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HOUSE BILL NO. 2079

Offered January 9, 2013

Prefiled January 9, 2013

A BILL to amend and reenact §§ 2.2-2012, 2.2-3104.01, 2.2-3106, 2.2-3109, 2.2-4301, 2.2-4303, 2.2-4343, 2.2-4359, 11-34.3, 23-38.110, 30-105, 33.1-391.3, 56-573.1, and 56-575.16 of the Code of Virginia and to amend the Code of Virginia by adding in Article 2 of Chapter 43 of Title 2.2 sections numbered 2.2-4302.1 and 2.2-4302.2, relating to the Virginia Public Procurement Act; methods of procurement.

Patron—Jones

Referred to Committee on Transportation

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-2012, 2.2-3104.01, 2.2-3106, 2.2-3109, 2.2-4301, 2.2-4303, 2.2-4343, 2.2-4359, 11-34.3, 23-38.110, 30-105, 33.1-391.3, 56-573.1, 56-575.16 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding in Article 2 of Chapter 43 of Title 2.2 sections numbered 2.2-4302.1 and 2.2-4302.2, as follows:

§ 2.2-2012. Procurement of information technology and telecommunications goods and services; computer equipment to be based on performance-based specifications.

A. Information technology and telecommunications goods and services of every description shall be procured by (i) VITA for its own benefit or on behalf of other state agencies and institutions or (ii) such other agencies or institutions to the extent authorized by VITA. Such procurements shall be made in accordance with the Virginia Public Procurement Act (§ 2.2-4300 et seq.), regulations that implement the electronic and information technology accessibility standards of the Rehabilitation Act of 1973 (29 U.S.C. § 794d), as amended, and any regulations as may be prescribed by VITA. In no case shall such procurements exceed the requirements of the regulations that implement the electronic and information technology accessibility standards of the Rehabilitation Act of 1973, as amended.

The CIO shall disapprove any procurement that does not conform to the Commonwealth strategic plan for information technology developed and approved pursuant to § 2.2-2007 or to the individual strategic plans of state agencies or public institutions of higher education.

B. All statewide contracts and agreements made and entered into by VITA for the purchase of communications services, telecommunications facilities, and information technology goods and services shall provide for the inclusion of counties, cities, and towns in such contracts and agreements. Notwithstanding the provisions of § 2.2-4301, § 2.2-4302.1 or § 2.2-4302.2, VITA may enter into multiple vendor contracts for the referenced services, facilities, and goods and services.

C. VITA may establish contracts for the purchase of personal computers and related devices by licensed teachers employed in a full-time teaching capacity in Virginia public schools or in state educational facilities for use outside the classroom. The computers and related devices shall not be purchased with public funds, but shall be paid for and owned by teachers individually provided that no more than one such computer and related device per year shall be so purchased.

D. If VITA, or any agency or institution authorized by VITA, elects to procure personal computers and related peripheral equipment pursuant to any type of blanket purchasing arrangement under which public bodies, as defined in § 2.2-4301, may purchase such goods from any vendor following competitive procurement but without the conduct of an individual procurement by or for the using agency or institution, it shall establish performance-based specifications for the selection of equipment. Establishment of such contracts shall emphasize performance criteria including price, quality, and delivery without regard to "brand name." All vendors meeting the Commonwealth's performance requirements shall be afforded the opportunity to compete for such contracts.

E. This section shall not be construed or applied so as to infringe upon, in any manner, the responsibilities for accounting systems assigned to the Comptroller under § 2.2-803.

§ 2.2-3104.01. Prohibited conduct; bids or proposals under the Virginia Public Procurement Act, Public-Private Transportation Act, and Public-Private Education Facilities and Infrastructure Act.

A. Neither the Governor, his political action committee, or the Governor's Secretaries, if the Secretary is responsible to the Governor for an executive branch agency with jurisdiction over the matters at issue, shall knowingly solicit or accept a contribution, gift, or other item with a value greater than \$50 from any bidder, offeror, or private entity, or from an officer or director of such bidder, offeror, or private entity, who has submitted a bid or proposal to an executive branch agency that is

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59 directly responsible to the Governor pursuant to the Virginia Public Procurement Act (§ 2.2-4300 et
60 seq.), the Public-Private Transportation Act of 1995 (§ 56-556 et seq.), or the Public-Private Education
61 Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.) (i) during the period between the
62 submission of the bid and the award of the public contract under the Virginia Public Procurement Act or
63 (ii) following the submission of a proposal under the Public-Private Transportation Act of 1995 or the
64 Public-Private Education Facilities and Infrastructure Act of 2002 until the execution of a comprehensive
65 agreement thereunder.

66 B. The provisions of this section shall apply only for public contracts, proposals, or comprehensive
67 agreements where the stated or expected value of the contract is \$5 million or more. The provisions of
68 this section shall not apply to contracts awarded as the result of competitive sealed bidding as defined
69 set forth in § 2.2-4301.2-4302.1.

70 C. Any person who knowingly violates this section shall be subject to a civil penalty of \$500 or up
71 to two times the amount of the contribution or gift, whichever is greater. The attorney for the
72 Commonwealth shall initiate civil proceedings to enforce the civil penalties. Any civil penalties collected
73 shall be payable to the State Treasurer for deposit to the general fund.

74 **§ 2.2-3106. Prohibited contracts by officers and employees of state government and Eastern**
75 **Virginia Medical School.**

76 A. No officer or employee of any governmental agency of state government or Eastern Virginia
77 Medical School shall have a personal interest in a contract with the governmental agency of which he is
78 an officer or employee, other than his own contract of employment.

79 B. No officer or employee of any governmental agency of state government or Eastern Virginia
80 Medical School shall have a personal interest in a contract with any other governmental agency of state
81 government unless such contract is (i) awarded as a result of competitive sealed bidding or competitive
82 negotiation as defined set forth in § 2.2-4301.2-4302.1 or § 2.2-4302.2 or (ii) is awarded after a
83 finding, in writing, by the administrative head of the governmental agency that competitive bidding or
84 negotiation is contrary to the best interest of the public.

85 C. The provisions of this section shall not apply to:

86 1. An employee's personal interest in additional contracts of employment with his own governmental
87 agency that accrue to him because of a member of his immediate family, provided the employee does
88 not exercise any control over the employment or the employment activities of the member of his
89 immediate family and the employee is not in a position to influence those activities;

90 2. The personal interest of an officer or employee of a state institution of higher education or the
91 Eastern Virginia Medical School in additional contracts of employment with his own governmental
92 agency that accrue to him because of a member of his immediate family, provided (i) the officer or
93 employee and the immediate family member are engaged in teaching, research or administrative support
94 positions at the educational institution or the Eastern Virginia Medical School, (ii) the governing board
95 of the educational institution finds that it is in the best interests of the institution or the Eastern Virginia
96 Medical School and the Commonwealth for such dual employment to exist, and (iii) after such finding,
97 the governing board of the educational institution or the Eastern Virginia Medical School ensures that
98 the officer or employee, or the immediate family member, does not have sole authority to supervise,
99 evaluate or make personnel decisions regarding the other;

100 3. An officer's or employee's personal interest in a contract of employment with any other
101 governmental agency of state government;

102 4. Contracts for the sale by a governmental agency or the Eastern Virginia Medical School of
103 services or goods at uniform prices available to the general public;

104 5. An employee's personal interest in a contract between a public institution of higher education in
105 Virginia or the Eastern Virginia Medical School and a publisher or wholesaler of textbooks or other
106 educational materials for students, which accrues to him solely because he has authored or otherwise
107 created such textbooks or materials;

108 6. An employee's personal interest in a contract with his or her employing public institution of higher
109 education to acquire the collections or scholarly works owned by the employee, including manuscripts,
110 musical scores, poetry, paintings, books or other materials, writings, or papers of an academic, research,
111 or cultural value to the institution, provided the president of the institution approves the acquisition of
112 such collections or scholarly works as being in the best interests of the institution's public mission of
113 service, research, or education;

114 7. Subject to approval by the board of visitors, an employee's personal interest in a contract between
115 the Eastern Virginia Medical School or a public institution of higher education in Virginia that operates
116 a school of medicine or dentistry and a not-for-profit nonstock corporation that operates a clinical
117 practice within such public institution of higher education or the Eastern Virginia Medical School and of
118 which such employee is a member or employee;

119 8. Subject to approval by the relevant board of visitors, an employee's personal interest in a contract
120 for research and development or commercialization of intellectual property between a public institution

121 of higher education in Virginia or the Eastern Virginia Medical School and a business in which the
 122 employee has a personal interest, if (i) the employee's personal interest has been disclosed to and
 123 approved by such public institution of higher education or the Eastern Virginia Medical School prior to
 124 the time at which the contract is entered into; (ii) the employee promptly files a disclosure statement
 125 pursuant to § 2.2-3117 and thereafter files such statement annually on or before January 15; (iii) the
 126 institution has established a formal policy regarding such contracts, approved by the State Council of
 127 Higher Education or, in the case of the Eastern Virginia Medical School, a formal policy regarding such
 128 contracts in conformity with any applicable federal regulations that has been approved by its board of
 129 visitors; and (iv) no later than December 31 of each year, the institution or the Eastern Virginia Medical
 130 School files an annual report with the Secretary of the Commonwealth disclosing each open contract
 131 entered into subject to this provision, the names of the parties to each contract, the date each contract
 132 was executed and its term, the subject of each contractual arrangement, the nature of the conflict of
 133 interest, the institution's or the Eastern Virginia Medical School's employee responsible for administering
 134 each contract, the details of the institution's or the Eastern Virginia Medical School's commitment or
 135 investment of resources or finances for each contract, and any other information requested by the
 136 Secretary of the Commonwealth; or

