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SENATE BILL NO. 145

Offered January 15, 1996

A BILL to amend and reenact §§ 2.1-457, 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.

Patrons—Chichester, Couric, Houck, Marye, Norment and Saslaw

Referred to the Committee on General Laws

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.1-457, 11-35, 11-40, and 11-41 of the Code of Virginia are amended and reenacted as follows:

§ 2.1-457. Transfer or sale of surplus supplies or equipment.

A. The Division of Purchases and Supply shall transfer surplus supplies or equipment, other than ADP equipment, from one state department, division, institution or agency to another, and sell surplus supplies or equipment which may accumulate in the possession of any state department, division, institution or agency. The term "surplus supplies and equipment" shall exclude finished products which a mental health or mental retardation facility sells for the benefit of the patients or residents, provided most of the supplies, equipment or products have been donated to the patients, and have been substantially altered by the patients in the course of occupational or other therapy, and such alterations result in a finished product. The Division shall pay the proceeds derived therefrom into the state treasury to the credit of the department, division, institution or agency owning the surplus supplies or equipment. *The Director of the Division may delegate to selected and approved public institutions of higher education the authority to dispose of their own surplus property.*

B. Prior to the sale of any dog especially trained for police work, the Division shall offer to sell such dog to the handler who last was in control of such dog at a price deemed appropriate by the Division. This provision shall in no way be deemed to be in violation of the State and Local Government Conflict of Interests Act (§ 2.1-639.1 et seq.). In the case of surplus clothing, the Division may transfer such items to an appropriate state agency for distribution to local social services boards to be used as donations to needy individuals. The Division may dispose of such supplies or equipment by other means if the supplies or equipment are unsuitable for donation, transfer or sale. Any disposition other than by transfer or sale shall be reported to the Auditor of Public Accounts. No such surplus supplies or equipment shall be donated, transferred, sold, exchanged or disposed of, however, without the consent of the head of the department, division, institution or agency having possession, or unless ordered by the Governor. No such supplies or equipment shall be donated, transferred, sold, exchanged, or disposed of except as provided herein.

C. The Director of the Department of Planning and Budget may increase appropriations to any state agency by the amount of credit resulting to the agency from the sale of surplus supplies and equipment pursuant to subsection A of this section. Any state agency receiving funds pursuant to this subsection may use the funds to purchase property and plant equipment, and to defray the cost of disposing of surplus supplies and equipment. Notwithstanding the provisions of this subsection, the Department of Planning and Budget shall promulgate regulations which permit all state agencies to retain fifty percent of the proceeds of the sale of surplus supplies or equipment purchased in whole or in part from general fund appropriations; the remaining fifty percent to be transferred to the Conservation Resources Fund. Such regulations shall also provide that state agencies and institutions meeting management standards prescribed by the Governor may retain the net proceeds of surplus supplies and equipment sales. The retention shall be effective on July 1 following the date the Department determines that the agency or institution meets the management standards.

D. The provisions of this section shall not be construed to prohibit the recycling of paper products, beverage containers or used motor oil and the retention of the proceeds from the sale of the recycled goods by the department, division, institution or agency which recycles them.

§ 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.

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

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

78 E. Notwithstanding the exemptions set forth in subsection D, the provisions of §§ 11-41 C, 11-41.1,
79 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,
80 cities and school divisions, and to all towns having a population greater than 3,500 in the
81 Commonwealth. The method for procurement of professional services set forth in subdivision 3 a of
82 § 11-37 in the definition of competitive negotiation shall also apply to all counties, cities and school
83 divisions, and to all towns having a population greater than 3,500, where the cost of the professional
84 service is expected to exceed \$20,000.

85 F. The provisions of this chapter shall not apply to those contracts entered into prior to January 1,
86 1983, which shall continue to be governed by the laws in effect at the time those contracts were
87 executed.

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

97 H. Notwithstanding the foregoing provisions of this section, the selection of services by the Virginia
98 Retirement System and the Board of the Virginia Higher Education Tuition Trust Fund related to the
99 management, purchase or sale of authorized investments, including but not limited to actuarial services,
100 shall be governed by the standards set forth in §§ 51.1-124.30 and 23-38.80, respectively, and shall not
101 be subject to the provisions of this chapter.

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

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

110 § 11-40. Cooperative procurement.

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

118 B. Subject to the provisions of §§ 2.1-440, 2.1-442 and 2.1-447, any department, agency, or
119 institution of the Commonwealth may participate in, sponsor, conduct, or administer a cooperative
120 procurement arrangement with private health or educational institutions or with public agencies or
121 institutions of the several states, territories of the United States, or the District of Columbia, for the

purpose of combining requirements to effect cost savings or reduce administrative expense in any acquisition of equipment, instrumentation, or medical care supplies. In such instances, deviation from the procurement procedures set forth in the Virginia Public Procurement Act (§ 11-35 et seq.) and the administrative policies and procedures established to implement the Act will be permitted, if approved by the Director of the Division of Purchases and Supply *goods and services*; however, such acquisitions shall be procured competitively. Nothing herein shall prohibit the payment by direct or indirect means of any administrative fee that will allow for participation in any such arrangement.

§ 11-41. Methods of procurement.

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

B. Professional services shall be procured by competitive negotiation.

C. 1. 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, goods, services, or insurance may be procured by competitive negotiation. The writing shall document the basis for this determination.

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

2. Construction may be procured only by competitive sealed bidding, except that competitive negotiation may be used in the following instances 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, which writing shall document the basis for this determination:

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

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

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

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

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

E. 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 in a designated public area or published 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.

F. A public body may establish purchase procedures, if adopted in writing, not requiring competitive sealed bids or competitive negotiation for single or term contracts not expected to exceed \$15,000 and for contracts for microcomputers and related peripheral equipment and services not expected to exceed \$30,000 \$100,000; however, such small purchase procedures shall provide for competition wherever practicable.

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

183 Public Instruction may provide assistance to public school systems regarding this chapter and other
184 related laws.

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

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