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## HOUSE BILL NO. 1108

House Amendments in [ ] — February 15, 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 Prior to Engrossment—Delegate 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 proposals by posting on the Department of General Services' central electronic procurement website or

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

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

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

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

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

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

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

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

114 **§ 11-9.8. Construction of certain terms of offer to contract; use of experience modification factor**  
115 **prohibited.**

116 A. As used in this section:

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

119 "Experience modification factor" means a value assigned to an employer as determined by a rate  
120 service organization in accordance with its uniform experience rating plan required to be filed pursuant

to subsection D of § 38.2-1913.

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

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

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

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

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

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