137 9. Subject to approval by the relevant board of visitors, an employee's personal interest in a contract
 138 between a public institution of higher education in Virginia or the Eastern Virginia Medical School and
 139 a business in which the employee has a personal interest, if (i) the personal interest has been disclosed
 140 to the institution or the Eastern Virginia Medical School prior to the time the contract is entered into;
 141 (ii) the employee files a disclosure statement pursuant to § 2.2-3117 and thereafter annually on or before
 142 January 15; (iii) the employee does not participate in the institution's or the Eastern Virginia Medical
 143 School's decision to contract; (iv) the president of the institution or the Eastern Virginia Medical School
 144 finds and certifies in writing that the contract is for goods and services needed for quality patient care,
 145 including related medical education or research, by the institution's medical center or the Eastern
 146 Virginia Medical School, its affiliated teaching hospitals and other organizations necessary for the
 147 fulfillment of its mission, including the acquisition of drugs, therapies and medical technologies; and (v)
 148 no later than December 31 of each year, the institution or the Eastern Virginia Medical School files an
 149 annual report with the Secretary of the Commonwealth disclosing each open contract entered subject to
 150 this provision, the names of the parties to each contract, the date each contract was executed and its
 151 term, the subject of each contractual arrangement, the nature of the conflict of interest, the institution's
 152 or the Eastern Virginia Medical School's employee responsible for administering each contract, the
 153 details of the institution's or the Eastern Virginia Medical School's commitment or investment of
 154 resources or finances for each contract, and any other information requested by the Secretary of the
 155 Commonwealth.

156 D. Notwithstanding the provisions of subdivisions C 8 and C 9, if the research and development or
 157 commercialization of intellectual property or the employee's personal interest in a contract with a
 158 business is subject to policies and regulations governing conflicts of interest promulgated by any agency
 159 of the United States government, including the adoption of policies requiring the disclosure and
 160 management of such conflicts of interests, the policies established by the Eastern Virginia Medical
 161 School pursuant to such federal requirements shall constitute compliance with subdivisions C 8 and C 9,
 162 upon notification by the Eastern Virginia Medical School to the Secretary of the Commonwealth by
 163 January 31 of each year of evidence of their compliance with such federal policies and regulations.

164 E. The board of visitors may delegate the authority granted under subdivision C 8 to the president of
 165 the institution. If the board elects to delegate such authority, the board shall include this delegation of
 166 authority in the formal policy required by clause (iii) of subdivision C 8. In those instances where the
 167 board has delegated such authority, on or before December 1 of each year, the president of the relevant
 168 institution shall file a report with the relevant board of visitors disclosing each open contract entered
 169 into subject to this provision, the names of the parties to each contract, the date each contract was
 170 executed and its term, the subject of each contractual arrangement, the nature of the conflict of interest,
 171 the institution's or the Eastern Virginia Medical School's employee responsible for administering each
 172 contract, the details of the institution's or the Eastern Virginia Medical School's commitment or
 173 investment of resources or finances for each contract, the details of how revenues are to be dispersed,
 174 and any other information requested by the board of visitors.

175 **§ 2.2-3109. Prohibited contracts by other officers and employees of local governmental agencies.**

176 A. No other officer or employee of any governmental agency of local government shall have a
 177 personal interest in a contract with the agency of which he is an officer or employee other than his own
 178 contract of employment.

179 B. No officer or employee of any governmental agency of local government shall have a personal
 180 interest in a contract with any other governmental agency that is a component of the government of his
 181 county, city or town unless such contract is (i) awarded as a result of competitive sealed bidding or

182 competitive negotiation as defined ~~set forth~~ in § ~~2.2-4301~~2.2-4302.1 or § 2.2-4302.2 or is awarded as a
 183 result of a procedure embodying competitive principles as authorized by subdivisions A 10 or A 11 of
 184 § 2.2-4343 or (ii) is awarded after a finding, in writing, by the administrative head of the governmental
 185 agency that competitive bidding or negotiation is contrary to the best interest of the public.

186 C. The provisions of this section shall not apply to:

187 1. An employee's personal interest in additional contracts for goods or services, or contracts of
 188 employment with his own governmental agency that accrue to him because of a member of his
 189 immediate family, provided the employee does not exercise any control over (i) the employment or the
 190 employment activities of the member of his immediate family and (ii) the employee is not in a position
 191 to influence those activities or the award of the contract for goods or services;

192 2. An officer's or employee's personal interest in a contract of employment with any other
 193 governmental agency that is a component part of the government of his county, city or town;

194 3. Contracts for the sale by a governmental agency of services or goods at uniform prices available
 195 to the general public;

196 4. Members of local governing bodies who are subject to § 2.2-3107;

197 5. Members of local school boards who are subject to § 2.2-3108; or

198 6. Any ownership or financial interest of members of the governing body, administrators, and other
 199 personnel serving in a public charter school in renovating, lending, granting, or leasing public charter
 200 school facilities, as the case may be, provided such interest has been disclosed in the public charter
 201 school application as required by § 22.1-212.8.

202 **§ 2.2-4301. Definitions.**

203 As used in this chapter:

204 "Affiliate" means an individual or business that controls, is controlled by, or is under common
 205 control with another individual or business. A person controls an entity if the person owns, directly or
 206 indirectly, more than 10 percent of the voting securities of the entity. For the purposes of this definition
 207 "voting security" means a security that (i) confers upon the holder the right to vote for the election of
 208 members of the board of directors or similar governing body of the business or (ii) is convertible into,
 209 or entitles the holder to receive, upon its exercise, a security that confers such a right to vote. A general
 210 partnership interest shall be deemed to be a voting security.

211 "Best value," as predetermined in the solicitation, means the overall combination of quality, price,
 212 and various elements of required services that in total are optimal relative to a public body's needs.

213 "Business" means any type of corporation, partnership, limited liability company, association, or sole
 214 proprietorship operated for profit.

215 "Competitive negotiation" is a *the* method of contractor selection that includes the following
 216 elements: *set forth* in § 2.2-4302.2.

217 1. Issuance of a written Request for Proposal indicating in general terms that which is sought to be
 218 procured, specifying the factors that will be used in evaluating the proposal and containing or
 219 incorporating by reference the other applicable contractual terms and conditions, including any unique
 220 capabilities or qualifications that will be required of the contractor.

221 2. Public notice of the Request for Proposal at least 10 days prior to the date set for receipt of
 222 proposals by posting on the Department of General Services' central electronic procurement website or
 223 other appropriate websites. Additionally, public bodies shall publish in a newspaper of general
 224 circulation in the area in which the contract is to be performed so as to provide reasonable notice to the
 225 maximum number of offerors that can be reasonably anticipated to submit proposals in response to the
 226 particular request. Posting on the Department of General Services' central electronic procurement website
 227 shall be required of any state public body. Local public bodies are encouraged to utilize the Department
 228 of General Services' central electronic procurement website to provide the public with centralized
 229 visibility and access to the Commonwealth's procurement opportunities. In addition, proposals may be
 230 solicited directly from potential contractors.

231 3. a. Procurement of professional services. The public body shall engage in individual discussions
 232 with two or more offerors deemed fully qualified, responsible and suitable on the basis of initial
 233 responses and with emphasis on professional competence, to provide the required services. Repetitive
 234 informal interviews shall be permissible. The offerors shall be encouraged to elaborate on their
 235 qualifications and performance data or staff expertise pertinent to the proposed project, as well as
 236 alternative concepts. In addition, offerors shall be informed of any ranking criteria that will be used by
 237 the public body in addition to the review of the professional competence of the offeror. The Request for
 238 Proposal shall not, however, request that offerors furnish estimates of man-hours or cost for services. At
 239 the discussion stage, the public body may discuss nonbinding estimates of total project costs, including,
 240 but not limited to, life-cycle costing, and where appropriate, nonbinding estimates of price for services.
 241 Proprietary information from competing offerors shall not be disclosed to the public or to competitors.
 242 At the conclusion of discussion, outlined in this subdivision, on the basis of evaluation factors published
 243 in the Request for Proposal and all information developed in the selection process to this point, the

244 public body shall select in the order of preference two or more offerors whose professional qualifications
 245 and proposed services are deemed most meritorious. Negotiations shall then be conducted, beginning
 246 with the offeror ranked first. If a contract satisfactory and advantageous to the public body can be
 247 negotiated at a price considered fair and reasonable, the award shall be made to that offeror. Otherwise,
 248 negotiations with the offeror ranked first shall be formally terminated and negotiations conducted with
 249 the offeror ranked second, and so on until such a contract can be negotiated at a fair and reasonable
 250 price. Notwithstanding the foregoing, if the terms and conditions for multiple awards are included in the
 251 Request for Proposal, a public body may award contracts to more than one offeror.

