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HOUSE BILL NO. 1354

Offered January 21, 2016

A *BILL to amend and reenact §§ 2.2-4303, 2.2-4305, 2.2-5005, 15.2-5102.1, and 15.2-6314.1 of the Code of Virginia, relating to the Virginia Public Procurement Act; use of best value contracting; construction and professional services.*

Patrons—Bell, John J. and Boysko

Referred to Committee on General Laws

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-4303, 2.2-4305, 2.2-5005, 15.2-5102.1, and 15.2-6314.1 of the Code of Virginia are amended and reenacted as follows:

§ 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 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 set forth in § 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 § 2.2-4302.2; or

4. As otherwise provided in § 2.2-4308.

E. *In addition to the provisions of subsection D, any public body may procure construction on a best value procurement basis using a numerical scoring system consisting of the following: (i) technical solution, 30 percent; (ii) past performance, 30 percent, including (a) price history of cost overruns, (b) schedule history of on-time delivery, and (c) contractor performance ratings from the immediately preceding five-year period; and (iii) price, 40 percent. The Request for Proposal shall contain a notice to potential offerors that the procurement decision will be made on a best value procurement basis. The Request for Proposal shall describe (1) the criteria that will be considered in evaluating the proposals and (2) the numerical scoring system that will be used in evaluating the proposals, including identification of the factors and weight values as set forth in this subsection.*

F. 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'

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59 central electronic procurement website shall be required of any state public body. Local public bodies
60 are encouraged to utilize the Department of General Services' central electronic procurement website to
61 provide the public with centralized visibility and access to the Commonwealth's procurement
62 opportunities.

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

77 G. H. A public body may establish purchase procedures, if adopted in writing, not requiring
78 competitive sealed bids or competitive negotiation for single or term contracts for (i) goods and services
79 other than professional services and (ii) non transportation-related construction, if the aggregate or the
80 sum of all phases is not expected to exceed \$100,000; however, such small purchase procedures shall
81 provide for competition wherever practicable. Such purchase procedures may allow for single or term
82 contracts for professional services without requiring competitive negotiation, provided the aggregate or
83 the sum of all phases is not expected to exceed \$60,000. Where small purchase procedures are adopted
84 for construction, the procedures shall not waive compliance with the Uniform State Building Code.

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

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

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

103 **§ 2.2-4305. Competitive procurement by localities on state-aid projects.**

104 No contract for the construction of any building or for an addition to or improvement of an existing
105 building by any local governing body or subdivision thereof for which state funds of not more than
106 \$50,000 in the aggregate or for the sum of all phases of a contract or project either by appropriation,
107 grant-in-aid or loan, are used or are to be used for all or part of the cost of construction shall be let
108 except after competitive sealed bidding or after competitive negotiation as provided under subsection D
109 of § 2.2-4303 or using best value contracting as provided under subsection E of § 2.2-4303. The
110 procedure for the advertising for bids or for proposals and for letting of the contract shall conform,
111 mutatis mutandis, to this chapter.

112 **§ 2.2-5005. Incentive performance benefits to certain public institutions of higher education.**

113 As used in this section, unless the context requires a different meaning:

114 "Fiscal year of implementation" means the first full fiscal year for which the financial and
115 administrative management and educational-related performance benchmarks described under
116 § 23-9.6:1.01 are effective, as provided in a general appropriation act.

117 Beginning with the fiscal year that immediately follows the fiscal year of implementation and for all
118 fiscal years thereafter, each public institution of higher education that (i) has been certified during the
119 fiscal year by the State Council of Higher Education of Virginia pursuant to § 23-9.6:1.01 as having
120 met the institutional performance benchmarks for public institutions of higher education and (ii) meets

the conditions prescribed in subsection B of § 23-38.88, shall receive the following financial benefits:

1. Interest on the tuition and fees and other nongeneral fund Educational and General Revenues deposited into the State Treasury by the public institution of higher education, as provided in the appropriation act. Such interest shall be paid from the general fund and shall be an appropriate and equitable amount as determined and certified in writing by the Secretary of Finance to the Comptroller by the end of each fiscal year, or as soon thereafter as practicable;

2. Any unexpended appropriations of the public institution of higher education at the close of the fiscal year, which shall be reappropriated and allotted for expenditure by the institution in the immediately following fiscal year; and

3. A pro rata amount of the rebate due to the Commonwealth on credit card purchases of \$5,000 or less made during the fiscal year. The amount to be paid to each institution shall equal a pro rata share based upon its total transactions of \$5,000 or less using the credit card that is approved for use by all state agencies as compared to all transactions of \$5,000 or less using such card by all state agencies. The Comptroller shall determine the public institution's pro rata share and, as provided in the appropriation act, shall pay the institution by August 15, or as soon thereafter as practicable, of the fiscal year immediately following the year of certification.

The payment to an institution of its pro rata share under this subdivision shall also be applicable to other rebate or refund programs in effect that are similar to that of the credit card rebate program described in this subdivision. The Secretary of Finance shall identify such other rebate or refund programs and shall determine the pro rata share to be paid to the public institution of higher education.

4. A rebate of any transaction fees for the prior fiscal year paid for sole source procurements made by the institution in accordance with subsection E F of § 2.2-4303, for using a vendor who is not registered with the Department of General Service's web-based electronic procurement program commonly known as "eVA", as provided in the appropriation act. Such rebate shall be certified by the Department of General Services and paid to each public institution by August 15, or as soon thereafter as practicable, of the fiscal year immediately following the year of certification.

§ 15.2-5102.1. (Contingent expiration date) Hampton Roads area refuse collection and disposal system authority.

