

## Use of Competitive Sealed Bidding or Competitive Negotiation - Discussion Draft

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

1 A BILL to amend and reenact §§ 2.2-4302.2 and 2.2-4303 of the Code of Virginia, relating to the  
2 Virginia Public Procurement Act; the use of competitive sealed bidding or competitive  
3 negotiation for the procurement of goods, certain services, and insurance.

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

5 **1. That §§ 2.2-4302.2 and 2.2-4303 of the Code of Virginia are amended and reenacted as follows:**

6 **§ 2.2-4302.2. Process for competitive negotiation.**

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

8 1. Issuance of a written Request for Proposal indicating in general terms that which is sought to  
9 be procured, specifying the factors that will be used in evaluating the proposal and containing or  
10 incorporating by reference the other applicable contractual terms and conditions, including any unique  
11 capabilities, specifications or qualifications that will be required, and the public body's determination  
12 that its use of competitive negotiation as opposed to competitive sealed bidding is more practicable or  
13 fiscally advantageous to the public;

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

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24 certified businesses selected from a list made available by the Department of Small Business and  
25 Supplier Diversity; and

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

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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.

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;

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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  
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 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;

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

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

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

### 116           § 2.2-4303. Methods of procurement.

117           A. All public contracts with nongovernmental contractors for the purchase or lease of goods, or  
118 for the purchase of services, insurance, or construction, shall be awarded after competitive sealed  
119 bidding, or competitive negotiation as provided in this section, unless otherwise authorized by law.

120           B. Professional services shall be procured by competitive negotiation.

121           ~~C. Upon a determination made in advance by the public body and set forth in writing that~~  
122 ~~competitive sealed bidding is either not practicable or not fiscally advantageous to the public, goods,~~  
123 ~~services, or insurance may be procured by competitive negotiation. The writing shall document the basis~~  
124 ~~for this determination.~~

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125           Upon a written determination made in advance by (i) the Governor or his designee in the case of  
126 a procurement by the Commonwealth or by a department, agency or institution thereof or (ii) the local  
127 governing body in the case of a procurement by a political subdivision of the Commonwealth, that  
128 competitive negotiation is either not practicable or not fiscally advantageous, insurance may be procured  
129 through a licensed agent or broker selected in the manner provided for the procurement of things other  
130 than professional services set forth in § 2.2-4302.2. The basis for this determination shall be documented  
131 in writing.

132           D. Construction may be procured only by competitive sealed bidding, except that competitive  
133 negotiation may be used in the following instances upon a determination made in advance by the public  
134 body and set forth in writing that competitive sealed bidding is either not practicable or not fiscally  
135 advantageous to the public, which writing shall document the basis for this determination:

136           1. By the Commonwealth, its departments, agencies and institutions on a fixed price design-build  
137 basis or construction management basis under § 2.2-4306;

138           2. By any public body for the construction of highways and any draining, dredging, excavation,  
139 grading or similar work upon real property;

140           3. By any governing body of a locality with a population in excess of 100,000, provided that the  
141 locality has the personnel, procedures, and expertise to enter into a contract for construction on a fixed  
142 price or not-to-exceed price design-build or construction management basis and shall otherwise be in  
143 compliance with the provisions of this section, § 2.2-4308, and other applicable law governing design-  
144 build or construction management contracts for public bodies other than the Commonwealth. The  
145 procedures of the local governing body shall be consistent with the two-step competitive negotiation  
146 process established in § 2.2-4302.2; or

147           4. As otherwise provided in § 2.2-4308.

148           E. Upon a determination in writing that there is only one source practicably available for that  
149 which is to be procured, a contract may be negotiated and awarded to that source without competitive  
150 sealed bidding or competitive negotiation. The writing shall document the basis for this determination.

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151 The public body shall issue a written notice stating that only one source was determined to be  
152 practicably available, and identifying that which is being procured, the contractor selected, and the date  
153 on which the contract was or will be awarded. This notice shall be posted on the Department of General  
154 Services' central electronic procurement website or other appropriate websites, and in addition, public  
155 bodies may publish in a newspaper of general circulation on the day the public body awards or  
156 announces its decision to award the contract, whichever occurs first. Posting on the Department of  
157 General Services' central electronic procurement website shall be required of any state public body.  
158 Local public bodies are encouraged to utilize the Department of General Services' central electronic  
159 procurement website to provide the public with centralized visibility and access to the Commonwealth's  
160 procurement opportunities.

161 F. In case of emergency, a contract may be awarded without competitive sealed bidding or  
162 competitive negotiation; however, such procurement shall be made with such competition as is  
163 practicable under the circumstances. A written determination of the basis for the emergency and for the  
164 selection of the particular contractor shall be included in the contract file. The public body shall issue a  
165 written notice stating that the contract is being awarded on an emergency basis, and identifying that  
166 which is being procured, the contractor selected, and the date on which the contract was or will be  
167 awarded. This notice shall be posted on the Department of General Services' central electronic  
168 procurement website or other appropriate websites, and in addition, public bodies may publish in a  
169 newspaper of general circulation on the day the public body awards or announces its decision to award  
170 the contract, whichever occurs first, or as soon thereafter as is practicable. Posting on the Department of  
171 General Services' central electronic procurement website shall be required of any state public body.  
172 Local public bodies are encouraged to utilize the Department of General Services' central electronic  
173 procurement website to provide the public with centralized visibility and access to the Commonwealth's  
174 procurement opportunities.

175 G. A public body may establish purchase procedures, if adopted in writing, not requiring  
176 competitive sealed bids or competitive negotiation for single or term contracts for goods and services

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177 other than professional services if the aggregate or the sum of all phases is not expected to exceed  
178 \$100,000; however, such small purchase procedures shall provide for competition wherever practicable.  
179 For local public bodies, such purchase procedures may allow for single or term contracts for  
180 professional services without requiring competitive negotiation, provided the aggregate or the sum of all  
181 phases is not expected to exceed \$60,000.

182 For state public bodies, purchases under this subsection that are expected to exceed \$30,000 shall  
183 require the (i) written informal solicitation of a minimum of four bidders or offerors and (ii) posting of a  
184 public notice on the Department of General Services' central electronic procurement website or other  
185 appropriate websites. Posting on the Department of General Services' central electronic procurement  
186 website shall be required of any state public body. Local public bodies are encouraged to utilize the  
187 Department of General Services' central electronic procurement website to provide the public with  
188 centralized visibility and access to the Commonwealth's procurement opportunities.

189 H. A state public body may establish purchase procedures, if adopted in writing, not requiring  
190 competitive negotiation for single or term contracts for professional services if the aggregate or the sum  
191 of all phases is not expected to exceed \$50,000; however such small purchase procedures shall provide  
192 for competition wherever practicable.

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

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

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