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SENATE BILL NO. 195

Offered January 8, 2020

Prefiled December 29, 2019

A *BILL to amend and reenact §§ 2.2-4340, 2.2-4343, 22.1-212.2:2, and 23.1-1017 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 2.2-4340.1, relating to Virginia Public Procurement Act; statute of limitations on actions on construction contracts; statute of limitations on actions on performance bonds.*

Patron—Cosgrove

Referred to Committee on General Laws and Technology

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-4340, 2.2-4343, 22.1-212.2:2, and 23.1-1017 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 2.2-4340.1 as follows:

§ 2.2-4340. Action on performance bond.

No action against the surety on a performance bond shall be brought unless within five years after completion of the work on the project to the satisfaction of the Department of Transportation, in cases where the public body is the Department of Transportation, or, in all other cases, within one year after (i) completion of the contract, including the expiration of all warranties and guarantees, or (ii) discovery of the defect or breach of warranty that gave rise to the action work on the project.

§ 2.2-4340.1. Statute of limitations on construction contracts.

No action may be brought by a public body on any construction contract, including construction contracts governed by Chapter 43.1 (§ 2.2-4378 et seq.) but excluding contracts where the public body is the Department of Transportation, unless such action (i) is brought within five years after completion of the work on the project; (ii) in the case of latent defects, is brought within five years after discovery of a latent defect but, in any event, not more than 10 years after completion of the work on the project; or (iii) in the case of a warranty or guaranty in such construction contract, is brought within one year after the expiration of such warranty or guaranty.

§ 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, 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 respective public institution of higher education pursuant to § 23.1-2210, 23.1-2306, 23.1-2604, or 23.1-2803. However, selection of these services shall be governed by the Uniform Prudent Management of Institutional Funds Act (§ 64.2-1100 et seq.) as required by §§ 23.1-2210, 23.1-2306, 23.1-2604, and 23.1-2803.

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 § 23.1-706.

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

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59 competition where practicable.

60 8. The purchase of goods and services by agencies of the legislative branch that may be specifically
61 exempted therefrom by the Chairman of the Committee on Rules of either the House of Delegates or the
62 Senate. Nor shall the contract review provisions of § 2.2-2012 apply to such procurements. The
63 exemption shall be in writing and kept on file with the agency's disbursement records.

64 9. Any town with a population of less than 3,500, except as stipulated in the provisions of
65 §§ 2.2-4305, 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
66 2.2-4377 and Chapter 43.1 (§ 2.2-4378 et seq.).

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

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

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

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

85 12. Notwithstanding the exemptions set forth in subdivisions 9 through 11, the provisions of
86 subsections B, C, and D of § 2.2-4303, §§ 2.2-4305, 2.2-4311, 2.2-4315, 2.2-4317, 2.2-4330, 2.2-4333
87 through 2.2-4338, 2.2-4342, 2.2-4343.1, and 2.2-4367 through 2.2-4377, and Chapter 43.1 (§ 2.2-4378 et
88 seq.) shall apply to all counties, cities, and school divisions, and to all towns having a population greater
89 than 3,500 in the Commonwealth.

90 The method for procurement of professional services through competitive negotiation set forth in
91 §§ 2.2-4302.2, 2.2-4303.1, and 2.2-4303.2 shall also apply to all counties, cities, and school divisions,
92 and to all towns having a population greater than 3,500, where the cost of the professional service is
93 expected to exceed \$80,000 in the aggregate or for the sum of all phases of a contract or project. A
94 school board that makes purchases through its public school foundation or purchases educational
95 technology through its educational technology foundation, either as may be established pursuant to
96 ~~§ 22.1-212.2:2~~ shall be exempt from the provisions of this chapter, except, relative to such purchases,
97 the school board shall comply with the provisions of §§ 2.2-4311 and 2.2-4367 through 2.2-4377.

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

105 ~~14.~~ 13. Procurement of any construction or planning and design services for construction by a
106 Virginia nonprofit corporation or organization not otherwise specifically exempted when (i) the planning,
107 design, or construction is funded by state appropriations of \$10,000 or less or (ii) the Virginia nonprofit
108 corporation or organization is obligated to conform to procurement procedures that are established by
109 federal statutes or regulations, whether those federal procedures are in conformance with the provisions
110 of this chapter.

111 ~~15.~~ 14. Purchases, exchanges, gifts, or sales by the Citizens' Advisory Council on Furnishing and
112 Interpreting the Executive Mansion.

113 ~~16.~~ 15. The Eastern Virginia Medical School in the selection of services related to the management
114 and investment of its endowment and other institutional funds. The selection of these services shall,
115 however, be governed by the Uniform Prudent Management of Institutional Funds Act (§ 64.2-1100 et
116 seq.).

117 ~~17.~~ 16. The Department of Corrections in the selection of pre-release and post-incarceration services
118 and the Department of Juvenile Justice in the selection of pre-release and post-commitment services.

119 ~~18.~~ 17. The University of Virginia Medical Center to the extent provided by subdivision A 3 of
120 § 23.1-2213.

121 19. 18. The purchase of goods and services by a local governing body or any authority, board,
 122 department, instrumentality, institution, agency, or other unit of state government when such purchases
 123 are made under a remedial plan established by the Governor pursuant to subsection C of § 2.2-4310 or
 124 by a chief administrative officer of a county, city or town pursuant to § 15.2-965.1.