Any authority, or any subsidiary thereof, organized pursuant to § 15.2-5102 to operate a refuse collection and disposal system that has among its members the Cities of Norfolk, Virginia Beach, Portsmouth, Chesapeake, and Franklin, and the Counties of Isle of Wight, Southampton, and Suffolk, shall, notwithstanding any other law to the contrary, comply with the following requirements:

1. Each locality that is a member of the authority shall be entitled to nominate individuals to fill one position on the Board of Directors (the Board) by submitting a list of three potential directors, each of whom shall possess general business knowledge and shall not be an elected official, to the Governor. The Governor shall then select and appoint one director from each of the lists of nominees prepared by the member localities. In addition, each member locality shall be authorized to directly appoint, upon a majority vote of the governing body of the member locality, one ex officio member of the Board who shall be an employee of the member locality. The members of the Board shall be appointed for terms of four years each. Vacancies occurring other than by expiration of a term shall be filled for the unexpired term. Vacancies shall be filled in the same manner as the original appointments. No member shall serve for more than two consecutive four-year terms, except that any member appointed to the unexpired term of another shall be eligible to serve two consecutive four-year terms.

2. The authority shall develop and maintain an overall strategic plan that shall cover a period of at least five years forward from the year in which it is submitted and approved by the Board. The plans shall be reviewed annually to determine whether amendments are needed. Any such amendments shall be submitted to the board of directors for approval.

3. The authority's core purpose shall be defined as "management of the safe and environmentally sound disposal of regional waste." The authority shall devote its time and effort to activities associated with its core purpose. A vote of a majority of the Board shall be required prior to undertaking any activities not associated with the authority's core purpose.

4. The authority shall develop and maintain a strategic operating plan identifying all elements of its core business units and core purpose, how each business and administrative unit will support the overall strategic plan, and how the authority will achieve its stated mission and core purpose. The strategic operating plan shall be subject to review and approval of the Board on an annual basis.

5. The authority shall consider outsourcing any or all functions that may result in reduced costs to the authority, and the authority shall annually issue requests for proposals that potentially reduce the costs of any of its programs. In addition, the authority shall accept and review any proposals under the Public-Private Education Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.) that potentially reduce the costs of any of the authority's programs.

6. The authority shall evaluate its landfill capacity annually, taking into consideration and projecting

182 future changes in the quantity of waste disposed of in its landfill, or landfills reasonably situated or
183 contractually obligated to accept its waste.

184 7. The authority shall keep records of its costs, revenue, debts, and capital expenses by fiscal year
185 for each program. The authority shall also keep records of costs for each individual capital project.

186 8. The authority shall maintain a detailed financing plan that shall include a plan for the retirement
187 of all debt and a plan for the funding of all planned capital projects. The plan for the funding of all
188 planned capital projects shall specify the amount of debt the authority will issue in furtherance of the
189 projects and the debt repayment plan for any new debt created by the capital projects, including the
190 revenue source that will be used to repay the debt. The detailed financing plan shall be updated and
191 approved annually by the Board and reviewed and certified annually by an external certified public
192 accountant.

193 9. Prior to issuance of new debt, the Board shall perform a due diligence investigation of the
194 appropriateness of issuing the debt, including an analysis of the costs of repaying the debt. Such analysis
195 shall be certified by an external certified public accountant, reviewed by the Board, and approved by a
196 vote of a minimum of 75 percent of the Board. The issuance of new debt shall require a vote of a
197 minimum of 75 percent of the Board of Directors of the authority. The authority shall not issue
198 long-term bond indebtedness to fund operational expenses. The provisions of this subdivision shall not
199 apply to the issuance of new debt issued for the purpose of refunding or refinancing debt incurred by
200 the authority prior to September 30, 2009.

201 10. In the interest of open and transparent government, the authority shall adhere strictly to the
202 requirements of the Freedom of Information Act (§ 2.2-3700 et seq.).

203 11. The executive director of the authority shall not be permitted to execute or commit the authority
204 to any contract, memorandum of agreement or memorandum of understanding without an informed vote
205 of approval by the Board. This subdivision shall not apply in the case of (i) contracts for the purchase
206 of goods and services for an aggregate sum of less than \$30,000, which are subject to the Virginia
207 Procurement Act (Va. Code § 2.2-4300 et seq.) but exempted from competitive negotiation or
208 competitive sealed bidding by a duly adopted policy of the Board and (ii) sole source and emergency
209 procurements made pursuant to subsections E and F and G of § 2.2-4303.

210 **§ 15.2-6314.1. Applicability of the Virginia Personnel Act and the Virginia Public Procurement**
211 **Act.**

212 A. Employees of an authority created by a locality shall be exempt from the provisions of the
213 Virginia Personnel Act (§ 2.2-2900 et seq.) if (i) the locality has personnel policies and procedures that
214 are consistent with the goals, objectives, and policies of the Virginia Personnel Act; and (ii) such
215 authority adopts the locality's personnel policies and procedures. In any event, personnel actions shall be
216 taken without regard to race, sex, color, national origin, religion, age, handicap, or political affiliation.

217 B. Any authority created under this chapter shall be subject to the terms of the Virginia Public
218 Procurement Act (§ 2.2-4300 et seq.). Notwithstanding the foregoing, should the United States
219 Department of Defense place a federal area on a list of installations to be closed or realigned under the
220 authority granted to the United States Department of Defense pursuant to the federal Defense Base
221 Closure And Realignment Act of 1990 (United States Public Law 101-501, as amended through the
222 National Defense Authorization Act of Fiscal Year 2003), and such federal area is subject to the
223 jurisdiction of an authority created by a locality, such listing of that installation shall qualify as an
224 "emergency" under subsection F G of § 2.2-4303 of the Virginia Public Procurement Act.