4306, 2.2-4307, 2.2-4308, and 23-38.88 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 2.2-4308.01 as follows:

§ 2.2-4302. Implementation.

A. This chapter may be implemented by ordinances, resolutions or regulations consistent with this chapter and with the provisions of other applicable law promulgated by any public body empowered by law to undertake the activities described in this chapter. Any such public body may act by and through its duly designated or authorized officers or employees.

B. Any ordinance, resolution, or regulation established by a public body to implement this chapter shall comply with the provisions of § 2.2-4308.01 pertaining to the use of construction management.

§ 2.2-4306. Design-build or construction management contracts for Commonwealth authorized.

A. Notwithstanding any other provisions of law, the Commonwealth may enter into contracts on a fixed price design-build basis or construction management basis in accordance with the provisions of this section and §§ 2.2-1502 and 2.2-4308.01. Procedures to implement this section and any changes to such procedures shall be adopted by the Secretary of Administration after a public hearing and reviewed by the House Committee on Appropriations and the Senate Committee on Finance.

B. Procurement of construction by the design-build method shall be a two-step competitive negotiation process. In the first step, offerors shall be requested to submit their qualifications. Based upon the information submitted and any other relevant information which the Commonwealth may obtain, no more than five offerors deemed most suitable for the project shall be selected by the Commonwealth and requested to submit proposals.

C. Design-build contracts may be used by the Commonwealth only for those types of construction projects designated in the procedures adopted by the Secretary of Administration to implement this section.

§ 2.2-4307. Fixed-price or not-to-exceed-price design-build and construction management contracts for juvenile correctional facilities authorized.

Notwithstanding the provisions of § 2.2-4306, but subject to § 2.2-4308.01 and the procedures adopted by the Secretary of Administration to implement the provisions of ~~that section~~ §§ 2.2-4306 and 2.2-4308.01, the Commonwealth may enter into contracts for juvenile correctional facilities on a fixed-price or not-to-exceed-price design-build basis or construction management basis, including related leases, lease/purchase contracts, agreements relating to the sale of securities to finance such facilities, and similar financing agreements.

§ 2.2-4308. Design-build or construction management contracts for public bodies other than the Commonwealth; eligibility requirements; award of contract; records to be kept.

A. While the competitive sealed bid process remains the preferred method of construction procurement for public bodies in the Commonwealth, any public body other than the Commonwealth may enter into a contract for construction on a fixed price or not-to-exceed price design-build or construction management basis, provided *that* the public body complies with the requirements of this section and § 2.2-4308.01 and has implemented procedures consistent with the procedures adopted by the Secretary of Administration for utilizing design-build or construction management contracts.

Prior to making a determination as to the use of design-build or construction management for a specific construction project, the public body shall have in its employ or under contract a licensed architect or engineer with professional competence appropriate to the project who shall advise the public body regarding the use of design-build or construction management for that project and who shall assist the public body with the preparation of the Request for Proposal and the evaluation of such proposals.

Prior to issuing a Request for Proposal for any design-build or construction management contract for

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59 a specific construction project, the public body shall:

60 1. Have adopted, by ordinance or resolution, written procedures governing the selection, evaluation
61 and award of design-build and construction management contracts. Such procedures shall be consistent
62 with those described in this chapter for the procurement of nonprofessional services through competitive
63 negotiation. Such procedures shall also require Requests for Proposals to include and define the criteria
64 of such construction project in areas such as site plans; floor plans; exterior elevations; basic building
65 envelope materials; fire protection information plans; structural, mechanical (HVAC), and electrical
66 systems; and special telecommunications; and may define such other requirements as the public body
67 determines appropriate for that particular construction project. Such procedures for:

68 a. Design-build construction projects shall include a two-step competitive negotiation process
69 consistent with the standards established by the Division of Engineering and Buildings of the
70 Department of General Services for state agencies.

71 b. Construction management projects shall include selection procedures and required construction
72 management contract terms consistent with § 2.2-4308.01 and the procedures as adopted by the
73 Secretary of Administration.

74 2. Have documented in writing that for a specific construction project (i) a design-build or
75 construction management contract is more advantageous than a competitive sealed bid construction
76 contract; (ii) there is a benefit to the public body by using a design-build or construction management
77 contract; and (iii) competitive sealed bidding is not practical or fiscally advantageous.

78 B. The contract shall be awarded to the fully qualified offeror who submits an acceptable proposal
79 determined to be the best value in response to the Request for Proposal.

