

VIRGINIA ACTS OF ASSEMBLY -- 1999 SESSION

CHAPTER 735

An Act to amend and reenact §§ 11-35 and 22.1-212.2:2 of the Code of Virginia, relating to public school foundations.

[H 2176]

Approved March 28, 1999

Be it enacted by the General Assembly of Virginia:

1. That §§ 11-35 and 22.1-212.2:2 of the Code of Virginia are amended and reenacted as follows:

§ 11-35. 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, to include governmental procurement which may or may not result in monetary consideration for either party. This chapter shall apply whether the consideration is monetary or nonmonetary and regardless of whether the public body, the contractor, or some third party is providing the consideration.

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 \$30,000 in the aggregate or for the sum of all phases of a contract or project. A school board that *makes purchases through its public school foundation or purchases educational technology through its educational technology ~~corporation~~ foundation, either as may be* established pursuant to § 22.1-212.2:2 shall be exempt from the provisions of this chapter, except, relative to such purchases, the school board shall comply with the provisions of §§ 11-51 and 11-72 through 11-80; *however, a school board that makes purchases through its public school foundation established pursuant § 22.1-212.2:2 shall not be exempt from the provisions of this chapter.*

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 the 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 related to the management, purchase or sale of authorized investments, including but not limited to actuarial services, shall be governed by the standard set forth in § 51.1-124.30 and shall not be subject to the provisions of this chapter.

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

J. The provisions of this chapter shall not apply to items purchased by public institutions of higher education for resale at retail bookstores and similar retail outlets operated by such institution. However, such purchase procedures shall provide for competition where practicable.

K. The provisions of this chapter shall not apply to 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 and approved by the Department of General Services, 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.

L. Notwithstanding the foregoing provisions of this section, the selection of services by the Board of the Virginia Higher Education Tuition Trust Fund related to the operation and administration of the Fund, including, but not limited to, contracts or agreements for the management, purchase, or sale of authorized investments or actuarial, record-keeping, or consulting services, shall be governed by the standard set forth in § 23-38.80 and shall not be subject to the provisions of this chapter.

M. Notwithstanding the provisions of this section, the selection of services by the University of Virginia related to the management and investment of its endowment funds shall be governed by the Uniform Management of Institutional Funds Act (§ 55-268.1 et seq.) as required by § 23-76.1 and shall not be subject to the provisions of this chapter.

§ 22.1-212.2:2. Educational technology foundations and public school foundations.

A. As used in this section:

"Educational technology" means any software, hardware, or other equipment or infrastructure or technical assistance or instruction in the use of such software, hardware or other equipment or infrastructure which may be required to implement a local school board's approved plan for educational technology or the Board of Education's Six-Year Plan for Educational Technology.

"Educational technology foundation" means a nonstock, nonprofit corporation, established for the express purpose of implementing a public/private partnership to expand access to and improve the quality of educational technology in a school division.

"Public school foundation" means a nonstock, nonprofit corporation, established for the express purpose of implementing a public/private partnership to implement public school improvement projects approved by the local school board.

"Public school improvement project" means any project designed to achieve an educational purpose that may be identified in Title 22.1.

B. Any school board may establish ~~an~~ educational technology ~~foundation~~ and public school foundations. Such ~~foundation~~ foundations may be established directly by the school board or by the school board and other organizations or persons, on behalf of the school board by a third party, or through a contract with a corporation as defined in this section. ~~An educational technology foundation~~ Such foundations may be established as a cooperative regional effort by two or more school boards.

C. Upon establishing or contracting with such *nonstock, nonprofit* corporation, whether or not other organizations, school boards or persons are involved, a school board shall:

1. Review and approve the articles of incorporation and bylaws;
2. Establish a system of accounting to protect public funds;
3. Establish agreement that, upon dissolution of ~~the~~ *such* corporation, any assets remaining after payment of just debts shall be transferred to and become the property of the school board or, if a regional effort, the procedure by which the property may be divided among the school boards;
4. Require, in any instance in which the school board advances, contributes or loans funds to the corporation, that such contract shall provide for the posting of a bond with surety by the officers of ~~the~~ *such* corporation conditioned to protect the rights of the school board;
5. Establish terms for the allocation of any profits or revenues between the school board and the corporation; and
6. Take such other steps as may be necessary to comply with applicable law.

D. A school board may (i) advance, contribute or loan funds to such ~~foundation~~ foundations and (ii) establish an escrow fund for the purpose of funding various educational technology projects, *in the case*

of an educational technology foundation, or public school improvement projects approved by the local school board, in the case of a public school foundation.

E. A school board that makes purchases through its public school foundation or purchases educational technology through its educational technology foundation, either as may be established pursuant to this section shall be exempt from the provisions of the Virginia Public Procurement Act (§ 11-35 et seq.), as provided in § 11-35 E, except, relative to such purchases, the school board shall comply with the provisions of §§ 11-51 and 11-72 through 11-80.