DRAFT Meeting Minutes

Public Body Procurement Workgroup

Meeting # 2

Tuesday, May 16, 2023, 1:00 p.m.
House Committee Room
The Pocahontas Building
900 E. Main Street, Richmond, Virginia 23219

http://dgs.virginia.gov/dgs/directors-office/procurement-workgroup/

The Public Body Procurement Workgroup (the Workgroup) met in-person in the House Committee Room in the Pocahontas Building in Richmond, Virginia, with Joe Damico, Director of the Department of General Services (DGS), presiding. The meeting began with remarks from Mr. Damico, followed by finalization of the recommendation for SB 272, discussion and public comment on SB 912, and statements regarding SB 859. Materials presented at the meeting are available through the Workgroup's website. A recording of the meeting is available on the House of Delegates video streaming site.

Workgroup members and representatives present at the meeting included Joe Damico (Department of General Services), Willis Morris (Department of Small Business and Supplier Diversity), Joshua Heslinga (Virginia Information Technologies Agency), Lisa Pride (Virginia Department of Transportation), Jason Saunders (Department of Planning and Budget), Elizabeth Dooley (Virginia Association of Governmental Procurement), John McHugh (Virginia Association of State Colleges and University Purchasing Professionals), Leslie Haley (Office of the Attorney General), Mike Tweedy (Senate Finance and Appropriations Committee), and Joanne Frye (the Division of Legislative Services). A representative from the House Appropriations Committee was not in attendance.

I. Call to Order; Remarks by Chair

Joe Damico, Director
Department of General Services

Mr. Damico called the meeting to order and announced that Andrea Peeks with the House Appropriations Committee is not able to attend, and that Elizabeth Dooley is in attendance for the Virginia Association of Governmental Procurement.

II. Approval of Meeting Minutes from the May 2, 2023 Workgroup Meeting

Mr. Saunders requested a small amendment to the draft meeting minutes, citing that on page one "the Department of General Services" was missing after "Deputy Director of" and made a motion to approve the meeting minutes from the May 2, 2023 meeting of the Workgroup as amendment. The motion was seconded by Mr. Heslinga and unanimously approved by the Workgroup.

III. Public Comment on Draft Recommendation for SB 272

Next, Mr. Damico invited the public to provide comment on the draft recommendation for SB 272. There was no public comment.

Mr. Damico reminded the workgroup that at the last meeting, the Workgroup approved DGS' request to engage DEQ to identify a process to monitor greenhouse gas emissions from cement manufacturing in Virginia. Mr. Damico asked Jessica Hendrickson to report DEQ's response. Ms. Hendrickson reported that DEQ does not directly collect greenhouse gas emissions data from regulated sources in the state, however the sources of interest are required to submit annual reports of greenhouse gas emissions data to the EPA. The EPA data is publicly available and DEQ will add the link to the EPA report on DEQ's greenhouse gas emissions inventory website for the purpose of reviewing and tracking specific facility emissions in the Commonwealth.

IV. Finalize Recommendation on SB 272

Draft of Final Recommendation for SB 272

The Workgroup finds that it is not appropriate at this time for the state to enact procurement incentives for the cement and concrete industries to reduce overall CO2 emissions resulting from the manufacturing cement and production of concrete that is used in state-funded projects because (i) the cement and concrete industries are already making significant strides to reduce overall CO2 emissions resulting from the manufacturing of cement and production of concrete and has committed to making additional progress in the future, (ii) the Virginia Department of Transportation permits and advocates for lower carbon concrete to be used in its specifications and has been working with the cement and concrete industries for several years to reduce the amount of CO2 associated with the concrete used in transportation projects, and (iii) the state agencies that use concrete on vertical construction projects use a very small amount of the total cement produced in Virginia each year (one-half percent).

Mr. Heslinga made a motion to move the recommendation forward and Mr. Pride seconded the motion. The motion carried by a vote of 8-0-2[1].

