

VIRGINIA ACTS OF ASSEMBLY — CHAPTER

An Act 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.

[H 2079]

Approved

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, and 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 directly responsible to the Governor pursuant to the Virginia Public Procurement Act (§ 2.2-4300 et seq.), the Public-Private Transportation Act of 1995 (§ 56-556 et seq.), or the Public-Private Education

ENROLLED

HB2079ER

57 Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.) (i) during the period between the
 58 submission of the bid and the award of the public contract under the Virginia Public Procurement Act or
 59 (ii) following the submission of a proposal under the Public-Private Transportation Act of 1995 or the
 60 Public-Private Education Facilities and Infrastructure Act of 2002 until the execution of a comprehensive
 61 agreement thereunder.

62 B. The provisions of this section shall apply only for public contracts, proposals, or comprehensive
 63 agreements where the stated or expected value of the contract is \$5 million or more. The provisions of
 64 this section shall not apply to contracts awarded as the result of competitive sealed bidding as ~~defined~~
 65 *set forth* in § ~~2.2-4304~~ 2.2-4302.1.

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

70 **§ 2.2-3106. Prohibited contracts by officers and employees of state government and Eastern**
 71 **Virginia Medical School.**

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

75 B. No officer or employee of any governmental agency of state government or Eastern Virginia
 76 Medical School shall have a personal interest in a contract with any other governmental agency of state
 77 government unless such contract is (i) awarded as a result of competitive sealed bidding or competitive
 78 negotiation as ~~defined set forth~~ in § ~~2.2-4304~~ 2.2-4302.1 or 2.2-4302.2 or (ii) is awarded after a finding,
 79 in writing, by the administrative head of the governmental agency that competitive bidding or
 80 negotiation is contrary to the best interest of the public.

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

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

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

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

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

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

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

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

115 8. Subject to approval by the relevant board of visitors, an employee's personal interest in a contract
 116 for research and development or commercialization of intellectual property between a public institution
 117 of higher education in Virginia or the Eastern Virginia Medical School and a business in which the

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

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

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

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

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

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

B. No officer or employee of any governmental agency of local government shall have a personal interest in a contract with any other governmental agency that is a component of the government of his county, city or town unless such contract is (i) awarded as a result of competitive sealed bidding or competitive negotiation as defined set forth in § 2.2-4301 2.2-4302.1 or 2.2-4302.2 or is awarded as a

result of a procedure embodying competitive principles as authorized by subdivisions A 10 or A 11 of § 2.2-4343 or (ii) is awarded after a finding, in writing, by the administrative head of the governmental agency that competitive bidding or negotiation is contrary to the best interest of the public.

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

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

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

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

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

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

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

§ 2.2-4301. Definitions.

As used in this chapter:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Public opening and announcement of all bids received.

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

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

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

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

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

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

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

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

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

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

"Nonprofessional services" means any services not specifically identified as professional services in the definition of professional services.

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

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

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

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

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

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

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

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

§ 2.2-4302.1. Process for competitive sealed bidding.

The process for competitive sealed bidding shall include the following:

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

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

3. Public opening and announcement of all bids received;

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

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

§ 2.2-4302.2. Process for competitive negotiation.

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

1. Issuance of a written Request for Proposal indicating in general terms that which is sought to be procured, specifying the factors that will be used in evaluating the proposal and containing or

incorporating by reference the other applicable contractual terms and conditions, including any unique capabilities, specifications or qualifications that will be required;

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

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

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

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

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

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

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

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

1. A state agency, as defined in § 2.2-4347, the sum of all projects performed in a one-year contract

term shall not exceed \$1 million as may be determined by the Director of the Department of General Services;

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

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

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

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

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

C. For any single project, for (i) architectural or professional engineering services relating to construction projects, or (ii) job order contracting, the project fee shall not exceed \$100,000, except that for:

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

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

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

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

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

§ 2.2-4303. Methods of procurement.

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

B. Professional services shall be procured by competitive negotiation.

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

Upon a written determination made in advance by (i) the Governor or his designee in the case of a procurement by the Commonwealth or by a department, agency or institution thereof or (ii) the local governing body in the case of a procurement by a political subdivision of the Commonwealth, that competitive negotiation is either not practicable or not fiscally advantageous, insurance may be procured through a licensed agent or broker selected in the manner provided for the procurement of things other than professional services in subdivision 3 b of the definition of "competitive negotiation" in set forth in § 2.2-4304 2.2-4302.2. The basis for this determination shall be documented in writing.

