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SENATE BILL NO. 1129

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on Finance
on February 2, 2017)

(Patron Prior to Substitute—Senator Ruff)

A BILL to amend and reenact §§ 2.2-4301, 2.2-4303, 2.2-4305, 2.2-4343, 2.2-4345, 23.1-1002, and 33.2-209 of the Code of Virginia; to amend the Code of Virginia by adding in Title 2.2 a chapter numbered 43.1, containing articles numbered 1 through 5, consisting of sections numbered 2.2-4378 through 2.2-4383; and to repeal §§ 2.2-4306, 2.2-4307, and 2.2-4308 of the Code of Virginia, relating to procurement by public bodies; requirements for use of construction management and design-build contracts.

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-4301, 2.2-4303, 2.2-4305, 2.2-4343, 2.2-4345, 23.1-1002, and 33.2-209 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding in Title 2.2 a chapter numbered 43.1, containing articles numbered 1 through 5, consisting of sections numbered 2.2-4378 through 2.2-4383, as follows:

§ 2.2-4301. Definitions.

As used in this chapter:

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

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

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

"Competitive negotiation" is the method of contractor selection set forth in § 2.2-4302.2.

"Competitive sealed bidding" is the method of contractor selection set forth in § 2.2-4302.1.

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

"Construction management contract" means a contract in which a party is retained by the owner to coordinate and administer contracts for construction services for the benefit of the owner, and may also include, if provided in the contract, the furnishing of construction services to the owner the same as that term is defined in § 2.2-4379.

"Design-build contract" means a contract between a public body and another party in which the party contracting with the public body agrees to both design and build the structure, roadway or other item specified in the contract the same as that term is defined in § 2.2-4379.

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

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

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

"Job order contracting" means a method of procuring construction by establishing a book of unit prices and then obtaining a contractor to perform work as needed using the prices, quantities, and specifications in the book as the basis of its pricing. The contractor may be selected through either competitive sealed bidding or competitive negotiation depending on the needs of the public body procuring the construction services. A minimum amount of work may be specified in the contract. The contract term and the project amount shall not exceed the limitations specified in § 2.2-4303 or 2.2-4303.2.

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

"Nonprofessional services" means any services not specifically identified as professional services in

60 the definition of professional services.

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

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

71 "Public body" means any legislative, executive or judicial body, agency, office, department, authority,
72 post, commission, committee, institution, board or political subdivision created by law to exercise some
73 sovereign power or to perform some governmental duty, and empowered by law to undertake the
74 activities described in this chapter. "Public body" shall include (i) any independent agency of the
75 Commonwealth, and (ii) any metropolitan planning organization or planning district commission which
76 operates exclusively within the Commonwealth of Virginia.

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

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

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

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

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

92 **§ 2.2-4303. Methods of procurement.**

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

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

97 C. *Goods, services other than professional services, and insurance may be procured by competitive*
98 *sealed bidding or competitive negotiation.*

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

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

110 1. ~~By the Commonwealth, its departments, agencies and institutions~~ *any public body* on a fixed price
111 design-build basis or construction management basis ~~under § 2.2-4306 as provided in Chapter 43.1~~
112 ~~(§ 2.2-4378 et seq.); or~~

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

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

4. As otherwise provided in § 2-2-4308.

E. 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. 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. 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:

1. Goods and services other than professional services and non-transportation-related construction, if the aggregate or the sum of all phases is not expected to exceed \$100,000; and

2. Transportation-related construction, if the aggregate or sum of all phases is not expected to exceed \$25,000.

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. 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. 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

183 \$50,000 in the aggregate or for the sum of all phases of a contract or project either by appropriation,
184 grant-in-aid or loan, are used or are to be used for all or part of the cost of construction shall be let
185 except after competitive sealed bidding or after competitive negotiation as provided under subsection D
186 of § 2.2-4303 or Chapter 43.1 (§ 2.2-4378 et seq.). The procedure for the advertising for bids or for
187 proposals and for letting of the contract shall conform, mutatis mutandis, to this chapter.

188 **§ 2.2-4343. Exemption from operation of chapter for certain transactions.**

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

190 1. The Virginia Port Authority in the exercise of any of its powers in accordance with Chapter 10
191 (§ 62.1-128 et seq.) of Title 62.1, provided the Authority implements, by policy or regulation adopted by
192 the Board of Commissioners, procedures to ensure fairness and competitiveness in the procurement of
193 goods and services and in the administration of its capital outlay program. This exemption shall be
194 applicable only so long as such policies and procedures meeting the requirements remain in effect.

