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**SENATE BILL NO. 311**

Offered January 13, 2016

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*A BILL to amend and reenact §§ 2.2-4303, 2.2-4305, 2.2-5005, 15.2-5102.1, and 15.2-6314.1 of the Code of Virginia, relating to the Virginia Public Procurement Act; use of best value contracting; construction and professional services.*

Patrons—McEachin, Favola, Locke, Miller and Saslaw; Delegates: Bagby, Carr, Cole, Heretick, Herring, Kory, Lindsey, McQuinn, Simon and Watts

Referred to Committee on General Laws and Technology

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

**1. That §§ 2.2-4303, 2.2-4305, 2.2-5005, 15.2-5102.1, and 15.2-6314.1 of the Code of Virginia are amended and reenacted as follows:**

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

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

B. Professional services shall be procured by competitive negotiation.

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

D. Construction may be procured only by competitive sealed bidding, except that competitive negotiation may be used in the following instances 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, which writing shall document the basis for this determination:

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

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

3. By any governing body of a locality with a population in excess of 100,000, provided that the locality has the personnel, procedures, and expertise to enter into a contract for construction on a fixed price or not-to-exceed price design-build or construction management basis and shall otherwise be in compliance with the provisions of this section, § 2.2-4308, and other applicable law governing design-build or construction management contracts for public bodies other than the Commonwealth. The procedures of the local governing body shall be consistent with the two-step competitive negotiation process established in § 2.2-4302.2; or

4. As otherwise provided in § 2.2-4308.

E. *In addition to the provisions of subsection D, any public body may procure construction on a best value procurement basis wherein price as a factor shall be weighted at least 51 percent. The Request for Proposal shall contain a notice to potential offerors that the procurement decision will be made on a best value procurement basis. The Request for Proposal shall describe (i) the criteria that will be considered in evaluating the proposals and (ii) the rating or weighting system that will be used in evaluating the proposals, including a disclosure that price will be weighted at least 51 percent as a factor.*

F. Upon a determination in writing that there is only one source practicably available for that which is to be procured, a contract may be negotiated and awarded to that source without competitive sealed bidding or competitive negotiation. The writing shall document the basis for this determination. The public body shall issue a written notice stating that only one source was determined to be practicably available, and identifying that which is being procured, the contractor selected, and the date on which the contract was or will be awarded. This notice shall be posted on the Department of General Services' central electronic procurement website or other appropriate websites, and in addition, public bodies may publish in a newspaper of general circulation on the day the public body awards or announces its decision to award the contract, whichever occurs first. Posting on the Department of General Services'

central electronic procurement website shall be required of any state public body. Local public bodies are encouraged to utilize the Department of General Services' central electronic procurement website to provide the public with centralized visibility and access to the Commonwealth's procurement opportunities.

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

G. H. A public body may establish purchase procedures, if adopted in writing, not requiring competitive sealed bids or competitive negotiation for single or term contracts for (i) goods and services other than professional services and (ii) non transportation-related construction, if the aggregate or the sum of all phases is not expected to exceed \$100,000; however, such small purchase procedures shall provide for competition wherever practicable. Such purchase procedures may allow for single or term contracts for professional services without requiring competitive negotiation, provided the aggregate or the sum of all phases is not expected to exceed \$60,000. Where small purchase procedures are adopted for construction, the procedures shall not waive compliance with the Uniform State Building Code.

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

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

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

**§ 2.2-4305. Competitive procurement by localities on state-aid projects.**

No contract for the construction of any building or for an addition to or improvement of an existing building by any local governing body or subdivision thereof for which state funds of not more than \$50,000 in the aggregate or for the sum of all phases of a contract or project either by appropriation, grant-in-aid or loan, are used or are to be used for all or part of the cost of construction shall be let except after competitive sealed bidding or after competitive negotiation as provided under subsection D of § 2.2-4303 or using best value contracting as provided under subsection E of § 2.2-4303. The procedure for the advertising for bids or for proposals and for letting of the contract shall conform, mutatis mutandis, to this chapter.