252 Should the public body determine in writing and in its sole discretion that only one offeror is fully
 253 qualified, or that one offeror is clearly more highly qualified and suitable than the others under
 254 consideration, a contract may be negotiated and awarded to that offeror.

255 A contract for architectural or professional engineering services relating to construction projects may
 256 be negotiated by a public body, for multiple projects provided (i) the projects require similar experience
 257 and expertise, (ii) the nature of the projects is clearly identified in the Request for Proposal, and (iii) the
 258 contract term is limited to one year or when the cumulative total project fees reach the maximum cost
 259 authorized in this paragraph, whichever occurs first. For state public bodies, such contract, except those
 260 awarded for environmental, location, design and inspection work regarding highways and bridges by the
 261 Commissioner of Highways may be renewable for four additional one-year terms at the option of the
 262 public body. For local public bodies, including metropolitan planning organizations or planning district
 263 commissions, such contract may be renewable for four additional one-year terms at the option of the
 264 public body. Under such contract, (a) the fair and reasonable prices, as negotiated, shall be used in
 265 determining the cost of each project performed, (b) except those awarded for environmental, location,
 266 design and inspection work regarding highways and bridges by the Commissioner of Highways, the sum
 267 of all projects performed in one contract term shall not exceed \$500,000 or, in the case of a state
 268 agency, as defined in § 2-2-4347, such greater amount as may be determined by the Director of the
 269 Department of General Services, not to exceed \$1 million, except that in any locality or any authority,
 270 sanitation district, metropolitan planning organization or planning district commission with a population
 271 in excess of 80,000, the sum of all such projects shall not exceed \$5 million; and (c) except those
 272 awarded for environmental, location, design and inspection work regarding highways and bridges by the
 273 Commissioner of Highways or for architectural and engineering services for rail and public
 274 transportation projects by the Director of the Department of Rail and Public Transportation, the project
 275 fee of any single project shall not exceed \$100,000 or, in the case of a state agency, such greater
 276 amount as may be determined by the Director of the Department of General Services not to exceed
 277 \$200,000, except that in any locality or any authority or sanitation district with a population in excess of
 278 80,000, such fee shall not exceed \$1 million. Any unused amounts from the first contract term shall not
 279 be carried forward to the additional term. Competitive negotiations for such contracts may result in
 280 awards to more than one offeror provided (1) the Request for Proposal so states and (2) the public body
 281 has established procedures for distributing multiple projects among the selected contractors during the
 282 contract term. Notwithstanding any other provision in this section, for contracts for environmental
 283 location, design and inspection work regarding highways and bridges by the Commissioner of Highways,
 284 the initial contract term shall be limited to two years or when the cumulative total project fees reach \$5
 285 million, whichever occurs first. Such contract may be renewable for two additional one-year terms at the
 286 option of the Commissioner, and the sum of all projects in each one-year term shall not exceed \$5
 287 million. For architectural and engineering services for rail and public transportation projects by the
 288 Director of the Department of Rail and Public Transportation, the sum of all projects in one contract
 289 term shall not exceed \$2 million and such contract may be renewable for two additional one-year terms
 290 at the option of the Commissioner.

291 Multiphase professional services contracts satisfactory and advantageous to the Department of
 292 Transportation for environmental, location, design and inspection work regarding highways and bridges
 293 may be negotiated and awarded based on a fair and reasonable price for the first phase only, when
 294 completion of the earlier phases is necessary to provide information critical to the negotiation of a fair
 295 and reasonable price for succeeding phases.

296 Multiphase professional services contracts satisfactory and advantageous to a local public body,
 297 including metropolitan planning organizations and planning district commissions, for environmental,
 298 location, design and inspection work regarding construction of infrastructure projects may be negotiated
 299 and awarded based on qualifications at a fair and reasonable price for the first phase only, when
 300 completion of the earlier phases is necessary to provide information critical to the negotiation of a fair
 301 and reasonable price for succeeding phases. Prior to the procurement of any such contract, the local
 302 public body shall state the anticipated intended total scope of the project and determine in writing that
 303 the nature of the work is such that the best interests of such public body require awarding the contract.

304 b. Procurement of other than professional services. Selection shall be made of two or more offerors

305 deemed to be fully qualified and best suited among those submitting proposals, on the basis of the
306 factors involved in the Request for Proposal, including price if so stated in the Request for Proposal.
307 Negotiations shall then be conducted with each of the offerors so selected. Price shall be considered, but
308 need not be the sole determining factor. After negotiations have been conducted with each offeror so
309 selected, the public body shall select the offeror which, in its opinion, has made the best proposal, and
310 shall award the contract to that offeror. When the terms and conditions of multiple awards are so
311 provided in the Request for Proposal, awards may be made to more than one offeror. Should the public
312 body determine in writing and in its sole discretion that only one offeror is fully qualified, or that one
313 offeror is clearly more highly qualified than the others under consideration, a contract may be negotiated
314 and awarded to that offeror.

315 "Competitive sealed bidding" is a *the* method of contractor selection, other than for professional
316 services, which includes the following elements: *set forth in § 2.2-4302.1.*

317 1. Issuance of a written Invitation to Bid containing or incorporating by reference the specifications
318 and contractual terms and conditions applicable to the procurement. Unless the public body has provided
319 for prequalification of bidders, the Invitation to Bid shall include a statement of any requisite
320 qualifications of potential contractors. When it is impractical to prepare initially a purchase description
321 to support an award based on prices, an Invitation to Bid may be issued requesting the submission of
322 unpriced offers to be followed by an Invitation to Bid limited to those bidders whose offers have been
323 qualified under the criteria set forth in the first solicitation.

324 2. Public notice of the Invitation to Bid at least 10 days prior to the date set for receipt of bids by
325 posting on the Department of General Services' central electronic procurement website or other
326 appropriate websites. In addition, public bodies may publish in a newspaper of general circulation.
327 Posting on the Department of General Services' central electronic procurement website shall be required
328 of any state public body. Local public bodies are encouraged to utilize the Department of General
329 Services' central electronic procurement website to provide the public with centralized visibility and
330 access to the Commonwealth's procurement opportunities. In addition, bids may be solicited directly
331 from potential contractors. Any additional solicitations shall include businesses selected from a list made
332 available by the Department of Minority Business Enterprise.

333 3. Public opening and announcement of all bids received.

334 4. Evaluation of bids based upon the requirements set forth in the invitation, which may include
335 special qualifications of potential contractors, life-cycle costing, value analysis, and any other criteria
336 such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose, which
337 are helpful in determining acceptability.

338 5. Award to the lowest responsive and responsible bidder. When the terms and conditions of multiple
339 awards are so provided in the Invitation to Bid, awards may be made to more than one bidder.

340 "Construction" means building, altering, repairing, improving or demolishing any structure, building
341 or highway, and any draining, dredging, excavation, grading or similar work upon real property.

342 "Construction management contract" means a contract in which a party is retained by the owner to
343 coordinate and administer contracts for construction services for the benefit of the owner, and may also
344 include, if provided in the contract, the furnishing of construction services to the owner.

345 "Design-build contract" means a contract between a public body and another party in which the party
346 contracting with the public body agrees to both design and build the structure, roadway or other item
347 specified in the contract.

348 "Employment services organization" means an organization that provides employment services to
349 individuals with disabilities that is an approved Commission on the Accreditation of Rehabilitation
350 Facilities (CARF) accredited vendor of the Department for Aging and Rehabilitative Services.

351 "Goods" means all material, equipment, supplies, printing, and automated data processing hardware
352 and software.

353 "Informality" means a minor defect or variation of a bid or proposal from the exact requirements of
354 the Invitation to Bid, or the Request for Proposal, which does not affect the price, quality, quantity or
355 delivery schedule for the goods, services or construction being procured.

356 "*Job order contracting*" means a method of procuring construction services by establishing a book of
357 unit prices and then obtaining a contractor to perform work as needed using the prices, quantities, and
358 specifications in the book as the basis of its pricing. The contractor may be selected through either
359 competitive sealed bidding or competitive negotiation depending on the needs of the public body
360 procuring the construction services. A minimum amount of work may be specified in the contract. The
361 contract term and the project amount shall not exceed the limitations specified in § 2.2-4302.1,
362 § 2.2-4302.2, or § 2.2-4303.

363 "Multiphase professional services contract" means a contract for the providing of professional
364 services where the total scope of work of the second or subsequent phase of the contract cannot be
365 specified without the results of the first or prior phase of the contract.

366 "Nonprofessional services" means any services not specifically identified as professional services in

367 the definition of professional services.

368 "Potential bidder or offeror," for the purposes of §§ 2.2-4360 and 2.2-4364, means a person who, at
 369 the time a public body negotiates and awards or proposes to award a contract, is engaged in the sale or
 370 lease of goods, or the sale of services, insurance or construction, of the type to be procured under the
 371 contract, and who at such time is eligible and qualified in all respects to perform that contract, and who
 372 would have been eligible and qualified to submit a bid or proposal had the contract been procured
 373 through competitive sealed bidding or competitive negotiation.

