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HOUSE BILL NO. 460

Offered January 13, 2010

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A BILL to amend and reenact §§ 2.2-203, 2.2-204, 2.2-205.1, 2.2-1400, 2.2-1403, 2.2-1404, 2.2-1405, 2.2-2311, 2.2-3705.6, 2.2-4301, 2.2-4310, 15.2-965.1, 23-38.88, and 23-38.110 of the Code of Virginia, relating to the Department of Minority Business Enterprise.

Patron—Herring

Referred to Committee on General Laws

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-203, 2.2-204, 2.2-205.1, 2.2-1400, 2.2-1403, 2.2-1404, 2.2-1405, 2.2-2311, 2.2-3705.6, 2.2-4301, 2.2-4310, 15.2-965.1, 23-38.88, and 23-38.110 of the Code of Virginia are amended and reenacted as follows:

§ 2.2-203. Position established; agencies for which responsible.

The position of Secretary of Administration (the Secretary) is created. The Secretary shall be responsible to the Governor for the following agencies and boards: Department of Human Resource Management, Department of General Services, *Department of Supplier Diversity and Procurement Advocacy*, Compensation Board, Secretary of the Commonwealth, Department of Employment Dispute Resolution, and Virginia Public Broadcasting Board. The Governor may, by executive order, assign any other state executive agency to the Secretary, or reassign any agency listed above to another Secretary.

§ 2.2-204. Position established; agencies for which responsible; additional duties.

The position of Secretary of Commerce and Trade (the Secretary) is created. The Secretary shall be responsible to the Governor for the following agencies: Department of Business Assistance, Virginia Economic Development Partnership Authority, Virginia Tourism Authority, Department of Labor and Industry, Department of Mines, Minerals and Energy, Virginia Employment Commission, Department of Professional and Occupational Regulation, Department of Housing and Community Development, ~~Department of Minority Business Enterprise~~, Virginia Housing Development Authority, Virginia Resources Authority, Virginia Racing Commission, Tobacco Indemnification and Community Revitalization Commission, and Board of Accountancy. The Governor, by executive order, may assign any state executive agency to the Secretary, or reassign any agency listed in this section to another Secretary.

The Secretary shall implement the provisions of the Virginia Biotechnology Research Act (§ 2.2-5500 et seq.).

§ 2.2-205.1. Economic Crisis Strike Force.

A. There is hereby established the Economic Crisis Strike Force (Strike Force) for the purpose of serving as a working group to respond as needed to economic disasters in Virginia communities by (i) immediately providing a single point of contact for citizens in affected communities to assist with accessing available government and private sector services and resources, (ii) assisting localities in developing short-term and long-term strategies for addressing the economic crisis, and (iii) identifying opportunities for workforce retraining, job creation, and new investment.

B. The Strike Force shall be chaired by the Secretary of Commerce and Trade and be deployed at the direction of the Governor. Membership shall include high level representatives designated by the Secretaries of Education and Health and Human Resources and by the respective heads of the following agencies: the Department of Agriculture and Consumer Services, the Department of Business Assistance, the Department of Education, the Department of Housing and Community Development, the Department of Labor and Industry, the Department of Medical Assistance Services, ~~the Department of Minority Business Enterprise~~, the Department of Social Services, *the Department of Supplier Diversity and Procurement Advocacy*, the Virginia Community College System, the Virginia Employment Commission, the Virginia Economic Development Partnership, and the Virginia Tourism Authority. The Strike Force shall also include representatives from such other agencies as may be designated by the Governor to meet the needs of a particular affected community. In addition, the Governor may designate such citizens as he deems appropriate to advise the Strike Force.

C. Staff support for the Strike Force shall be provided by the Office of the Governor and the Secretary of Commerce and Trade. All agencies of the Commonwealth shall assist the Strike Force upon request.

D. On or before December 1 of each year, the Strike Force shall report to the Governor and the General Assembly on its activities.

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E. For the purposes of this section, "economic disaster" means an employment loss of at least 5% during the immediately preceding six-month period, the closure or downsizing of a major regional employer in an economically distressed area, a natural disaster or act of terrorism for which the Governor has declared a state of emergency, or other economic crisis situations, which in the opinion of the Governor adversely affect the welfare of the citizens of the Commonwealth.

CHAPTER 14.

DEPARTMENT OF ~~MINORITY BUSINESS ENTERPRISE~~ *SUPPLIER DIVERSITY AND PROCUREMENT ADVOCACY.*

§ 2.2-1400. Creation of Department of Supplier Diversity and Procurement Advocacy; appointment of Director; offices; personnel.

A. There is created within the Office of the Governor a Department of ~~Minority Business Enterprise~~ *Supplier Diversity and Procurement Advocacy* (the Department), which shall be headed by a Director appointed by the Governor to serve at his pleasure. The Director shall also serve as a special assistant to the Governor for small, women-owned, and minority-owned business development.

B. The Director of the Department shall, under the direction and control of the Governor, exercise the powers and perform the duties conferred or imposed upon him by law and perform such other duties as may be required by the Governor.

C. The Department shall have its main office in Richmond and may have branch offices as may be necessary, as determined by the Director subject to the approval of the Secretary of Commerce and Trade.

§ 2.2-1403. Powers of Director.

As deemed necessary or appropriate to better fulfill the duties of the Department, the Director may:

1. With the participation of other state departments and agencies, develop comprehensive plans and specific program goals for the small, women-owned, and minority-owned business programs; establish regular performance monitoring and reporting systems to assure that goals of state agencies and institutions are being achieved; and evaluate the impact of federal and state support in achieving objectives.

2. Employ the necessary personnel and/or subcontract according to his discretion, with localities to supplement the functions of business development organizations.

3. Assure the coordinated review of all proposed state training and technical assistance activities in direct support of the small, women-owned, and minority-owned business programs to ensure consistency with program goals and to avoid duplication.

