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## HOUSE BILL NO. 1197

Offered January 22, 1996

*A BILL to amend and reenact §§ 11-35, 11-40, and 11-41 of the Code of Virginia and to repeal § 11-41.3 of the Code of Virginia, relating to the Public Procurement Act; public institutions of higher education.*

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Referred to Committee for Courts of Justice

**Be it enacted by the General Assembly of Virginia:****1. That §§ 11-35, 11-40, and 11-41 of the Code of Virginia are amended and reenacted as follows:**

§ 11-35. (Effective July 1, 1996) Title; purpose; applicability.

A. This chapter may be cited as the Virginia Public Procurement Act.

B. The purpose of this chapter is to enunciate the public policies pertaining to governmental procurement from nongovernmental sources.

C. The provisions of this chapter, however, shall not apply, except as stipulated in the provisions of §§ 11-41.1, 11-49, 11-51, 11-54, 11-56 through 11-61 and 11-72 through 11-80, to any town with a population of less than 3,500 as determined by the last official United States census.

D. Except to the extent adopted by such governing body, the provisions of this chapter also shall not apply, except as stipulated in subsection E, to any county, city or town whose governing body adopts by ordinance or resolution alternative policies and procedures which are based on competitive principles and which are generally applicable to procurement of goods and services by such governing body and the agencies thereof. This exemption shall be applicable only so long as such policies and procedures, or other policies and procedures meeting the requirements of this section, remain in effect in such county, city or town. Such policies and standards may provide for incentive contracting which offers a contractor whose bid is accepted the opportunity to share in any cost savings realized by the locality when project costs are reduced by such contractor, without affecting project quality, during construction of the project. The fee, if any, charged by the project engineer or architect for determining such cost savings shall be paid as a separate cost and shall not be calculated as part of any cost savings.

Except to the extent adopted by such school board, the provisions of this chapter shall not apply, except as stipulated in subsection E, to any school division whose school board adopts by policy or regulation alternative policies and procedures which are based on competitive principles and which are generally applicable to procurement of goods and services by such school board. This exemption shall be applicable only so long as such policies and procedures, or other policies or procedures meeting the requirements of this section, remain in effect in such school division. This provision shall not exempt any school division from any centralized purchasing ordinance duly adopted by a local governing body.

E. Notwithstanding the exemptions set forth in subsection D, the provisions of §§ 11-41 C, 11-41.1, 11-46 B, 11-49, 11-51, 11-54, 11-56 through 11-61 and 11-72 through 11-80 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 set forth in subdivision 3 a of § 11-37 in the definition of competitive negotiation 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 \$20,000.

F. The provisions of this chapter shall not apply to those contracts entered into prior to January 1, 1983, which shall continue to be governed by the laws in effect at the time those contracts were executed.

G. To the end that public bodies in the Commonwealth obtain high quality goods and services at reasonable cost, that all procurement procedures be conducted in a fair and impartial manner with avoidance of any impropriety or appearance of impropriety, that all qualified vendors have access to public business and that no offeror be arbitrarily or capriciously excluded, it is the intent of the General Assembly that competition be sought to the maximum feasible degree, that individual public bodies enjoy broad flexibility in fashioning details of such competition, that the rules governing contract awards be made clear in advance of the competition, that specifications reflect the procurement needs of the purchasing body rather than being drawn to favor a particular vendor, and that purchaser and vendor freely exchange information concerning what is sought to be procured and what is offered.

H. Notwithstanding the foregoing provisions of this section, the selection of services by the Virginia Retirement System and the Board of the Virginia Higher Education Tuition Trust Fund related to the management, purchase or sale of authorized investments, including but not limited to actuarial services,

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60 shall be governed by the standards set forth in §§ 51.1-124.30 and 23-38.80, respectively, and shall not  
61 be subject to the provisions of this chapter.

62 I. The provisions of this chapter shall apply to procurement of any construction or planning and  
63 design services for construction by a Virginia not-for-profit corporation or organization not otherwise  
64 specifically exempted when the planning, design or construction is funded by state appropriations greater  
65 than \$10,000 unless the Virginia not-for-profit corporation or organization is obligated to conform to  
66 procurement procedures which are established by federal statutes or regulations, whether or not those  
67 federal procedures are in conformance with the provisions of this chapter.

68 *J. The provisions of this chapter shall not apply to items purchased by public institutions of higher*  
69 *education for resale at retail bookstores and similar retail outlets operated by such institution.*

70 § 11-40. Cooperative procurement.

71 A. Any public body may participate in, sponsor, conduct, or administer a cooperative procurement  
72 agreement with one or more other public bodies, or agencies of the United States, for the purpose of  
73 combining requirements to increase efficiency or reduce administrative expenses. Any public body which  
74 enters into a cooperative procurement agreement with a county, city, or town whose governing body has  
75 adopted alternative policies and procedures pursuant to § 11-35 C or § 11-35 D of this chapter shall  
76 comply with the alternative policies and procedures adopted by the governing body of such county, city,  
77 or town.