80 **§ 2.2-4308.01. Requirements for certain construction projects; use of construction management.**

81 A. For the purposes of this section, "public body" shall include (i) state agencies, (ii) public
82 institutions of higher education under the Restructured Higher Education Financial and Administrative
83 Operations Act of 2005 (§ 23-38.88 et seq.) and (iii) any local public body that has implemented the
84 provisions of this chapter pursuant to § 2.2-4302.

85 B. A public body may enter into a construction management contract for \$50 million or more,
86 provided such contracts involve projects that are (i) of substantial historical value or interest or (ii)
87 significantly unique or extremely complex in nature and provided that:

88 1. Combining multiple construction projects for the purpose of exceeding the \$50 million threshold
89 for construction management contracts is prohibited.

90 2. No construction management contract shall exceed 15 percent of the total schematic design for the
91 project.

92 3. In the selection of a contractor, the public body shall consider the contractor's experience and
93 quality of work on projects comparable to the project for which the construction management
94 solicitation is made. Specific construction management experience shall not be required. This subdivision
95 shall also apply to a prequalification as well as a contractor selection process.

96 4. When evaluating a proposal for a construction management contract, the public body shall not
97 assess a point value based on the location of the proposer's major business operations.

98 5. Price shall constitute at least 50 percent of the criteria for award.

99 6. The proposer shall include a plan for small, women-owned, and minority-owned business
100 participation in the project.

101 C. A state public body may request a waiver from the provisions of subsection B from the Director
102 of the Department of General Services. In the case of procurement by localities, a waiver may be
103 granted by the local governing body. A request for a waiver shall be made in writing and shall include
104 a copy of the small, women-owned, and minority-owned business plan for the project for which the
105 waiver is being requested. No waiver shall be granted by the Director or the local governing body
106 unless the project is (i) of substantial historical value or interest or (ii) significantly unique or extremely
107 complex in nature. Any waiver granted shall be on a per project basis and shall be in writing. The
108 determination regarding requests for waivers by state public bodies shall be made by the Director under
109 existing regulations and guidelines established by the Department of General Services.

110 **§ 23-38.88. Eligibility for restructured financial and administrative operational authority.**

111 A. Public institutions of higher education shall be eligible for the following restructured financial and
112 operational authority:

113 1. To dispose of their surplus materials at the location where the surplus materials are held and to
114 retain any proceeds from such disposal as provided in subdivision B 14 of § 2.2-1124;

115 2. To have the option, as provided in subsection C of § 2.2-1132 and pursuant to the conditions and
116 provisions under such subsection, to contract with a building official of the locality in which
117 construction is taking place and for such official to perform any inspection and certifications required for
118 the purpose of complying with the Uniform Statewide Building Code (§ 36-97 et seq.) pursuant to
119 subsection C of § 36-98.1;

120 3. For those public institutions of higher education that have in effect a signed memorandum of

understanding with the Secretary of Administration regarding participation in the nongeneral fund decentralization program as set forth in the appropriation act, as provided in subsection C of § 2.2-1132, to enter into contracts for specific construction projects without the preliminary review and approval of the Division of Engineering and Buildings of the Department of General Services, provided such institutions are in compliance with the requirements of the Virginia Public Procurement Act (§ 2.2-4300 et seq.) and utilize the general terms and conditions for those forms of procurement approved by the Division and the Office of the Attorney General;

4. To acquire easements as provided in subdivision 4 of § 2.2-1149;

5. To enter into an operating/income lease or capital lease pursuant to the conditions and provisions provided in subdivision 5 of § 2.2-1149;

6. To convey an easement pertaining to any property such institution owns or controls as provided in subsection C of § 2.2-1150;

7. In accordance with the conditions and provisions of subdivision C 2 of § 2.2-1153, to sell surplus real property valued at less than \$5 million, which is possessed and controlled by the institution;

8. For purposes of compliance with § 2.2-4310, to procure goods, services, and construction from a vendor that the institution has certified as a small, women-owned, and minority-owned business enterprise pursuant to the conditions and provisions provided in § 2.2-1609;

9. To be exempt from review of their budget request for information technology by the CIO as provided in subdivision A 4 of § 2.2-2007;

10. To be allowed to establish policies for the designation of administrative and professional faculty positions at the institution pursuant to the conditions and provisions provided in subsection E of § 2.2-2901;

11. To receive the financial benefits described under § 2.2-5005 pursuant to the conditions and provisions of such section;

12. To be exempt from reporting its purchases to the Secretary of Education, provided that all purchases, including sole source purchases, are placed through the Commonwealth's electronic procurement system using proper system codes for the methods of procurement;

13. To utilize as methods of procurement a fixed price, design-build or construction management contract ~~notwithstanding in compliance with~~ the provisions of §§ 2.2-4306 and 2.2-4308.01; and

14. The restructured financial and operational authority set forth in Article 2 (§ 23-38.90) and Article 3 (§ 23-38.91 et seq.).