**§ 2.2-5005. Incentive performance benefits to certain public institutions of higher education.**

As used in this section, unless the context requires a different meaning:

"Fiscal year of implementation" means the first full fiscal year for which the financial and administrative management and educational-related performance benchmarks described under § 23-9.6:1.01 are effective, as provided in a general appropriation act.

Beginning with the fiscal year that immediately follows the fiscal year of implementation and for all fiscal years thereafter, each public institution of higher education that (i) has been certified during the fiscal year by the State Council of Higher Education of Virginia pursuant to § 23-9.6:1.01 as having met the institutional performance benchmarks for public institutions of higher education and (ii) meets

the conditions prescribed in subsection B of § 23-38.88, shall receive the following financial benefits:

1. Interest on the tuition and fees and other nongeneral fund Educational and General Revenues deposited into the State Treasury by the public institution of higher education, as provided in the appropriation act. Such interest shall be paid from the general fund and shall be an appropriate and equitable amount as determined and certified in writing by the Secretary of Finance to the Comptroller by the end of each fiscal year, or as soon thereafter as practicable;

2. Any unexpended appropriations of the public institution of higher education at the close of the fiscal year, which shall be reappropriated and allotted for expenditure by the institution in the immediately following fiscal year; and

3. A pro rata amount of the rebate due to the Commonwealth on credit card purchases of \$5,000 or less made during the fiscal year. The amount to be paid to each institution shall equal a pro rata share based upon its total transactions of \$5,000 or less using the credit card that is approved for use by all state agencies as compared to all transactions of \$5,000 or less using such card by all state agencies. The Comptroller shall determine the public institution's pro rata share and, as provided in the appropriation act, shall pay the institution by August 15, or as soon thereafter as practicable, of the fiscal year immediately following the year of certification.

The payment to an institution of its pro rata share under this subdivision shall also be applicable to other rebate or refund programs in effect that are similar to that of the credit card rebate program described in this subdivision. The Secretary of Finance shall identify such other rebate or refund programs and shall determine the pro rata share to be paid to the public institution of higher education.

4. A rebate of any transaction fees for the prior fiscal year paid for sole source procurements made by the institution in accordance with subsection E F of § 2.2-4303, for using a vendor who is not registered with the Department of General Service's web-based electronic procurement program commonly known as "eVA", as provided in the appropriation act. Such rebate shall be certified by the Department of General Services and paid to each public institution by August 15, or as soon thereafter as practicable, of the fiscal year immediately following the year of certification.

**§ 15.2-5102.1. (Contingent expiration date) Hampton Roads area refuse collection and disposal system authority.**

Any authority, or any subsidiary thereof, organized pursuant to § 15.2-5102 to operate a refuse collection and disposal system that has among its members the Cities of Norfolk, Virginia Beach, Portsmouth, Chesapeake, and Franklin, and the Counties of Isle of Wight, Southampton, and Suffolk, shall, notwithstanding any other law to the contrary, comply with the following requirements:

1. Each locality that is a member of the authority shall be entitled to nominate individuals to fill one position on the Board of Directors (the Board) by submitting a list of three potential directors, each of whom shall possess general business knowledge and shall not be an elected official, to the Governor. The Governor shall then select and appoint one director from each of the lists of nominees prepared by the member localities. In addition, each member locality shall be authorized to directly appoint, upon a majority vote of the governing body of the member locality, one ex officio member of the Board who shall be an employee of the member locality. The members of the Board shall be appointed for terms of four years each. Vacancies occurring other than by expiration of a term shall be filled for the unexpired term. Vacancies shall be filled in the same manner as the original appointments. No member shall serve for more than two consecutive four-year terms, except that any member appointed to the unexpired term of another shall be eligible to serve two consecutive four-year terms.

2. The authority shall develop and maintain an overall strategic plan that shall cover a period of at least five years forward from the year in which it is submitted and approved by the Board. The plans shall be reviewed annually to determine whether amendments are needed. Any such amendments shall be submitted to the board of directors for approval.

3. The authority's core purpose shall be defined as "management of the safe and environmentally sound disposal of regional waste." The authority shall devote its time and effort to activities associated with its core purpose. A vote of a majority of the Board shall be required prior to undertaking any activities not associated with the authority's core purpose.