4. Convene, for purposes of coordination, meetings of the heads of departments and agencies, or their designees, whose programs and activities may affect or contribute to the purposes of this chapter.

5. Convene business leaders, educators, and other representatives of the private sector who are engaged in assisting the development of small, women-owned, and minority-owned business programs or who could contribute to its development, for the purpose of proposing, evaluating or coordinating governmental and private activities in furtherance of the objectives of this chapter.

6. Provide the managerial and organizational framework through which joint undertakings with state departments or agencies or private organizations can be planned and implemented.

7. Recommend appropriate legislative or executive actions.

8. Adopt regulations to implement certification programs for small, women-owned, and minority-owned businesses, which regulations shall be exempt from the Administrative Process Act (§ 2.2-4000 et seq.) pursuant to subdivision B 2 of § 2.2-4002. Such certification programs shall deny certification to vendors from states that deny like certifications to Virginia-based small, women-owned or minority-owned businesses or that provide a preference for small, women-owned, or minority-owned businesses based in that state that is not available to Virginia-based businesses. The regulations shall (i) establish minimum requirements for certification of small, women-owned, and minority-owned businesses; (ii) provide a process for evaluating existing local, state, private sector, and federal certification programs that meet the minimum requirements; and (iii) mandate certification, without any additional paperwork, of any prospective state vendor that has obtained certification under any certification program that is determined to meet the minimum requirements established in the regulations.

9. Establish an interdepartmental board in accordance with § 2.2-1404 to supply the Director with information useful in promoting minority business activity.

§ 2.2-1404. Interdepartmental Board; cooperation with Department.

A. The Interdepartmental Board established by the Director shall be composed of heads of the several departments and agencies of state government or their respective designees, whose functions affect small, women-owned, and minority-owned businesses. The participating departments and agencies shall be determined by the Director of the Department. The Interdepartmental Board shall meet at the call of the Director and shall supply the Director with information useful in promoting small, women-owned, and minority-owned business development.

B. The head of each participating state department and agency or their designees shall furnish information, assistance, and reports to, and shall otherwise cooperate with, the Director in the performance of his duties as needed.

C. The head of each participating state department or agency shall, when so requested by the Director, designate an assistant or such other similar official to have primary and continuing responsibility for the participation and cooperation of that department or agency in matters concerning small, women-owned, and minority-owned businesses.

D. Each participating state department or agency shall, within constraints of law and availability of funding, continue all current efforts to foster and promote small, women-owned, and minority-owned businesses and to support small, women-owned, and minority-owned business programs, and shall cooperate with the Director in increasing the total state effort.

§ 2.2-1405. Reports and recommendations; collection of data.

The Director shall, from time to time, submit directly or through an assistant to the Governor his recommendations for legislation or other action as he deems desirable to promote the purposes of this chapter.

The Director shall report, on or before November 1 of each year, to the Governor and the General Assembly the identity of the state departments and agencies failing to submit annual progress reports on small, women-owned, and minority-owned business procurement required by § 2.2-4310, and the nature and extent of such lack of compliance. The annual report shall include recommendations on the ways to improve compliance with the provisions of § 2.2-4310 and such other related matters as the Director deems appropriate.

The Director, with the assistance of the Comptroller, shall develop and implement a systematic data collection process that will provide information for a report to the Governor and General Assembly on state expenditures to small, women-owned, and minority-owned businesses during the previous fiscal year.

§ 2.2-2311. Creation, administration, and management of the Capital Access Fund for Disadvantaged Businesses.

A. For the purposes of this section:

"Disadvantaged business" means a for-profit small business concern that is majority-owned by one or more economically disadvantaged individuals. In the case of a corporation, a majority of the stock shall be owned by one or more such individuals and the management and daily business operations shall be controlled by one or more of the economically disadvantaged individuals who own it.

"Economically disadvantaged individual" means an individual whose ability to compete in the free market has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business and competitive market area.

B. There is created in the state treasury a permanent nonreverting fund to be known as the Capital Access Fund for Disadvantaged Businesses (the Fund). The Fund shall be comprised of (i) moneys appropriated to the Fund by the General Assembly, (ii) all income from the investment of moneys held by the Fund, and (iii) any other moneys designated for deposit to the Fund from any source, public or private. Interest earned on moneys in the Fund shall remain in the Fund and be credited to it. Any moneys remaining in the Fund, including interest thereon, at the end of each fiscal year shall not revert to the general fund but shall remain in the Fund. Moneys in the Fund shall be used to provide loan guarantees, loan loss reserves, and interest rate write downs. The Fund shall be managed by the Department of ~~Minority Business Enterprise~~ *Supplier Diversity and Procurement Advocacy* (the Department) and administered by the Virginia Small Business Financing Authority (the Authority).

C. The operation of the Fund shall be as follows:

1. The Fund may be used as a special reserve fund to cover potential future losses from the loan portfolios of participating banks and lending institutions. The Authority shall (i) establish with one or more banks and lending institutions one or more accounts or pools for the Capital Access Fund for Disadvantaged Businesses and (ii) deposit into such accounts or pools moneys from the Fund in an amount at least equal to the total of the sum of the bank or lending institutions and the individual borrower's deposits, cash equivalents or other acceptable securities, including but not limited to letters of credit, for each loan sought to be covered for future losses. Such matching sum by the Authority shall not exceed fourteen percent of the principal amount of the loan. The Authority may require up to a one hundred percent match by the individual borrowers pursuant to established guidelines.

2. The Fund may also be used to guarantee up to ninety percent of the principal amount of any loan to cover potential future losses from the loan portfolios of participating banks and lending institutions to cover specific loans on such terms and conditions as set forth in established guidelines. Such guarantees shall not exceed a term of five years.

3. The Fund may also be used to provide interest rate write downs or other payments to achieve a concessionary rate of interest that shall be limited to seven percent of the balance of the Fund that is

unencumbered by any special reserves or guarantees or the income earned by the Fund from all sources including fees, interest, or other investment income. No interest rate write down or payment to achieve a concessionary rate shall extend for more than five years and such rates shall include provisions for an increase in such rates to a near market rate but not more than the prime rate.