[1] Yes: Mr. Morris, Mr. McHugh, Ms. Dooley, Ms. Pride, Mr. Saunders, Mr. Heslinga, Ms. Haley, Mr. Damico. Abstain: Ms. Frye, Mr. Tweedy

Mr. Damico made an additional motion to include in the report on SB 272 that DEQ is willing to stand up a link to the EPA database for reviewing greenhouse gas emissions on their website. Ms. Pride seconded the motion. The motion carried by a vote of 8-0-2[2].

V. Presentation on SB 859

None.

VI. Public Comment on SB 859

There was no public comment.

Mr. Damico shared that this bill will be redirected to a different workgroup under the Code Commission and made a motion to not discuss this bill while awaiting formal guidance from the Senate. Mr. Saunders seconded. The motion was unanimously approved.

VII. Findings and Recommendations on SB 859

None.

VIII. Presentation on SB 912

Senator Ruff began his remarks by explaining the importance of obtaining the best value at the best price in procurement. He shared that he would like to move forward with something to ensure taxpayers dollars are well spent and stated that there have been past instances where the state purchased technology that was not as successful as desired. Senator Ruff called on Mr. Andrew Lamar with the Richmond Technology Council to further explain.

Mr. Lamar, speaking on behalf of the Richmond Technology Council. He shared that during the 2023 session, SB 912 was introduced to bring a small change to the procurement act that they believe will result in more business participation in information technology procurements for the Commonwealth. Mr. Lamar stated that each of the nine regional technology councils support this change. He explained that in 2016 similar legislation was passed by the General Assembly regarding exceptions to liability terms and conditions, which resulted in more vendors having the opportunity to compete on the technical proposal and move to the negotiation phase. Mr. Lamar shared that the process being proposed is similar to architects and engineers, where exceptions to terms and conditions are not submitted with the proposal and are discussed at the negotiation stage which would be beneficial for information technology procurements.

Mr. Lamar shared that the problem members are facing is the increasing frequency in proposal scoring done by agencies on a vendor's willingness to wholly accept the terms and conditions in the proposal without the opportunity to discuss concerns or revisions.

[2] Yes: Mr. Morris, Mr. McHugh, Ms. Dooley, Ms. Pride, Mr. Saunders, Mr. Heslinga, Ms. Haley, Mr. Damico. Abstain: Ms. Frye, Mr. Tweedy

He shared that some agencies score proposals based on whether a vendor takes exception to terms and conditions causing highly qualified vendors being ranked lower than less capable vendors. He stated that rewarding a vendor for not taking exceptions to terms and conditions is not the right approach. He shared that vendors who do not take exceptions or seek clarification should be a red flag to the Commonwealth and that Richmond Technology Council advocates for policies that increase opportunities and competition, and proposals should be evaluated on their merit, best solution, and ability to perform.

Mr. Lamar shared that SB 912 would allow agencies to select the most qualified proposals and allow for thoughtful conversations on appropriate terms and conditions. He stated that agencies can still insist on any terms they believe are essential for a particular contract and concluded his remarks by thanking Mr. Heslinga with VITA for continued dialogue and believes that a solution can be found that will help everyone meet their needs.

Mr. McHugh asked Mr. Lamar if the goal is to prohibit suppliers from proposing exceptions to terms and conditions at the time of the proposal? Mr. Lamar responded that, under SB912, the public body would be prohibited from requiring the vendor to state exceptions, however, that does not prohibit the vendor from indicating exceptions on their own. Mr. Lamar further explained that the goal is to allow evaluation of proposals based on the merit of the proposal and the technical abilities to perform and not exclude vendors from the process based on exceptions to terms and conditions without an understanding of those exceptions. Mr. Lamar expressed concern over public bodies scoring proposals when some proposals have redlines and others do not and the influence that might have over the scoring.

Mr. Damico thanked Mr. Lamar for speaking on behalf of Senator Ruff and the bill's proponents and providing a thorough explanation.

IX. Presentations on SB 912

Next, Mr. Damico called for presentations on SB 912 and indicated that each presenter is limited to three minutes.