4. The authority shall develop and maintain a strategic operating plan identifying all elements of its core business units and core purpose, how each business and administrative unit will support the overall strategic plan, and how the authority will achieve its stated mission and core purpose. The strategic operating plan shall be subject to review and approval of the Board on an annual basis.

5. The authority shall consider outsourcing any or all functions that may result in reduced costs to the authority, and the authority shall annually issue requests for proposals that potentially reduce the costs of any of its programs. In addition, the authority shall accept and review any proposals under the Public-Private Education Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.) that potentially reduce the costs of any of the authority's programs.

6. The authority shall evaluate its landfill capacity annually, taking into consideration and projecting

181 future changes in the quantity of waste disposed of in its landfill, or landfills reasonably situated or  
182 contractually obligated to accept its waste.

183 7. The authority shall keep records of its costs, revenue, debts, and capital expenses by fiscal year  
184 for each program. The authority shall also keep records of costs for each individual capital project.

185 8. The authority shall maintain a detailed financing plan that shall include a plan for the retirement  
186 of all debt and a plan for the funding of all planned capital projects. The plan for the funding of all  
187 planned capital projects shall specify the amount of debt the authority will issue in furtherance of the  
188 projects and the debt repayment plan for any new debt created by the capital projects, including the  
189 revenue source that will be used to repay the debt. The detailed financing plan shall be updated and  
190 approved annually by the Board and reviewed and certified annually by an external certified public  
191 accountant.

192 9. Prior to issuance of new debt, the Board shall perform a due diligence investigation of the  
193 appropriateness of issuing the debt, including an analysis of the costs of repaying the debt. Such analysis  
194 shall be certified by an external certified public accountant, reviewed by the Board, and approved by a  
195 vote of a minimum of 75 percent of the Board. The issuance of new debt shall require a vote of a  
196 minimum of 75 percent of the Board of Directors of the authority. The authority shall not issue  
197 long-term bond indebtedness to fund operational expenses. The provisions of this subdivision shall not  
198 apply to the issuance of new debt issued for the purpose of refunding or refinancing debt incurred by  
199 the authority prior to September 30, 2009.

200 10. In the interest of open and transparent government, the authority shall adhere strictly to the  
201 requirements of the Freedom of Information Act (§ 2.2-3700 et seq.).

202 11. The executive director of the authority shall not be permitted to execute or commit the authority  
203 to any contract, memorandum of agreement or memorandum of understanding without an informed vote  
204 of approval by the Board. This subdivision shall not apply in the case of (i) contracts for the purchase  
205 of goods and services for an aggregate sum of less than \$30,000, which are subject to the Virginia  
206 Procurement Act ( Va. Code § 2.2-4300 et seq.) but exempted from competitive negotiation or  
207 competitive sealed bidding by a duly adopted policy of the Board and (ii) sole source and emergency  
208 procurements made pursuant to subsections E and F and G of § 2.2-4303.

209 **§ 15.2-6314.1. Applicability of the Virginia Personnel Act and the Virginia Public Procurement**  
210 **Act.**

211 A. Employees of an authority created by a locality shall be exempt from the provisions of the  
212 Virginia Personnel Act (§ 2.2-2900 et seq.) if (i) the locality has personnel policies and procedures that  
213 are consistent with the goals, objectives, and policies of the Virginia Personnel Act; and (ii) such  
214 authority adopts the locality's personnel policies and procedures. In any event, personnel actions shall be  
215 taken without regard to race, sex, color, national origin, religion, age, handicap, or political affiliation.

216 B. Any authority created under this chapter shall be subject to the terms of the Virginia Public  
217 Procurement Act (§ 2.2-4300 et seq.). Notwithstanding the foregoing, should the United States  
218 Department of Defense place a federal area on a list of installations to be closed or realigned under the  
219 authority granted to the United States Department of Defense pursuant to the federal Defense Base  
220 Closure And Realignment Act of 1990 (United States Public Law 101-501, as amended through the  
221 National Defense Authorization Act of Fiscal Year 2003), and such federal area is subject to the  
222 jurisdiction of an authority created by a locality, such listing of that installation shall qualify as an  
223 "emergency" under subsection F G of § 2.2-4303 of the Virginia Public Procurement Act.