374 "Professional services" means work performed by an independent contractor within the scope of the
 375 practice of accounting, actuarial services, architecture, land surveying, landscape architecture, law,
 376 dentistry, medicine, optometry, pharmacy or professional engineering. "Professional services" shall also
 377 include the services of an economist procured by the State Corporation Commission.

378 "Public body" means any legislative, executive or judicial body, agency, office, department, authority,
 379 post, commission, committee, institution, board or political subdivision created by law to exercise some
 380 sovereign power or to perform some governmental duty, and empowered by law to undertake the
 381 activities described in this chapter. "Public body" shall include any metropolitan planning organization or
 382 planning district commission which operates exclusively within the Commonwealth of Virginia.

383 "Public contract" means an agreement between a public body and a nongovernmental source that is
 384 enforceable in a court of law.

385 "Responsible bidder" or "offeror" means a person who has the capability, in all respects, to perform
 386 fully the contract requirements and the moral and business integrity and reliability that will assure good
 387 faith performance, and who has been prequalified, if required.

388 "Responsive bidder" means a person who has submitted a bid that conforms in all material respects
 389 to the Invitation to Bid.

390 "Reverse auctioning" means a procurement method wherein bidders are invited to bid on specified
 391 goods or nonprofessional services through real-time electronic bidding, with the award being made to
 392 the lowest responsive and responsible bidder. During the bidding process, bidders' prices are revealed
 393 and bidders shall have the opportunity to modify their bid prices for the duration of the time period
 394 established for bid opening.

395 "Services" means any work performed by an independent contractor wherein the service rendered
 396 does not consist primarily of acquisition of equipment or materials, or the rental of equipment, materials
 397 and supplies.

398 **§ 2.2-4302.1. Process for competitive sealed bidding.**

399 *The process for competitive sealed bidding shall include the following:*

400 1. *Issuance of a written Invitation to Bid containing or incorporating by reference the specifications*
 401 *and contractual terms and conditions applicable to the procurement. Unless the public body has*
 402 *provided for prequalification of bidders, the Invitation to Bid shall include a statement of any requisite*
 403 *qualifications of potential contractors. When it is impractical to prepare initially a purchase description*
 404 *to support an award based on prices, an Invitation to Bid may be issued requesting the submission of*
 405 *unpriced offers to be followed by an Invitation to Bid limited to those bidders whose offers have been*
 406 *qualified under the criteria set forth in the first solicitation;*

407 2. *Public notice of the Invitation to Bid at least 10 days prior to the date set for receipt of bids by*
 408 *posting on the Department of General Services' central electronic procurement website or other*
 409 *appropriate websites. In addition, public bodies may publish in a newspaper of general circulation.*
 410 *Posting on the Department of General Services' central electronic procurement website shall be required*
 411 *of any state public body. Local public bodies are encouraged to utilize the Department of General*
 412 *Services' central electronic procurement website to provide the public with centralized visibility and*
 413 *access to the Commonwealth's procurement opportunities. In addition, bids may be solicited directly*
 414 *from potential contractors. Any additional solicitations shall include certified businesses selected from a*
 415 *list made available by the Department of Minority Business Enterprise;*

416 3. *Public opening and announcement of all bids received;*

417 4. *Evaluation of bids based upon the requirements set forth in the Invitation to Bid, which may*
 418 *include special qualifications of potential contractors, life-cycle costing, value analysis, and any other*
 419 *criteria such as inspection, testing, quality, workmanship, delivery, and suitability for a particular*
 420 *purpose, which are helpful in determining acceptability; and*

421 5. *Award to the lowest responsive and responsible bidder. When the terms and conditions of multiple*
 422 *awards are so provided in the Invitation to Bid, awards may be made to more than one bidder.*

423 **§ 2.2-4302.2. Process for competitive negotiation.**

424 *A. The process for competitive negotiation shall include the following:*

425 1. *Issuance of a written Request for Proposal indicating that which is sought to be procured,*
 426 *specifying the factors that will be used in evaluating the proposal and containing or incorporating by*
 427 *reference the other applicable contractual terms and conditions, including any unique capabilities,*

428 specifications or qualifications that will be required;

429 2. Public notice of the Request for Proposal at least 10 days prior to the date set for receipt of
430 proposals by posting on the Department of General Services' central electronic procurement website or
431 other appropriate websites. Additionally, public bodies shall publish in a newspaper of general
432 circulation in the area in which the contract is to be performed so as to provide reasonable notice to
433 the maximum number of offerors that can be reasonably anticipated to submit proposals in response to
434 the particular request. Posting on the Department of General Services' central electronic procurement
435 website shall be required of any state public body. Local public bodies are encouraged to utilize the
436 Department of General Services' central electronic procurement website to provide the public with
437 centralized visibility and access to the Commonwealth's procurement opportunities. In addition,
438 proposals may be solicited directly from potential contractors. Any additional solicitations shall include
439 certified businesses selected from a list made available by the Department of Minority Business
440 Enterprise; and

441 3. For goods, nonprofessional services, and insurance, selection shall be made of two or more
442 offerors deemed to be fully qualified and best suited among those submitting proposals, on the basis of
443 the factors involved in the Request for Proposal, including price if so stated in the Request for
444 Proposal. Negotiations shall then be conducted with each of the offerors so selected. Price shall be
445 considered, but need not be the sole or primary determining factor. After negotiations have been
446 conducted with each offeror so selected, the public body shall select the offeror which, in its opinion,
447 has made the best proposal and provides the best value, and shall award the contract to that offeror.
448 When the terms and conditions of multiple awards are so provided in the Request for Proposal, awards
449 may be made to more than one offeror. Should the public body determine in writing and in its sole
450 discretion that only one offeror is fully qualified, or that one offeror is clearly more highly qualified
451 than the others under consideration, a contract may be negotiated and awarded to that offeror; or

452 4. For professional services, the public body shall engage in individual discussions with two or more
453 offerors deemed fully qualified, responsible and suitable on the basis of initial responses and with
454 emphasis on professional competence, to provide the required services. Repetitive informal interviews
455 shall be permissible. The offerors shall be encouraged to elaborate on their qualifications and
456 performance data or staff expertise pertinent to the proposed project, as well as alternative concepts. In
457 addition, offerors shall be informed of any ranking criteria that will be used by the public body in
458 addition to the review of the professional competence of the offeror. The Request for Proposal shall not,
459 however, request that offerors furnish estimates of man-hours or cost for services. At the discussion
460 stage, the public body may discuss nonbinding estimates of total project costs, including, but not limited
461 to, life-cycle costing, and where appropriate, nonbinding estimates of price for services. In accordance
462 with § 2.2-4342, proprietary information from competing offerors shall not be disclosed to the public or
463 to competitors. At the conclusion of discussion, outlined in this subdivision, on the basis of evaluation
464 factors published in the Request for Proposal and all information developed in the selection process to
465 this point, the public body shall select in the order of preference two or more offerors whose
466 professional qualifications and proposed services are deemed most meritorious.

467 Negotiations shall then be conducted, beginning with the offeror ranked first. If a contract
468 satisfactory and advantageous to the public body can be negotiated at a price considered fair and
469 reasonable, the award shall be made to that offeror. Otherwise, negotiations with the offeror ranked
470 first shall be formally terminated and negotiations conducted with the offeror ranked second, and so on
471 until such a contract can be negotiated at a fair and reasonable price.

472 Notwithstanding the foregoing, if the terms and conditions for multiple awards are included in the
473 Request for Proposal, a public body may award contracts to more than one offeror.

474 Should the public body determine in writing and in its sole discretion that only one offeror is fully
475 qualified or that one offeror is clearly more highly qualified and suitable than the others under
476 consideration, a contract may be negotiated and awarded to that offeror; or

477 5. For construction or construction management contracts, a public body may use competitive sealed
478 bidding or competitive negotiation provided competitive negotiation is authorized under § 2.2-4303.

479 B. For multiple projects, a contract for architectural or professional engineering services relating to
480 construction projects or job order contracting, may be negotiated by a public body, provided (i) the
481 projects require similar experience and expertise, (ii) the nature of the projects is clearly identified in
482 the Request for Proposal, and (iii) the contract is limited to a one-year term or when the cumulative
483 total project fees reach the maximum cost authorized in this subsection, whichever occurs first.

484 Such contracts may be renewable for four additional one-year terms at the option of the public body.
485 The fair and reasonable prices as negotiated shall be used in determining the cost of each project
486 performed and the sum of all projects performed in a one-year contract term shall not exceed \$500,000,
487 except that for:

488 1. A state agency, as defined in § 2.2-4347, the sum of all projects performed in a one-year contract
489 term shall not exceed \$1 million as may be determined by the Director of the Department of General

490 Services;

491 2. Any locality or any authority, sanitation district, metropolitan planning organization or planning
492 district commission with a population in excess of 80,000, the sum of all projects performed in a
493 one-year contract term shall not exceed \$5 million;

494 3. Architectural and engineering services for rail and public transportation projects by the Director
495 of the Department of Rail and Public Transportation, the sum of all projects in a one-year contract term
496 shall not exceed \$2 million. Such contract may be renewable for two additional one-year terms at the
497 option of the Director;

498 4. Environmental location, design and inspection work regarding highways and bridges by the
499 Commissioner of Highways, the initial contract term shall be limited to two years or when the
500 cumulative total project fees reach \$5 million, whichever occurs first. Such contract may be renewable
501 for two additional one-year terms at the option of the Commissioner, and the sum of all projects in each
502 one-year contract term shall not exceed \$5 million; and

503 5. Job order contracting, the sum of all projects performed in a one-year contract term shall not
504 exceed \$2 million.