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

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

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

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

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

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

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

222 9. Any town with a population of less than 3,500, except as stipulated in the provisions of
223 §§ 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
224 2.2-4367 through 2.2-4377, and Chapter 43.1 (§ 2.2-4378 et seq.).

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

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

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

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

243 12. Notwithstanding the exemptions set forth in subdivisions 9 through 11, the provisions of
244 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, and Chapter 43.1 (§ 2.2-4378 *et seq.*) 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 §§ 2.2-4303.1 and 2.2-4303.2 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 (§ 64.2-1100 *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 A 3 of § 23.1-2213.

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. [Expired].

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

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.

§ 2.2-4345. Exemptions from competitive sealed bidding and competitive negotiation for certain transactions; limitations.

A. The following public bodies may enter into contracts without competitive sealed bidding or competitive negotiation:

1. The Director of the Department of Medical Assistance Services for special services provided for eligible recipients pursuant to subsection H of § 32.1-325, provided that the Director has made a determination in advance after reasonable notice to the public and set forth in writing that competitive sealed bidding or competitive negotiation for such services is not fiscally advantageous to the public, or would constitute an imminent threat to the health or welfare of such recipients. The writing shall document the basis for this determination.

2. The State Health Commissioner for the compilation, storage, analysis, evaluation, and publication of certain data submitted by health care providers and for the development of a methodology to measure

the efficiency and productivity of health care providers pursuant to Chapter 7.2 (§ 32.1-276.2 et seq.) of Title 32.1, if the Commissioner has made a determination in advance, after reasonable notice to the public and set forth in writing, that competitive sealed bidding or competitive negotiation for such services is not fiscally advantageous to the public. The writing shall document the basis for this determination. Such agreements and contracts shall be based on competitive principles.

3. The Virginia Code Commission when procuring the services of a publisher, pursuant to §§ 30-146 and 30-148, to publish the Code of Virginia or the Virginia Administrative Code.

4. (Effective until July 1, 2018) The Department of Alcoholic Beverage Control for the purchase of alcoholic beverages.

4. (Effective July 1, 2018) The Virginia Alcoholic Beverage Control Authority for the purchase of alcoholic beverages.

5. The Department for Aging and Rehabilitative Services, for the administration of elder rights programs, with (i) nonprofit Virginia corporations granted tax-exempt status under § 501(c)(3) of the Internal Revenue Code with statewide experience in Virginia in conducting a state long-term care ombudsman program or (ii) designated area agencies on aging.

6. The Department of Health for (a) child restraint devices, pursuant to § 46.2-1097; (b) health care services with Virginia corporations granted tax-exempt status under § 501(c)(3) of the Internal Revenue Code and operating as clinics for the indigent and uninsured that are organized for the delivery of primary health care services in a community (i) as federally qualified health centers designated by the Health Care Financing Administration or (ii) at a reduced or sliding fee scale or without charge; or (c) contracts with laboratories providing cytology and related services if competitive sealed bidding and competitive negotiations are not fiscally advantageous to the public to provide quality control as prescribed in writing by the Commissioner of Health.

7. Virginia Correctional Enterprises, when procuring materials, supplies, or services for use in and support of its production facilities, provided the procurement is accomplished using procedures that ensure as efficient use of funds as practicable and, at a minimum, includes obtaining telephone quotations. Such procedures shall require documentation of the basis for awarding contracts under this section.

8. The Virginia Baseball Stadium Authority for the operation of any facilities developed under the provisions of Chapter 58 (§ 15.2-5800 et seq.) of Title 15.2, including contracts or agreements with respect to the sale of food, beverages and souvenirs at such facilities.

9. With the consent of the Governor, the Jamestown-Yorktown Foundation for the promotion of tourism through marketing with private entities provided a demonstrable cost savings, as reviewed by the Secretary of Education, can be realized by the Foundation and such agreements or contracts are based on competitive principles.

10. The Chesapeake Hospital Authority in the exercise of any power conferred under Chapter 271, as amended, of the Acts of Assembly of 1966, provided that it does not discriminate against any person on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, or disability in the procurement of goods and services.