Joshua Heslinga was the first to present the Workgroup and began by thanking Senator Ruff and Richmond Technology Council for their continued dialogue. He shared that VITA is not aware of instances identified by the proponents where suppliers are being scored significantly lower or excluded from negotiation due to suppliers taking exceptions to terms and conditions. Mr. Heslinga explained VITA's process for evaluating proposals and stated that in cases where VITA does score exceptions, it is usually a minor component that does not significantly impact the overall scoring. He stated that VITA agreed with the proponents of SB912 that increasing participation in procurement is a good thing, that negotiations can resolve a majority of contract issues identified, and that when suppliers quickly accept all terms and conditions without exceptions that does not always result in a better contract. Mr. Heslinga shared that if there are cases where vendors are being penalized or kicked out of negotiations because of a supplier's robust compliance department, that is a problem worth remedying. He

explained that the bill as introduced could have negative effects on public bodies, however, by denying public bodies information that is useful in the evaluation process, by potentially delaying the process, and by weakening the negotiation position of the public body. Mr. Heslinga stated that, by requiring exceptions be stated upfront, public bodies can better prepare for the negotiation process by ensuring the appropriate subject matter experts or legal resources are engaged.

Mr. Heslinga shared the proposed amendments VITA provided ahead of the meeting and explained that the proposed amendments address the problem identified by the bill's proponents by prohibiting public bodies from considering exceptions during the initial evaluation of proposals, while also addressing the concerns of public bodies by allowing public bodies to obtain exceptions with the submission of proposals. Mr. Heslinga concluded his remarks summarizing the two proposed amendments provided by VITA.

Jennifer Stieffenhofer with the Virginia Association of Governmental Procurement (VAGP) was second to present to the Workgroup. She shared that VAGP represents over 1,100 procurement professional across Virginia and is unaware of practices that establish scoring criteria for exceptions to contractual terms and conditions as exceptions are addressed during the negotiation phase. She requested examples of such practices.

Gerrit VanVoorhees, the Director of Information Technology at the City of Petersburg was third to present to the Workgroup, representing the Virginia Local Government IT Executives (VaLGITE). Mr. VanVoorhees asked why information technology is singled out and why not change procurement across the state. He stated that he is unclear of the problem this is trying to solve. Mr. VanVoorhees shared that there are instances where it is important to know upfront the exceptions vendors take in order to avoid a prolonged process. He shared that he is unaware of vendors that have been excluded based solely on exceptions taken to terms and conditions. He concluded his remarks by stating that this change could cause problems by making the process less efficient and slower.

Michael Thomas with McGuireWoods Consulting was the fourth person to present. He shared that terms and conditions are there for a variety of reasons, relate to the type of proposal, and can influence the cost of services, which are better understood when discussed in negotiations. He stated that it is beneficial for vendors to think out of the box and offer more innovative proposals. He shared that the proposed terms and conditions that agencies include in the request for proposal do not always fit what is being proposed and stated that, while a redlined document can look daunting and overwhelming to the evaluation panel, allowing negotiations provides the opportunity for explanation and better understanding of the redlines.

Mr. Damico called on Pete Stamps, the Director of Purchases and Supply (DPS) at the Department of General Services, to speak on the process DPS has regarding exceptions to terms and conditions in proposals. Mr. Stamps shared that DPS requests vendors to document exceptions to terms and conditions in proposal responses, however, such exceptions are not evaluated until the negotiations stage.

Mr. Morris asked Mr. Stamps if he is aware of instances where a vendor has been scored lower for redlining terms and conditions. Mr. Stamps stated that he is unaware of instances where vendors have been scored lower for redlining terms and conditions.

Mr. Heslinga asked if the bill is amended to require that public bodies will not score contract exceptions as VITA has proposed, does DGS believe this should apply to more than information technology? Mr. Stamps replied that DPS does not currently score on contract exceptions, therefore it would have minimal impact.

Ms. Dooley asked Mr. Stamps if there is concern from DGS with not knowing all the information ahead of going into a negotiation and dealing with risks. Mr. Stamps stated that is why DPS asks for exceptions upfront, even though DPS does not evaluate on the information, it is used to prepare for negotiation.

