

Term Contracts - Discussion Draft #2

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. 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 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 ~~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~~

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

116 § 2.2-4302.3. Competitive negotiation; term contract limitations for certain projects and services;
117 exceptions.

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

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

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

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131 2. Any locality or any authority, sanitation district, metropolitan planning organization or
132 planning district commission with a population in excess of 80,000, or any city within Planning District
133 8, the sum of all projects performed in a one-year contract term shall not exceed \$5 million and those
134 awarded for any airport as defined in § 5.1-1 and aviation transportation projects, the sum of all such
135 projects shall not exceed \$1.5 million;

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

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

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

148 C. Where a contract for architectural or professional engineering services (i) relating to a
149 multiple construction project contract has been awarded, the fee shall not exceed \$100,000, or (ii) for
150 airports as defined in § 5.1-1 and aviation transportation projects, the project fee shall not exceed
151 \$500,000, except that for:

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

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

156 The limitations imposed upon single project fees pursuant to this subsection shall not apply to
157 environmental, location, design, and inspection work regarding highways and bridges by the

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158 Commissioner of Highways or architectural and engineering services for rail and public transportation
159 projects by the Director of the Department of Rail and Public Transportation.

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

162 **§ 2.2-4343. Exemption from operation of chapter for certain transactions.**

163 A. The provisions of this chapter shall not apply to:

164 1. The Virginia Port Authority in the exercise of any of its powers in accordance with Chapter 10
165 (§ 62.1-128 et seq.) of Title 62.1, provided the Authority implements, by policy or regulation adopted by
166 the Board of Commissioners, procedures to ensure fairness and competitiveness in the procurement of
167 goods and services and in the administration of its capital outlay program. This exemption shall be
168 applicable only so long as such policies and procedures meeting the requirements remain in effect.

169 2. The Virginia Retirement System for selection of services related to the management, purchase
170 or sale of authorized investments, actuarial services, and disability determination services. Selection of
171 these services shall be governed by the standard set forth in § 51.1-124.30.

172 3. The State Treasurer in the selection of investment management services related to the external
173 management of funds shall be governed by the standard set forth in § 2.2-4514, and shall be subject to
174 competitive guidelines and policies that are set by the Commonwealth Treasury Board and approved by
175 the Department of General Services.

176 4. The Department of Social Services or local departments of social services for the acquisition
177 of motor vehicles for sale or transfer to Temporary Assistance to Needy Families (TANF) recipients.

178 5. The College of William and Mary in Virginia, Virginia Commonwealth University, the
179 University of Virginia, and Virginia Polytechnic Institute and State University in the selection of
180 services related to the management and investment of their endowment funds, endowment income, gifts,
181 all other nongeneral fund reserves and balances, or local funds of or held by the College or Universities
182 pursuant to § 23-44.1, 23-50.10:01, 23-76.1, or 23-122.1. However, selection of these services shall be
183 governed by the Uniform Prudent Management of Institutional Funds Act (§ 64.2-1100 et seq.) as
184 required by §§ 23-44.1, 23-50.10:01, 23-76.1, and 23-122.1.

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

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

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

197 9. Any town with a population of less than 3,500, except as stipulated in the provisions of §§ 2.2-
198 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
199 through 2.2-4377.

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

204 This exemption shall be applicable only so long as such policies and procedures, or other policies
205 and procedures meeting the requirements of § 2.2-4300, remain in effect in such county, city or town.
206 Such policies and standards may provide for incentive contracting that offers a contractor whose bid is
207 accepted the opportunity to share in any cost savings realized by the locality when project costs are
208 reduced by such contractor, without affecting project quality, during construction of the project. The fee,
209 if any, charged by the project engineer or architect for determining such cost savings shall be paid as a
210 separate cost and shall not be calculated as part of any cost savings.

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

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

218 12. Notwithstanding the exemptions set forth in subdivisions 9 through 11, the provisions of
219 subsections C and D of § 2.2-4303, and §§ 2.2-4305, 2.2-4308, 2.2-4311, 2.2-4315, 2.2-4317, 2.2-4330,
220 2.2-4333 through 2.2-4338, 2.2-4343.1, and 2.2-4367 through 2.2-4377 shall apply to all counties, cities
221 and school divisions, and to all towns having a population greater than 3,500 in the Commonwealth.

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

230 13. A public body that is also a utility operator may purchase services through or participate in
231 contracts awarded by one or more utility operators that are not public bodies for utility marking services
232 as required by the Underground Utility Damage Prevention Act (§ 56-265.14 et seq.). A purchase of
233 services under this subdivision may deviate from the procurement procedures set forth in this chapter
234 upon a determination made in advance by the public body and set forth in writing that competitive
235 sealed bidding is either not practicable or not fiscally advantageous to the public, and the contract is
236 awarded based on competitive principles.

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

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

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

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

250 18. The University of Virginia Medical Center to the extent provided by subdivision B 3 of § 23-
251 77.4.

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

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

258 21. [Expired].

259 B. Where a procurement transaction involves the expenditure of federal assistance or contract
260 funds, the receipt of which is conditioned upon compliance with mandatory requirements in federal laws
261 or regulations not in conformance with the provisions of this chapter, a public body may comply with
262 such federal requirements, notwithstanding the provisions of this chapter, only upon the written
263 determination of the Governor, in the case of state agencies, or the governing body, in the case of

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264 political subdivisions, that acceptance of the grant or contract funds under the applicable conditions is in
265 the public interest. Such determination shall state the specific provision of this chapter in conflict with
266 the conditions of the grant or contract.

267 **§ 23-38.110. Procurement; discrimination prohibited; participation of small, women-**
268 **owned, and minority-owned business enterprises.**

269 A. Subject to the express provisions of the management agreement described in § 23-38.88,
270 covered institutions may be exempt from the provisions of the Virginia Public Procurement Act (§ 2.2-
271 4300 et seq.), except for § 2.2-4342 (which section shall not be construed to require compliance with the
272 prequalification application procedures of subsection B of § 2.2-4317); provided, however, that any
273 deviations from the Virginia Public Procurement Act approved in a Management Agreement shall be
274 uniform across all covered institutions; and provided further that the governing body of a covered
275 institution shall adopt, and the covered institution shall comply with, policies for the procurement of
276 goods and services, including professional services, that shall be based upon competitive principles and
277 shall in each instance seek competition to the maximum practical degree. The policies shall implement a
278 system of competitive negotiation for professional services pursuant to ~~subsections~~ subsection A, B, and
279 E of § 2.2-4302.2 or pursuant to § 2.2-4302.3, shall prohibit discrimination because of race, religion,
280 color, sex or national origin of the bidder or offeror in the solicitation or award of contracts, shall
281 incorporate the prompt payment principles of §§ 2.2-4350 and 2.2-4354, and shall consider the impact
282 on correctional enterprises under § 53.1-47.

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

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

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

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

306 **§ 33.1-391.3. (Repealed effective October 1, 2014) Powers and duties of the Director.**

307 Except such powers as are conferred by law upon the Commonwealth Transportation Board, or
308 such services as are performed by the Department of Transportation pursuant to law, the Director of the
309 Department of Rail and Public Transportation shall have the power to do all acts necessary or
310 convenient for establishing, maintaining, improving, and promoting public transportation, transportation
311 demand management, ridesharing, and passenger and freight rail transportation in the Commonwealth
312 and to procure architectural and engineering services for rail and public transportation projects as
313 specified in ~~§ 2.2-4302.2~~ 2.2-4302.3.

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