505 Competitive negotiations for such contracts may result in awards to more than one offeror provided
506 (i) the Request for Proposal so states and (ii) the public body has established procedures for
507 distributing multiple projects among the selected contractors during the contract term.

508 C. For any single project, for (i) architectural or professional engineering services relating to
509 construction projects, (ii) job order contracting, (iii) environmental, location, design, and inspection
510 work regarding highways and bridges by the Commissioner of Highways, or (iv) architectural and
511 engineering services for rail and public transportation projects by the Director of the Department of
512 Rail and Public Transportation, the project fee shall not exceed \$100,000, except that for:

513 1. A state agency as defined in § 2.2-4347, the project fee shall not exceed \$200,000 as may be
514 determined by the Director of the Department of General Services;

515 2. Any locality or any authority or sanitation district with a population in excess of 80,000, the
516 project fee shall not exceed \$1 million; and

517 3. Job order contracting, the project fee shall not exceed \$400,000.

518 D. For the purposes of subsections B and C, any unused amounts from the first contract term shall
519 not be carried forward to the additional term.

520 E. Multiphase professional services contracts satisfactory and advantageous to the completion of
521 large, phased, or long term projects may be negotiated and awarded based on a fair and reasonable
522 price for the first phase only, where the completion of the earlier phases is necessary to provide
523 information critical to the negotiation of a fair and reasonable price for succeeding phases. Prior to the
524 entering into any such contract, the public body shall (i) state the anticipated intended total scope of the
525 project and (ii) determine in writing that the nature of the work is such that the best interests of the
526 public body require awarding the contract.

527 **§ 2.2-4303. Methods of procurement.**

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

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

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

536 Upon a written determination made in advance by (i) the Governor or his designee in the case of a
537 procurement by the Commonwealth or by a department, agency or institution thereof or (ii) the local
538 governing body in the case of a procurement by a political subdivision of the Commonwealth, that
539 competitive negotiation is either not practicable or not fiscally advantageous, insurance may be procured
540 through a licensed agent or broker selected in the manner provided for the procurement of things other
541 than professional services in subdivision 3 b of the definition of "competitive negotiation" in set forth
542 § 2.2-4301.2-4302.2. The basis for this determination shall be documented in writing.

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

547 1. By the Commonwealth, its departments, agencies and institutions on a fixed price design-build
548 basis or construction management basis under § 2.2-4306;

549 2. By any public body for the construction of highways and any draining, dredging, excavation,
550 grading or similar work upon real property;

551 3. By any governing body of a locality with a population in excess of 100,000, provided that the
552 locality has the personnel, procedures, and expertise to enter into a contract for construction on a fixed
553 price or not-to-exceed price design-build or construction management basis and shall otherwise be in
554 compliance with the provisions of this section, § 2.2-4308, and other applicable law governing
555 design-build or construction management contracts for public bodies other than the Commonwealth. The
556 procedures of the local governing body shall be consistent with the two-step competitive negotiation
557 process established in § 2.2-4301.2-4302.2; or

558 4. As otherwise provided in § 2.2-4308.

559 E. Upon a determination in writing that there is only one source practicably available for that which
560 is to be procured, a contract may be negotiated and awarded to that source without competitive sealed
561 bidding or competitive negotiation. The writing shall document the basis for this determination. The
562 public body shall issue a written notice stating that only one source was determined to be practicably
563 available, and identifying that which is being procured, the contractor selected, and the date on which
564 the contract was or will be awarded. This notice shall be posted on the Department of General Services'
565 central electronic procurement website or other appropriate websites, and in addition, public bodies may
566 publish in a newspaper of general circulation on the day the public body awards or announces its
567 decision to award the contract, whichever occurs first. Posting on the Department of General Services'
568 central electronic procurement website shall be required of any state public body. Local public bodies
569 are encouraged to utilize the Department of General Services' central electronic procurement website to
570 provide the public with centralized visibility and access to the Commonwealth's procurement
571 opportunities.

572 F. In case of emergency, a contract may be awarded without competitive sealed bidding or
573 competitive negotiation; however, such procurement shall be made with such competition as is
574 practicable under the circumstances. A written determination of the basis for the emergency and for the
575 selection of the particular contractor shall be included in the contract file. The public body shall issue a
576 written notice stating that the contract is being awarded on an emergency basis, and identifying that
577 which is being procured, the contractor selected, and the date on which the contract was or will be
578 awarded. This notice shall be posted on the Department of General Services' central electronic
579 procurement website or other appropriate websites, and in addition, public bodies may publish in a
580 newspaper of general circulation on the day the public body awards or announces its decision to award
581 the contract, whichever occurs first, or as soon thereafter as is practicable. Posting on the Department of
582 General Services' central electronic procurement website shall be required of any state public body.
583 Local public bodies are encouraged to utilize the Department of General Services' central electronic
584 procurement website to provide the public with centralized visibility and access to the Commonwealth's
585 procurement opportunities.

586 G. A public body may establish purchase procedures, if adopted in writing, not requiring competitive
587 sealed bids or competitive negotiation for single or term contracts for goods and services other than
588 professional services if the aggregate or the sum of all phases is not expected to exceed \$100,000;
589 however, such small purchase procedures shall provide for competition wherever practicable. For local
590 public bodies, such purchase procedures may allow for single or term contracts for professional services
591 without requiring competitive negotiation, provided the aggregate or the sum of all phases is not
592 expected to exceed \$60,000.

593 For state public bodies, purchases under this subsection that are expected to exceed \$30,000 shall
594 require the written informal solicitation of a minimum of four bidders or offerors. All public bodies
595 proceeding with purchases under this subsection shall post a public notice on the Department of General
596 Services' central electronic procurement website or other appropriate websites. Posting on the
597 Department of General Services' central electronic procurement website shall be required of any state
598 public body. Local public bodies are encouraged to utilize the Department of General Services' central
599 electronic procurement website to provide the public with centralized visibility and access to the
600 Commonwealth's procurement opportunities.

601 H. A state public body may establish purchase procedures, if adopted in writing, not requiring
602 competitive negotiation for single or term contracts for professional services if the aggregate or the sum
603 of all phases is not expected to exceed \$50,000; however such small purchase procedures shall provide
604 for competition wherever practicable.

605 I. Upon a determination made in advance by a public body and set forth in writing that the purchase
606 of goods, products or commodities from a public auction sale is in the best interests of the public, such
607 items may be purchased at the auction, including online public auctions. Purchase of information
608 technology and telecommunications goods and nonprofessional services from a public auction sale shall
609 be permitted by any authority, department, agency, or institution of the Commonwealth if approved by
610 the Chief Information Officer of the Commonwealth. The writing shall document the basis for this
611 determination. However, bulk purchases of commodities used in road and highway construction and
612 maintenance, and aggregates shall not be made by online public auctions.

613 J. The purchase of goods or nonprofessional services, but not construction or professional services,
614 may be made by reverse auctioning. However, bulk purchases of commodities used in road and highway
615 construction and maintenance, and aggregates shall not be made by reverse auctioning.

616 **§ 2.2-4343. Exemption from operation of chapter for certain transactions.**

617 A. The provisions of this chapter shall not apply to:

618 1. The Virginia Port Authority in the exercise of any of its powers in accordance with Chapter 10
619 (§ 62.1-128 et seq.) of Title 62.1, provided the Authority implements, by policy or regulation adopted by
620 the Board of Commissioners and approved by the Department of General Services, procedures to ensure
621 fairness and competitiveness in the procurement of goods and services and in the administration of its
622 capital outlay program. This exemption shall be applicable only so long as such policies and procedures
623 meeting the requirements remain in effect.

624 2. The Virginia Retirement System for selection of services related to the management, purchase or
625 sale of authorized investments, actuarial services, and disability determination services. Selection of these
626 services shall be governed by the standard set forth in § 51.1-124.30.

627 3. The State Treasurer in the selection of investment management services related to the external
628 management of funds shall be governed by the standard set forth in § 2.2-4514, and shall be subject to
629 competitive guidelines and policies that are set by the Commonwealth Treasury Board and approved by
630 the Department of General Services.

631 4. The Department of Social Services or local departments of social services for the acquisition of
632 motor vehicles for sale or transfer to Temporary Assistance to Needy Families (TANF) recipients.

