

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

1 A BILL to amend and reenact §§ 2.2-4301, 2.2-4302.2, and 23-38.110, as they will become  
2 effective, of the Code of Virginia, relating to the Virginia Public Procurement Act; competitive  
3 negotiation; job order contracting.

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

5 **1. That §§ 2.2-4301, 2.2-4302.2, and 23-38.110, as they will become effective, of the Code of**  
6 **Virginia are amended and reenacted 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.

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  
45 [subsection D of § 2.2-4302.2 or 2.2-4303.](#)

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

49 "Nonprofessional services" means any services not specifically identified as professional  
50 services in the definition of professional services.

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

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

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

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

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

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

74 "Reverse auctioning" means a procurement method wherein bidders are invited to bid on  
75 specified goods or nonprofessional services through real-time electronic bidding, with the award being  
76 made to the lowest responsive and responsible bidder. During the bidding process, bidders' prices are

77 revealed and bidders shall have the opportunity to modify their bid prices for the duration of the time  
78 period established for bid opening.

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

82 **§ 2.2-4302.2. (Effective July 1, 2014) Process for competitive negotiation.**

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

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

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

100 3. For goods, nonprofessional services, and insurance, selection shall be made of two or more  
101 offerors deemed to be fully qualified and best suited among those submitting proposals, on the basis of  
102 the factors involved in the Request for Proposal, including price if so stated in the Request for Proposal.  
103 Negotiations shall then be conducted with each of the offerors so selected. Price shall be considered, but

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

177 D. ~~For job order contracting, the per project cost shall not exceed \$400,000, and the sum of all~~  
178 ~~projects performed in a one-year contract term shall not exceed \$2 million.~~

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

181 ~~E-F.~~ Multiphase professional services contracts satisfactory and advantageous to the completion  
182 of large, phased, or long term projects may be negotiated and awarded based on a fair and reasonable  
183 price for the first phase only, where the completion of the earlier phases is necessary to provide  
184 information critical to the negotiation of a fair and reasonable price for succeeding phases. Prior to the

185 entering into any such contract, the public body shall (i) state the anticipated intended total scope of the  
186 project and (ii) determine in writing that the nature of the work is such that the best interests of the  
187 public body require awarding the contract.

188 **§ 23-38.110. Procurement; discrimination prohibited; participation of small, women-**  
189 **owned, and minority-owned business enterprises.**

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

204 B. Such policies may, among other things, (i) provide for consideration of the dollar amount of  
205 the intended procurement, the term of the anticipated contract, and the likely extent of competition; (ii)  
206 implement a prequalification procedure for contractors or products; and (iii) include provisions for  
207 cooperative arrangements with other covered institutions, other public or private educational institutions,  
208 other public or private organizations or entities, including public-private partnerships, public bodies,  
209 charitable organizations, health care provider alliances or purchasing organizations or entities, state  
210 agencies or institutions of the Commonwealth or the several states, the District of Columbia, the  
211 territories and the United States, and any combination thereof. Nothing in this section shall preclude a



212 covered institution from requesting and utilizing, and covered institutions are hereby encouraged to  
213 utilize, the assistance of the Virginia Information Technologies Agency in information technology  
214 procurements.

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

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

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