No such authority shall be granted unless the institution meets the conditions set forth in this chapter.

B. The Board of Visitors of a public institution of higher education shall commit to the Governor and the General Assembly by August 1, 2005, through formal resolution adopted according to its own bylaws, to meeting the state goals specified below, and shall be responsible for ensuring that such goals are met, in addition to such other responsibilities as may be prescribed by law. Each such institution shall commit to the Governor and the General Assembly to:

1. Consistent with its institutional mission, provide access to higher education for all citizens throughout the Commonwealth, including underrepresented populations, and, consistent with subdivision 4 of § 23-9.6:1 and in accordance with anticipated demand analysis, meet enrollment projections and degree estimates as agreed upon with the State Council of Higher Education for Virginia. Each such institution shall bear a measure of responsibility for ensuring that the statewide demand for enrollment is met;

2. Consistent with § 23-38.87:17, ensure that higher education remains affordable, regardless of individual or family income, and through a periodic assessment, determine the impact of tuition and fee levels net of financial aid on applications, enrollment, and student indebtedness incurred for the payment of tuition and fees;

3. Offer a broad range of undergraduate and, where appropriate, graduate programs consistent with its mission and assess regularly the extent to which the institution's curricula and degree programs address the Commonwealth's need for sufficient graduates in particular shortage areas, including specific academic disciplines, professions, and geographic regions;

4. Ensure that the institution's academic programs and course offerings maintain high academic standards, by undertaking a continuous review and improvement of academic programs, course availability, faculty productivity, and other relevant factors;

5. Improve student retention such that students progress from initial enrollment to a timely graduation, and that the number of degrees conferred increases as enrollment increases;

6. Consistent with its institutional mission, develop articulation, dual admissions, and guaranteed admissions agreements with all Virginia community colleges and offer dual enrollment programs in cooperation with high schools;

7. Actively contribute to efforts to stimulate the economic development of the Commonwealth and the area in which the institution is located, and for those institutions subject to a management agreement

182 set forth in Article 3 (§ 23-38.91 et seq.), in areas that lag the Commonwealth in terms of income,
183 employment, and other factors;

184 8. Consistent with its institutional mission, increase the level of externally funded research conducted
185 at the institution and facilitate the transfer of technology from university research centers to private
186 sector companies;

187 9. Work actively and cooperatively with elementary and secondary school administrators, teachers,
188 and students in public schools and school divisions to improve student achievement, upgrade the
189 knowledge and skills of teachers, and strengthen leadership skills of school administrators;

190 10. Prepare a six-year financial plan consistent with § 23-38.87:17;

191 11. Conduct the institution's business affairs in a manner that maximizes operational efficiencies and
192 economies for the institution, contributes to maximum efficiencies and economies of state government as
193 a whole, and meets the financial and administrative management standards as specified by the Governor
194 pursuant to § 2.2-5004 and included in the appropriation act that is in effect, which shall include best
195 practices for electronic procurement and leveraged purchasing, information technology, real estate
196 portfolio management, and diversity of suppliers through fair and reasonable consideration of small,
197 women-owned, and minority-owned business enterprises; and

198 12. Seek to ensure the safety and security of the Commonwealth's students on college and university
199 campuses.

200 Upon making such commitments to the Governor and the General Assembly by August 1, 2005, the
201 public institution of higher education shall be allowed to exercise the restructured financial and
202 operational authority set forth in subdivisions A 1 through A 13, subject to such conditions as may be
203 provided under the enabling statutes granting the additional authority.

204 C. As provided in § 23-9.6:1.01, the State Council of Higher Education shall in consultation with the
205 respective chairmen of the House Committees on Education and Appropriations and the Senate
206 Committees on Finance and Education and Health or their designees, representatives of public
207 institutions of higher education, and such other state officials as may be designated by the Governor,
208 develop objective measures of educational-related performance and institutional performance benchmarks
209 for such objective measures. At a minimum, the State Council shall develop such objective measures
210 and institutional performance benchmarks for the goals and objectives set forth in subdivisions B 1
211 through B 10 and B 12. In addition, the Governor shall develop objective measures of financial and
212 administrative management performance and related institutional performance benchmarks for the goals
213 and objectives set forth in subdivision B 11.