11. Richmond Eye and Ear Hospital Authority, any authorities created under Chapter 53 (§ 15.2-5300 et seq.) of Title 15.2 and any hospital or health center commission created under Chapter 52 (§ 15.2-5200 et seq.) of Title 15.2 in the exercise of any power conferred under their respective authorizing legislation, provided that these entities shall not discriminate against any person on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, or disability in the procurement of goods and services.

12. The Patrick Hospital Authority sealed in the exercise of any power conferred under the Acts of Assembly of 2000, provided that it does not discriminate against any person on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, or disability in the procurement of goods and services.

13. Public bodies for insurance or electric utility services if purchased through an association of which it is a member if the association was formed and is maintained for the purpose of promoting the interest and welfare of and developing close relationships with similar public bodies, provided such association has procured the insurance or electric utility services by use of competitive principles and provided that the public body has made a determination in advance after reasonable notice to the public and set forth in writing that competitive sealed bidding and competitive negotiation are not fiscally advantageous to the public. The writing shall document the basis for this determination.

14. Public bodies administering public assistance and social services programs as defined in § 63.2-100, community services boards as defined in § 37.2-100, or any public body purchasing services under the Children's Services Act (§ 2.2-5200 et seq.) or the Virginia Juvenile Community Crime Control Act (§ 16.1-309.2 et seq.) for goods or personal services for direct use by the recipients of such programs if the procurement is made for an individual recipient. Contracts for the bulk procurement of goods or services for the use of recipients shall not be exempted from the requirements of § 2.2-4303.

15. The Eastern Virginia Medical School in the exercise of any power conferred pursuant to Chapter 471, as amended, of the Acts of Assembly of 1964.

B. No contract for the construction of any building or for an addition to or improvement of an existing building by any local government or subdivision of local government 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 of subsection D of § 2.2-4303 or Chapter 43.1 (§ 2.2-4378 *et seq.*). The procedure for the advertising for bids or for proposals and for letting of the contract shall conform, mutatis mutandis, to this chapter.

CHAPTER 43.1.

CONSTRUCTION MANAGEMENT AND DESIGN-BUILD CONTRACTING.

Article 1.

General Provisions.

§ 2.2-4378. Purpose; applicability.

A. The purpose of this chapter is to enunciate the public policies pertaining to governmental procurement of construction utilizing the construction management and design-build procurement methods. Notwithstanding any other provision 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 chapter and § 2.2-1502.

B. Except as provided in subsection C, this chapter shall apply regardless of the source of financing, whether it is general fund, nongeneral fund, federal trust fund, state debt, or institutional debt.

C. Projects for covered institutions that are to be funded wholly with institutional funds shall be exempt from the provisions of this chapter.

§ 2.2-4379. Definitions.

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

"Complex project" means a construction project that may include one or more of the following significant components: difficult site location, unique equipment, specialized building systems, multifaceted program, accelerated schedule, historic designation, or intricate phasing.

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

"Covered institution" means a public institution of higher education operating (i) subject to a management agreement set forth in Article 4 (§ 23.1-1004 *et seq.*) of Chapter 10 of Title 23.1, (ii) under a memorandum of understanding pursuant to § 23.1-1003, or (iii) under the pilot program authorized in the appropriation act.

"Department" means the Department of General Services.

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

"Public body" means the same as that term is defined in § 2.2-4301.

"State public body" means any authority, board, department, instrumentality, agency, or other unit of state government. "State public body" does not include any covered institution; any county, city, or town; or any local or regional governmental authority.

Article 2.

Procedures for State Public Bodies.

§ 2.2-4380. Design-build or construction management contracts for state public bodies authorized.

A. Any state public body may enter into a contract for construction on a fixed price or not-to-exceed price design-build or construction management basis, provided that such public body complies with the requirements of this article and the procedures adopted by the Secretary of Administration for utilizing design-build or construction management contracts.

B. Procedures adopted by a state public body pursuant to this article shall include the following requirements:

1. Construction management or design-build contracts may be utilized for projects where the estimated project cost is expected to be greater than \$25 million;

2. Construction management and design-build contracts may be used for projects where the estimated project cost is expected to be less than \$25 million, provided that the project is (i) a complex project and (ii) has been approved in writing by the Department after review of the written determination made by the state public body;

3. A written determination is made in advance by the state public body that competitive sealed bidding is not practical or fiscally advantageous, and such writing shall document the basis for the determination to utilize construction management or design-build. The determination shall be submitted

429 to the Department for approval. The determination shall be included in the Request for Qualifications
430 and maintained in the procurement file. The written determination of the Department shall also be
431 maintained in the procurement file.