78 B. Subject to the provisions of §§ 2.1-440, 2.1-442 and 2.1-447, any department, agency, or  
79 institution of the Commonwealth may participate in, sponsor, conduct, or administer a cooperative  
80 procurement arrangement with private health or educational institutions or with public agencies or  
81 institutions of the several states, territories of the United States, or the District of Columbia, for the  
82 purpose of combining requirements to effect cost savings or reduce administrative expense in any  
83 acquisition of ~~equipment, instrumentation, or medical care supplies~~ *goods and services*. In such  
84 instances, deviation from the procurement procedures set forth in the Virginia Public Procurement Act  
85 (§ 11-35 et seq.) and the administrative policies and procedures established to implement the Act will be  
86 permitted, if approved by the Director of the Division of Purchases and Supply; however, such  
87 acquisitions shall be procured competitively. Nothing herein shall prohibit the payment by direct or  
88 indirect means of any administrative fee that will allow for participation in any such arrangement.

89 § 11-41. Methods of procurement.

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

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

94 C. 1. Upon a determination made in advance by the public body and set forth in writing that  
95 competitive sealed bidding is either not practicable or not fiscally advantageous to the public, goods,  
96 services, or insurance may be procured by competitive negotiation. The writing shall document the basis  
97 for this determination.

98 Upon a written determination made in advance by (i) the Governor or his designee in the case of a  
99 procurement by the Commonwealth or by a department, agency or institution thereof or (ii) the local  
100 governing body in the case of a procurement by a political subdivision of the Commonwealth, that  
101 competitive negotiation is either not practicable or not fiscally advantageous, insurance may be procured  
102 through a licensed agent or broker selected in the manner provided for the procurement of things other  
103 than professional services in subdivision 3 b of the definition of "competitive negotiation" in § 11-37.  
104 The basis for this determination shall be documented in writing.

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

109 (i) By the Commonwealth, its departments, agencies and institutions on a fixed price design-build  
110 basis or construction management basis under § 11-41.2;

111 (ii) By any public body for the alteration, repair, renovation or demolition of buildings when the  
112 contract is not expected to cost more than \$500,000;

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

115 (iv) As otherwise provided in § 11-41.2:1.

116 D. Upon a determination in writing that there is only one source practicably available for that which  
117 is to be procured, a contract may be negotiated and awarded to that source without competitive sealed  
118 bidding or competitive negotiation. The writing shall document the basis for this determination. The  
119 public body shall issue a written notice stating that only one source was determined to be practicably  
120 available, and identifying that which is being procured, the contractor selected, and the date on which  
121 the contract was or will be awarded. This notice shall be posted in a designated public area or published

122 in a newspaper of general circulation on the day the public body awards or announces its decision to  
123 award the contract, whichever occurs first.

124 E. In case of emergency, a contract may be awarded without competitive sealed bidding or  
125 competitive negotiation; however, such procurement shall be made with such competition as is  
126 practicable under the circumstances. A written determination of the basis for the emergency and for the  
127 selection of the particular contractor shall be included in the contract file. The public body shall issue a  
128 written notice stating that the contract is being awarded on an emergency basis, and identifying that  
129 which is being procured, the contractor selected, and the date on which the contract was or will be  
130 awarded. This notice shall be posted in a designated public area or published in a newspaper of general  
131 circulation on the day the public body awards or announces its decision to award the contract, whichever  
132 occurs first, or as soon thereafter as is practicable.

133 F. A public body may establish purchase procedures, if adopted in writing, not requiring competitive  
134 sealed bids or competitive negotiation for single or term contracts not expected to exceed \$15,000 and  
135 for contracts for microcomputers and related peripheral equipment and services not expected to exceed  
136 \$30,000; however, such small purchase procedures shall provide for competition wherever practicable.

137 G. Any local school board may authorize any of its public schools or its school division to enter into  
138 contracts providing that caps and gowns, photographs, class rings, yearbooks and graduation  
139 announcements will be available for purchase or rental by students, parents, faculty or other persons  
140 using nonpublic money through the use of competitive negotiation as provided in this chapter,  
141 competitive sealed bidding not necessarily being required for such contracts. The Superintendent of  
142 Public Instruction may provide assistance to public school systems regarding this chapter and other  
143 related laws.

144 H. Upon a determination made in advance by the local governing body and set forth in writing that  
145 the purchase of goods, products or commodities from a public auction sale is in the best interests of the  
146 public, such items may be purchased at the auction. The writing shall document the basis for this  
147 determination.

148 **2. That § 11-41.3 of the Code of Virginia is repealed.**