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## SENATE BILL NO. 1049

## AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee for Courts of Justice  
on February 7, 2011)

(Patrons Prior to Substitute—Senators Barker and McWaters [SB 1288])

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 Virginia Public Procurement Act; verification of eligibility for employment in the United States.

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; debarment.

A. For purposes of this section, "E-Verify program" means the electronic verification of work authorization program of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (P.L. 104-208), Division C, Title IV, sec. 403(a), as amended, operated by the U.S. Department of Homeland Security, or a successor work authorization program designated by the U.S. Department of Homeland Security or other federal agency authorized to verify the work authorization status of newly hired employees under the Immigration Reform and Control Act of 1986 (P.L. 99-603).

B. Any employer with more than an average of 50 employees for the previous 12 months entering into a contract in excess of \$50,000 with any agency of the Commonwealth to perform work or provide services pursuant to such contract shall register and participate in the E-Verify program to verify information and work authorization of its newly hired employees performing work pursuant to such public contract.

C. Any such employer who fails to comply with the provisions of subsection B shall be debarred from contracting with any agency of the Commonwealth for a period up to one year. Such debarment shall cease upon the employer's registration and participation in the E-Verify program.

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

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

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

1. The contractor does not have sufficient financial ability to perform the contract that would result from such procurement. If a bond is required to ensure performance of a contract, evidence that the contractor can acquire a surety bond from a corporation included on the United States Treasury list of

60 acceptable surety corporations in the amount and type required by the public body shall be sufficient to  
61 establish the financial ability of the contractor to perform the contract resulting from such procurement;

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

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

67 4. The contractor has been in substantial noncompliance with the terms and conditions of prior  
68 construction contracts with a public body without good cause. If the public body has not contracted with  
69 a contractor in any prior construction contracts, the public body may deny prequalification if the  
70 contractor has been in substantial noncompliance with the terms and conditions of comparable  
71 construction contracts with another public body without good cause. A public body may not utilize this  
72 provision to deny prequalification unless the facts underlying such substantial noncompliance were  
73 documented in writing in the prior construction project file and such information relating thereto given  
74 to the contractor at that time, with the opportunity to respond;

75 5. The contractor or any officer, director, owner, project manager, procurement manager or chief  
76 financial official thereof has been convicted within the past ten years of a crime related to governmental  
77 or nongovernmental construction or contracting, including, but not limited to, a violation of (i) Article 6  
78 (§ 2.2-4367 et seq.) of this chapter, (ii) the Virginia Governmental Frauds Act (§ 18.2-498.1 et seq.), (iii)  
79 Chapter 4.2 (§ 59.1-68.6 et seq.) of Title 59.1, or (iv) any substantially similar law of the United States  
80 or another state;

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

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

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

91 E. *A state public body shall deny prequalification to any contractor who fails to register and*  
92 *participate in the E-Verify program as required by § 2.2-4308.2.*

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

95 **2. That the provisions of this act shall become effective on December 1, 2013.**