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SENATE BILL NO. 645

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on General Laws and Technology
on January 29, 2020)

(Patron Prior to Substitute—Senator Surovell)

A BILL to amend the Code of Virginia by adding in Chapter 43 of Title 2.2 an article numbered 7, consisting of sections numbered 2.2-4377.1 through 2.2-4377.5, relating to local arbitration agreements.

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Chapter 43 of Title 2.2 an article numbered 7, consisting of sections numbered 2.2-4377.1 through 2.2-4377.5, as follows:

Article 7.

Arbitration Agreements Act.

§ 2.2-4377.1. Definitions.

As used in this article:

"Consumer dispute" means a dispute between an individual who seeks or acquires real or personal property, services, money, or credit for personal, family, or household purposes and the seller or provider of such property, services, money, or credit.

"Employment dispute" means a dispute (i) between an employer and his employee arising out of the relationship of employer and employee as defined by the Fair Labor Standards Act (29 U.S.C. § 201 et seq.), state labor law, or by contract, or (ii) as to whether an individual categorized as an independent contractor is an employee under applicable law.

"Pre-dispute arbitration clause" means any contractual provision that compels or otherwise relates to arbitration of disputes that arise after the contract is formed.

§ 2.2-4377.2. Procurement procedures; disclosure required for pre-award actions.

A. For any procurement contract for goods and services and any purchasing decision, a locality shall ensure that solicitations require the bidder or offeror to disclose information regarding pre-dispute arbitration clauses. The locality shall require the bidder or offeror to provide written submissions, together with any documents referenced in such submissions, to allow the locality to ascertain:

1. Whether the bidder or offeror requires employees to sign a contract containing a pre-dispute arbitration clause as a condition of employment;

2. If the pre-dispute arbitration clause is not a condition of employment, whether the pre-dispute arbitration clause binds employees who do not take affirmative steps to opt out;

3. If there is an opt-out provision, what procedures and time periods govern its application;

4. If there is an opt-out provision, what percentage of the bidder or offeror's workforce has opted out of the pre-dispute arbitration clause;

5. Whether the bidder or offeror requires consumers to sign a contract containing a pre-dispute arbitration clause as a condition of purchasing products or services;

6. Whether the pre-dispute arbitration clause applies to all potential causes of action related to the employment relationship, and if not, whether the pre-dispute arbitration clause applies to claims concerning (i) sexual harassment or other forms of gender discrimination, (ii) racial discrimination or other claims arising pursuant to Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) or (iii) the Fair Labor Standards Act (29 U.S.C. § 201 et seq.) or an equivalent state law claim;

7. Whether the pre-dispute arbitration clause limits the ability of employees, consumers, or other parties to participate in collective, class, or representative actions;

8. Whether the pre-dispute arbitration clause limits discovery;

9. Whether the pre-dispute arbitration clause purports to limit the right of an employee or consumer to lodge or pursue a complaint with public agencies;

10. The estimated costs the bidder or offeror's employees or consumers are required to bear to pursue arbitration;

11. Whether the pre-dispute arbitration clause designates a venue other than the state in which non-bidder or non-offeror party resides;

12. Whether the pre-dispute arbitration clause (i) imposes any limits on the relief that an arbitrator may award, or (ii) waives the right to seek certain forms of relief;

13. Whether the pre-dispute arbitration clause requires employees or consumers to waive the right to assert any claims;

14. Whether the pre-dispute arbitration clause imposes any limit on the time period in which an employee or consumer may initiate arbitration, other than the statute of limitations under state or federal law;

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60 15. Which, if any, arbitration administrator or arbitration service provider is designated by the
61 pre-dispute arbitration clause;

62 16. How many times the bidder or offeror filed a motion to compel arbitration in a judicial
63 proceeding in the last five years;

64 17. How many requests for arbitration the bidder or offeror received in the last five years;

65 18. Whether the bidder or offeror's retainer agreement with its arbitral provider gives the bidder or
66 offeror's directors and executives access to arbitration outcomes or findings;

67 19. Who reviews the bidder or offeror's arbitration outcomes and how the arbitration outcomes are
68 evaluated; and

69 20. Whether the bidder or offeror retains authority to take independent action to make personnel
70 changes based on arbitral findings.

71 B. Such disclosures shall be open to the inspection of any citizen, or any interested person, firm or
72 corporation, in accordance with the Virginia Freedom of Information Act (§ 2.2-3700 et seq.)

73 C. No disclosure requirements shall apply to procurements for construction, construction-related
74 services, transportation construction, or transportation-related construction.

75 **§ 2.2-4377.3. Solicitation evaluation criteria.**

76 A. In addition to other factors relevant to awarding contracts under existing law, a locality shall
77 consider each bidder or offeror's policies and practices related to arbitration as disclosed in
78 submissions required pursuant to § 2.2-4377.2. Each locality shall seek to contract with qualified entities
79 and business owners that can demonstrate or will certify that they do not use pre-dispute arbitration
80 clauses in contracts with employees or consumers.

81 B. If no otherwise qualified bidder or offeror can demonstrate or will certify that they do not use
82 pre-dispute arbitration clauses in contracts with employees or consumers, a locality shall evaluate the
83 disclosures provided pursuant to § 2.2-4377.2 in selecting a bidder or offeror.

84 C. No bidder or offeror that fails to disclose the information required pursuant to § 2.2-4377.2 shall
85 be eligible to enter a contract to provide goods or services to a locality.

86 **§ 2.2-4377.4. Compliance for post-award actions.**

87 A. A contractor required to provide information pursuant to § 2.2-4377.2 shall be required to update
88 such information every six months during the performance of any contract. The contractor shall furnish
89 all submissions and documents required pursuant to § 2.2-4377.2 to the contracting locality and shall
90 permit access to its books, records, and accounts by the contracting agency for purposes of investigating
91 compliance with this article.

92 B. Such contractor shall include answers to the disclosure inquiry provisions of subdivision 20 of
93 § 2.2-4377.2 in every subcontract or purchase order related to the performance of its contract with the
94 city or its agencies and make such disclosures binding upon each subcontractor or vendor.

95 C. The contractor shall take such action with respect to any subcontract or purchase order as the
96 contracting agency may direct as a means of enforcing such provisions, including sanctions for
97 noncompliance.

98 **§ 2.2-4377.5. Penalty.**

99 Upon violation by a contractor of any provision of this article, a locality may cancel, terminate, or
100 suspend, in whole or in part, any such contractor's contract and may declare the contractor ineligible
101 for further contracts with such locality.