

# Term Contracts - Discussion Draft

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

1 A BILL to amend and reenact §§ 2.2-4302.2, 2.2-4343, 23-38.110, and 33.1-391.3 of the Code of  
2 Virginia and to amend the Code of Virginia by adding a section numbered 2.2-4302.3, relating to  
3 the Virginia Public Procurement Act; competitive negotiation; term contract limitations.

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

5 **1. That §§ 2.2-4302.2, 2.2-4343, 23-38.110, and 33.1-391.3 of the Code of Virginia is amended and**  
6 **reenacted and that the Code of Virginia is amended by adding a section numbered 2.2-4302.3 as**  
7 **follows:**

8 **§ 2.2-4302.2. (Effective July 1, 2014) Process for competitive negotiation.**

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

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

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

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

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

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

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

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

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

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

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

75 ~~2. Any locality or any authority, sanitation district, metropolitan planning organization or~~  
76 ~~planning district commission with a population in excess of 80,000, or any city within Planning District~~  
77 ~~8, the sum of all projects performed in a one year contract term shall not exceed \$5 million and those~~

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78 ~~awarded for any airport as defined in § 5.1-1 and aviation transportation projects, the sum of all such~~  
79 ~~projects shall not exceed \$1.5 million;~~

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

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

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

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

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

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

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

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

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

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

112 § 2.2-4302.3. Competitive negotiation; term contract limitations for certain projects and  
113 services; exceptions.

114 A. In accordance with the process for competitive negotiation set forth in § 2.2-4302.2, a  
115 contract for architectural or professional engineering services relating to multiple construction projects  
116 may be negotiated by a public body, provided (i) the projects require similar experience and expertise,  
117 (ii) the nature of the projects is clearly identified in the Request for Proposal, and (iii) the contract is  
118 limited to a one-year term or when the cumulative total project fees reach the maximum cost authorized  
119 in this subsection, whichever occurs first.

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

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

127 2. Any locality or any authority, sanitation district, metropolitan planning organization or  
128 planning district commission with a population in excess of 80,000, or any city within Planning District  
129 8, the sum of all projects performed in a one-year contract term shall not exceed \$5 million and those  
130 awarded for any airport as defined in § 5.1-1 and aviation transportation projects, the sum of all such  
131 projects shall not exceed \$1.5 million;

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

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

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

144 B. For architectural or professional engineering services relating to a multiple construction  
145 project contract, the fee for any single project shall not exceed \$100,000, and (ii) for airports as defined  
146 in § 5.1-1 and aviation transportation projects, the fee for any single project shall not exceed \$500,000,  
147 except that for:

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

150 2. Any locality or any authority or sanitation district with a population in excess of 80,000, or  
151 any city within Planning District 8, such fee shall not exceed \$2 million.

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

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

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D. 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.

### § 2.2-4343. 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 College or Universities

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185 pursuant to § 23-44.1, 23-50.10:01, 23-76.1, or 23-122.1. However, selection of these services shall be  
186 governed by the Uniform Prudent Management of Institutional Funds Act (§ 64.2-1100 et seq.) as  
187 required by §§ 23-44.1, 23-50.10:01, 23-76.1, and 23-122.1.

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

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

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

200 9. Any town with a population of less than 3,500, except as stipulated in the provisions of §§ 2.2-  
201 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  
202 through 2.2-4377.

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

207 This exemption shall be applicable only so long as such policies and procedures, or other policies  
208 and procedures meeting the requirements of § 2.2-4300, remain in effect in such county, city or town.  
209 Such policies and standards may provide for incentive contracting that offers a contractor whose bid is  
210 accepted the opportunity to share in any cost savings realized by the locality when project costs are  
211 reduced by such contractor, without affecting project quality, during construction of the project. The fee,



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212 if any, charged by the project engineer or architect for determining such cost savings shall be paid as a  
213 separate cost and shall not be calculated as part of any cost savings.

