

**Use of Competitive Sealed Bidding or Competitive Negotiation -
Discussion Draft #2**

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; use of competitive sealed bidding or competitive negotiation
3 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;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

114 § 2.2-4303. Methods of procurement.

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

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

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

123 Upon a written determination made in advance by (i) the Governor or his designee in the case of
124 a procurement by the Commonwealth or by a department, agency or institution thereof or (ii) the local
125 governing body in the case of a procurement by a political subdivision of the Commonwealth, that
126 competitive negotiation is either not practicable or not fiscally advantageous, insurance may be procured

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127 through a licensed agent or broker selected in the manner provided for the procurement of things other
128 than professional services set forth in § 2.2-4302.2. The basis for this determination shall be documented
129 in writing.

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

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

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

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

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

146 E. Upon a determination in writing that there is only one source practicably available for that
147 which is to be procured, a contract may be negotiated and awarded to that source without competitive
148 sealed bidding or competitive negotiation. The writing shall document the basis for this determination.
149 The public body shall issue a written notice stating that only one source was determined to be
150 practicably available, and identifying that which is being procured, the contractor selected, and the date
151 on which the contract was or will be awarded. This notice shall be posted on the Department of General
152 Services' central electronic procurement website or other appropriate websites, and in addition, public

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153 bodies may publish in a newspaper of general circulation on the day the public body awards or
154 announces its decision to award the contract, whichever occurs first. Posting on the Department of
155 General Services' central electronic procurement website shall be required of any state public body.
156 Local public bodies are encouraged to utilize the Department of General Services' central electronic
157 procurement website to provide the public with centralized visibility and access to the Commonwealth's
158 procurement opportunities.

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

173 G. A public body may establish purchase procedures, if adopted in writing, not requiring
174 competitive sealed bids or competitive negotiation for single or term contracts for goods and services
175 other than professional services if the aggregate or the sum of all phases is not expected to exceed
176 \$100,000; however, such small purchase procedures shall provide for competition wherever practicable.
177 For local public bodies, such purchase procedures may allow for single or term contracts for

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178 professional services without requiring competitive negotiation, provided the aggregate or the sum of all
179 phases is not expected to exceed \$60,000.

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

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

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

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

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