X. Public Comment on SB 912

The first stakeholder to comment was Chris Nolen, of McGuireWoods Consulting. Mr. Nolen explained the issue is that the request for proposals states that vendors are deemed to have accepted the terms and conditions in the proposal if no objection is taken. He stated that redlining of terms and conditions is based on the vendors view of risk and without context, it is impossible to know if the vendor really understands the agency proposal.

Mr. Damico asked Mr. Nolen his thoughts on the two ideas before the Workgroup, (i) do not ask vendors to identify exceptions with their proposal submission, or (ii) ask vendors to identify exceptions with their proposal submission and prohibit agencies from evaluating exceptions during the initial evaluation process. Mr. Nolen shared he understands wanting the information submitted at the beginning of the process and the question is whether the exceptions are a part of the proposal. Mr. Nolen stated a desire to ensure that stated exceptions are kept separate from scoring of the proposal. Mr. Lamar agreed with Mr. Nolen and stated a desire to work together to meet everyone's needs.

The second stakeholder to speak was Mark Perry, a member of VaLGITE. Mr. Perry explained the importance of knowing exceptions upfront in proposals before the process can proceed. He stated that there are many data and legal requirements and that knowing upfront will be more efficient. He expressed a desire to keep terms in there but understands not scoring in the initial phase. Mr. McHugh asked Mr. Perry about local government's evaluation of technical requirements, and Mr. Perry responded that it was important to know upfront to be efficient in the procurement process.

XI. Findings and Recommendations on SB 912

Mr. Heslinga stated that it appears there are no serious concerns with the conceptual approach proposed by VITA to allow public bodies to obtain vendors exceptions with the proposal submission and ensure that public bodies do not hold exceptions against suppliers during the initial review. He noted that there was still some question

Mr. McHugh said that IT is very complex procurement and that he would question whether we need to expand this to everything, preferring to keep it focused on the original intent of IT.

Mr. Morris stated that it is good to know upfront what exceptions there are and that more information leads to better evaluations. He expressed concern about the behavior identified by the proponents, which may not be happening much but which would be a problem when it happens.

Mr. Saunders asked whether the comparable language for architects and engineers was in subparagraph (A)(4) of the statute and noted that it has an exception for required terms that is a somewhat different structure. Mr. Heslinga responded, noting that professional services feature negotiations with only one offeror at a time but the goods and nonprofessional services category often features negotiations with multiple suppliers at the same time, creating a greater need to know everything upfront. With respect to the "unless" clause noted by Mr. Saunders for the architects and engineers, Mr. Heslinga stated that not everyone agrees on what's required and that such language introduces additional complexity.

Ms. Dooley commented that technology procurements are vastly different than architect and engineer contracts. She noted that offerors in technology procurements often bring forward other terms and agreements, such as cloud terms and software license agreements, which are then part of the overall consideration of the proposal package and how to proceed with the procurement and that it would do a disservice to taxpayers to go forward without that information.

Mr. Tweedy shared that, without a complete understanding of the impact to non-information technology procurements, the recommendation should be limited to information technology as that is how the bill was originally drafted and referred to the workgroup.

Mr. Tweedy asked about the existing statute's language concerning exceptions to liability provisions. Mr. Heslinga responded that VITA would remove that language because there would not be a need for it with the across-the-board approach of not evaluating exceptions and that 2019 legislation dealt with liability provisions for IT projects.

Mr. Damico noted that it can be problematic for buyers to keep up with different requirements for different types of procurements and that consistency is important. He stated that he has heard from the buyer community that it is important to be well informed and avoid lengthening the procurement, but that he has also heard the vendor community's concern that a redline should not prevent vendors from getting to the table, and that a middle of the road approach can meet both sets of concerns.