633 5. The College of William and Mary in Virginia, Virginia Commonwealth University, the University
634 of Virginia, and Virginia Polytechnic Institute and State University in the selection of services related to
635 the management and investment of their endowment funds, endowment income, gifts, all other
636 nongeneral fund reserves and balances, or local funds of or held by the College or Universities pursuant
637 to § 23-44.1, 23-50.10:01, 23-76.1, or 23-122.1. However, selection of these services shall be governed
638 by the Uniform Prudent Management of Institutional Funds Act (§ 55-268.11 et seq.) as required by
639 §§ 23-44.1, 23-50.10:01, 23-76.1, and 23-122.1.

640 6. The Board of the Virginia College Savings Plan for the selection of services related to the
641 operation and administration of the Plan, including, but not limited to, contracts or agreements for the
642 management, purchase, or sale of authorized investments or actuarial, record keeping, or consulting
643 services. However, such selection shall be governed by the standard set forth in § 23-38.80.

644 7. Public institutions of higher education for the purchase of items for resale at retail bookstores and
645 similar retail outlets operated by such institutions. However, such purchase procedures shall provide for
646 competition where practicable.

647 8. The purchase of goods and services by agencies of the legislative branch that may be specifically
648 exempted therefrom by the Chairman of the Committee on Rules of either the House of Delegates or the
649 Senate. Nor shall the contract review provisions of § 2.2-2011 apply to such procurements. The
650 exemption shall be in writing and kept on file with the agency's disbursement records.

651 9. Any town with a population of less than 3,500, except as stipulated in the provisions of
652 §§ 2.2-4305, 2.2-4308, 2.2-4311, 2.2-4315, 2.2-4330, 2.2-4333 through 2.2-4338, 2.2-4343.1, and
653 2.2-4367 through 2.2-4377.

654 10. Any county, city or town whose governing body has adopted, by ordinance or resolution,
655 alternative policies and procedures which are (i) based on competitive principles and (ii) generally
656 applicable to procurement of goods and services by such governing body and its agencies, except as
657 stipulated in subdivision 12.

658 This exemption shall be applicable only so long as such policies and procedures, or other policies
659 and procedures meeting the requirements of § 2.2-4300, remain in effect in such county, city or town.
660 Such policies and standards may provide for incentive contracting that offers a contractor whose bid is
661 accepted the opportunity to share in any cost savings realized by the locality when project costs are
662 reduced by such contractor, without affecting project quality, during construction of the project. The fee,
663 if any, charged by the project engineer or architect for determining such cost savings shall be paid as a
664 separate cost and shall not be calculated as part of any cost savings.

665 11. Any school division whose school board has adopted, by policy or regulation, alternative policies
666 and procedures that are (i) based on competitive principles and (ii) generally applicable to procurement
667 of goods and services by the school board, except as stipulated in subdivision 12.

668 This exemption shall be applicable only so long as such policies and procedures, or other policies or
669 procedures meeting the requirements of § 2.2-4300, remain in effect in such school division. This
670 provision shall not exempt any school division from any centralized purchasing ordinance duly adopted
671 by a local governing body.

672 12. Notwithstanding the exemptions set forth in subdivisions 9 through 11, the provisions of
673 subsections C and D of § 2.2-4303, and §§ 2.2-4305, 2.2-4308, 2.2-4311, 2.2-4315, 2.2-4317, 2.2-4330,

674 2.2-4333 through 2.2-4338, 2.2-4343.1, and 2.2-4367 through 2.2-4377 shall apply to all counties, cities
675 and school divisions, and to all towns having a population greater than 3,500 in the Commonwealth.

676 The method for procurement of professional services *through competitive negotiation* set forth in
677 subdivision 3 a of § ~~2.2-4304~~ ~~in the definition of competitive negotiation~~ *subsection B of § 2.2-4302.2*
678 shall also apply to all counties, cities and school divisions, and to all towns having a population greater
679 than 3,500, where the cost of the professional service is expected to exceed \$60,000 in the aggregate or
680 for the sum of all phases of a contract or project. A school board that makes purchases through its
681 public school foundation or purchases educational technology through its educational technology
682 foundation, either as may be established pursuant to § 22.1-212.2:2 shall be exempt from the provisions
683 of this chapter, except, relative to such purchases, the school board shall comply with the provisions of
684 §§ 2.2-4311 and 2.2-4367 through 2.2-4377.

685 13. A public body that is also a utility operator may purchase services through or participate in
686 contracts awarded by one or more utility operators that are not public bodies for utility marking services
687 as required by the Underground Utility Damage Prevention Act (§ 56-265.14 et seq.). A purchase of
688 services under this subdivision may deviate from the procurement procedures set forth in this chapter
689 upon a determination made in advance by the public body and set forth in writing that competitive
690 sealed bidding is either not practicable or not fiscally advantageous to the public, and the contract is
691 awarded based on competitive principles.

692 14. Procurement of any construction or planning and design services for construction by a Virginia
693 nonprofit corporation or organization not otherwise specifically exempted when (i) the planning, design
694 or construction is funded by state appropriations of \$10,000 or less or (ii) the Virginia nonprofit
695 corporation or organization is obligated to conform to procurement procedures that are established by
696 federal statutes or regulations, whether those federal procedures are in conformance with the provisions
697 of this chapter.

698 15. Purchases, exchanges, gifts or sales by the Citizens' Advisory Council on Furnishing and
699 Interpreting the Executive Mansion.

700 16. The Eastern Virginia Medical School in the selection of services related to the management and
701 investment of its endowment and other institutional funds. The selection of these services shall, however,
702 be governed by the Uniform Prudent Management of Institutional Funds Act (§ 55-268.11 et seq.).

703 17. The Department of Corrections in the selection of pre-release and post-incarceration services.

704 18. The University of Virginia Medical Center to the extent provided by subdivision B 3 of
705 § 23-77.4.

706 19. The purchase of goods and services by a local governing body or any authority, board,
707 department, instrumentality, institution, agency or other unit of state government when such purchases
708 are made under a remedial plan established by the Governor pursuant to subsection C of § 2.2-4310 or
709 by a chief administrative officer of a county, city or town pursuant to § 15.2-965.1.

710 20. The contract by community services boards or behavioral health authorities with an administrator
711 or management body pursuant to a joint agreement authorized by § 37.2-512 or 37.2-615.

712 21. (Contingent expiration date, see note.) Procurement of any construction or planning and design
713 services and contracts with or assigned to George Mason University by the corporation or other legal
714 entity created by the board of visitors of George Mason University for the establishment and operation
715 of the branch campus of George Mason University in the Republic of Korea, pursuant to § 23-91.29:1.

716 B. Where a procurement transaction involves the expenditure of federal assistance or contract funds,
717 the receipt of which is conditioned upon compliance with mandatory requirements in federal laws or
718 regulations not in conformance with the provisions of this chapter, a public body may comply with such
719 federal requirements, notwithstanding the provisions of this chapter, only upon the written determination
720 of the Governor, in the case of state agencies, or the governing body, in the case of political
721 subdivisions, that acceptance of the grant or contract funds under the applicable conditions is in the
722 public interest. Such determination shall state the specific provision of this chapter in conflict with the
723 conditions of the grant or contract.

724 **§ 2.2-4359. Determination of nonresponsibility.**

725 A. Following public opening and announcement of bids received on an Invitation to Bid, the public
726 body shall evaluate the bids in accordance with element 4 of the ~~definition of "Competitive process for~~
727 *competitive sealed bidding"* set forth in § ~~2.2-4304~~ 2.2-4302.1. At the same time, the public body shall
728 determine whether the apparent low bidder is responsible. If the public body so determines, then it may
729 proceed with an award in accordance with element 5 of the ~~definition of "Competitive process for~~
730 *competitive sealed bidding"* set forth in § ~~2.2-4304~~ 2.2-4302.1. If the public body determines that the
731 apparent low bidder is not responsible, it shall proceed as follows:

732 1. Prior to the issuance of a written determination of nonresponsibility, the public body shall (i)
733 notify the apparent low bidder in writing of the results of the evaluation, (ii) disclose the factual support
734 for the determination, and (iii) allow the apparent low bidder an opportunity to inspect any documents
735 that relate to the determination, if so requested by the bidder within five business days after receipt of

736 the notice.

737 2. Within ten business days after receipt of the notice, the bidder may submit rebuttal information
738 challenging the evaluation. The public body shall issue its written determination of responsibility based
739 on all information in the possession of the public body, including any rebuttal information, within five
740 business days of the date the public body received the rebuttal information. At the same time, the public
741 body shall notify, with return receipt requested, the bidder in writing of its determination.

742 3. Such notice shall state the basis for the determination, which shall be final unless the bidder
743 appeals the decision within ten days after receipt of the notice by invoking administrative procedures
744 meeting the standards of § 2.2-4365, if available, or in the alternative by instituting legal action as
745 provided in § 2.2-4364.

746 The provisions of this subsection shall not apply to procurements involving the prequalification of
747 bidders and the rights of any potential bidders under such prequalification to appeal a decision that such
748 bidders are not responsible.

749 B. If, upon appeal pursuant to § 2.2-4364 or § 2.2-4365, it is determined that the decision of the
750 public body was not (i) an honest exercise of discretion, but rather was arbitrary or capricious or (ii) in
751 accordance with the Constitution of Virginia, applicable state law or regulation, or the terms or
752 conditions of the Invitation to Bid, and the award of the contract in question has not been made, the
753 sole relief shall be a finding that the bidder is a responsible bidder for the contract in question or
754 directed award as provided in subsection A of § 2.2-4364 or both.