125 20. 19. The contract by community services boards or behavioral health authorities with an
 126 administrator or management body pursuant to a joint agreement authorized by § 37.2-512 or 37.2-615.

127 21. 20. [Expired].

128 22. 21. The purchase of Virginia-grown food products for use by a public body where the annual
 129 cost of the product is not expected to exceed \$100,000, provided that the procurement is accomplished
 130 by (i) obtaining written informal solicitation of a minimum of three bidders or offerors if practicable and
 131 (ii) including a written statement regarding the basis for awarding the contract.

132 23. 22. The Virginia Industries for the Blind when procuring components, materials, supplies, or
 133 services for use in commodities and services furnished to the federal government in connection with its
 134 operation as an AbilityOne Program-qualified nonprofit agency for the blind under the
 135 Javits-Wagner-O'Day Act, 41 U.S.C. §§ 8501-8506, provided that the procurement is accomplished using
 136 procedures that ensure that funds are used as efficiently as practicable. Such procedures shall require
 137 documentation of the basis for awarding contracts. Notwithstanding the provisions of § 2.2-1117, no
 138 public body shall be required to purchase such components, materials, supplies, services, or
 139 commodities.

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

148 C. *Notwithstanding the exemptions set forth in subdivisions A 9, 10, and 11, the provisions of*
 149 *subsections B, C, and D of § 2.2-4303, §§ 2.2-4305, 2.2-4311, 2.2-4315, 2.2-4317, 2.2-4330, 2.2-4333*
 150 *through 2.2-4338, 2.2-4340, 2.2-4340.1, 2.2-4342, 2.2-4343.1, and 2.2-4367 through 2.2-4377, and*
 151 *Chapter 43.1 (§ 2.2-4378 et seq.) shall apply to all counties, cities, and school divisions, and to all*
 152 *towns having a population greater than 3,500, in the Commonwealth.*

153 *The method for procurement of professional services through competitive negotiation set forth in*
 154 *§§ 2.2-4302.2, 2.2-4303.1, and 2.2-4303.2 shall also apply to all counties, cities, and school divisions,*
 155 *and to all towns having a population greater than 3,500, where the cost of the professional service is*
 156 *expected to exceed \$80,000 in the aggregate or for the sum of all phases of a contract or project. A*
 157 *school board that makes purchases through its public school foundation or purchases educational*
 158 *technology through its educational technology foundation, either as may be established pursuant to*
 159 *§ 22.1-212.2:2, shall be exempt from the provisions of this chapter, except that, relative to such*
 160 *purchases, the school board shall comply with the provisions of §§ 2.2-4311 and 2.2-4367 through*
 161 *2.2-4377.*

162 **§ 22.1-212.2:2. Educational technology foundations and public school foundations.**

163 A. As used in this section:

164 "Educational technology" means any software, hardware, or other equipment or infrastructure or
 165 technical assistance or instruction in the use of such software, hardware or other equipment or
 166 infrastructure that may be required to implement a local school board's approved plan for educational
 167 technology or the Board of Education's comprehensive technology plan for Virginia described in
 168 § 22.1-253.13:6.

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

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

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

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

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

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

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

E. A school board that makes purchases through its public school foundation or purchases educational technology through its educational technology foundation, either as may be established pursuant to this section shall be exempt from the provisions of the Virginia Public Procurement Act (§ 2.2-4300 et seq.), as provided in ~~subdivision A 12~~ subsection C of § 2.2-4343, 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.

§ 23.1-1017. Covered institutions; operational authority; procurement.

A. Subject to the express provisions of the management agreement, each covered institution may be exempt from the provisions of the Virginia Public Procurement Act (§ 2.2-4300 et seq.), except for §§ 2.2-4340, 2.2-4340.1, and 2.2-4342, which shall not be construed to require compliance with the prequalification application procedures of subsection B of § 2.2-4317, provided, however, that (i) any deviations from the Virginia Public Procurement Act in the management agreement shall be uniform across all covered institutions and (ii) the governing board of the covered institution shall adopt, and the covered institution shall comply with, policies for the procurement of goods and services, including professional services, that shall (a) be based upon competitive principles, (b) in each instance seek competition to the maximum practical degree, (c) implement a system of competitive negotiation for professional services pursuant to §§ 2.2-4303.1 and 2.2-4302.2, (d) prohibit discrimination in the solicitation and award of contracts based on the bidder's or offeror's race, religion, color, sex, national origin, age, or disability or on any other basis prohibited by state or federal law, (e) incorporate the prompt payment principles of §§ 2.2-4350 and 2.2-4354, (f) consider the impact on correctional enterprises under § 53.1-47, and (g) 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.

B. Such policies may (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, or 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 other states, the District of Columbia, the territories, or the United States, and any combination of such organizations and entities.

C. Nothing in this section shall preclude a covered institution from requesting and utilizing the assistance of the Virginia Information Technologies Agency for information technology procurements and covered institutions are encouraged to utilize such assistance.

D. Each covered 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.

E. As part of any procurement provisions of the management agreement, the governing board of a covered institution shall identify the public, educational, and operational interests served by any procurement rule that deviates from procurement rules in the Virginia Public Procurement Act (§ 2.2-4300 et seq.).