4. Provisions may be made for a borrower to use a combination of subdivisions C. 1., C. 2., and C. 3. pursuant to established guidelines.

D. The determination of economic disadvantage shall be made by the Director of the Department of ~~Minority Business Enterprise~~ *Supplier Diversity and Procurement Advocacy* pursuant to the guidelines developed in accordance with subsections B and C.

E. The Department and the Authority, or their designated agents, shall determine the qualifications, terms, and conditions for the use of the Fund and the accounts thereof. In connection with applications for claims made against the Fund, the Department may require the production of any document, instrument, certificate, legal opinion, or any other information it deems necessary or convenient. All claims made against the Fund shall be approved by the Department and the Authority.

§ 2.2-3705.6. Exclusions to application of chapter; proprietary records and trade secrets.

The following records are excluded from the provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law:

1. Proprietary information gathered by or for the Virginia Port Authority as provided in § 62.1-132.4 or 62.1-134.1.

2. Financial statements not publicly available filed with applications for industrial development financings in accordance with Chapter 49 (§ 15.2-4900 et seq.) of Title 15.2.

3. Confidential proprietary records, voluntarily provided by private business pursuant to a promise of confidentiality from a public body, used by the public body for business, trade and tourism development or retention; and memoranda, working papers or other records related to businesses that are considering locating or expanding in Virginia, prepared by a public body, where competition or bargaining is involved and where, if such records are made public, the financial interest of the public body would be adversely affected.

4. Information that was filed as confidential under the Toxic Substances Information Act (§ 32.1-239 et seq.), as such Act existed prior to July 1, 1992.

5. Fisheries data that would permit identification of any person or vessel, except when required by court order as specified in § 28.2-204.

6. Confidential financial statements, balance sheets, trade secrets, and revenue and cost projections provided to the Department of Rail and Public Transportation, provided such information is exempt under the federal Freedom of Information Act or the federal Interstate Commerce Act or other laws administered by the Surface Transportation Board or the Federal Railroad Administration with respect to data provided in confidence to the Surface Transportation Board and the Federal Railroad Administration.

7. Confidential proprietary records related to inventory and sales, voluntarily provided by private energy suppliers to the Department of Mines, Minerals and Energy, used by that Department for energy contingency planning purposes or for developing consolidated statistical information on energy supplies.

8. Confidential proprietary information furnished to the Board of Medical Assistance Services or the Medicaid Prior Authorization Advisory Committee pursuant to Article 4 (§ 32.1-331.12 et seq.) of Chapter 10 of Title 32.1.

9. Proprietary, commercial or financial information, balance sheets, trade secrets, and revenue and cost projections provided by a private transportation business to the Virginia Department of Transportation and the Department of Rail and Public Transportation for the purpose of conducting transportation studies needed to obtain grants or other financial assistance under the Transportation Equity Act for the 21st Century (P.L. 105-178) for transportation projects, provided such information is exempt under the federal Freedom of Information Act or the federal Interstate Commerce Act or other laws administered by the Surface Transportation Board or the Federal Railroad Administration with respect to data provided in confidence to the Surface Transportation Board and the Federal Railroad Administration. However, the exemption provided by this subdivision shall not apply to any wholly owned subsidiary of a public body.

10. Confidential information designated as provided in subsection F of § 2.2-4342 as trade secrets or proprietary information by any person who has submitted to a public body an application for prequalification to bid on public construction projects in accordance with subsection B of § 2.2-4317.

11. a. Memoranda, staff evaluations, or other records prepared by the responsible public entity, its staff, outside advisors, or consultants exclusively for the evaluation and negotiation of proposals filed under the Public-Private Transportation Act of 1995 (§ 56-556 et seq.) or the Public Private Education Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.), where (i) if such records were made public prior to or after the execution of an interim or a comprehensive agreement, § 56-573.1:1 or 56-575.17 notwithstanding, the financial interest or bargaining position of the public entity would be adversely

affected, and (ii) the basis for the determination required in clause (i) is documented in writing by the responsible public entity; and

b. Records provided by a private entity to a responsible public entity, affected jurisdiction, or affected local jurisdiction pursuant to the provisions of the Public-Private Transportation Act of 1995 or the Public-Private Education Facilities and Infrastructure Act of 2002, to the extent that such records contain (i) trade secrets of the private entity as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.); (ii) financial records of the private entity, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise; or (iii) other information submitted by the private entity, where, if the records were made public prior to the execution of an interim agreement or a comprehensive agreement, the financial interest or bargaining position of the public or private entity would be adversely affected. In order for the records specified in clauses (i), (ii) and (iii) to be excluded from the provisions of this chapter, the private entity shall make a written request to the responsible public entity:

1. Invoking such exclusion upon submission of the data or other materials for which protection from disclosure is sought;

2. Identifying with specificity the data or other materials for which protection is sought; and

3. Stating the reasons why protection is necessary.

The responsible public entity shall determine whether the requested exclusion from disclosure is necessary to protect the trade secrets or financial records of the private entity. To protect other records submitted by the private entity from disclosure, the responsible public entity shall determine whether public disclosure prior to the execution of an interim agreement or a comprehensive agreement would adversely affect the financial interest or bargaining position of the public or private entity. The responsible public entity shall make a written determination of the nature and scope of the protection to be afforded by the responsible public entity under this subdivision. Once a written determination is made by the responsible public entity, the records afforded protection under this subdivision shall continue to be protected from disclosure when in the possession of any affected jurisdiction or affected local jurisdiction.

Except as specifically provided in subdivision 11 a, nothing in this subdivision shall be construed to authorize the withholding of (a) procurement records as required by § 56-573.1:1 or 56-575.17; (b) information concerning the terms and conditions of any interim or comprehensive agreement, service contract, lease, partnership, or any agreement of any kind entered into by the responsible public entity and the private entity; (c) information concerning the terms and conditions of any financing arrangement that involves the use of any public funds; or (d) information concerning the performance of any private entity developing or operating a qualifying transportation facility or a qualifying project.