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

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

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

3. By any governing body of a locality with a population in excess of 100,000, provided that the

locality has the personnel, procedures, and expertise to enter into a contract for construction on a fixed price or not-to-exceed price design-build or construction management basis and shall otherwise be in compliance with the provisions of this section, § 2.2-4308, and other applicable law governing design-build or construction management contracts for public bodies other than the Commonwealth. The procedures of the local governing body shall be consistent with the two-step competitive negotiation process established in § ~~2.2-4304~~ 2.2-4302.2; or

4. As otherwise provided in § 2.2-4308.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9. Any town with a population of less than 3,500, except as stipulated in the provisions of §§ 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 2.2-4367 through 2.2-4377.

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

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

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

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

12. Notwithstanding the exemptions set forth in subdivisions 9 through 11, the provisions of 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,

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 and school divisions, and to all towns having a population greater than 3,500 in the Commonwealth.

The method for procurement of professional services *through competitive negotiation* set forth in subdivision 3 a of § 2.2-4301 in the definition of *competitive negotiation subsection B of § 2.2-4302.2* shall also apply to all counties, cities and school divisions, and to all towns having a population greater than 3,500, where the cost of the professional service is expected to exceed \$60,000 in the aggregate or for the sum of all phases of a contract or project. A school board that makes purchases through its public school foundation or purchases educational technology through its educational technology foundation, either as may be established pursuant to § 22.1-212.2:2 shall be exempt from the provisions of this chapter, except, relative to such purchases, the school board shall comply with the provisions of §§ 2.2-4311 and 2.2-4367 through 2.2-4377.

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

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

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

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

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

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

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

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

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

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

§ 2.2-4359. Determination of nonresponsibility.

A. Following public opening and announcement of bids received on an Invitation to Bid, the public body shall evaluate the bids in accordance with element 4 of the definition of "*Competitive process for competitive sealed bidding*" set forth in § 2.2-4301 2.2-4302.1. At the same time, the public body shall determine whether the apparent low bidder is responsible. If the public body so determines, then it may proceed with an award in accordance with element 5 of the definition of "*Competitive process for competitive sealed bidding*" set forth in § 2.2-4301 2.2-4302.1. If the public body determines that the apparent low bidder is not responsible, it shall proceed as follows:

1. Prior to the issuance of a written determination of nonresponsibility, the public body shall (i) notify the apparent low bidder in writing of the results of the evaluation, (ii) disclose the factual support for the determination, and (iii) allow the apparent low bidder an opportunity to inspect any documents

that relate to the determination, if so requested by the bidder within five business days after receipt of the notice.

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

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

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

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

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

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

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

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

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

B. The energy performance contractor shall be selected through competitive sealed bidding or competitive negotiation as defined set forth in ~~§ 2.2-4301~~ 2.2-4302.1 or 2.2-4302.2. The evaluation of the request for proposal shall analyze the estimates of all costs of installation, maintenance, repairs, debt service, post installation project monitoring and reporting.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 30-105. Prohibited contracts by legislators.

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

B. No legislator shall have a personal interest in a contract with any governmental agency of the executive or judicial branches of state government, other than in a contract of regular employment, unless such contract is awarded as a result of competitive sealed bidding or competitive negotiation as defined set forth in § 2.2-4301 2.2-4302.1 or 2.2-4302.2.

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

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

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

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

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

§ 56-573.1. Procurement.

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

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

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

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

3. Interim or comprehensive agreements for maintenance or asset management services for a transportation facility that is a highway, bridge, tunnel, or overpass, and any amendment or change order

thereto that increases the highway lane-miles receiving services under such an agreement, shall be procured in accordance with guidelines that are consistent with procurement through "competitive sealed bidding" as defined set forth in § 2.2-4301 2.2-4302.1 and subsection B of § 2.2-4310. Furthermore, such contracts shall be of a size and scope to encourage maximum competition and participation by agency prequalified contractors and otherwise qualified contractors.

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

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

§ 56-575.16. Procurement.

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

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

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

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

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

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

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

972 2. That the provisions of the first enactment of this act shall become effective on July 1, 2014.
973 3. That the Chairmen of the House Committee on General Laws and the Senate Committee on
974 General Laws and Technology shall convene a working group consisting of representatives of the
975 Department of General Services and the contracting community, local government procurement
976 officials, professional service contractors, and other interested parties to examine the provisions of
977 the Virginia Public Procurement Act (§ 2.2-4300 et seq.) of the Code of Virginia and report its
978 findings and recommendations for changes in the law, to the Chairmen of the House Committee
979 on General Laws and the Senate Committee on General Laws and Technology on or before
980 December 1, 2013.

ENROLLED

HB2079ER