755 If it is determined that the decision of the public body was not an honest exercise of discretion, but
756 rather was arbitrary or capricious or not in accordance with the Constitution of Virginia, applicable state
757 law or regulation, or the terms or conditions of the Invitation to Bid, and an award of the contract has
758 been made, the relief shall be as set forth in subsection B of § 2.2-4360.

759 C. A bidder contesting a determination that he is not a responsible bidder for a particular contract
760 shall proceed under this section, and may not protest the award or proposed award under the provisions
761 of § 2.2-4360.

762 D. Nothing contained in this section shall be construed to require a public body, when procuring by
763 competitive negotiation, to furnish a statement of the reasons why a particular proposal was not deemed
764 to be the most advantageous.

765 **§ 11-34.3. Energy Performance-Based Contract Procedures; required contract provisions.**

766 A. Any contracting entity may enter into an energy performance-based contract with an energy
767 performance contractor to significantly reduce energy costs to a level established by the public body or
768 operating costs of a facility through one or more energy conservation or operational efficiency measures.

769 B. The energy performance contractor shall be selected through competitive sealed bidding or
770 competitive negotiation as defined set forth in § 2.2-4301.2-4302.1 or § 2.2-4302.2. The evaluation of
771 the request for proposal shall analyze the estimates of all costs of installation, maintenance, repairs, debt
772 service, post installation project monitoring and reporting.

773 C. Before entering into a contract for energy conservation measures and facility technology
774 infrastructure upgrades and modernization measures, the contracting entity shall require the performance
775 contractor to provide a payment and performance bond relating to the installation of energy conservation
776 measures and facility technology infrastructure upgrades and modernization measures in the amount the
777 contracting entity finds reasonable and necessary to protect its interests.

778 D. Prior to the design and installation of the energy conservation measure, the contracting entity shall
779 obtain from the energy performance contractor a report disclosing all costs associated with the energy
780 conservation measure and providing an estimate of the amount of the energy cost savings. After
781 reviewing the report, the contracting entity may enter into an energy performance-based contract if it
782 finds (i) the amount the entity would spend on the energy conservation measures and facility and
783 technology infrastructure upgrades and modernization measures recommended in the report will not
784 exceed the amount to be saved in energy and operation costs more than 20 years from the date of
785 installation, based on life-cycle costing calculations, if the recommendations in the report were followed
786 and (ii) the energy performance contractor provides a written guarantee that the energy and operating
787 cost savings will meet or exceed the costs of the system. The contract may provide for payments over a
788 period of time not to exceed 20 years.

789 E. The term of any energy performance-based contract shall expire at the end of each fiscal year but
790 may be renewed annually up to 20 years, subject to the contracting entity making sufficient annual
791 appropriations based upon continued realized cost savings. Such contracts shall stipulate that the
792 agreement does not constitute a debt, liability, or obligation of the contracting entity, or a pledge of the
793 faith and credit of the contracting entity. Such contract may also provide capital contributions for the
794 purchase and installation of energy conservation and facility and technology infrastructure upgrades and
795 modernization measures that cannot be totally funded by the energy and operational savings.

796 F. An energy performance-based contract shall include the following provisions:

797 1. A guarantee by the energy performance contractor that annual energy and operational cost savings
 798 will meet or exceed the amortized cost of energy conservation measures. The guaranteed energy savings
 799 contract shall include a written guarantee of the qualified provider that either the energy or operational
 800 cost savings, or both, will meet or exceed within 20 years the costs of the energy and operational
 801 savings measures. The qualified provider shall reimburse the contracting entity for any shortfall of
 802 guaranteed energy savings projected in the contract.

803 2. A requirement that the energy performance contractor to whom the contract is awarded provide a
 804 100 percent performance guarantee bond to the contracting entity for the installation and faithful
 805 performance of the installed energy savings measures as outlined in the contract document.

806 3. A requirement that the energy performance contractor provide to the contracting entity an annual
 807 reconciliation of the guaranteed energy cost savings. The energy performance contractor shall be liable
 808 for any annual savings shortfall that may occur.

809 G. The Department of Mines, Minerals and Energy (the Department) shall make a reasonable effort,
 810 as long as workload permits, to:

811 1. Provide general advice, upon request, to local governments that wish to consider pursuit of an
 812 energy performance-based contract pursuant to this section;

813 2. Annually compile a list of performance-based contracts entered into by local governments of
 814 which the Department may become aware.

815 **§ 23-38.110. Procurement; discrimination prohibited; participation of small, women-owned, and**
 816 **minority-owned business enterprises.**

817 A. Subject to the express provisions of the management agreement described in § 23-38.88, covered
 818 institutions may be exempt from the provisions of the Virginia Public Procurement Act (§ 2.2-4300 et
 819 seq.), except for § 2.2-4342 (which section shall not be construed to require compliance with the
 820 prequalification application procedures of subsection B of § 2.2-4317); provided, however, that any
 821 deviations from the Virginia Public Procurement Act approved in a Management Agreement shall be
 822 uniform across all covered institutions; and provided further that the governing body of a covered
 823 institution shall adopt, and the covered institution shall comply with, policies for the procurement of
 824 goods and services, including professional services, that shall be based upon competitive principles and
 825 shall in each instance seek competition to the maximum practical degree. The policies shall implement a
 826 system of competitive negotiation for professional services pursuant to ~~subdivisions 1, 2, and 3 a of the~~
 827 ~~defined term "competitive negotiation" under § 2.2-4301~~ 2.2-4302.2, shall prohibit discrimination
 828 because of race, religion, color, sex or national origin of the bidder or offeror in the solicitation or
 829 award of contracts, shall incorporate the prompt payment principles of §§ 2.2-4350 and 2.2-4354, and
 830 shall consider the impact on correctional enterprises under § 53.1-47.

831 B. Such policies may, among other things, (i) provide for consideration of the dollar amount of the
 832 intended procurement, the term of the anticipated contract, and the likely extent of competition; (ii)
 833 implement a prequalification procedure for contractors or products; and (iii) include provisions for
 834 cooperative arrangements with other covered institutions, other public or private educational institutions,
 835 other public or private organizations or entities, including public-private partnerships, public bodies,
 836 charitable organizations, health care provider alliances or purchasing organizations or entities, state
 837 agencies or institutions of the Commonwealth or the several states, the District of Columbia, the
 838 territories and the United States, and any combination thereof. Nothing in this section shall preclude a
 839 covered institution from requesting and utilizing, and covered institutions are hereby encouraged to
 840 utilize, the assistance of the Virginia Information Technologies Agency in information technology
 841 procurements.

842 C. In the solicitation and awarding of contracts, no covered institution shall discriminate against a
 843 bidder or offeror because of race, religion, color, sex, national origin, age, disability, or any other basis
 844 prohibited by state or federal law. The procurement policies of a covered institution shall provide that,
 845 whenever solicitations are made seeking competitive procurement of goods or services, it shall be a
 846 priority of the institution to provide for fair and reasonable consideration of small, women-owned, and
 847 minority-owned businesses and to promote and encourage a diversity of suppliers. The institution shall
 848 post on the Department of General Services' central electronic procurement website all Invitations to
 849 Bid, Requests for Proposal, sole source award notices, and emergency award notices to ensure visibility
 850 and access to the Commonwealth's procurement opportunities on one website.

851 D. As part of any procurement provisions of a management agreement, the governing board of a
 852 covered institution shall identify the public, educational, and operational interests served by any
 853 procurement rule or rules that deviate from those in the Virginia Public Procurement Act.

854 **§ 30-105. Prohibited contracts by legislators.**

855 A. No legislator shall have a personal interest in a contract with the legislative branch of state
 856 government.

857 B. No legislator shall have a personal interest in a contract with any governmental agency of the
 858 executive or judicial branches of state government, other than in a contract of regular employment,

859 unless such contract is awarded as a result of competitive sealed bidding or competitive negotiation as
860 defined *set forth* in § ~~2.2-4301~~ 2.2-4302.1 or § 2.2-4302.2.

861 C. No legislator shall have a personal interest in a contract with any governmental agency of local
862 government, other than in a contract of regular employment, unless such contract is (i) awarded as a
863 result of competitive sealed bidding or competitive negotiation as defined *set forth* in § ~~2.2-4301~~
864 2.2-4302.1 or § 2.2-4302.2 or is awarded as a result of a procedure embodying competitive principles as
865 authorized by subdivision A 10 or A 11 of § 2.2-4343, or (ii) is awarded after a finding, in writing, by
866 the administrative head of the local governmental agency that competitive bidding or negotiation is
867 contrary to the best interest of the public.

868 D. The provisions of this section shall not apply to contracts for the sale by a governmental agency
869 of services or goods at uniform prices available to the general public.

870 E. The provisions of this section shall not apply to a legislator's personal interest in a contract
871 between a public institution of higher education in Virginia and a publisher or wholesaler of textbooks
872 or other educational materials for students, which accrues to him solely because he has authored or
873 otherwise created such textbooks or materials.