For the purposes of this subdivision, the terms "affected jurisdiction," "affected local jurisdiction," "comprehensive agreement," "interim agreement," "qualifying project," "qualifying transportation facility," "responsible public entity," and "private entity" shall mean the same as those terms are defined in the Public-Private Transportation Act of 1995 or in the Public-Private Education Facilities and Infrastructure Act of 2002.

12. Confidential proprietary information or trade secrets, not publicly available, provided by a private person or entity to the Virginia Resources Authority or to a fund administered in connection with financial assistance rendered or to be rendered by the Virginia Resources Authority where, if such information were made public, the financial interest of the private person or entity would be adversely affected, and, after June 30, 1997, where such information was provided pursuant to a promise of confidentiality.

13. Trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), or confidential proprietary records that are not generally available to the public through regulatory disclosure or otherwise, provided by a (a) bidder or applicant for a franchise or (b) franchisee under Chapter 21 (§ 15.2-2100 et seq.) of Title 15.2 to the applicable franchising authority pursuant to a promise of confidentiality from the franchising authority, to the extent the records relate to the bidder's, applicant's, or franchisee's financial capacity or provision of new services, adoption of new technologies or implementation of improvements, where such new services, technologies or improvements have not been implemented by the franchisee on a nonexperimental scale in the franchise area, and where, if such records were made public, the competitive advantage or financial interests of the franchisee would be adversely affected.

In order for trade secrets or confidential proprietary information to be excluded from the provisions of this chapter, the bidder, applicant, or franchisee shall (i) invoke such exclusion upon submission of the data or other materials for which protection from disclosure is sought, (ii) identify the data or other materials for which protection is sought, and (iii) state the reason why protection is necessary.

No bidder, applicant, or franchisee may invoke the exclusion provided by this subdivision if the bidder, applicant, or franchisee is owned or controlled by a public body or if any representative of the

305 applicable franchising authority serves on the management board or as an officer of the bidder,
306 applicant, or franchisee.

307 14. Documents and other information of a proprietary nature furnished by a supplier of charitable
308 gaming supplies to the Department of Agriculture and Consumer Services pursuant to subsection E of
309 § 18.2-340.34.

310 15. Records and reports related to Virginia apple producer sales provided to the Virginia State Apple
311 Board pursuant to § 3.2-1215.

312 16. Trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.) of Title 59.1,
313 submitted by CMRS providers as defined in § 56-484.12 to the Wireless Carrier E-911 Cost Recovery
314 Subcommittee created pursuant to § 56-484.15, relating to the provision of wireless E-911 service.

315 17. Records submitted as a grant or loan application, or accompanying a grant or loan application, to
316 the Innovation and Entrepreneurship Investment Authority pursuant to Article 3 (§ 2.2-2233.1 et seq.) of
317 Chapter 22 of Title 2.2 or to the Commonwealth Health Research Board pursuant to Chapter 22
318 (§ 23-277 et seq.) of Title 23 to the extent such records contain proprietary business or research-related
319 information produced or collected by the applicant in the conduct of or as a result of study or research
320 on medical, rehabilitative, scientific, technical, technological, or scholarly issues, when such information
321 has not been publicly released, published, copyrighted, or patented, if the disclosure of such information
322 would be harmful to the competitive position of the applicant.

323 18. Confidential proprietary records and trade secrets developed and held by a local public body (i)
324 providing telecommunication services pursuant to § 56-265.4:4 and (ii) providing cable television
325 services pursuant to Article 1.1 (§ 15.2-2108.2 et seq.) of Chapter 21 of Title 15.2, to the extent that
326 disclosure of such records would be harmful to the competitive position of the locality. In order for
327 confidential proprietary information or trade secrets to be excluded from the provisions of this chapter,
328 the locality in writing shall (i) invoke the protections of this subdivision, (ii) identify with specificity the
329 records or portions thereof for which protection is sought, and (iii) state the reasons why protection is
330 necessary.

331 19. Confidential proprietary records and trade secrets developed by or for a local authority created in
332 accordance with the Virginia Wireless Service Authorities Act (§ 15.2-5431.1 et seq.) to provide
333 qualifying communications services as authorized by Article 5.1 (§ 56-484.7:1 et seq.) of Chapter 15 of
334 Title 56, where disclosure of such information would be harmful to the competitive position of the
335 authority, except that records required to be maintained in accordance with § 15.2-2160 shall be
336 released.

337 20. Trade secrets as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.) or financial
338 records of a business, including balance sheets and financial statements, that are not generally available
339 to the public through regulatory disclosure or otherwise, provided to the Department of ~~Minority~~
340 ~~Business Enterprise~~ *Supplier Diversity and Procurement Advocacy* as part of an application for (i)
341 certification as a small, women-owned, or minority-owned business in accordance with Chapter 14
342 (§ 2.2-1400 et seq.) of this title or (ii) a claim made by a disadvantaged business or an economically
343 disadvantaged individual against the Capital Access Fund for Disadvantaged Businesses created pursuant
344 to § 2.2-2311. In order for such trade secrets or financial records to be excluded from the provisions of
345 this chapter, the business shall (a) invoke such exclusion upon submission of the data or other materials
346 for which protection from disclosure is sought, (b) identify the data or other materials for which
347 protection is sought, and (c) state the reasons why protection is necessary.

348 21. Documents and other information of a proprietary or confidential nature disclosed by a carrier to
349 the State Health Commissioner pursuant to § 32.1-276.5:1.

350 22. Trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), including, but
351 not limited to, financial records, including balance sheets and financial statements, that are not generally
352 available to the public through regulatory disclosure or otherwise, and revenue and cost projections
353 supplied by a private or nongovernmental entity to the Inspector General of the Virginia Department of
354 Transportation for the purpose of an audit, special investigation, or any study requested by the Inspector
355 General's Office in accordance with law.