In response to Mr. Damico's request for a conceptual recommendation, Mr. Heslinga made a motion to conceptually recommend that for information technology requests for proposals, public bodies would not be prohibited from asking for exceptions to terms and conditions in proposal responses and that any exceptions made by offerors would not be considered as part of the initial scoring or evaluation process for shortlisting offerors for negotiation. Ms. Pride stated that she agrees with the VITA proposals and would like to consider consistency when proposing changes to procurement code to clean up the inconsistencies and variations that make it challenging for procurement officers to navigate. After restatement of the motion, Ms. Dooley seconded. The motion passed 6-0-4.[3]

Mr. Damico requested a second conceptual recommendation that included non-IT nonprofessional services for further consideration at the next meeting. Mr. Heslinga made a motion for a second conceptual recommendation that for requests for proposals under subsection (A)(3) of §2.2-4302.2, public bodies would not be prohibited from asking for exceptions to terms and conditions in proposal responses and that any exceptions made by offerors would not be evaluated as part of the initial evaluation process for shortlisting offerors for negotiation. Ms. Pride seconded. By a show of hands, the motion was approved 4-2-4.[4]

XII. Public Comment

None.

XIII. Discussion

None.

XIV. Adjournment

Mr. Damico adjourned the meeting at 2:26 p.m. and noted that the Workgroup's next meeting is scheduled for June 6, 2023.

For more information, see the Workgroup's website or contact that Workgroup's staff at pwg@dgs.virginia.gov.

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[3] Yes: Mr. Morris, Mr. McHugh, Ms. Dooley, Ms. Pride, Mr. Heslinga, Mr. Damico. Abstain: Ms. Frye, Mr. Tweedy, Mr. Saunders, Ms. Haley

[4] Yes: Mr. Morris, Ms. Pride, Mr. Heslinga, Mr. Damico. No: Ms. Dooley, Mr. McHugh. Abstain: Ms. Frye, Ms. Haley, Mr. Tweedy, Mr. Saunders

COMMONWEALTH OF VIRGINIA

SUSAN CLARKE SCHAAR
CLERK OF THE SENATE
POST OFFICE BOX 396
RICHMOND, VIRGINIA 23218

SENATE

May 18, 2023

The Honorable John S. Edwards
Chair, Virginia Code Commission
P.O. Box 1179
Roanoke, Virginia 24006

Dear Senator Edwards:

This is to inform you that, pursuant to Rule 20 (o) of the Rules of the Senate of Virginia, the Senate Committee on General Laws and Technology has referred the subject matter contained in Senate Bill 859 to the Virginia Code Commission Work Group to Review Requirements for Localities to Provide Public Notice. It is requested that the appropriate committee chair and bill patron receive a written report, with a copy to this office, by November 1, 2023.

With kind regards, I am

Sincerely yours,

Susan Clarke Schaar

SCS:dhl

cc: Sen. Adam P. Ebbin, Chair, Senate Committee on General Laws and Technology
Sen. John A. Cosgrove, Jr., Patron of SB 859
Amigo Wade, Director, Division of Legislative Services
Joe Damico, Director, Virginia Department of General Services
Holly Trice, Division of Legislative Services

Public Body Procurement Workgroup

Draft of Conceptual Recommendation Options for SB 912

<u>Option 1</u> (specific to information technology)

The Workgroup recommends that the General Assembly consider amending subsection (A)(3) of § 2.2-4302.2 to (i) include language for information technology procurements that prohibits public bodies from basing the scoring or evaluation of which offerors are selected for negotiations on exceptions stated in a proposal to any contractual terms or conditions and that such exceptions shall be considered during negotiation; and (ii) remove existing language for information technology procurements that prohibits public bodies from requiring an offeror to state in a proposal response exceptions to liability provisions in the Request for Proposal.

<u>Option 2</u> (across the statutory category of goods, nonprofessional services, and insurance, including information technology)

The Workgroup recommends that the General Assembly consider amending subsection (A)(3) of § 2.2-4302.2 to (i) insert language that prohibits public bodies from basing the scoring or evaluation of which offerors are selected for negotiations on exceptions stated in a proposal to any contractual terms or conditions and that such exceptions shall be considered during negotiation; and (ii) remove existing language for information technology procurements that prohibits public bodies from requiring an offeror to state in a proposal response exceptions to liability provisions in the Request for Proposal.