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

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

221 12. (Effective July 1, 2014) Notwithstanding the exemptions set forth in subdivisions 9 through  
222 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,  
223 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  
224 to all counties, cities and school divisions, and to all towns having a population greater than 3,500 in the  
225 Commonwealth.

226 The method for procurement of professional services through competitive negotiation set forth in  
227 ~~subsection B of § 2.2-4302.2~~ § 2.2-4302.3 shall also apply to all counties, cities and school divisions,  
228 and to all towns having a population greater than 3,500, where the cost of the professional service is  
229 expected to exceed \$60,000 in the aggregate or for the sum of all phases of a contract or project. A  
230 school board that makes purchases through its public school foundation or purchases educational  
231 technology through its educational technology foundation, either as may be established pursuant to §  
232 22.1-212.2:2 shall be exempt from the provisions of this chapter, except, relative to such purchases, the  
233 school board shall comply with the provisions of §§ 2.2-4311 and 2.2-4367 through 2.2-4377.

234 13. A public body that is also a utility operator may purchase services through or participate in  
235 contracts awarded by one or more utility operators that are not public bodies for utility marking services  
236 as required by the Underground Utility Damage Prevention Act (§ 56-265.14 et seq.). A purchase of  
237 services under this subdivision may deviate from the procurement procedures set forth in this chapter  
238 upon a determination made in advance by the public body and set forth in writing that competitive

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239 sealed bidding is either not practicable or not fiscally advantageous to the public, and the contract is  
240 awarded based on competitive principles.

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

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

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

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

254 18. The University of Virginia Medical Center to the extent provided by subdivision B 3 of § 23-  
255 77.4.

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

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

262 21. (Contingent expiration date, see note.) Procurement of any construction or planning and  
263 design services and contracts with or assigned to George Mason University by the corporation or other  
264 legal entity created by the board of visitors of George Mason University for the establishment and

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265 operation of the branch campus of George Mason University in the Republic of Korea, pursuant to § 23-  
266 91.29:1.

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

275 **§ 23-38.110. Procurement; discrimination prohibited; participation of small, women-**  
276 **owned, and minority-owned business enterprises.**

277 A. (Effective July 1, 2014) Subject to the express provisions of the management agreement  
278 described in § 23-38.88, covered institutions may be exempt from the provisions of the Virginia Public  
279 Procurement Act (§ 2.2-4300 et seq.), except for § 2.2-4342 (which section shall not be construed to  
280 require compliance with the prequalification application procedures of subsection B of § 2.2-4317);  
281 provided, however, that any deviations from the Virginia Public Procurement Act approved in a  
282 Management Agreement shall be uniform across all covered institutions; and provided further that the  
283 governing body of a covered institution shall adopt, and the covered institution shall comply with,  
284 policies for the procurement of goods and services, including professional services, that shall be based  
285 upon competitive principles and shall in each instance seek competition to the maximum practical  
286 degree. The policies shall implement a system of competitive negotiation for professional services  
287 pursuant to ~~subsections~~ subsection ~~A, B, and E~~ of § 2.2-4302.2 or pursuant to § 2.2-4302.3, shall  
288 prohibit discrimination because of race, religion, color, sex or national origin of the bidder or offeror in  
289 the solicitation or award of contracts, shall incorporate the prompt payment principles of §§ 2.2-4350  
290 and 2.2-4354, and shall consider the impact on correctional enterprises under § 53.1-47.

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

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

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

### 314 § 33.1-391.3. (Effective July 1, 2014) Powers and duties of the Director.

315 Except such powers as are conferred by law upon the Commonwealth Transportation Board, or  
316 such services as are performed by the Department of Transportation pursuant to law, the Director of the  
317 Department of Rail and Public Transportation shall have the power to do all acts necessary or

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318 convenient for establishing, maintaining, improving, and promoting public transportation, transportation  
319 demand management, ridesharing, and passenger and freight rail transportation in the Commonwealth  
320 and to procure architectural and engineering services for rail and public transportation projects as  
321 specified in § ~~2.2-4302.2~~ 2.2-4302.3.

322 #