356 In order for the records specified in this subdivision to be excluded from the provisions of this
357 chapter, the private or nongovernmental entity shall make a written request to the Department:

358 1. Invoking such exclusion upon submission of the data or other materials for which protection from
359 disclosure is sought;

360 2. Identifying with specificity the data or other materials for which protection is sought; and

361 3. Stating the reasons why protection is necessary.

362 The Inspector General of the Virginia Department of Transportation shall determine whether the
363 requested exclusion from disclosure is necessary to protect the trade secrets or financial records of the
364 private entity. The Virginia Department of Transportation shall make a written determination of the
365 nature and scope of the protection to be afforded by it under this subdivision.

366 § 2.2-4301. Definitions.

As used in this chapter:

"Affiliate" means an individual or business that controls, is controlled by, or is under common control with another individual or business. A person controls an entity if the person owns, directly or indirectly, more than 10 percent of the voting securities of the entity. For the purposes of this definition "voting security" means a security that (i) confers upon the holder the right to vote for the election of members of the board of directors or similar governing body of the business or (ii) is convertible into, or entitles the holder to receive, upon its exercise, a security that confers such a right to vote. A general partnership interest shall be deemed to be a voting security.

"Best value," as predetermined in the solicitation, means the overall combination of quality, price, and various elements of required services that in total are optimal relative to a public body's needs.

"Business" means any type of corporation, partnership, limited liability company, association, or sole proprietorship operated for profit.

"Competitive negotiation" is a method of contractor selection that includes the following elements:

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 and containing or incorporating by reference the other applicable contractual terms and conditions, including any unique capabilities or qualifications that will be required of the contractor.

2. Public notice of the Request for Proposal at least 10 days prior to the date set for receipt of proposals by posting in a public area normally used for posting of public notices and by publication in a newspaper or newspapers of general circulation in the area in which the contract is to be performed so as to provide reasonable notice to the maximum number of offerors that can be reasonably anticipated to submit proposals in response to the particular request. Public notice may also be published on the Department of General Services' central electronic procurement website and other appropriate websites. Effective July 1, 2002, publishing by state agencies, departments and institutions on the public Internet procurement website designated by the Department of General Services shall be required. In addition, proposals may be solicited directly from potential contractors.

3. a. Procurement of professional services. The public body shall engage in individual discussions with two or more offerors deemed fully qualified, responsible and suitable on the basis of initial responses and with emphasis on professional competence, to provide the required services. Repetitive informal interviews shall be permissible. The offerors shall be encouraged to elaborate on their qualifications and performance data or staff expertise pertinent to the proposed project, as well as alternative concepts. In addition, offerors shall be informed of any ranking criteria that will be used by the public body in addition to the review of the professional competence of the offeror. The Request for Proposal shall not, however, request that offerors furnish estimates of man-hours or cost for services. At the discussion stage, the public body may discuss nonbinding estimates of total project costs, including, but not limited to, life-cycle costing, and where appropriate, nonbinding estimates of price for services. Proprietary information from competing offerors shall not be disclosed to the public or to competitors. At the conclusion of discussion, outlined in this subdivision, on the basis of evaluation factors published in the Request for Proposal and all information developed in the selection process to this point, the public body shall select in the order of preference two or more offerors whose professional qualifications and proposed services are deemed most meritorious. Negotiations shall then be conducted, beginning with the offeror ranked first. If a contract satisfactory and advantageous to the public body can be negotiated at a price considered fair and reasonable, the award shall be made to that offeror. Otherwise, negotiations with the offeror ranked first shall be formally terminated and negotiations conducted with the offeror ranked second, and so on until such a contract can be negotiated at a fair and reasonable price. Notwithstanding the foregoing, if the terms and conditions for multiple awards are included in the Request for Proposal, a public body may award contracts to more than one offeror.

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

A contract for architectural or professional engineering services relating to construction projects may be negotiated by a public body, for multiple projects provided (i) the projects require similar experience and expertise, (ii) the nature of the projects is clearly identified in the Request for Proposal, and (iii) the contract term is limited to one year or when the cumulative total project fees reach the maximum cost authorized in this paragraph, whichever occurs first. For state public bodies, such contract, except those awarded for environmental, location, design and inspection work regarding highways and bridges by the Commonwealth Transportation Commissioner may be renewable for four additional one-year terms at the option of the public body. For local public bodies, such contract may be renewable for four additional one-year terms at the option of the public body. Under such contract, (a) the fair and reasonable prices, as negotiated, shall be used in determining the cost of each project performed, (b) except those awarded for environmental, location, design and inspection work regarding highways and

bridges by the Commonwealth Transportation Commissioner, the sum of all projects performed in one contract term shall not exceed \$500,000 or, in the case of a state agency, as defined in § 2.2-4347, such greater amount as may be determined by the Director of the Department of General Services, not to exceed \$1 million, except that in any locality or any authority or sanitation district with a population in excess of 80,000, the sum of all such projects shall not exceed \$5 million; and (c) except those awarded for environmental, location, design and inspection work regarding highways and bridges by the Commonwealth Transportation Commissioner or for architectural and engineering services for rail and public transportation projects by the Director of the Department of Rail and Public Transportation, the project fee of any single project shall not exceed \$100,000 or, in the case of a state agency, such greater amount as may be determined by the Director of the Department of General Services not to exceed \$200,000, except that in any locality or any authority or sanitation district with a population in excess of 80,000, such fee shall not exceed \$1 million. Any unused amounts from the first contract term shall not be carried forward to the additional term. Competitive negotiations for such contracts may result in awards to more than one offeror provided (1) the Request for Proposal so states and (2) the public body has established procedures for distributing multiple projects among the selected contractors during the contract term. For contracts for environmental location, design and inspection work regarding highways and bridges by the Commonwealth Transportation Commissioner or for architectural and engineering services for rail and public transportation projects by the Director of the Department of Rail and Public Transportation, the sum of all projects in one contract term shall not exceed \$2 million and such contract may be renewable for two additional one-year terms at the option of the Commissioner.