432 Prior to making a determination as to the use of design-build or construction management for a
433 specific construction project, a state public body shall have in its employ or under contract a licensed
434 architect or engineer with professional competence appropriate to the project who shall (i) advise the
435 public body regarding the use of design-build or construction management for that project and (ii)
436 assist the public body with the preparation of the Request for Proposal and the evaluation of such
437 proposals;

438 4. Public notice of the Request for Qualifications is posted on the Department's central electronic
439 procurement website, known as eVA, at least 30 days prior to the date set for receipt of qualification
440 proposals;

441 5. For construction management contracts, the contract is entered into no later than the completion
442 of the schematic phase of design, unless prohibited by authorization of funding restrictions;

443 6. Prior construction management or design-build experience or previous experience with the
444 Department's Bureau of Capital Outlay Management shall not be required as a prerequisite for award
445 of a contract. However, in the selection of a contractor, a state public body may consider the experience
446 of each contractor on comparable projects;

447 7. Construction management contracts shall require that (i) no more than 10 percent of the
448 construction work, as measured by the cost of the work, be performed by the construction manager with
449 its own forces and (ii) the remaining 90 percent of the construction work, as measured by the cost of
450 the work, be performed by subcontractors of the construction manager, which the construction manager
451 shall procure by publicly advertised, competitive sealed bidding to the maximum extent practicable;

452 8. The procedures allow for a two-step competitive negotiation process; and

453 9. Price is a critical basis for award of the contract.

454 C. A Class A contractor may submit an appeal of a state public body's determination to procure
455 construction on a construction management or design-build basis when the estimated project cost is
456 expected to be less than \$25 million. Such appeal shall be made in writing within 10 days after the
457 public posting of the Request for Qualifications. The appeal shall be made to the Department. The state
458 public body shall conduct an internal review of the method of procurement selected and respond in
459 writing within 10 days of receipt of the appeal. The findings of fact by the state public body shall be
460 final and may not be disputed or subject to further appeal.

461 Article 3.

462 Procedures for Covered Institutions.

463 **§ 2.2-4381. Design-build or construction management contracts for covered institutions authorized.**

464 A. Any covered institution of may enter into a contract for construction on a fixed price or
465 not-to-exceed price design-build or construction management basis, provided that such institution
466 complies with the requirements of this article and with the procedures adopted by the Secretary of
467 Administration for utilizing design-build or construction management contracts.

468 B. Covered institutions shall:

469 1. Develop procedures for determining the selected procurement method which, at a minimum, shall
470 consider cost, schedule, complexity, and building use;

471 2. Submit such procedures, and any subsequent changes to adopted procedures, to the Department
472 for review and comment; and

473 3. Submit Department-reviewed procedures to its board of visitors for adoption.

474 C. Procedures adopted by a board of visitors pursuant to this article shall include the following
475 requirements:

476 1. Construction management and design-build contracts may be utilized for projects where the
477 estimated project cost is expected to be greater than \$25 million;

478 2. Construction management and design-build contracts may be used for projects where the
479 estimated project cost is expected to be less than \$25 million, provided that the project is (i) a complex
480 project and (ii) approved by the contracting officer for the institution pursuant to subdivision 3;

481 3. A written determination is made in advance by the contracting officer for the institution that
482 competitive sealed bidding is not practical or fiscally advantageous, and such writing shall document
483 the basis for the determination to utilize construction management or design-build. The determination
484 shall be included in the Request for Qualifications and be maintained in the procurement file.

485 Prior to making a determination as to the use of construction management or design-build for a
486 specific construction project, the institution shall have in its employ or under contract a licensed
487 architect or engineer with professional competence appropriate to the project who shall (i) advise the
488 institution regarding the use of construction management or design-build for that project and (ii) assist
489 the institution with the preparation of the Request for Proposal and the evaluation of such proposals;

490 5. Public notice of the Request for Qualifications is posted on the Department's central electronic

procurement website, known as eVA, at least 30 days prior to the date set for receipt of qualification proposals;

6. For construction management contracts, the contract is entered into no later than the completion of the schematic phase of design, unless prohibited by authorization of funding restrictions;

7. Prior construction management or design-build experience or previous experience with the Department's Bureau of Capital Outlay Management shall not be required as a prerequisite for award of a contract. However, in the selection of a contractor, the institution may consider the experience of each contractor on comparable projects;