214 As provided in subsection C of § 23-9.6:1.01, any public institution of higher education that has been
215 certified during the fiscal year by the State Council of Higher Education for Virginia as meeting the
216 institutional performance benchmarks in effect for the fiscal year as set forth in the general appropriation
217 act shall be provided the financial benefits under § 2.2-5005. Such benefits shall first be provided as
218 determined under such section. Objective criteria for measuring performance with regard to the state
219 goals and objectives developed pursuant to subsection B, and benefits or consequences for meeting or
220 not meeting those goals and objectives, shall be developed as provided in subdivision B 5 of
221 § 23-38.87:20.

222 D. 1. The restructured financial and operational authority set forth in Article 3 (§ 23-38.91 et seq.)
223 shall only be granted in accordance with the expressed terms of a management agreement between the
224 public institution of higher education and the Commonwealth.

225 No restructured financial or operational authority set forth in Article 3 (§ 23-38.91 et seq.) shall be
226 granted to a public institution of higher education unless such authority is expressly included in the
227 management agreement. In addition, the only implied authority that shall be granted from entering into a
228 management agreement is that implied authority that is actually necessary to carry out the expressed
229 grant of restructured financial or operational authority. As a matter of law, the initial presumption shall
230 be that any restructured financial or operational authority set forth in Article 3 (§ 23-38.91 et seq.) is not
231 included in the management agreement. These requirements shall also apply to any other provision
232 included in Article 3 (§ 23-38.91 et seq.).

233 2. No public institution of higher education shall enter into a management agreement unless:

234 a. (i) Its most current and unenhanced bond rating received from (a) Moody's Investors Service, Inc.,
235 (b) Standard & Poor's, Inc., or (c) Fitch Investor's Services, Inc. is at least AA- (i.e., AA minus) or its
236 equivalent, provided that such bond rating has been received within the last three years of the date that
237 the initial agreement is entered into or (ii) the institution has (a) participated in decentralization pilot
238 programs in the areas of finance and capital outlay, (b) demonstrated management competency in those
239 two areas as evidenced by a written certification from the Cabinet Secretary or Secretaries designated by
240 the Governor, (c) received additional operational authority under a memorandum of understanding
241 pursuant to § 23-38.90 in at least one functional area, and (d) demonstrated management competency in
242 that area for a period of at least two years. In submitting "The Budget Bill" for calendar year 2005
243 pursuant to subsection A of § 2.2-1509, the Governor shall include criteria for determining whether or

not an institution has demonstrated the management competency required by clause (ii);

b. An absolute two-thirds, or more, of the institution's governing body shall have voted in the affirmative for a resolution expressing the sense of the body that the institution is qualified to be, and should be, governed by the provisions of Article 3 (§ 23-38.91 et seq.), which resolution shall be included in the initial management agreement;

c. The institution agrees to reimburse the Commonwealth for any additional costs to the Commonwealth in providing health or other group insurance benefits to employees, and in undertaking any risk management program, that are attributable to the institution's exercise of any restructured financial or operational authority set forth in Article 3 (§ 23-38.91 et seq.). The institution's agreement to reimburse the Commonwealth for such additional costs shall be expressly included in each management agreement with the institution. The Secretary of Finance and the Secretary of Administration, in consultation with the Virginia Retirement System and the affected institutions, shall establish procedures for determining any amounts to be paid by each institution and a mechanism for transferring the appropriate amounts directly and solely to the programs whose costs have been affected.

In developing management agreements, public institutions of higher education shall give consideration to potential future impacts of tuition increases on the Virginia College Savings Plan (§ 23-38.75) and shall discuss such potential impacts with parties participating in development of such agreements. The chief executive officer of the Virginia College Savings Plan shall provide to the institution and such parties the Plan's assumptions underlying the contract pricing of the program; and

d. Before executing a management agreement with the Commonwealth that affects insurance or benefit programs administered by the Virginia Retirement System, the Governor shall transmit a draft of the relevant provisions to the Board of Trustees of the Virginia Retirement System, which shall review the relevant provisions in order to ensure compliance with the applicable provisions of Title 51.1, administrative policies and procedures and federal regulations governing retirement plans. The Board shall advise the Governor and appropriate Cabinet Secretaries of any conflicts.

3. Each initial management agreement with an institution shall remain in effect for a period of three years. Subsequent management agreements with the institution shall remain in effect for a period of five years.

