

# VIRGINIA ACTS OF ASSEMBLY -- 1995 SESSION

## CHAPTER 694

*An Act to amend and reenact §§ 53.1-261, 53.1-262, 53.1-265 and 53.1-266 of the Code of Virginia, to amend the Code of Virginia by adding a section numbered 11-41.2:01, and by adding in Chapter 15 of Title 53.1 a section numbered 53.1-267, all relating to the Corrections Private Management Act and the Virginia Public Procurement Act.*

[S 990]

Approved March 27, 1995

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

**1. That §§ 53.1-261, 53.1-262, 53.1-265 and 53.1-266 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 11-41.2:01 and by adding in Chapter 15 of Title 53.1 a section numbered 53.1-267 as follows:**

*§ 11-41.2:01. Fixed-price, not-to-exceed-price, design-build, design-build-operate, construction management, and related contracts for prison facilities and correctional services authorized.*

*Notwithstanding the provisions of § 11-41.2 or any procedures adopted thereunder by the Secretary of Administration, the Commonwealth may enter into contracts for prison facilities or correctional services as provided in § 53.1-267 on a fixed-price, not-to-exceed-price, design-build, design-build-operate, or construction management basis, including related leases, lease/purchase contracts, agreements relating to the sale of securities to finance such facilities, and similar financing agreements.*

**§ 53.1-261. Definitions.**

As used in this chapter unless the context requires otherwise or it is otherwise provided:

"Correctional services" means the following functions, services and activities when provided within a prison or otherwise:

1. Operation of facilities, including management, custody of inmates and provision of security;
2. Food services, commissary, medical services, transportation, sanitation or other ancillary services;
3. Development and implementation assistance for classification, management information systems or other information systems or services;
4. Education, training and employment programs;
5. Recreational, religious and other activities; and
6. Counseling, special treatment programs, or other programs for special needs.

"Prison" or "facility" or "prison facility" means any institution operated by or under authority of the Department and shall include, whether obtained by purchase, lease, *lease/purchase*, construction, reconstruction, restoration, improvement, alteration, repair or other means, any physical betterment or improvement related to the housing of inmates or any preliminary plans, studies or surveys relative thereto; land or rights to land; and any furnishings, machines, vehicles, apparatus, or equipment for use in connection with any prison facility.

"Prison contractor" or "contractor" means any entity entering into or offering or proposing to enter into a contractual agreement to provide any *prison facility for or* correctional services to inmates under the custody of the Commonwealth.

**§ 53.1-262. State correctional facilities; private contracts.**

The Director, subject to any applicable regulations which may be promulgated by the Board pursuant to § 53.1-266 and ~~subject to the provisions of the Virginia Public Procurement Act (§ 11-35 et seq.)~~, is hereby authorized to enter into contracts with prison contractors for the financing, site selection, *design, design/build*, acquisition, construction, *construction management*, maintenance, leasing, *leasing/purchasing*, management or operation of prison facilities, or any combination of those services, subject to the requirements and limitations set out below.

1. Contracts entered into under the terms of this chapter shall be with an entity submitting an acceptable response pursuant to a request for proposals. An acceptable response shall be one which meets all the requirements in the request for proposals. However, no contract for *prison facilities or* correctional services may be entered into unless the private contractor demonstrates *to the satisfaction of the Director* that it has:

- a. The qualifications, experience and management personnel necessary to carry out the terms of this contract;
- b. The financial resources to provide indemnification for liability arising from prison management projects;
- c. Evidence of past performance of similar contracts; and
- d. The ability to comply with all applicable federal and state constitutional standards; federal, state, and local laws; court orders; and correctional standards.

2. Contracts awarded under the provisions of this chapter, including contracts for the provision of correctional services, *the construction of prison facilities*, or for the lease, *lease/purchase* or use of public or private lands or buildings for use in the operation of facilities, may be entered into for a period of up to thirty years, subject to the requirements for annual appropriation of funds by the Commonwealth.

3. Contracts awarded under the provisions of this chapter shall, at a minimum, comply with the following:

- a. Provide for internal and perimeter security to protect the public, employees and inmates;
  - b. Provide inmates with work or training opportunities while incarcerated; however, the contractor shall not benefit financially from the labor of inmates;
  - c. Impose discipline on inmates only in accordance with applicable regulations; and
  - d. Provide proper food, clothing, housing and medical care for inmates.
4. No contract for *prison facilities* or correctional services shall be entered into unless the following requirements are met:

- a. The contractor provides audited financial statements for the previous five years or for each of the years the contractor has been in operation, if fewer than five years, and provides other financial information as requested; and
- b. The contractor provides an adequate plan of indemnification, specifically including indemnity for civil rights claims. The indemnification plan shall be adequate to protect the Commonwealth and public officials from all claims and losses incurred as a result of the contract. Nothing herein is intended to deprive a prison contractor or the Commonwealth of the benefits of any law limiting exposure to liability or setting a limit on damages.

