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SENATE BILL NO. 1369

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee for Courts of Justice
on January 28, 2019)

(Patron Prior to Substitute—Senator Norment)

A BILL to amend and reenact §§ 2.2-4340, 2.2-4343, and 23.1-1017 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 2.2-4340.1, relating to the Virginia Public Procurement Act; statute of limitations on actions on construction contracts; statute of limitations on actions on performance bonds.

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-4340, 2.2-4343, and 23.1-1017 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 2.2-4340.1 as follows:

§ 2.2-4340. Action on performance bond.

No action against the surety on a performance bond shall be brought unless within five years after completion of the work on the project to the satisfaction of the Department of Transportation, in cases where the public body is the Department of Transportation, or, in all other cases, within one year after (i) completion of the contract, including the expiration of all warranties and guarantees, or (ii) discovery of the defect or breach of warranty that gave rise to the action work on the project.

§ 2.2-4340.1. Statute of limitations on construction contracts.

No action may be brought by a public body on any construction contract, including construction contracts governed by Chapter 43.1 (§ 2.2-4378 et seq.) but excluding contracts where the public body is the Department of Transportation, unless such action (i) is brought within five years after completion of the work on the project; (ii) in the case of latent defects, is brought within five years of discovery of a latent defect but, in any event, not more than 10 years from completion of the work on the project; or (iii) in the case of a warranty or guaranty in such construction contract, is brought no more than one year after the expiration of such warranty or guaranty.

§ 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 respective public institution of higher education 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

60 exemption shall be in writing and kept on file with the agency's disbursement records.

61 9. Any town with a population of less than 3,500, except as stipulated in the provisions of
62 §§ 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
63 2.2-4377 and Chapter 43.1 (§ 2.2-4378 et seq.).

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

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

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

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

82 12. Notwithstanding the exemptions set forth in subdivisions 9 through 11, the provisions of
83 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
84 through 2.2-4338, 2.2-4340, 2.2-4340.1, 2.2-4342, 2.2-4343.1, and 2.2-4367 through 2.2-4377, and
85 Chapter 43.1 (§ 2.2-4378 et seq.) shall apply to all counties, cities, and school divisions, and to all
86 towns having a population greater than 3,500 in the Commonwealth.

87 The method for procurement of professional services through competitive negotiation set forth in
88 §§ 2.2-4303.1 and 2.2-4303.2 shall also apply to all counties, cities and school divisions, and to all
89 towns having a population greater than 3,500, where the cost of the professional service is expected to
90 exceed \$60,000 in the aggregate or for the sum of all phases of a contract or project. A school board
91 that makes purchases through its public school foundation or purchases educational technology through
92 its educational technology foundation, either as may be established pursuant to § 22.1-212.2:2 shall be
93 exempt from the provisions of this chapter, except, relative to such purchases, the school board shall
94 comply with the provisions of §§ 2.2-4311 and 2.2-4367 through 2.2-4377.

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

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

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

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

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

115 18. The University of Virginia Medical Center to the extent provided by subdivision A 3 of
116 § 23.1-2213.

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

121 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, provided that the procurement is accomplished by (i) obtaining written informal solicitation of a minimum of three bidders or offerors if practicable and (ii) including a written statement regarding the basis for awarding the contract.

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

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.

§ 23.1-1017. Covered institutions; operational authority; procurement.

A. Subject to the express provisions of the management agreement, each covered institution may be exempt from the provisions of the Virginia Public Procurement Act (§ 2.2-4300 et seq.), except for §§ 2.2-4340, 2.2-4340.1, and 2.2-4342, which shall not be construed to require compliance with the prequalification application procedures of subsection B of § 2.2-4317, provided, however, that (i) any deviations from the Virginia Public Procurement Act in the management agreement shall be uniform across all covered institutions and (ii) the governing board of the covered institution shall adopt, and the covered institution shall comply with, policies for the procurement of goods and services, including professional services, that shall (a) be based upon competitive principles, (b) in each instance seek competition to the maximum practical degree, (c) implement a system of competitive negotiation for professional services pursuant to §§ 2.2-4303.1 and 2.2-4302.2, (d) prohibit discrimination in the solicitation and award of contracts based on the bidder's or offeror's race, religion, color, sex, national origin, age, or disability or on any other basis prohibited by state or federal law, (e) incorporate the prompt payment principles of §§ 2.2-4350 and 2.2-4354, (f) consider the impact on correctional enterprises under § 53.1-47, and (g) provide that whenever solicitations are made seeking competitive procurement of goods or services, it shall be a priority of the institution to provide for fair and reasonable consideration of small, women-owned, and minority-owned businesses and to promote and encourage a diversity of suppliers.

B. Such policies may (i) provide for consideration of the dollar amount of the intended procurement, the term of the anticipated contract, and the likely extent of competition; (ii) implement a prequalification procedure for contractors or products; and (iii) include provisions for cooperative arrangements with other covered institutions, other public or private educational institutions, or other public or private organizations or entities, including public-private partnerships, public bodies, charitable organizations, health care provider alliances or purchasing organizations or entities, state agencies or institutions of the Commonwealth or the other states, the District of Columbia, the territories, or the United States, and any combination of such organizations and entities.

C. Nothing in this section shall preclude a covered institution from requesting and utilizing the assistance of the Virginia Information Technologies Agency for information technology procurements and covered institutions are encouraged to utilize such assistance.

D. Each covered institution shall post on the Department of General Services' central electronic procurement website all Invitations to Bid, Requests for Proposal, sole source award notices, and emergency award notices to ensure visibility and access to the Commonwealth's procurement opportunities on one website.

E. As part of any procurement provisions of the management agreement, the governing board of a covered institution shall identify the public, educational, and operational interests served by any procurement rule that deviates from procurement rules in the Virginia Public Procurement Act (§ 2.2-4300 et seq.).