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SENATE BILL NO. 1384

FLOOR AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by Senator Surovell
on February 1, 2021)

(Patron Prior to Substitute—Senator Surovell)

A *BILL to amend the Code of Virginia by adding in Chapter 43 of Title 2.2 an article numbered 7, consisting of sections numbered 2.2-4377.1 through 2.2-4377.5, relating to the Virginia Public Procurement Act; local arbitration agreements.*

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Chapter 43 of Title 2.2 an article numbered 7, consisting of sections numbered 2.2-4377.1 through 2.2-4377.5, as follows:

Article 7.

Civil Rights and Consumer Protection Disclosure Act.

§ 2.2-4377.1. Definitions.

As used in this article:

"Consumer dispute" means a dispute between a natural person who seeks or acquires real or personal property, services, money, or credit for personal, family, or household purposes and the seller or provider of such property, services, money, or credit.

"Civil rights dispute" means a dispute arising from an alleged violation of (i) the Constitution of the United States or the constitution of a state or (ii) any federal, state, or local law that prohibits discrimination on the basis of race, sex, age, gender identity, sexual orientation, disability, religion, national origin, or any legally protected status in education, employment, credit, housing, public accommodations and facilities, voting, veterans or service member services, health care, or a program funded or conducted by the federal government, Commonwealth of Virginia, or local government, including any law referred to or described in § 62(e) of the Internal Revenue Code of 1986, including parts of such law not explicitly referenced in such section but that relate to protecting individuals on any such basis.

"Employment dispute" means a dispute between one or more individuals or their authorized representative and a person arising out of or related to the work relationship or prospective work relationship between them, including a dispute regarding the terms of or payment for, advertising of, recruiting for, referring of, arranging for, or discipline or discharge in connection with such work, regardless of whether the individual is or would be classified as an employee or a non-employee with respect to such work, and including a dispute arising under any law referred to or described in § 62(e) of the Internal Revenue Code of 1986, including parts of such law not explicitly referenced in such section but that relate to protecting individuals on any such basis.

"Pre-dispute arbitration clause" means any contractual provision under which one or both parties to the contract commits to or is required to resolve through private arbitration, rather than in court, disputes that have not yet arisen between them at the time the contract is made.

"Senior executive" means any person who holds the title of president, chief executive officer, chief operating officer, chief financial officer, chief lending officer, or chief investment officer or, without regard to title, salary, or compensation, performs the function of one or more of these positions and whose position was compensated with taxable annual compensation averaging more than \$300,000 over three years preceding the date of the bid.

§ 2.2-4377.2. Procurement procedures; disclosures.

A. For any procurement solicitation or contract exceeding \$10,000 for goods or nonprofessional services, a participating locality may require the bidder or offeror to disclose information regarding the use of pre-dispute arbitration clauses in employment, civil rights, and consumer disputes. The participating locality shall require the bidder or offeror to provide written or electronic submissions, together with any requested documents referenced in such submissions, to allow the locality to ascertain:

1. Whether the bidder or offeror requires persons with whom it is in a work relationship or prospective work relationship to sign or otherwise enter into a contract containing a pre-dispute arbitration clause that could require arbitration for an employment or civil rights dispute; and

2. Whether the bidder or offeror requires consumers to sign or otherwise enter into a contract containing a pre-dispute arbitration clause that could cover a consumer or civil rights dispute as a condition of purchasing products or services, downloading mobile applications, or using websites.

B. If a bidder or offeror indicates in its submission, pursuant to subsection A, that it utilizes arbitration, such bidder or offeror shall provide a copy of its pre-dispute arbitration clause to the participating locality along with the following information arising out of consumer disputes, employment

60 disputes, or civil rights disputes initiated in a period commencing January 1 five years preceding the
61 date of the bid through the first day of the prior month preceding the bid:

62 1. The number of requests for arbitration the bidder or offeror received;

63 2. The number of occasions the bidder or offeror filed a motion to compel arbitration in a judicial
64 proceeding;

65 3. The number of claimants that exercised their right to opt out of arbitration if the bidder or offeror
66 utilized an opt-out provision in its pre-dispute arbitration clause; and

67 4. The number of times a claimant prevailed in any arbitration related to any employment, civil
68 rights, or consumer disputes that were submitted to arbitration.

69 C. Such disclosures shall not be exempt from disclosure pursuant to the Virginia Freedom of
70 Information Act (§ 2.2-3700 et seq.).

71 D. Nothing in this article shall apply to (i) an arbitration provision in a contract between an
72 employer and a labor organization or between labor organizations; (ii) senior executives who have
73 negotiated employment contracts that include pre-dispute arbitration provisions; (iii) pre-dispute
74 arbitration clauses or matters arising out of contracts entered into by wholly owned subsidiaries of any
75 contractor not participating in any goods or services provided in the contract; (iv) an arbitration
76 provision required by a state or other regulator jurisdiction, or by the Financial Industry Regulatory
77 Authority or other self-regulatory organization, in relation to the registration or representatives of
78 broker-dealers, investments advisers, or issuers of securities; (v) arms-length negotiated pre-dispute
79 arbitration agreements to resolve business-to-business contractual disputes; (vi) a contract or agreement
80 in effect before July 1, 2021; or (vii) a contract or agreement entered into to address a public
81 emergency in a locality declared by the Governor or the governing body of the locality.

82 **§ 2.2-4377.3. Solicitation evaluation criteria.**

83 A. In addition to other factors relevant to awarding contracts under existing law, a participating
84 locality may consider the policies and practices related to arbitration of each bidder or offeror as
85 disclosed in submissions required pursuant to § 2.2-4377.2 in making an award of the contract.

86 B. A bidder or offeror that fails to disclose the information required pursuant to § 2.2-4377.2 shall
87 not be eligible to enter into a contract to provide goods or services to a participating locality.

88 **§ 2.2-4377.4. Compliance for post-award actions.**

89 A. A contractor required to provide information pursuant to § 2.2-4377.2 shall be required to update
90 such information every 12 months during the performance of any contract. The contractor shall furnish
91 all submissions and documents required pursuant to § 2.2-4377.2 to the contracting locality and shall
92 permit access to its books, records, and accounts at the option of the locality with 30-days written
93 notice and for the limited purpose of investigating compliance with this article.

94 B. Such contractor shall include the disclosure inquiry provisions of § 2.2-4377.2 in every
95 subcontract involved in the performance or delivery of the good or services procured with the
96 participating locality and make such disclosures binding upon each subcontractor.

97 C. The contractor shall take such action with respect to any subcontract as the contracting agency
98 may direct as a means of enforcing such provisions, including sanctions for noncompliance.

99 **§ 2.2-4377.5. Penalty.**

100 Upon a failure of a contractor to comply with § 2.2-4377.4, a locality may provide notice to the
101 contractor of such violation in writing. Upon a failure to cure such violation within 30 days, a locality
102 may cancel, terminate, or suspend, in whole or in part, any such contractor's contract and may declare
103 the contractor ineligible for further contracts with such locality for up to five years.