8. Construction management contracts shall require that (i) no more than 10 percent of the construction work, as measured by cost of the work, be performed by the construction manager with its own forces and (ii) the remaining 90 percent of the construction work, as measured by cost of the work, be performed by subcontractors of the construction manager, which the construction manager shall procure by publicly advertised, competitive sealed bidding to the maximum extent practicable;

9. The procedures allow for a two-step competitive negotiation process; and

10. Price is a critical basis for award of the contract.

D. A Class A contractor may submit an appeal of an institution's determination to procure construction on a construction management or design-build basis when the estimated project cost is expected to be less than \$25 million. Such appeal shall be made in writing within 10 days after the public posting of the Request for Qualifications. The appeal shall be made to the contracting officer of the institution. The institution shall conduct an internal review of the method of procurement selected and respond in writing within 10 days of receipt of the appeal. The findings of fact by the institution shall be final and may not be disputed or subject to further appeal.

Article 4.

Procedures for Local Public Bodies.

§ 2.2-4382. Design-build or construction management contracts for local public bodies authorized.

A. Any local public body 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 local public body (i) complies with the requirements of this article and (ii) has by ordinance or resolution implemented procedures consistent with the procedures adopted by the Secretary of Administration for utilizing design-build or construction management contracts.

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

C. A written determination is made in advance by the local public body that competitive sealed bidding is not practical or fiscally advantageous, and such writing shall document the basis for the determination to utilize construction management or design-build. The determination shall be included in the Request for Qualifications and be maintained in the procurement file.

D. Procedures adopted by a local public body for construction management pursuant to this article shall include the following requirements:

1. Construction management and design-build contracts may be utilized for projects where the estimated project cost is expected to be greater than \$25 million;

2. Construction management may be used on projects with a project cost expected to be less than \$25 million, provided that (i) the project is a complex project and (ii) the project procurement method is approved by the local governing body;

3. Public notice of the Request for Qualifications is posted on the Department's central electronic procurement website, known as eVA, at least 30 days prior to the date set for receipt of qualification proposals;

4. The construction management contract is entered into no later than the completion of the schematic phase of design, unless prohibited by authorization of funding restrictions;

5. Prior construction management or design-build experience or previous experience with the Department's Bureau of Capital Outlay Management shall not be required as a prerequisite for award of a contract. However, in the selection of a contractor, the local public body may consider the experience of each contractor on comparable projects;

6. Construction management contracts shall require that (i) no more than 10 percent of the construction work, as measured by the cost of the work, be performed by the construction manager with its own forces and (ii) the remaining 90 percent of the construction work, as measured by the cost of the work, be performed by subcontractors of the construction manager, which the construction manager shall procure by publicly advertised, competitive sealed bidding to the maximum extent practicable;

7. The procedures allow for a two-step competitive negotiation process; and

8. Price is a critical basis for award of the contract.

E. A Class A contractor may submit an appeal of a local public body's determination to procure construction on a construction management basis when the estimated project cost is expected to be less than \$25 million. Such appeal shall be made in writing within 10 days after the public posting of the Request for Qualifications. The appeal shall be submitted to the chief executive officer of the local public body. The local public body shall conduct an internal review of the method of procurement selected and respond in writing within 10 days of receipt of the appeal. The findings of fact by the local public body shall be final and may not be disputed or subject to further appeal.

F. Procedures adopted by a local public body for design-build construction projects shall include a two-step competitive negotiation process consistent with the standards established by the Division of Engineering and Buildings of the Department for state public bodies.

Article 5.

Reporting Requirements for All Public Bodies.

§ 2.2-4383. Reporting requirements.

A. All public bodies subject to the provisions of this chapter shall report no later than November 1 of each year to the Director of the Department on all completed capital projects in excess of \$2 million, which report shall include at a minimum (i) the procurement method utilized, (ii) the project budget, (iii) the actual project cost, (iv) the expected timeline, (v) the actual completion time, and (vi) any post-project issues.

B. The Department shall consolidate received report data and submit the consolidated data to the Governor and Chairmen of the House Committee on Appropriations and the Senate Committee on Finance by December 1 of each year.

