

17102128D

SENATE BILL NO. 1129

Offered January 11, 2017

Prefiled January 9, 2017

A BILL to amend and reenact §§ 2.2-4306, 2.2-4307, 2.2-4308, 2.2-4343, and 23.1-1002 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 2.2-4308.01, relating to Virginia Public Procurement Act; requirements for use of construction management contracts.

Patron—Ruff

Referred to Committee on General Laws and Technology

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-4306, 2.2-4307, 2.2-4308, 2.2-4343, and 23.1-1002 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:

§ 2.2-4306. 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 a specific construction project, the public body shall:

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

INTRODUCED

SB1129

59 determines appropriate for that particular construction project. Such procedures for:

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

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

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

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

72 **§ 2.2-4308.01. Requirements for use of construction management contracts.**

73 A. For the purposes of this section, "public body" shall include without limitation (i) public
74 institutions of higher education that have executed a valid management agreement under the
75 Restructured Higher Education Financial and Administrative Operations Act of 2005 (§ 23.1-1000 et
76 seq.) and (ii) any public body that has implemented the provisions of this chapter pursuant to
77 subdivisions A 9, 10, and 11 of § 2.2-4343.

78 B. While the competitive sealed bid process remains the preferred method of construction
79 procurement for public bodies in the Commonwealth, for projects with a total estimated contract value
80 expected to be \$40 million or more, any public body may use competitive negotiation to procure
81 construction on a construction management basis, provided that:

82 1. The public body makes a determination in advance and sets forth in writing that competitive
83 sealed bidding is neither practicable nor fiscally advantageous to the public, which writing shall
84 document the basis for the determination. Such written determination shall be included in the request for
85 qualifications;

86 2. The contract is entered into prior to the schematic phase of design, unless prohibited by
87 authorization of funding restrictions;

88 3. Prior alternative procurement method experience, including previous construction management
89 experience or previous Virginia Bureau of Capital Outlay Management contract work, shall not be
90 required as a prerequisite for award of a contract. However, in the selection of a contractor, the public
91 body may consider the experience of each contractor on comparable projects; and

92 4. Price is the critical basis for award of the contract.

93 C. While the competitive sealed bid process remains the preferred method of construction
94 procurement for public bodies in the Commonwealth, for projects with a total estimated contract value
95 expected to be less than \$40 million, any public body may use competitive negotiation to procure
96 construction on a construction management basis, provided that:

97 1. The requirements of subdivisions B 1 through 4 are satisfied;

98 2. The project is (i) of substantial historical value or interest or (ii) significantly unique or extremely
99 complex in nature; and

100 3. The project complies with the following requirements:

101 a. In the case of a local public body, prior to any solicitation for such project, the public body
102 notifies its local governing body in writing of its intent to procure construction on a construction
103 management basis and such local public body makes a written finding that the public body is in
104 compliance with the requirements of this section. The finding of the local governing body shall be made
105 on a per project basis;

106 b. In the case of a state public body that is not a public institution of higher education designated as
107 a Tier 3 procurement authority as of January 1, 2016, prior to any solicitation for such project the
108 public body notifies the Director of the Department of General Services of its intent to procure
109 construction on a construction management basis and the Director of the Department of General
110 Services makes a written finding that the state public body is in compliance with the requirements of
111 this section. The finding of the Director shall be made on a per project basis; and

112 c. In the case of a public institution of higher education designated as Tier 3 procurement authority
113 as of January 1, 2016, prior to any solicitation the contracting officer of the public institution of higher
114 education makes a written finding that the public institution of higher education is in compliance with
115 the requirements of this section. The finding of the contracting officer shall be made on a per project
116 basis and shall be in writing.

117 D. A public body shall be prohibited from combining multiple construction projects for the purpose
118 of exceeding the monetary threshold for proceeding under subsection B, unless the projects are
119 contiguous or directly related to each other. However, the board of visitors of a public institution of
120 higher education designated as Tier 3 procurement authority may issue a written waiver of the

prohibition provided by this subsection.

E. The public body shall make available to the public, after award, all prequalification score sheets, award score sheets, and selection information for each project covered by this section.