COMMONWEALTH OF VIRGINIA

SUSAN CLARKE SCHAAR
CLERK OF THE SENATE
POST OFFICE BOX 396
RICHMOND, VIRGINIA 23218

SENATE

March 24, 2023

Mr. Joseph F. Damico
Director, Department of General Services
1100 Bank Street, Suite 420
Richmond, Virginia 23219

Dear Joe:

This is to inform you that, pursuant to Rule 20 (o) of the Rules of the Senate of Virginia, the Senate Committee on Finance and Appropriations has referred the subject matters contained in Senate Bill 912, Senate Bill 954, and Senate Bill 1115 to the Procurement Workgroup for study. It is requested that the appropriate committee co-chairs and bill patrons receive written reports, with copies to this office, by November 1, 2023.

With kind regards, I am

Sincerely yours,

Susan Clarke Schaar

SCS:gc

cc: Sen. Janet D. Howell, Co-Chair, Senate Committee on Finance and Appropriations
Sen. George L. Barker, Co-Chair, Senate Committee on Finance and Appropriations
Sen. Frank M. Ruff, Jr., Patron of SB 912
Sen. J. Chapman Petersen, Patron of SB 954
Sen. Bill DeSteph, Patron of SB 1115
Amigo Wade, Director, Division of Legislative Services
April Kees, Director, Senate Finance and Appropriations Committee

2023 SESSION

SB 1115 Virginia Public Procurement Act; preference for products made or manufactured in Virginia.

Introduced by: **Bill DeSteph** | **all patrons** ... **notes** | **add to my profiles**

SUMMARY AS INTRODUCED:

Virginia Public Procurement Act; preference for products made or manufactured in Virginia and the U.S.; recyclable content; report. Provides preference for a bidder who is a resident of Virginia over a bidder who is a resident of any other state in determining the award for any contract for goods, services, or construction under the Virginia Public Procurement Act. The bill requires a state agency to decrease by seven percent the price of any offer for a Virginia end product, defined in the bill, and to decrease by two percent the price of any offer for a U.S. end product, defined in the bill, when evaluating bids for purposes of making an award determination. When the lowest responsive and responsible bidder, after price preferences have been taken into account, is a resident of Virginia and the offer price is within $10,000 or five percent, whichever is less, of the lowest responsive and responsible bidder who is a resident of another state, the Virginia resident shall be given the option to match the price of the nonresident bidder. Current allowance for granting price preferences to Virginia residents is made mandatory by the bill. The bill directs the Secretary of Commerce and Trade to convene a stakeholder work group to recommend revisions to the recyclable materials tax credit and report on the work group's recommendations by November 1, 2023. This bill is a recommendation of the Manufacturing Development Commission.

FULL TEXT

01/10/23 Senate: Prefiled and ordered printed; offered 01/11/23 23103895D pdf | impact statement

02/01/23 Senate: Committee substitute printed 23106208D-S1 pdf | impact statement

AMENDMENTS

Senate committee, floor amendments and substitutes offered

HISTORY

01/10/23 Senate: Prefiled and ordered printed; offered 01/11/23 23103895D

01/10/23 Senate: Referred to Committee on General Laws and Technology

02/01/23 Senate: Reported from General Laws and Technology with substitute (13-Y 0-N 2-A)

02/01/23 Senate: Incorporates SB1176 (McPike)

02/01/23 Senate: Committee substitute printed 23106208D-S1

02/01/23 Senate: Rereferred to Finance and Appropriations

02/02/23 Senate: Passed by indefinitely in Finance and Appropriations with letter (11-Y 4-N)

23103895D

SENATE BILL NO. 1115

Offered January 11, 2023

Prefiled January 10, 2023

A BILL to amend and reenact § 2.2-4324 of the Code of Virginia, relating to Virginia Public Procurement Act; preference for products made or manufactured in Virginia and the U.S.; recyclable content report.

Patrons—DeSteph, Cosgrove, McPike and Reeves

Referred to Committee on General Laws and Technology

Be it enacted by the General Assembly of Virginia:

1. That § 2.2-4324 of the Code of Virginia is amended and reenacted as follows:

§ 2.2-4324. Preference for products made or manufactured in Virginia and the U.S.; recyclable content.