If an existing agreement is not renewed or a new agreement executed prior to the expiration of the three-year or five-year term, as applicable, the existing agreement shall remain in effect on a provisional basis for a period not to exceed one year. If, after the expiration of the provisional one-year period, the management agreement has not been renewed or a new agreement executed, the institution shall no longer be granted any of the financial or operational authority set forth in Article 3 (§ 23-38.91 et seq.), unless and until such time as a new management agreement is entered into between the institution and the Commonwealth.

The Joint Legislative Audit and Review Commission, in cooperation with the Auditor of Public Accounts, shall conduct a review relating to the initial management agreement with each public institution of higher education. The review shall cover a period of at least the first 24 months from the effective date of the management agreement. The review shall include, but shall not be limited to, the degree of compliance with the expressed terms of the management agreement, the degree to which the institution has demonstrated its ability to manage successfully the administrative and financial operations of the institution without jeopardizing the financial integrity and stability of the institution, the degree to which the institution is meeting the objectives described in subsection B, and any related impact on students and employees of the institution from execution of the management agreement. The Joint Legislative Audit and Review Commission shall make a written report of its review no later than June 30 of the third year of the management agreement. The Joint Legislative Audit and Review Commission is authorized, but not required, to conduct a similar review of any management agreement entered into subsequent to the initial agreement.

4. The right and power by the Governor to void a management agreement shall be expressly included in each management agreement. The management agreement shall provide that if the Governor makes a written determination that a public institution of higher education that has entered into a management agreement with the Commonwealth is not in substantial compliance with the terms of the agreement or with the requirements of this chapter in general, (i) the Governor shall provide a copy of that written determination to the chairmen of the Board of Visitors or other governing body of the public institution of higher education and to the members of the General Assembly, and (ii) the institution shall develop and implement a plan of corrective action, satisfactory to the Governor, for purposes of coming into substantial compliance with the terms of the management agreement and with the requirements of this chapter, as soon as practicable, and shall provide a copy of such corrective action plan to the members of the General Assembly. If after a reasonable period of time after the corrective action plan has been implemented by the institution, the Governor determines that the institution is not yet in substantial compliance with the management agreement or the requirements of this chapter, the Governor may void

305 the management agreement. Upon the Governor voiding a management agreement, the affected public
306 institution of higher education shall not be allowed to exercise any restructured financial or operational
307 authority pursuant to the provisions of Article 3 (§ 23-38.91 et seq.) unless and until the institution
308 enters into a subsequent management agreement with the Secretary or Secretaries designated by the
309 Governor or the void management agreement is reinstated by the General Assembly.

310 5. A management agreement with a public institution of higher education shall not grant any of the
311 restructured financial or operational authority set forth in Article 3 (§ 23-38.91 et seq.) to the Virginia
312 Cooperative Extension and Agricultural Experiment Station, the University of Virginia College at Wise,
313 or the Virginia Institute of Marine Sciences or to an affiliated entity of the institution unless such intent,
314 as well as the degree of the restructured financial or operational authority to be granted, is expressly
315 included in the management agreement.

316 6. Following the execution of each management agreement with a public institution of higher
317 education and submission of that management agreement to the Chairmen of the House Committee on
318 Appropriations, the House Committee on Education, the Senate Committee on Finance, and the Senate
319 Committee on Education and Health pursuant to § 23-38.97, the Governor shall include a
320 recommendation for approval of the management agreement in "The Budget Bill" submitted pursuant to
321 subsection A of § 2.2-1509 or in his gubernatorial amendments submitted pursuant to subsection E of
322 § 2.2-1509 due by the December 20 that immediately follows the date of submission of the management
323 agreement to such Committees. Following the General Assembly's consideration of whether to approve
324 or disapprove the management agreement as recommended, if the management agreement is approved as
325 part of the general appropriation act, it shall become effective on the effective date of such general
326 appropriation act. However, no management agreement shall be entered into by a public institution of
327 higher education and the Secretary or Secretaries designated by the Governor after November 15 of a
328 calendar year.

329 E. A covered institution and the members of its governing body, officers, directors, employees, and
330 agents shall be entitled to the same sovereign immunity to which they would be entitled if the institution
331 were not governed by this chapter; provided further, that the Virginia Tort Claims Act (§ 8.01-195.1 et
332 seq.) and its limitations on recoveries shall remain applicable with respect to institutions governed by
333 this chapter.

334 **2. That the fourth and fifth enactments of Chapters 760 and 776 of the Acts of Assembly of 2015**
335 **are repealed.**