F. Any person may appeal a public body's determination to procure construction on a construction management basis. Such appeal shall be made in writing not more than 10 business days after the public posting for construction services. The appeal shall be submitted to the appropriate public body; however, in the case of a public institution of higher education designated as a Tier 3 procurement authority, the appeal shall be submitted to the institution's contracting officer. The public body shall conduct an internal review of the method of procurement selected and respond in writing no more than 10 business days after receipt of the appeal.

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

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

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

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

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

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

5. The College of William and Mary in Virginia, Virginia Commonwealth University, the University of Virginia, and Virginia Polytechnic Institute and State University in the selection of services related to the management and investment of their endowment funds, endowment income, gifts, all other nongeneral fund reserves and balances, or local funds of or held by the College or Universities pursuant to § 23.1-2210, 23.1-2306, 23.1-2604, or 23.1-2803. However, selection of these services shall be governed by the Uniform Prudent Management of Institutional Funds Act (§ 64.2-1100 et seq.) as required by §§ 23.1-2210, 23.1-2306, 23.1-2604, and 23.1-2803.

6. The Board of the Virginia College Savings Plan for the selection of services related to the operation and administration of the Plan, including, but not limited to, contracts or agreements for the management, purchase, or sale of authorized investments or actuarial, record keeping, or consulting services. However, such selection shall be governed by the standard set forth in § 23.1-706.

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

8. The purchase of goods and services by agencies of the legislative branch that may be specifically exempted therefrom by the Chairman of the Committee on Rules of either the House of Delegates or the Senate. Nor shall the contract review provisions of § 2.2-2012 apply to such procurements. The exemption shall be in writing and kept on file with the agency's disbursement records.

9. Any town with a population of less than 3,500, except as stipulated in the provisions of §§ 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 2.2-4367 through 2.2-4377.

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

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

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

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

186 12. Notwithstanding the exemptions set forth in subdivisions 9 through 11, the provisions of
187 subsections C and D of § 2.2-4303, and §§ 2.2-4305, 2.2-4308, 2.2-4308.01, 2.2-4311, 2.2-4315,
188 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
189 to all counties, cities and school divisions, and to all towns having a population greater than 3,500 in
190 the Commonwealth.

191 The method for procurement of professional services through competitive negotiation set forth in
192 §§ 2.2-4303.1 and 2.2-4303.2 shall also apply to all counties, cities and school divisions, and to all
193 towns having a population greater than 3,500, where the cost of the professional service is expected to
194 exceed \$60,000 in the aggregate or for the sum of all phases of a contract or project. A school board
195 that makes purchases through its public school foundation or purchases educational technology through
196 its educational technology foundation, either as may be established pursuant to § 22.1-212.2:2 shall be
197 exempt from the provisions of this chapter, except, relative to such purchases, the school board shall
198 comply with the provisions of §§ 2.2-4311 and 2.2-4367 through 2.2-4377.

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

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

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

214 16. The Eastern Virginia Medical School in the selection of services related to the management and
215 investment of its endowment and other institutional funds. The selection of these services shall, however,
216 be governed by the Uniform Prudent Management of Institutional Funds Act (§ 64.2-1100 et seq.).

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

218 18. The University of Virginia Medical Center to the extent provided by subdivision A 3 of
219 § 23.1-2213.

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

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

226 21. [Expired].

227 22. The purchase of Virginia-grown food products for use by a public body where the annual cost of
228 the product is not expected to exceed \$100,000.

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

237 **§ 23.1-1002. Eligibility for restructured financial and administrative operational authority and**
238 **financial benefits.**

239 A. The state goals for each public institution of higher education are to:

240 1. Consistent with its institutional mission, provide access to higher education for all citizens
241 throughout the Commonwealth, including underrepresented populations, and consistent with subdivision
242 4 of § 23.1-203 and in accordance with anticipated demand analysis, meet enrollment projections and
243 degree estimates as agreed upon with the Council. Each such institution shall bear a measure of

responsibility for ensuring that the statewide demand for enrollment is met;

2. Consistent with § 23.1-306, 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, mandatory fees, and other necessary charges;

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 so that students progress from initial enrollment to a timely graduation and the number of degrees conferred increases as enrollment increases;

6. Consistent with its institutional mission, develop articulation agreements that have uniform application to all comprehensive community colleges and meet appropriate general education and program requirements at the baccalaureate institution of higher education, provide additional opportunities for associate degree graduates to be admitted and enrolled, 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 pursuant to Article 4 (§ 23.1-1004 et seq.), in areas with below-state average income levels and employment rates;