A. ~~In the case of a tie bid, preference shall be given to goods produced in Virginia and goods, services, or construction provided by Virginia persons, firms, or corporations; otherwise the tie shall be decided by lot~~ *For the purposes of this section:*

"End product" means the tangible product described in a solicitation for bids, including its component parts and its final form.

"Grown" means locally derived from any timber, agricultural product, aquaculture product, or livestock that is produced, cultivated, raised, or harvested upon the land or from the water.

"Made" or "manufactured" means assembled, fabricated, or processed into an end product, the price of which is substantially related to the cost of such assemblage, fabrication, or processing.

"Principal place of business" means the physical business location where the natural persons who direct, control, and manage the business's day-to-day operations are located.

"U.S. end product" means an end product made, manufactured, or grown in the United States.

"Virginia business" means a business that maintains a principal place of business within Virginia.

"Virginia end product" means an end product made, manufactured, or grown in Virginia.

B. *In determining the award of any contract for goods, services, or construction, preference shall be given to Virginia end products and to Virginia businesses or Virginia residents, as applicable, in accordance with this section.*

C. When evaluating bids for purposes of making an award determination, a state public body shall decrease the price of any bid offered (i) for a Virginia end product, by seven percent and (ii) for a U.S. end product, by two percent. If the lowest responsive and responsible bidder, after price preferences have been taken into account, who is a resident of Virginia is within five percent or $10,000, whichever is less, of the lowest responsive and responsible bidder who is a resident of another state, then the bidder who is a resident of Virginia shall be granted the option to match the price of the bidder who is a resident of another state.

D. Whenever the lowest responsive and responsible bidder is a resident of any other state and such state under its laws allows a resident contractor of that state a percentage preference, a like preference shall be ~~allowed~~ *granted* to the lowest responsive and responsible bidder who is a resident of Virginia and is the next lowest bidder. If the lowest responsive and responsible bidder is a resident of any other state and such state under its laws allows a resident contractor of that state a price-matching preference, a like preference shall be ~~allowed~~ *granted* to responsive and responsible bidders who are residents of Virginia. If the lowest bidder is a resident contractor of a state with an absolute preference, the bid shall not be considered. The Department of General Services shall post and maintain an updated list on its website of all states with an absolute preference for their resident contractors and those states that allow their resident contractors a percentage preference, including the respective percentage amounts. For purposes of compliance with this section, all public bodies may rely upon the accuracy of the information posted on this website.

~~C. Notwithstanding the provisions of subsections B and C, in~~ *E. In* the case of a tie bid in instances where goods are being offered, and existing price preferences have already been taken into account, preference shall be given to the bidder whose goods contain the greatest amount of recycled content, *including waste tires and materials manufactured by advanced recycling factories*.

~~D. For the purposes of this section, a Virginia person, firm or corporation shall be deemed to be a resident of Virginia if such person, firm or corporation has been organized pursuant to Virginia law or maintains a principal place of business within Virginia.~~

F. If a state public body receives three or more bids from a manufacturers that use materials or

product components made in Virginia or in the United States, such body may only select from among those bids.

2. That the Secretary of Commerce and Trade and the Department of Taxation shall establish a work group of stakeholders, including representatives from the Virginia Manufacturers Association, the Virginia Asphalt Association, the Virginia Transportation Construction Alliance, the Virginia Recycling Association, and the Virginia Economic Development Partnership, to recommend revisions to the recyclable materials tax credit, established pursuant to § 58.1-439.7 of the Code of Virginia, that will contribute to an increase in recycled materials and the growth of recyclable materials businesses to fulfill the expectations outlined in Executive Order 17 (2022). The Secretary of Commerce and Trade shall submit an executive summary of the work group's recommendations to the General Assembly and the Governor by November 1, 2023.

23106208D

SENATE BILL NO. 1115

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on General Laws and Technology on February 1, 2023)

(Patrons Prior to Substitute—Senators DeSteph and McPike [SB 1176])

A BILL to amend and reenact § 2.2-4324 of the Code of Virginia, relating to Virginia Public Procurement Act; preference for products made or manufactured in Virginia and the U.S.; report.