Multiphase professional services contracts satisfactory and advantageous to the Department of Transportation for environmental, location, design and inspection work regarding highways and bridges may be negotiated and awarded based on a fair and reasonable price for the first phase only, when completion of the earlier phases is necessary to provide information critical to the negotiation of a fair and reasonable price for succeeding phases.

Multiphase professional services contracts satisfactory and advantageous to a local public body for environmental, location, design and inspection work regarding construction of infrastructure projects may be negotiated and awarded based on qualifications at a fair and reasonable price for the first phase only, when completion of the earlier phases is necessary to provide information critical to the negotiation of a fair and reasonable price for succeeding phases. Prior to the procurement of any such contract, the local public body shall state the anticipated intended total scope of the project and determine in writing that the nature of the work is such that the best interests of such public body require awarding the contract.

b. Procurement of other than professional services. Selection shall be made of two or more offerors deemed to be fully qualified and best suited among those submitting proposals, on the basis of the factors involved in the Request for Proposal, including price if so stated in the Request for Proposal. Negotiations shall then be conducted with each of the offerors so selected. Price shall be considered, but need not be the sole determining factor. After negotiations have been conducted with each offeror so selected, the public body shall select the offeror which, in its opinion, has made the best proposal, and shall award the contract to that offeror. When the terms and conditions of multiple awards are so provided in the Request for Proposal, awards may be made to more than one offeror. Should the public body determine in writing and in its sole discretion that only one offeror is fully qualified, or that one offeror is clearly more highly qualified than the others under consideration, a contract may be negotiated and awarded to that offeror.

"Competitive sealed bidding" is a method of contractor selection, other than for professional services, which includes the following elements:

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. 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 in a designated public area, or publication in a newspaper of general circulation, or both. Public notice may also be published on the Department of General Services' central electronic procurement website and other appropriate websites. ~~Effective July 1, 2002, posting~~ Posting by state agencies, departments and institutions on the public Internet procurement website designated by the Department of General Services shall be required. In addition, bids may be solicited directly from potential contractors. Any additional solicitations shall include businesses selected from a list made available by the Department of ~~Minority Business Enterprise~~ *Supplier Diversity and Procurement Advocacy*.

3. Public opening and announcement of all bids received.

4. Evaluation of bids based upon the requirements set forth in the invitation, 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.

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.

"Construction" means building, altering, repairing, improving or demolishing any structure, building or highway, and any draining, dredging, excavation, grading or similar work upon real property.

"Construction management contract" means a contract in which a party is retained by the owner to coordinate and administer contracts for construction services for the benefit of the owner, and may also include, if provided in the contract, the furnishing of construction services to the owner.

"Design-build contract" means a contract between a public body and another party in which the party contracting with the public body agrees to both design and build the structure, roadway or other item specified in the contract.

"Goods" means all material, equipment, supplies, printing, and automated data processing hardware and software.

"Informality" means a minor defect or variation of a bid or proposal from the exact requirements of the Invitation to Bid, or the Request for Proposal, which does not affect the price, quality, quantity or delivery schedule for the goods, services or construction being procured.

"Multiphase professional services contract" means a contract for the providing of professional services where the total scope of work of the second or subsequent phase of the contract cannot be specified without the results of the first or prior phase of the contract.

"Nonprofessional services" means any services not specifically identified as professional services in the definition of professional services.

"Potential bidder or offeror" for the purposes of §§ 2.2-4360 and 2.2-4364 means a person who, at the time a public body negotiates and awards or proposes to award a contract, is engaged in the sale or lease of goods, or the sale of services, insurance or construction, of the type to be procured under the contract, and who at such time is eligible and qualified in all respects to perform that contract, and who would have been eligible and qualified to submit a bid or proposal had the contract been procured through competitive sealed bidding or competitive negotiation.

"Professional services" means work performed by an independent contractor within the scope of the practice of accounting, actuarial services, architecture, land surveying, landscape architecture, law, dentistry, medicine, optometry, pharmacy or professional engineering. "Professional services" shall also include the services of an economist procured by the State Corporation Commission.

"Public body" means any legislative, executive or judicial body, agency, office, department, authority, post, commission, committee, institution, board or political subdivision created by law to exercise some sovereign power or to perform some governmental duty, and empowered by law to undertake the activities described in this chapter.

"Public contract" means an agreement between a public body and a nongovernmental source that is enforceable in a court of law.

"Responsible bidder" or "offeror" means a person who has the capability, in all respects, to perform fully the contract requirements and the moral and business integrity and reliability that will assure good faith performance, and who has been prequalified, if required.

"Responsive bidder" means a person who has submitted a bid that conforms in all material respects to the Invitation to Bid.

"Reverse auctioning" means a procurement method wherein bidders are invited to bid on specified goods or nonprofessional services through real-time electronic bidding, with the award being made to the lowest responsive and responsible bidder. During the bidding process, bidders' prices are revealed and bidders shall have the opportunity to modify their bid prices for the duration of the time period established for bid opening.

"Services" means any work performed by an independent contractor wherein the service rendered does not consist primarily of acquisition of equipment or materials, or the rental of equipment, materials and supplies.

"Sheltered workshop" means a work-oriented rehabilitative facility with a controlled working environment and individual goals that utilizes work experience and related services for assisting the handicapped person to progress toward normal living and a productive vocational status.

§ 2.2-4310. Discrimination prohibited; participation of small, women-owned, minority-owned, and service disabled veteran-owned business.

A. In the solicitation or awarding of contracts, no public body shall discriminate against a bidder or offeror because of race, religion, color, sex, national origin, age, disability, status as a service disabled veteran, or any other basis prohibited by state law relating to discrimination in employment. Whenever solicitations are made, each public body shall include businesses selected from a list made available by

the Department of ~~Minority Business Enterprise~~ *Supplier Diversity and Procurement Advocacy*.

