

## Job Order Contracting - Discussion Draft

SENATE BILL NO. \_\_\_\_\_ HOUSE BILL NO. \_\_\_\_\_

1 A BILL to amend and reenact §§ 2.2-4301, 2.2-4302.2, and 2.2-4337 of the Code of Virginia and to  
2 amend the Code of Virginia by adding a section numbered 2.2-4303.1, relating to the Virginia  
3 Public Procurement Act; job order contracting.

4 **Be it enacted by the General Assembly of Virginia:**

5 **1. That §§ 2.2-4301, 2.2-4302.2, and 2.2-4337 of the Code of Virginia are amended and reenacted**  
6 **and that the Code of Virginia is amended by adding a section numbered 2.2-4303.1 as follows:**

7 **§ 2.2-4301. (Effective July 1, 2014) Definitions.**

8 As used in this chapter:

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

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

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

20 "Competitive negotiation" is the method of contractor selection set forth in § 2.2-4302.2.

21 "Competitive sealed bidding" is the method of contractor selection set forth in § 2.2-4302.1.

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

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

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

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

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

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

39 "Job order contracting" means a method of procuring construction services ~~by establishing a~~  
40 ~~book of unit prices and then obtaining a contractor to perform work as needed using the prices,~~  
41 ~~quantities, and specifications in the book as the basis of its pricing. The contractor may be selected~~  
42 ~~through either competitive sealed bidding or competitive negotiation depending on the needs of the~~  
43 ~~public body procuring the construction services. A minimum amount of work may be specified in the~~  
44 ~~contract. The contract term and the project amount shall not exceed the limitations specified in § 2.2-~~  
45 ~~4302.2 or 2.2-4303 through an indefinite delivery, indefinite quantity term contract, using task orders as~~  
46 ~~needed for individual projects, where the task order price is based on a book of pre-established unit~~  
47 ~~prices.~~

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

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

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

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

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

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

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

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

76 "Reverse auctioning" means a procurement method wherein bidders are invited to bid on  
77 specified goods or nonprofessional services through real-time electronic bidding, with the award being

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78 made to the lowest responsive and responsible bidder. During the bidding process, bidders' prices are  
79 revealed and bidders shall have the opportunity to modify their bid prices for the duration of the time  
80 period established for bid opening.

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

### 84 § 2.2-4302.2. (Effective July 1, 2014) Process for competitive negotiation.

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

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

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

102 3. For goods, nonprofessional services, and insurance, selection shall be made of two or more  
103 offerors deemed to be fully qualified and best suited among those submitting proposals, on the basis of  
104 the factors involved in the Request for Proposal, including price if so stated in the Request for Proposal.

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105 Negotiations shall then be conducted with each of the offerors so selected. Price shall be considered, but  
106 need not be the sole or primary determining factor. After negotiations have been conducted with each  
107 offeror so selected, the public body shall select the offeror which, in its opinion, has made the best  
108 proposal and provides the best value, and shall award the contract to that offeror. When the terms and  
109 conditions of multiple awards are so provided in the Request for Proposal, awards may be made to more  
110 than one offeror. Should the public body determine in writing and in its sole discretion that only one  
111 offeror is fully qualified, or that one offeror is clearly more highly qualified than the others under  
112 consideration, a contract may be negotiated and awarded to that offeror; or

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

128 Negotiations shall then be conducted, beginning with the offeror ranked first. If a contract  
129 satisfactory and advantageous to the public body can be negotiated at a price considered fair and  
130 reasonable, the award shall be made to that offeror. Otherwise, negotiations with the offeror ranked first

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131 shall be formally terminated and negotiations conducted with the offeror ranked second, and so on until  
132 such a contract can be negotiated at a fair and reasonable price.

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

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

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

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

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

151 2. Any locality or any authority, sanitation district, metropolitan planning organization or  
152 planning district commission with a population in excess of 80,000, or any city within Planning District  
153 8, the sum of all projects performed in a one-year contract term shall not exceed \$5 million and those  
154 awarded for any airport as defined in § 5.1-1 and aviation transportation projects, the sum of all such  
155 projects shall not exceed \$1.5 million;

156 3. Architectural and engineering services for rail and public transportation projects by the  
157 Director of the Department of Rail and Public Transportation, the sum of all projects in a one-year

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158 contract term shall not exceed \$2 million. Such contract may be renewable for two additional one-year  
159 terms at the option of the Director; and

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

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

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

170 C. For ~~any single project, for (i)~~ architectural or professional engineering services relating to a  
171 multiple construction projects, or (ii) job order contracting project contract, the ~~project~~ fee for any single  
172 project shall not exceed \$100,000, or for architectural or engineering services for airports as defined in §  
173 5.1-1 and aviation transportation projects, the project fee of any single project shall not exceed  
174 \$500,000, except that for:

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

177 2. Any locality or any authority or sanitation district with a population in excess of 80,000, or  
178 any city within Planning District 8, ~~the project such~~ fee shall not exceed \$2 million; ~~and~~

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

180 The limitations imposed upon single project fees pursuant to this subsection shall not apply to  
181 environmental, location, design, and inspection work regarding highways and bridges by the  
182 Commissioner of Highways or architectural and engineering services for rail and public transportation  
183 projects by the Director of the Department of Rail and Public Transportation.