874 **§ 33.1-391.3. Powers and duties of the Director.**

875 Except such powers as are conferred by law upon the Commonwealth Transportation Board, or such
876 services as are performed by the Department of Transportation pursuant to law, the Director of the
877 Department of Rail and Public Transportation shall have the power to do all acts necessary or
878 convenient for establishing, maintaining, improving, and promoting public transportation, transportation
879 demand management, ridesharing, and passenger and freight rail transportation in the Commonwealth
880 and to procure architectural and engineering services for rail and public transportation projects as
881 specified in § ~~2.2-4301~~ 2.2-4302.2.

882 **§ 56-573.1. Procurement.**

883 The Virginia Public Procurement Act (§ 2.2-4300 et seq.) shall not apply to this chapter; however, a
884 responsible public entity may enter into an interim or a comprehensive agreement only in accordance
885 with guidelines adopted by it as follows:

886 1. A responsible public entity may enter into an interim or a comprehensive agreement in accordance
887 with guidelines adopted by it that are consistent with procurement through "competitive sealed bidding"
888 as defined *set forth* in § ~~2.2-4301~~ 2.2-4302.1 and subsection B of § 2.2-4310.

889 2. A responsible public entity may enter into an interim or a comprehensive agreement in accordance
890 with guidelines adopted by it that are consistent with the procurement of "other than professional
891 services" through competitive negotiation as defined *set forth* in § ~~2.2-4301~~ 2.2-4302.2 and subsection B
892 of § 2.2-4310. Such responsible public entity shall not be required to select the proposal with the lowest
893 price offer, but may consider price as one factor in evaluating the proposals received. Other factors that
894 may be considered include (i) the proposed cost of the qualifying transportation facility; (ii) the general
895 reputation, qualifications, industry experience, and financial capacity of the private entity; (iii) the
896 proposed design, operation, and feasibility of the qualifying transportation facility; (iv) the eligibility of
897 the facility for priority selection, review, and documentation timelines under the responsible public
898 entity's guidelines; (v) local citizen and public entity comments; (vi) benefits to the public; (vii) the
899 private entity's compliance with a minority business enterprise participation plan or good faith effort to
900 comply with the goals of such plan; (viii) the private entity's plans to employ local contractors and
901 residents; (ix) the safety record of the private entity; (x) the ability of the facility to address the needs
902 identified in the appropriate state, regional or local transportation plan by improving safety, reducing
903 congestion, increasing capacity, and/or enhancing economic efficiency; and (xi) other criteria that the
904 responsible public entity deems appropriate.

905 A responsible public entity shall proceed in accordance with the guidelines adopted by it pursuant to
906 subdivision 1 unless it determines that proceeding in accordance with the guidelines adopted by it
907 pursuant to this subdivision is likely to be advantageous to the responsible public entity and the public,
908 based on (i) the probable scope, complexity, or urgency of a project; (ii) risk sharing including
909 guaranteed cost or completion guarantees, added value, or debt or equity investments proposed by the
910 private entity; or (iii) an increase in funding, dedicated revenue source or other economic benefit that
911 would not otherwise be available. When the responsible public entity determines to proceed according to
912 the guidelines adopted by it pursuant to this subdivision, it shall state the reasons for its determination in
913 writing. If a state agency is the responsible public entity, the approval of the Secretary of Transportation
914 shall be required as more specifically set forth in the guidelines before the comprehensive agreement is
915 signed.

916 3. Interim or comprehensive agreements for maintenance or asset management services for a
917 transportation facility that is a highway, bridge, tunnel, or overpass, and any amendment or change order
918 thereto that increases the highway lane-miles receiving services under such an agreement, shall be
919 procured in accordance with guidelines that are consistent with procurement through "competitive sealed

920 bidding" as defined set forth in § ~~2.2-4301~~2.2-4302.1 and subsection B of § 2.2-4310. Furthermore, such
 921 contracts shall be of a size and scope to encourage maximum competition and participation by agency
 922 prequalified contractors and otherwise qualified contractors.

923 4. The provisions of subdivision 3 shall not apply to maintenance or asset management services
 924 agreed to as part of the initial provisions of any interim or comprehensive agreement entered into for the
 925 original construction, reconstruction, or improvement of any highway pursuant to Chapter 22 (§ 56-556
 926 et seq.) of Title 56 and shall not apply to any concession that, at a minimum, provides for (i) the
 927 construction, reconstruction, or improvement of any transportation facility or (ii) the operation and
 928 maintenance of any transportation facility with existing toll facilities.

929 5. Nothing in this section shall require that professional services be procured by any method other
 930 than competitive negotiation in accordance with the Virginia Public Procurement Act (§ 2.2-4300 et
 931 seq.).

932 **§ 56-575.16. Procurement.**

933 The Virginia Public Procurement Act (§ 2.2-4300 et seq.) and any interpretations, regulations, or
 934 guidelines of the Division of Engineering and Buildings of the Department of General Services or the
 935 Virginia Information Technologies Agency, including the Capital Outlay Manual and those
 936 interpretations, regulations or guidelines developed pursuant to §§ 2.2-1131, 2.2-1132, 2.2-1133,
 937 2.2-1149, and 2.2-1502, except those developed by the Division or the Virginia Information
 938 Technologies Agency in accordance with this chapter when the Commonwealth is the responsible public
 939 entity, shall not apply to this chapter. However, a responsible public entity may enter into a
 940 comprehensive agreement only in accordance with guidelines adopted by it as follows:

941 1. A responsible public entity may enter into a comprehensive agreement in accordance with
 942 guidelines adopted by it that are consistent with procurement through competitive sealed bidding as
 943 defined set forth in § ~~2.2-4301~~ 2.2-4302.1 and subsection B of § 2.2-4310.

944 2. A responsible public entity may enter into a comprehensive agreement in accordance with
 945 guidelines adopted by it that are consistent with the procurement of "other than professional services"
 946 through competitive negotiation as defined set forth in § ~~2.2-4301~~2.2-4302.2 and subsection B of
 947 § 2.2-4310. Such responsible public entity shall not be required to select the proposal with the lowest
 948 price offer, but may consider price as one factor in evaluating the proposals received. Other factors that
 949 may be considered include (i) the proposed cost of the qualifying facility; (ii) the general reputation,
 950 industry experience, and financial capacity of the private entity; (iii) the proposed design of the
 951 qualifying project; (iv) the eligibility of the facility for accelerated selection, review, and documentation
 952 timelines under the responsible public entity's guidelines; (v) local citizen and government comments;
 953 (vi) benefits to the public; (vii) the private entity's compliance with a minority business enterprise
 954 participation plan or good faith effort to comply with the goals of such plan; (viii) the private entity's
 955 plans to employ local contractors and residents; and (ix) other criteria that the responsible public entity
 956 deems appropriate.

957 A responsible public entity shall proceed in accordance with the guidelines adopted by it pursuant to
 958 subdivision 1 unless it determines that proceeding in accordance with the guidelines adopted by it
 959 pursuant to this subdivision is likely to be advantageous to the responsible public entity and the public,
 960 based on (i) the probable scope, complexity, or priority of the project; (ii) risk sharing including
 961 guaranteed cost or completion guarantees, added value or debt or equity investments proposed by the
 962 private entity; or (iii) an increase in funding, dedicated revenue source or other economic benefit that
 963 would not otherwise be available. When the responsible public entity determines to proceed according to
 964 the guidelines adopted by it pursuant to this subdivision, it shall state the reasons for its determination in
 965 writing. If a state agency is the responsible public entity, the approval of the responsible Governor's
 966 Secretary, or the Governor, shall be required before the responsible public entity may enter into a
 967 comprehensive agreement pursuant to this subdivision.

968 3. Nothing in this chapter shall authorize or require that a responsible public entity obtain
 969 professional services through any process except in accordance with guidelines adopted by it that are
 970 consistent with the procurement of "professional services" through competitive negotiation as defined set
 971 forth in § ~~2.2-4301~~2.2-4302.2 and subsection B of § 2.2-4310.

972 4. A responsible public entity shall not proceed to consider any request by a private entity for
 973 approval of a qualifying project until the responsible public entity has adopted and made publicly
 974 available guidelines pursuant to § 56-575.3:1 that are sufficient to enable the responsible public entity to
 975 comply with this chapter.

976 5. A responsible public entity that is a school board or a county, city, or town may enter into an
 977 interim or comprehensive agreement under this chapter only with the approval of the local governing
 978 body.

979 **2. That the provisions of the first enactment of this act shall become effective on July 1, 2014.**

980 **3. That the Chairmen of the House Committee on General Laws and the Senate Committee on**
 981 **General Laws and Technology shall convene a working group consisting of representatives of the**

982 Department of General Services and the contracting community, local government procurement
983 officials, and other interested parties to examine the provisions of the Virginia Public Procurement
984 Act (§ 2.2-4300 et seq.) of the Code of Virginia and report its findings and recommendations for
985 changes in the law, to the Chairmen of the House Committee on General Laws and the Senate
986 Committee on General Laws and Technology on or before December 1, 2013.
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HB2079