B. All public bodies shall establish programs consistent with this chapter to facilitate the participation of small businesses and businesses owned by women, minorities, and service disabled veterans in procurement transactions. The programs established shall be in writing and shall comply with the provisions of any enhancement or remedial measures authorized by the Governor pursuant to subsection C or, where applicable, by the chief executive of a local governing body pursuant to § 15.2-965.1, and shall include specific plans to achieve any goals established therein. State agencies shall submit annual progress reports on small, women-owned, and minority-owned business procurement and on service disabled veteran-owned business procurement to the Department of ~~Minority Business Enterprise~~ *Supplier Diversity and Procurement Advocacy* in a form specified by the Department of ~~Minority Business Enterprise~~ *Supplier Diversity and Procurement Advocacy*. The Department of ~~Minority Business Enterprise~~ *Supplier Diversity and Procurement Advocacy* shall make information on service disabled veteran-owned procurement available to the Department of Veterans Services upon request.

C. Whenever there exists (i) a rational basis for small business enhancement or (ii) a persuasive analysis that documents a statistically significant disparity between the availability and utilization of women-owned, and minority-owned businesses, the Governor is authorized and encouraged to require state agencies to implement appropriate enhancement or remedial measures consistent with prevailing law.

D. In the solicitation or awarding of contracts, no state agency, department or institution shall discriminate against a bidder or offeror because the bidder or offeror employs ex-offenders unless the state agency, department or institution has made a written determination that employing ex-offenders on the specific contract is not in its best interest.

E. As used in this section:

"Minority individual" means an individual who is a citizen of the United States or a legal resident alien and who satisfies one or more of the following definitions:

1. "African American" means a person having origins in any of the original peoples of Africa and who is regarded as such by the community of which this person claims to be a part.

2. "Asian American" means a person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands, including but not limited to Japan, China, Vietnam, Samoa, Laos, Cambodia, Taiwan, Northern Mariana, the Philippines, a U.S. territory of the Pacific, India, Pakistan, Bangladesh, or Sri Lanka and who is regarded as such by the community of which this person claims to be a part.

3. "Hispanic American" means a person having origins in any of the Spanish-speaking peoples of Mexico, South or Central America, or the Caribbean Islands or other Spanish or Portuguese cultures and who is regarded as such by the community of which this person claims to be a part.

4. "Native American" means a person having origins in any of the original peoples of North America and who is regarded as such by the community of which this person claims to be a part or who is recognized by a tribal organization.

"Minority-owned business" means a business that is at least 51% owned by one or more minority individuals who are U.S. citizens or legal resident aliens, or in the case of a corporation, partnership, or limited liability company or other entity, at least 51% of the equity ownership interest in the corporation, partnership, or limited liability company or other entity is owned by one or more minority individuals who are U.S. citizens or legal resident aliens, and both the management and daily business operations are controlled by one or more minority individuals.

"Service disabled veteran" means a veteran who (i) served on active duty in the United States military ground, naval, or air service, (ii) was discharged or released under conditions other than dishonorable, and (iii) has a service-connected disability rating fixed by the United States Department of Veterans Affairs.

"Service disabled veteran business" means a business that is at least 51% owned by one or more service disabled veterans or, in the case of a corporation, partnership, or limited liability company or other entity, at least 51% of the equity ownership interest in the corporation, partnership, or limited liability company or other entity is owned by one or more individuals who are service disabled veterans and both the management and daily business operations are controlled by one or more individuals who are service disabled veterans.

"Small business" means a business, independently owned and controlled by one or more individuals who are U.S. citizens or legal resident aliens, and together with affiliates, has 250 or fewer employees, or annual gross receipts of \$10 million or less averaged over the previous three years. One or more of the individual owners shall control both the management and daily business operations of the small business.

"State agency" means any authority, board, department, instrumentality, institution, agency, or other unit of state government. "State agency" shall not include any county, city, or town.

"Women-owned business" means a business that is at least 51% owned by one or more women who

are U.S. citizens or legal resident aliens, or in the case of a corporation, partnership, or limited liability company or other entity, at least 51% of the equity ownership interest is owned by one or more women who are U.S. citizens or legal resident aliens, and both the management and daily business operations are controlled by one or more women.

§ 15.2-965.1. Participation of small, women-owned, and minority-owned businesses.

A. Any locality may enact an ordinance providing that whenever there exists (i) a rational basis for small business enhancement, or (ii) a persuasive analysis that documents a statistically significant disparity between the availability and utilization of women-owned, and minority-owned businesses, the chief executive of the local governing entity shall be authorized and encouraged to require implementation of appropriate enhancement and remedial measures consistent with prevailing law.

B. A small, women-owned or minority-owned business that is certified by the Department of Minority Business Enterprises *Supplier Diversity and Procurement Advocacy* pursuant to § 2.2-1403 shall not be required by any locality to obtain any additional certification to participate in any program designed to enhance the participation of such businesses as vendors or to remedy any documented disparity.

§ 23-38.88. Eligibility for restructured financial and administrative operational authority.

