

16103658D

HOUSE BILL NO. 1108

Offered January 13, 2016

Prefiled January 13, 2016

A BILL to amend and reenact §§ 2.2-4302.1 and 2.2-4302.2 of the Code of Virginia and to amend the Code of Virginia by adding in Chapter 1 of Title 11 a section numbered 11-9.8, relating to the Virginia Public Procurement Act and contracting generally; conditioning eligibility on a bidder's experience modification factor prohibited.

Patron—Webert

Referred to Committee on General Laws

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-4302.1 and 2.2-4302.2 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding in Chapter 1 of Title 11 a section numbered 11-9.8 as follows:

§ 2.2-4302.1. Process for competitive sealed bidding.

The process for competitive sealed bidding shall include the following:

1. Issuance of a written Invitation to Bid containing or incorporating by reference the specifications and contractual terms and conditions applicable to the procurement. Unless the public body has provided for prequalification of bidders, the Invitation to Bid shall include a statement of any requisite qualifications of potential contractors. *No Invitation to Bid for construction services shall condition a successful bidder's eligibility on having a specified experience modification factor.* When it is impractical to prepare initially a purchase description to support an award based on prices, an Invitation to Bid may be issued requesting the submission of unpriced offers to be followed by an Invitation to Bid limited to those bidders whose offers have been qualified under the criteria set forth in the first solicitation;

2. Public notice of the Invitation to Bid at least 10 days prior to the date set for receipt of bids by posting on the Department of General Services' central electronic procurement website or other appropriate websites. In addition, public bodies may publish in a newspaper of general circulation. Posting on the Department of General Services' central electronic procurement website shall be required of any state public body. Local public bodies are encouraged to utilize the Department of General Services' central electronic procurement website to provide the public with centralized visibility and access to the Commonwealth's procurement opportunities. In addition, bids may be solicited directly from potential contractors. Any additional solicitations shall include certified businesses selected from a list made available by the Department of Small Business and Supplier Diversity;

3. Public opening and announcement of all bids received;

4. Evaluation of bids based upon the requirements set forth in the Invitation to Bid, which may include special qualifications of potential contractors, life-cycle costing, value analysis, and any other criteria such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose, which are helpful in determining acceptability; and

5. Award to the lowest responsive and responsible bidder. When the terms and conditions of multiple awards are so provided in the Invitation to Bid, awards may be made to more than one bidder.

For the purposes of subdivision 1, "experience modification factor" means a value assigned to an employer as determined by a rate service organization in accordance with its uniform experience rating plan required to be filed pursuant to subsection D of § 38.2-1913.

§ 2.2-4302.2. Process for competitive negotiation.

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

1. Issuance of a written Request for Proposal indicating in general terms that which is sought to be procured, specifying the factors that will be used in evaluating the proposal, indicating whether a numerical scoring system will be used in evaluation of the proposal, and containing or incorporating by reference the other applicable contractual terms and conditions, including any unique capabilities, specifications or qualifications that will be required. In the event that a numerical scoring system will be used in the evaluation of proposals, the point values assigned to each of the evaluation criteria shall be included in the Request for Proposal or posted at the location designated for public posting of procurement notices prior to the due date and time for receiving proposals. *No Request for Proposal for construction services authorized by this chapter shall condition a successful offeror's eligibility on having a specified experience modification factor;*

2. Public notice of the Request for Proposal at least 10 days prior to the date set for receipt of

INTRODUCED

HB1108

59 proposals by posting on the Department of General Services' central electronic procurement website or
60 other appropriate websites. Additionally, public bodies shall publish in a newspaper of general
61 circulation in the area in which the contract is to be performed so as to provide reasonable notice to the
62 maximum number of offerors that can be reasonably anticipated to submit proposals in response to the
63 particular request. Posting on the Department of General Services' central electronic procurement website
64 shall be required of any state public body. Local public bodies are encouraged to utilize the Department
65 of General Services' central electronic procurement website to provide the public with centralized
66 visibility and access to the Commonwealth's procurement opportunities. In addition, proposals may be
67 solicited directly from potential contractors. Any additional solicitations shall include certified businesses
68 selected from a list made available by the Department of Small Business and Supplier Diversity; and

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

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

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

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

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

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

112 *For the purposes of subdivision A 1, "experience modification factor" means a value assigned to an*
113 *employer as determined by a rate service organization in accordance with its uniform experience rating*
114 *plan required to be filed pursuant to subsection D of § 38.2-1913.*

115 **§ 11-9.8. Construction of certain terms of offer to contract; use of experience modification factor**
116 **prohibited.**

117 A. As used in this section:

118 "Contract" means an agreement for the provision of construction services under which the contractor
119 will be required to have and maintain a policy of insurance as defined in § 38.2-119.

120 "Experience modification factor" means a value assigned to an employer as determined by a rate

121 service organization in accordance with its uniform experience rating plan required to be filed pursuant
122 to subsection D of § 38.2-1913.

123 "Offer to contract" means a solicitation of bids, Request for Proposals, or similar invitation to enter
124 into a contract that is extended to potential contractors for construction services.

125 "Person" means any individual; firm; cooperative; association; corporation; limited liability
126 company; trust; business trust; syndicate; partnership; limited liability partnership; joint venture;
127 receiver; trustee in bankruptcy; club, society, or other group or combination acting as a unit; or public
128 body, including but not limited to (i) the Commonwealth; (ii) any other state; and (iii) any agency,
129 department, institution, political subdivision, or instrumentality of the Commonwealth or any other state.

130 B. A term of an offer to contract issued that requires that the successful bidder have a specified
131 experience modification factor is prohibited.

132 C. Any contract or offer to contract that requires the contractor or bidder responding to the offer to
133 contract to have a specified experience modification is prohibited.

134 **2. That the provisions of this act shall apply to any offer to contract, as defined in § 11-9.8 of the**
135 **Code of Virginia, as created in this act; Invitation to Bid; or Request for Proposal for construction**
136 **services issued on or after July 1, 2016.**