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HOUSE BILL NO. 2121

Offered January 14, 2009

Prefiled January 13, 2009

A BILL to amend and reenact § 2.2-4317 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 2.2-4308.2, relating to the Public Procurement Act; verification of eligibility for employment in the United States.

Patron—Nichols

Referred to Committee on General Laws

Be it enacted by the General Assembly of Virginia:

1. That § 2.2-4317 of the Code of Virginia is amended and reenacted and that the Code of Virginia is amended by adding a section numbered 2.2-4308.2 as follows:

§ 2.2-4308.2. Registration and use of federal employment eligibility verification program required; employment of certain individuals prohibited; debarment.

A. Any nongovernmental contractor entering into a public contract with a public body, and any person that subcontracts with such contractor to perform work or provide services pursuant to such public contract, shall register and participate in the federal Electronic Work Verification Program or similar electronic verification of work authorization program operated by the United States Department of Homeland Security to verify information of newly hired employees pursuant to the Immigration Reform and Control Act of 1986 (8 U.S.C. § 1101 et seq.).

B. Any governmental contractor or subcontractor described in subsection A shall verify through the federal Electronic Work Verification Program or similar electronic verification of work authorization program that all of (i) its employees and (ii) the individual independent contractors with which it contracts to perform work or provide services pursuant to such public contract or subcontract are legally eligible for employment in the United States.

C. No governmental contractor or subcontractor described in subsection A shall employ or continue to employ an individual, or contract independently with an individual to perform work or provide services pursuant to such public contract, who is determined not to be legally eligible for employment in the United States as determined through the contractor's or subcontractor's verification of the individual's status through the federal Electronic Work Verification Program or similar electronic verification of work authorization program.

D. Any business that violates any provision of this section shall be debarred from contracting with any public body for a period of one year. In addition, the public contract or subcontract that the business had entered into with the public body, pursuant to which the violation of this section arose, shall be immediately terminated.

§ 2.2-4317. Prequalification generally; prequalification for construction.

A. Prospective contractors may be prequalified for particular types of supplies, services, insurance or construction, and consideration of bids or proposals limited to prequalified contractors. Any prequalification procedure shall be established in writing and sufficiently in advance of its implementation to allow potential contractors a fair opportunity to complete the process.

B. Any prequalification of prospective contractors for construction by a public body shall be pursuant to a prequalification process for construction projects adopted by the public body. The process shall be consistent with the provisions of this section.

The application form used in such process shall set forth the criteria upon which the qualifications of prospective contractors will be evaluated. The application form shall request of prospective contractors only such information as is appropriate for an objective evaluation of all prospective contractors pursuant to such criteria. The form shall allow the prospective contractor seeking prequalification to request, by checking the appropriate box, that all information voluntarily submitted by the contractor pursuant to this subsection shall be considered a trade secret or proprietary information subject to the provisions of subsection D of § 2.2-4342.

In all instances in which the public body requires prequalification of potential contractors for construction projects, advance notice shall be given of the deadline for the submission of prequalification applications. The deadline for submission shall be sufficiently in advance of the date set for the submission of bids for such construction so as to allow the procedures set forth in this subsection to be accomplished.

At least thirty days prior to the date established for submission of bids or proposals under the procurement of the contract for which the prequalification applies, the public body shall advise in

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59 writing each contractor who submitted an application whether that contractor has been prequalified. In
60 the event that a contractor is denied prequalification, the written notification to the contractor shall state
61 the reasons for the denial of prequalification and the factual basis of such reasons.

62 A decision by a public body denying prequalification under the provisions of this subsection shall be
63 final and conclusive unless the contractor appeals the decision as provided in § 2.2-4357.

64 C. A public body may deny prequalification to any contractor only if the public body finds one of
65 the following:

66 1. The contractor does not have sufficient financial ability to perform the contract that would result
67 from such procurement. If a bond is required to ensure performance of a contract, evidence that the
68 contractor can acquire a surety bond from a corporation included on the United States Treasury list of
69 acceptable surety corporations in the amount and type required by the public body shall be sufficient to
70 establish the financial ability of the contractor to perform the contract resulting from such procurement;

71 2. The contractor does not have appropriate experience to perform the construction project in
72 question;

73 3. The contractor or any officer, director or owner thereof has had judgments entered against him
74 within the past ten years for the breach of contracts for governmental or nongovernmental construction,
75 including, but not limited to, design-build or construction management;

76 4. The contractor has been in substantial noncompliance with the terms and conditions of prior
77 construction contracts with a public body without good cause. If the public body has not contracted with
78 a contractor in any prior construction contracts, the public body may deny prequalification if the
79 contractor has been in substantial noncompliance with the terms and conditions of comparable
80 construction contracts with another public body without good cause. A public body may not utilize this
81 provision to deny prequalification unless the facts underlying such substantial noncompliance were
82 documented in writing in the prior construction project file and such information relating thereto given
83 to the contractor at that time, with the opportunity to respond;

84 5. The contractor or any officer, director, owner, project manager, procurement manager or chief
85 financial official thereof has been convicted within the past ten years of a crime related to governmental
86 or nongovernmental construction or contracting, including, but not limited to, a violation of (i) Article 6
87 (§ 2.2-4367 et seq.) of this chapter, (ii) the Virginia Governmental Frauds Act (§ 18.2-498.1 et seq.), (iii)
88 Chapter 4.2 (§ 59.1-68.6 et seq.) of Title 59.1, or (iv) any substantially similar law of the United States
89 or another state;

90 6. The contractor or any officer, director or owner thereof is currently debarred pursuant to an
91 established debarment procedure from bidding or contracting by any public body, agency of another
92 state or agency of the federal government; and

93 7. The contractor failed to provide to the public body in a timely manner any information requested
94 by the public body relevant to subdivisions 1 through 6 of this subsection.

95 D. If a public body has a prequalification ordinance that provides for minority participation in
96 municipal construction contracts, that public body may also deny prequalification based on minority
97 participation criteria. However, nothing herein shall authorize the adoption or enforcement of minority
98 participation criteria except to the extent that such criteria, and the adoption and enforcement thereof, are
99 in accordance with the Constitution and laws of the United States and the Commonwealth.

100 E. *A state public body shall deny prequalification to any contractor who fails to register and*
101 *participate in the federal Electronic Work Verification Program or similar electronic verification of*
102 *work authorization program operated by the United States Department of Homeland Security as*
103 *required by § 2.2-4308.2.*

104 F. The provisions of subsections B, C, and D shall not apply to prequalification for contracts let
105 under § 33.1-12.

106 **2. That the provisions of this act shall become effective on July 1, 2010.**