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HOUSE BILL NO. 905

Offered January 10, 2018

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A BILL to amend and reenact §§ 2.2-4342 and 2.2-4343 of the Code of Virginia, relating to the Virginia Public Procurement Act; designation of trade secrets and proprietary information.

 Patron—Robinson

 Referred to Committee on General Laws

Be it enacted by the General Assembly of Virginia:**1. That §§ 2.2-4342 and 2.2-4343 of the Code of Virginia are amended and reenacted as follows:****§ 2.2-4342. Public inspection of certain records.**

A. Except as provided in this section, all proceedings, records, contracts and other public records relating to procurement transactions shall be open to the inspection of any citizen, or any interested person, firm or corporation, in accordance with the Virginia Freedom of Information Act (§ 2.2-3700 et seq.).

B. Cost estimates relating to a proposed procurement transaction prepared by or for a public body shall not be open to public inspection.

C. Any competitive sealed bidding bidder, upon request, shall be afforded the opportunity to inspect bid records within a reasonable time after the opening of all bids but prior to award, except in the event that the public body decides not to accept any of the bids and to reopen the contract. Otherwise, bid records shall be open to public inspection only after award of the contract.

D. Any competitive negotiation offeror, upon request, shall be afforded the opportunity to inspect proposal records within a reasonable time after the evaluation and negotiations of proposals are completed but prior to award, except in the event that the public body decides not to accept any of the proposals and to reopen the contract. Otherwise, proposal records shall be open to public inspection only after award of the contract.

E. Any inspection of procurement transaction records under this section shall be subject to reasonable restrictions to ensure the security and integrity of the records.

F. Trade secrets or proprietary information submitted by a bidder, offeror, or contractor in connection with a procurement transaction or prequalification application submitted pursuant to subsection B of § 2.2-4317 shall not be subject to the Virginia Freedom of Information Act (§ 2.2-3700 et seq.); however, the bidder, offeror, or contractor shall (i) invoke the protections of this section prior to or upon submission of the data or other materials, (ii) identify the data or other materials to be protected, and (iii) state the reasons why protection is necessary. *A bidder, offeror, or contractor shall not designate as trade secrets or proprietary information (a) an entire bid, proposal, or prequalification application; (b) any portion of a bid, proposal, or prequalification application that does not contain trade secrets or proprietary information; or (c) line item prices or total bid, proposal, or prequalification application prices.*

§ 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

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59 nongeneral fund reserves and balances, or local funds of or held by the respective public institution of
60 higher education pursuant to § 23.1-2210, 23.1-2306, 23.1-2604, or 23.1-2803. However, selection of
61 these services shall be governed by the Uniform Prudent Management of Institutional Funds Act (§
62 64.2-1100 et seq.) as required by §§ 23.1-2210, 23.1-2306, 23.1-2604, and 23.1-2803.

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

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

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

74 9. Any town with a population of less than 3,500, except as stipulated in the provisions of
75 §§ 2.2-4305, 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
76 2.2-4377 and Chapter 43.1 (§ 2.2-4378 et seq.).

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

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

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

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

95 12. Notwithstanding the exemptions set forth in subdivisions 9 through 11, the provisions of
96 subsections C and D of § 2.2-4303, §§ 2.2-4305, 2.2-4311, 2.2-4315, 2.2-4317, 2.2-4330, 2.2-4333
97 through 2.2-4338, 2.2-4342, 2.2-4343.1, and 2.2-4367 through 2.2-4377, and Chapter 43.1 (§ 2.2-4378 et
98 seq.) shall apply to all counties, cities and school divisions, and to all towns having a population greater
99 than 3,500 in the Commonwealth.

100 The method for procurement of professional services through competitive negotiation set forth in
101 §§ 2.2-4303.1 and 2.2-4303.2 shall also apply to all counties, cities and school divisions, and to all
102 towns having a population greater than 3,500, where the cost of the professional service is expected to
103 exceed \$60,000 in the aggregate or for the sum of all phases of a contract or project. A school board
104 that makes purchases through its public school foundation or purchases educational technology through
105 its educational technology foundation, either as may be established pursuant to § 22.1-212.2:2 shall be
106 exempt from the provisions of this chapter, except, relative to such purchases, the school board shall
107 comply with the provisions of §§ 2.2-4311 and 2.2-4367 through 2.2-4377.

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

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

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

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

126 17. The Department of Corrections in the selection of pre-release and post-incarceration services and
127 the Department of Juvenile Justice in the selection of pre-release and post-commitment services.

128 18. The University of Virginia Medical Center to the extent provided by subdivision A 3 of
129 § 23.1-2213.

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

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

136 21. [Expired].

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

139 23. The Virginia Industries for the Blind when procuring components, materials, supplies, or services
140 for use in commodities and services furnished to the federal government in connection with its operation
141 as an AbilityOne Program-qualified nonprofit agency for the blind under the Javits-Wagner-O'Day Act,
142 41 U.S.C. §§ 8501-8506, provided that the procurement is accomplished using procedures that ensure
143 that funds are used as efficiently as practicable. Such procedures shall require documentation of the
144 basis for awarding contracts. Notwithstanding the provisions of § 2.2-1117, no public body shall be
145 required to purchase such components, materials, supplies, services, or commodities.

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