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

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

10. Prepare a six-year financial plan consistent with § 23.1-306;

11. Conduct the institution's business affairs in a manner that (i) helps maximize the operational efficiencies and economies of the institution and the Commonwealth and (ii) meets all financial and administrative management standards pursuant to § 23.1-1001 specified by the Governor and included in the current general appropriation act, which shall include best practices for electronic procurement and leveraged purchasing, information technology, real estate portfolio management, and diversity of suppliers through fair and reasonable consideration of small, women-owned, and minority-owned business enterprises; and

12. Seek to ensure the safety and security of students on campus.

B. Each public institution of higher education that meets the state goals set forth in subsection A on or after August 1, 2005, may:

1. Dispose of its surplus materials at the location where the surplus materials are held and retain any proceeds from such disposal as provided in subdivision B 14 of § 2.2-1124;

2. As provided in and pursuant to the conditions in subsection C of § 2.2-1132, contract with a building official of the locality in which construction is taking place and for such official to perform any inspection and certifications required to comply with the Uniform Statewide Building Code (§ 36-97 et seq.) pursuant to subsection C of § 36-98.1;

3. For each public institution of higher education that has 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 general appropriation act, as provided in subsection C of § 2.2-1132, 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 that 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 of Engineering and Buildings and the Office of the Attorney General;

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

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

6. 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 in subdivision C 2 of § 2.2-1153, sell surplus real property that is possessed and controlled by the institution and valued at less than \$5 million;

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

9. Be exempt from review of its budget request for information technology by the CIO as provided in subdivision B 3 of § 2.2-2007.1;

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

11. 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; and

12. 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.

C. Each public institution of higher education that (i) has been certified during the fiscal year by the Council pursuant to § 23.1-206 as having met the institutional performance benchmarks for public institutions of higher education and (ii) meets the state goals set in subsection A 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 institution, as provided in the general 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 as practicable after the end of such fiscal year;

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

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 general appropriation act, shall pay the institution by August 15 of the fiscal year immediately following the year of certification or as soon as practicable after August 15 of such fiscal year. 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 institution; and

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 of § 2.2-4303 for using a vendor that is not registered with the Department of General Services' web-based electronic procurement program commonly known as "eVA," as provided in the general appropriation act. Such rebate shall be certified by the Department of General Services and paid to each public institution by August 15 of the fiscal year immediately following the year of certification or as soon as practicable after August 15 of such fiscal year.

2. That all state public bodies, including public institutions of higher education governed under Chapters 933 and 943 of the Acts of Assembly of 2006, Chapters 594 and 616 of the Acts of Assembly of 2008, and Chapters 675 and 685 of the Acts of Assembly of 2009 and such institutions operating on November 1 of each year, shall report, at a minimum, the following on completed capital projects beginning with those authorized for construction under Chapter 665 of the Acts of Assembly of 2015 to the Director of the Department of General Services: (i) the procurement method, (ii) the project budget, (iii) the actual project cost, (iv) the expedited timeline, (v) the actual time for completion, and (vi) any post-completion issues. The Department of General Services shall consolidate the data in each such report and submit the consolidated data no later than December 1 of each year to the Governor and the Chairmen of the House Committee on Appropriations and the Senate Committee on Finance.

3. That the Auditor of Public Accounts, as part of his annual audit plan, shall determine whether public institutions of higher education governed under Chapters 933 and 943 of the Acts of Assembly of 2006, Chapters 594 and 616 of the Acts of Assembly of 2008, and Chapters 675 and 685 of the Acts of Assembly of 2009, and those operating under a memorandum of understanding pursuant to § 23-38.90 of the Code of Virginia, have complied with their internal review process in the selection of procurement method for construction.

4. That all state public bodies, including public institutions of higher education governed under Chapters 933 and 943 of the Acts of Assembly of 2006, Chapters 594 and 616 of the Acts of Assembly of 2008, and Chapters 675 and 685 of the Acts of Assembly of 2009 and those operating under a memorandum of understanding pursuant to § 23-38.90 of the Code of Virginia, shall post

367 on the central electronic procurement website of the Department of General Services the approved
368 projects and approved procurement methods for construction at least 30 days prior to soliciting
369 for design services for such construction projects.

INTRODUCED

SB1129