Be it enacted by the General Assembly of Virginia:

1. That § 2.2-4324 of the Code of Virginia is amended and reenacted as follows:

§ 2.2-4324. Preference for products made or manufactured in Virginia and the U.S.; recyclable content.

A. ~~In the case of a tie bid, preference shall be given to goods produced in Virginia and goods, services, or construction provided by Virginia persons, firms, or corporations; otherwise the tie shall be decided by lot~~ *For the purposes of this section:*

"End product" means the tangible product described in a solicitation for bids, including its component parts and its final form.

"Grown" means locally derived from any timber, agricultural product, aquaculture product, or livestock that is produced, cultivated, raised, or harvested upon the land or from the water.

"Made" or "manufactured" means assembled, fabricated, or processed into an end product, the price of which is substantially related to the cost of such assemblage, fabrication, or processing.

"Principal place of business" means the physical business location where the natural persons who direct, control, and manage the business's day-to-day operations are located.

"U.S. end product" means an end product made, manufactured, or grown in the United States.

"Virginia business" means a business that maintains a principal place of business within Virginia.

"Virginia end product" means an end product made, manufactured, or grown in Virginia.

B. *In determining the award of any contract for goods, services, or construction, preference shall be given to Virginia end products and to Virginia businesses or Virginia residents, as applicable, in accordance with this section.*

C. When evaluating bids for purposes of making an award determination, a state public body shall decrease the price of any bid offered (i) for a Virginia end product, by seven percent and (ii) for a U.S. end product, by two percent. If the lowest responsive and responsible bidder, after price preferences have been taken into account, who is a resident of Virginia is within five percent or $10,000, whichever is less, of the lowest responsive and responsible bidder who is a resident of another state, then the bidder who is a resident of Virginia shall be granted the option to match the price of the bidder who is a resident of another state.

D. Whenever the lowest responsive and responsible bidder is a resident of any other state and such state under its laws allows a resident contractor of that state a percentage preference, a like preference shall be ~~allowed~~ *granted* to the lowest responsive and responsible bidder who is a resident of Virginia and is the next lowest bidder. If the lowest responsive and responsible bidder is a resident of any other state and such state under its laws allows a resident contractor of that state a price-matching preference, a like preference shall be ~~allowed~~ *granted* to responsive and responsible bidders who are residents of Virginia. If the lowest bidder is a resident contractor of a state with an absolute preference, the bid shall not be considered. The Department of General Services shall post and maintain an updated list on its website of all states with an absolute preference for their resident contractors and those states that allow their resident contractors a percentage preference, including the respective percentage amounts. For purposes of compliance with this section, all public bodies may rely upon the accuracy of the information posted on this website.

~~C. Notwithstanding the provisions of subsections B and C, in~~ *E. In* the case of a tie bid in instances where goods are being offered, and existing price preferences have already been taken into account, preference shall be given to the bidder whose goods contain the greatest amount of recycled content, *including waste tires and materials manufactured by advanced recycling factories.*

~~D. For the purposes of this section, a Virginia person, firm or corporation shall be deemed to be a resident of Virginia if such person, firm or corporation has been organized pursuant to Virginia law or maintains a principal place of business within Virginia.~~

F. If a state public body receives three or more bids from a manufacturers that use materials or product components made in Virginia or in the United States, such body may only select from among those bids.

2. That the Secretary of Commerce and Trade and the Department of Taxation shall establish a work group of stakeholders, including representatives from the Virginia Manufacturers

Association, the Virginia Asphalt Association, the Virginia Transportation Construction Alliance, the Virginia Recycling Association, and the Virginia Economic Development Partnership, to recommend revisions to the recyclable materials tax credit, established pursuant to § 58.1-439.7 of the Code of Virginia, that will contribute to an increase in recycled materials and the growth of recyclable materials businesses to fulfill the expectations outlined in Executive Order 17 (2022). The Secretary of Commerce and Trade shall submit an executive summary of the work group's recommendations to the General Assembly and the Governor by November 1, 2023.