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

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

193 § 2.2-4303.1. Job order contracting; limitations.

194 A. Contractors may be selected for job order contracts through either competitive sealed bidding  
195 or competitive negotiation depending on the needs of the public body procuring the construction  
196 services. A minimum amount of work may be specified in the contract. The contract term and the  
197 project amount shall not exceed the limitations specified in this section.

198 B. Job order contracts shall be limited to a one-year term or when the cumulative total project  
199 fees reach the maximum cost authorized in this section, whichever occurs first. Such contracts may be  
200 renewable for four additional one-year terms at the option of the public body. The fair and reasonable  
201 prices as negotiated shall be used in determining the cost of each project performed and the sum of all  
202 projects performed in a one-year contract term shall not exceed \$2 million.

203 Job order contracts may be awarded to multiple bidders or offerors, provided (i) the Request for  
204 Proposal so states and (ii) the public body has established procedures for distributing the projects among  
205 the contractors during the contract term.

206 C. A single task order under a job order contract shall not exceed \$400,000.

207 D. Any unused amounts from one contract term shall not be carried forward to any additional  
208 term.

209 **§ 2.2-4337. Performance and payment bonds.**



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210 A. Except as provided in subsection H, upon the award of any (i) public construction contract  
211 exceeding \$500,000 awarded to any prime contractor; (ii) construction contract exceeding \$500,000  
212 awarded to any prime contractor requiring the performance of labor or the furnishing of materials for  
213 buildings, structures or other improvements to real property owned or leased by a public body; (iii)  
214 construction contract exceeding \$500,000 in which the performance of labor or the furnishing of  
215 materials will be paid with public funds; or (iv) transportation-related projects exceeding \$350,000 that  
216 are partially or wholly funded by the Commonwealth, the contractor shall furnish to the public body the  
217 following bonds:

218 1. A performance bond in the sum of the contract amount conditioned upon the faithful  
219 performance of the contract in strict conformity with the plans, specifications and conditions of the  
220 contract. For transportation-related projects authorized under § 33.1-12, such bond shall be in a form and  
221 amount satisfactory to the public body.

222 2. A payment bond in the sum of the contract amount. The bond shall be for the protection of  
223 claimants who have and fulfill contracts to supply labor or materials to the prime contractor to whom the  
224 contract was awarded, or to any subcontractors, in furtherance of the work provided for in the contract,  
225 and shall be conditioned upon the prompt payment for all materials furnished or labor supplied or  
226 performed in the furtherance of the work. For transportation-related projects authorized under § 33.1-12  
227 and partially or wholly funded by the Commonwealth, such bond shall be in a form and amount  
228 satisfactory to the public body.

229 "Labor or materials" shall include public utility services and reasonable rentals of equipment, but  
230 only for periods when the equipment rented is actually used at the site.

231 B. For nontransportation-related construction contracts in excess of \$100,000 but less than  
232 \$500,000, where the bid bond requirements are waived, prospective contractors shall be prequalified for  
233 each individual project in accordance with § 2.2-4317.

234 C. Each of the bonds shall be executed by one or more surety companies selected by the  
235 contractor that are authorized to do business in Virginia.

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236 D. If the public body is the Commonwealth, or any agency or institution thereof, the bonds shall  
237 be payable to the Commonwealth of Virginia, naming also the agency or institution thereof. Bonds  
238 required for the contracts of other public bodies shall be payable to such public body.

239 E. Each of the bonds shall be filed with the public body that awarded the contract, or a  
240 designated office or official thereof.

241 F. Nothing in this section shall preclude a public body from requiring payment or performance  
242 bonds for construction contracts below \$500,000 for nontransportation-related projects or \$350,000 for  
243 transportation-related projects authorized under § 33.1-12 and partially or wholly funded by the  
244 Commonwealth.

245 G. Nothing in this section shall preclude the contractor from requiring each subcontractor to  
246 furnish a payment bond with surety thereon in the sum of the full amount of the contract with such  
247 subcontractor conditioned upon the payment to all persons who have and fulfill contracts that are  
248 directly with the subcontractor for performing labor and furnishing materials in the prosecution of the  
249 work provided for in the subcontract.

250 H. The performance and payment bond requirements of subsection A for transportation-related  
251 projects that are valued in excess of \$250,000 but less than \$350,000 may only be waived by a public  
252 body if the bidder provides evidence, satisfactory to the public body, that a surety company has declined  
253 an application from the contractor for a performance or payment bond.

254 I. Where a job order contract is used, the provisions of this section shall apply to each individual  
255 project or task order; but shall not apply to the overall job order contract term contract.

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