5. No contract for *prison facilities* or correctional services shall be executed by the Director nor shall any funds be expended for the contract unless:

- a. The proposed contract complies with any applicable regulations which may be promulgated by the Board pursuant to § 53.1-266;
- b. An appropriation for the *facilities* or the services to be provided under the contract has been expressly approved as is otherwise provided by law;
- c. The *prison facilities* or the correctional services proposed by the contract are of at least the same quality as those routinely provided by the Department to similar types of inmates; ~~and~~
- d. An evaluation of the proposed contract demonstrates a cost benefit to the Commonwealth when compared to alternative means of providing the *facilities* or the services through governmental agencies;
- e. *If a contract for acquiring facilities requires or otherwise contemplates that the Commonwealth, whether subject to appropriation or not, will make payments beyond the current biennium that are expected to pay debt service on any bonds or other obligations issued to finance such facilities, regardless of the issuer thereof, (i) the Treasury Board has approved the terms and structure of such bonds or other obligations and (ii) the appropriation for such facilities acknowledges that payments for the acquisition of such facilities are expected to be made beyond the current biennium under a capital lease, lease-purchase, or similar arrangement. Any contract that is for two years or less, or is cancelable by the Commonwealth without cause after such a period, shall not be deemed a contract described in this subdivision 5 e; and*

f. *Nothing herein shall be construed to constitute a waiver for the Department or contractor from complying with the provisions of state correctional siting criteria as set forth in §§ 53.1-19.2 and 66-3.2 of the Code of Virginia.*

6. A site proposed by a contractor for the construction of a prison facility shall not be subject to the approval procedure set forth in § 53.1-19.

§ 53.1-265. Powers and duties not delegable to contractor.

No contract for correctional services shall authorize, allow, or imply a delegation of authority or responsibility of the Director to a prison contractor for any of the following:

1. Developing and implementing procedures for calculating inmate release and parole eligibility dates;
2. Developing and implementing procedures for calculating and awarding sentence credits;
3. Approving inmates for furlough and work release;
4. Approving the type of work inmates may perform and the wages or sentence credits which may be given the inmates engaging in such work;
5. Granting, denying, or revoking sentence credits;
6. Classifying inmates or placing inmates in less restrictive custody or more restrictive custody;
7. Transferring an inmate; however, the contractor may make written recommendations regarding the transfer of an inmate or inmates;
8. Formulating rules of inmate behavior, violations of which may subject inmates to sanctions; however, the contractor may propose such rules to the Director for his review and adoption, rejection, or modification as otherwise provided by law or regulation; and
9. Disciplining inmates in any manner which requires a discretionary application of rules of inmate

behavior or a discretionary imposition of a sanction for violations of such rules.

§ 53.1-266. Board shall promulgate regulations.

The Board shall make, adopt and promulgate regulations governing the following aspects of private management and operation of prison facilities:

1. Contingency plans for state operation of a contractor-operated facility in the event of a termination of the contract;
2. Use of deadly and nondeadly force by prison contractors' security personnel;
3. Methods of monitoring a contractor-operated facility by the Department or the Board;
4. Public access to a contractor-operated facility; and
5. Such other regulations as may be necessary to carry out the provisions of this chapter.

§ 53.1-267. *Fixed-price, not-to-exceed-price, design-build, design-build-operate, construction management, and related contracts authorized.*

*Notwithstanding any other provisions of law to the contrary, but in accordance with procedures consistent with those described in the Virginia Public Procurement Act (§ 11-35 et seq.) for procurement of nonprofessional services through competitive negotiation, the Director may enter into contracts for prison facilities or correctional services on a fixed-price, not-to-exceed-price, design-build, design-build-operate, or construction management basis, including related leases, lease/purchase contracts, agreements relating to the sale of securities to finance such facilities, and similar financing agreements. The Director shall not be required to award such contracts to the lowest-price offeror but may consider price as one factor in evaluating the proposals received. The Director shall maintain adequate records to allow post-project evaluation.*

**2. That the provisions of this act shall expire on July 1, 1997.**