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## SENATE BILL NO. 481

## AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on General Laws

on February 7, 1996)

(Patron Prior to Substitute—Senator Wampler)

*A BILL to amend and reenact §§ 11-41, 11-59, 11-61, 11-70 and 11-79 of the Code of Virginia, relating to the Virginia Public Procurement Act.*

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

**1. That §§ 11-41, 11-59, 11-61, 11-70 and 11-79 of the Code of Virginia are amended and reenacted as follows:**

§ 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; however, such small purchase procedures shall provide for competition wherever practicable.

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

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

71 § 11-59. Action on performance bond.

72 No action against the surety on a performance bond shall be brought unless within five years after  
73 completion of the work on the project to the satisfaction of the ~~chief engineer~~, Department of  
74 Transportation, in cases where the public body is the Department of Transportation, or within one year  
75 after (i) completion of the contract, including the expiration of all warranties and guarantees, or (ii)  
76 discovery of the defect or breach of warranty, if the action be for such, in all other cases.

77 § 11-61. Alternative forms of security.

78 A. In lieu of a bid, payment, or performance bond, a bidder may furnish a certified check or cash  
79 escrow in the face amount required for the bond.

80 B. If approved by the Attorney General in the case of state agencies, or the attorney for the political  
81 subdivision in the case of political subdivisions, a bidder may furnish a personal bond, property bond, or  
82 bank or savings and loan association's letter of credit on certain designated funds in the face amount  
83 required for the bid, payment or performance bond. Approval shall be granted only upon a determination  
84 that the alternative form of security proffered affords protection to the public body equivalent to a  
85 corporate surety's bond.

86 *C. The provisions of subsections A and B shall not apply for the Department of Transportation.*

87 § 11-70. Legal actions.

88 A. A bidder or offeror, actual or prospective, who is refused permission or disqualified from  
89 participation in bidding or competitive negotiation, or who is determined not to be a responsible bidder  
90 or offeror for a particular contract, may bring an action in the appropriate circuit court challenging that  
91 decision, which shall be reversed only if the petitioner establishes that the decision was arbitrary or  
92 capricious, or, in the case of denial of prequalification, that the decision to deny prequalification was not  
93 based upon the criteria for denial of prequalification set forth in subsection B of § 11-46.

94 B. A bidder denied withdrawal of a bid under § 11-64 may bring an action in the appropriate circuit  
95 court challenging that decision, which shall be reversed only if the bidder establishes that the decision of  
96 the public body was clearly erroneous.

97 C. A bidder, offeror or contractor, or a potential bidder or offeror on a contract negotiated on a sole  
98 source or emergency basis in the manner provided in § 11-41, whose protest of an award or decision to  
99 award under § 11-66 is denied, may bring an action in the appropriate circuit court challenging a  
100 proposed award or the award of a contract, which shall be reversed only if the petitioner establishes that  
101 the proposed award or the award is not an honest exercise of discretion, but rather is arbitrary or  
102 capricious or not in accordance with the Constitution of Virginia, statutes, regulations or the terms and  
103 conditions of the Invitation to Bid or Request for Proposal.

104 *D. Where the award of a contract has been made by the Virginia Department of Transportation and*  
105 *performance has begun, the contract shall not be enjoined. Upon a determination by the court that the*  
106 *award of a Virginia Department of Transportation contract was arbitrary or capricious, the*  
107 *Commonwealth Transportation Commissioner shall declare the contract void upon a finding that this*  
108 *action is in the best interest of the public. Where a contract is declared void, the performing contractor*  
109 *shall be compensated for the cost of performance up to the time of such declaration. In no event shall*  
110 *the performing contractor be entitled to lost profits.*

111 ~~D.~~ E. If injunctive relief is granted, the court, upon request of the public body, shall require the  
112 posting of reasonable security to protect the public body.

113 ~~E.F.~~ F. A contractor may bring an action involving a contract dispute with a public body in the  
114 appropriate circuit court.

115 ~~F.G.~~ G. A bidder, offeror or contractor need not utilize administrative procedures meeting the standards  
116 of § 11-71, if available, but if those procedures are invoked by the bidder, offeror or contractor, the  
117 procedures shall be exhausted prior to instituting legal action concerning the same procurement  
118 transaction unless the public body agrees otherwise.

119 ~~G.H.~~ H. Nothing herein shall be construed to prevent a public body from instituting legal action against  
120 a contractor.

121 § 11-79. Purchase of building materials, etc., from architect or engineer prohibited.

122 A. No building materials, supplies or equipment for any building or structure constructed by or for a  
123 public body shall be sold by or purchased from any person employed as an independent contractor by  
124 the public body to furnish architectural or engineering services, but not construction, for such building  
125 or structure or from any partnership, association or corporation in which such architect or engineer has a  
126 personal interest as defined in § 2.1-639.2.

127 B. No building materials, supplies or equipment for any building or structure constructed by or for a  
128 public body shall be sold by or purchased from any person which has provided or is currently providing  
129 design services specifying a sole source for such materials, supplies or equipment to be used in such  
130 building or structure to the independent contractor employed by the public body to furnish architectural  
131 or engineering services in which such person has a personal interest as defined in § 2.1-639.2.

132 C. The provisions of subsections A and B shall not apply in cases of emergency *or for*  
133 *transportation-related projects conducted by the Department of Transportation and the Virginia Port*  
134 *Authority.*