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

A. The state goals for each public institution of higher education are 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 § 23.1-203 and in accordance with anticipated demand analysis, meet enrollment projections and 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 the provisions of § 2.2-4306~~ *in compliance with the provisions of Chapter 43.1 (§ 2.2-4378 et seq.) of Title 2.2.*

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

675 institution of its pro rata share under this subdivision shall also be applicable to other rebate or refund
676 programs in effect that are similar to that of the credit card rebate program described in this subdivision.
677 The Secretary of Finance shall identify such other rebate or refund programs and shall determine the pro
678 rata share to be paid to the institution; and

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

685 **§ 33.2-209. Construction and maintenance contracts and activities related to passenger and**
686 **freight rail and public transportation.**

687 A. The Board shall have the power and duty to let all contracts to be administered by the
688 Department of Transportation or the Department of Rail and Public Transportation for the construction,
689 maintenance, and improvement of the highways comprising systems of state highways and for all
690 activities related to passenger and freight rail and public transportation in excess of \$5 million. The
691 Commissioner of Highways has authority to let all Department of Transportation-administered contracts
692 for highway construction, maintenance, and improvements up to \$5 million in value. The Director of the
693 Department of Rail and Public Transportation has the authority to let contracts for passenger and freight
694 rail and public transportation improvements up to \$5 million in value. The Commissioner of Highways
695 is authorized to enter into agreements with localities, authorities, and transportation districts to
696 administer projects and to allow those localities, authorities, and transportation districts to let contracts
697 with no limit on contract value and without prior concurrence of the Commissioner of Highways or the
698 Board for highway construction, maintenance, and improvements within their jurisdictions, in accordance
699 with those provisions of this Code providing those localities, authorities, and transportation districts the
700 ability to let such contracts. The Director of the Department of Rail and Public Transportation is
701 authorized to enter into agreements with localities, authorities, and transportation districts to administer
702 projects and to allow those localities, authorities, and transportation districts to let contracts with no limit
703 on contract value and without prior concurrence of the Director of the Department of Rail and Public
704 Transportation or the Board for passenger and freight rail and public transportation activities within their
705 jurisdictions, in accordance with those provisions of this Code providing those localities, authorities, and
706 transportation districts the ability to let such contracts. The Commissioner of Highways and the Director
707 of the Department of Rail and Public Transportation shall report on their respective transportation
708 contracting activities at least quarterly to the Board.

709 B. The Board may award contracts for the construction of transportation projects on a design-build
710 basis. These contracts may be awarded after a written determination is made by the Commissioner of
711 Highways or the Director of the Department of Rail and Public Transportation, pursuant to objective
712 criteria previously adopted by the Board regarding the use of design-build, that delivery of the projects
713 must be expedited and that it is not in the public interest to comply with the design and construction
714 contracting procedures normally followed. Such objective criteria shall include requirements for
715 prequalification of contractors and competitive bidding processes. These contracts shall be of such size
716 and scope to encourage maximum competition and participation by agency prequalified and otherwise
717 qualified contractors. Such determination shall be retained for public inspection in the official records of
718 the Department of Transportation or the Department of Rail and Public Transportation, as the case may
719 be, and shall include a description of the nature and scope of the project and the reasons for the
720 Commissioner's or the Director's determination that awarding a design-build contract will best serve the
721 public interest. A Request for Proposal for transportation projects to be delivered on a design-build basis
722 pursuant to this section may allow for the submission and consideration of alternative technical concepts
723 in accordance with the procedures set forth in such Request for Proposal. The provisions of this section
724 shall supersede contrary provisions of subsection D of § 2.2-4303 and ~~§ 2.2-4306 Chapter 43.1~~
725 ~~(§ 2.2-4378 et seq.) of Title 2.2.~~

726 For the purposes of this subsection, "alternative technical concepts" means proposed changes to
727 agency-supplied base design configurations, project scope, design, or construction criteria that provide a
728 solution that is equal to or better than the requirements in the Request for Proposal.

729 C. The Board may award contracts for the provision of equipment, materials, and supplies to be used
730 in construction of transportation projects on a fixed-price basis. Any such contract may provide that the
731 price to be paid for the provision of equipment, materials, and supplies to be furnished in connection
732 with the projects shall not be increased but shall remain fixed until completion of the projects specified
733 in the contracts. Material components of any such contract for annual and multiyear programs, including
734 maintenance, may be fixed at the outset of the projects and until completion based on best achievable
735 prices.

736 **2. That §§ 2.2-4306, 2.2-4307, and 2.2-4308 of the Code of Virginia are repealed.**

737 3. That the provisions of § 2.2-4383 of the Code of Virginia, as created by this act, shall apply to
738 projects for which a public body as defined in this act has issued a Request for Qualifications
739 after July 1, 2017.