A. Public institutions of higher education shall be eligible for the following restructured financial and operational authority:

1. To dispose of their surplus materials at the location where the surplus materials are held and to retain any proceeds from such disposal as provided in subdivision B 14 of § 2.2-1124;

2. To have the option, as provided in subsection C of § 2.2-1132 and pursuant to the conditions and provisions under such subsection, to contract with a building official of the locality in which construction is taking place and for such official to perform any inspection and certifications required for the purpose of complying with the Uniform Statewide Building Code (§ 36-97 et seq.) pursuant to subsection C of § 36-98.1;

3. For those public institutions of higher education that have in effect a signed memorandum of understanding with the Secretary of Administration regarding participation in the nongeneral fund decentralization program as set forth in the appropriation act, as provided in subsection C of § 2.2-1132, to enter into contracts for specific construction projects without the preliminary review and approval of the Division of Engineering and Buildings of the Department of General Services, provided such institutions are in compliance with the requirements of the Virginia Public Procurement Act (§ 2.2-4300 et seq.) and utilize the general terms and conditions for those forms of procurement approved by the Division and the Office of the Attorney General;

4. To acquire easements as provided in subdivision 4 of § 2.2-1149;

5. To enter into an and/or lease or capital lease pursuant to the conditions and provisions provided in subdivision 5 of § 2.2-1149;

6. To convey an easement pertaining to any property such institution owns or controls as provided in subsection C of § 2.2-1150;

7. In accordance with the conditions and provisions of subdivision C 2 of § 2.2-1153, to sell surplus real property valued at less than \$5 million, which is possessed and controlled by the institution;

8. For purposes of compliance with § 2.2-4310, to procure goods, services, and construction from a vendor that the institution has certified as a small, women-owned, and minority-owned business enterprise pursuant to the conditions and provisions provided in § 2.2-1404.1;

9. To be exempt from review of their budget request for information technology by the CIO as provided in subdivision A 4 of § 2.2-2007;

10. To be allowed to establish policies for the designation of administrative and professional faculty positions at the institution pursuant to the conditions and provisions provided in subsection E of § 2.2-2901;

11. To receive the financial benefits described under § 2.2-5005 pursuant to the conditions and provisions of such section;

12. To be exempt from reporting its purchases to the Secretary of Education, provided that all purchases, including sole source purchases, are placed through the Commonwealth's electronic procurement system using proper system codes for the methods of procurement;

13. To utilize as methods of procurement a fixed price, design-build or construction management contract notwithstanding the provisions of § 2.2-4306; and

14. The restructured financial and operational authority set forth in Subchapter 2 (§ 23-38.90) and Subchapter 3 (§ 23-38.91 et seq.) of this chapter.

No such authority shall be granted unless the institution meets the conditions set forth in this chapter.

B. The Board of Visitors of a public institution of higher education shall commit to the Governor and the General Assembly by August 1, 2005, through formal resolution adopted according to its own bylaws, to meeting the state goals specified below, and shall be responsible for ensuring that such goals

674 are met, in addition to such other responsibilities as may be prescribed by law. Each such institution
675 shall commit to the Governor and the General Assembly to:

676 1. Consistent with its institutional mission, provide access to higher education for all citizens
677 throughout the Commonwealth, including underrepresented populations, and, consistent with subdivision
678 4 of § 23-9.6:1 and in accordance with anticipated demand analysis, meet enrollment projections and
679 degree estimates as agreed upon with the State Council of Higher Education for Virginia. Each such
680 institution shall bear a measure of responsibility for ensuring that the statewide demand for enrollment is
681 met;

682 2. Consistent with § 23-9.2:3.03, ensure that higher education remains affordable, regardless of
683 individual or family income, and through a periodic assessment, determine the impact of tuition and fee
684 levels net of financial aid on applications, enrollment, and student indebtedness incurred for the payment
685 of tuition and fees;

686 3. Offer a broad range of undergraduate and, where appropriate, graduate programs consistent with
687 its mission and assess regularly the extent to which the institution's curricula and degree programs
688 address the Commonwealth's need for sufficient graduates in particular shortage areas, including specific
689 academic disciplines, professions, and geographic regions;

690 4. Ensure that the institution's academic programs and course offerings maintain high academic
691 standards, by undertaking a continuous review and improvement of academic programs, course
692 availability, faculty productivity, and other relevant factors;

693 5. Improve student retention such that students progress from initial enrollment to a timely
694 graduation, and that the number of degrees conferred increases as enrollment increases;

695 6. Consistent with its institutional mission, develop articulation agreements that have uniform
696 application to all Virginia community colleges and meet appropriate general education and program
697 requirements at the four-year institution, provide additional opportunities for associate degree graduates
698 to be admitted and enrolled, and offer dual enrollment programs in cooperation with high schools;

699 7. Actively contribute to efforts to stimulate the economic development of the Commonwealth and
700 the area in which the institution is located, and for those institutions subject to a management agreement
701 set forth in Subchapter 3 (§ 23-38.91 et seq.) of this chapter, in areas that lag the Commonwealth in
702 terms of income, employment, and other factors;

703 8. Consistent with its institutional mission, increase the level of externally funded research conducted
704 at the institution and facilitate the transfer of technology from university research centers to private
705 sector companies;

706 9. Work actively and cooperatively with elementary and secondary school administrators, teachers,
707 and students in public schools and school divisions to improve student achievement, upgrade the
708 knowledge and skills of teachers, and strengthen leadership skills of school administrators;

709 10. Prepare a six-year financial plan consistent with § 23-9.2:3.03;

710 11. Conduct the institution's business affairs in a manner that maximizes operational efficiencies and
711 economies for the institution, contributes to maximum efficiencies and economies of state government as
712 a whole, and meets the financial and administrative management standards as specified by the Governor
713 pursuant to § 2.2-5004 and included in the appropriation act that is in effect, which shall include best
714 practices for electronic procurement and leveraged purchasing, information technology, real estate
715 portfolio management, and diversity of suppliers through fair and reasonable consideration of small,
716 women-owned, and minority-owned business enterprises; and

717 12. Seek to ensure the safety and security of the Commonwealth's students on college and university
718 campuses.

719 Upon making such commitments to the Governor and the General Assembly by August 1, 2005, the
720 public institution of higher education shall be allowed to exercise the restructured financial and
721 operational authority set forth in subdivisions A 1 through A 13 of § 23-38.88, subject to such
722 conditions as may be provided under the enabling statutes granting the additional authority.

723 C. As provided in § 23-9.6:1.01, the State Council of Higher Education shall in consultation with the
724 respective chairmen of the House Committees on Education and Appropriations and the Senate
725 Committees on Finance and Education and Health or their designees, representatives of public
726 institutions of higher education, and such other state officials as may be designated by the Governor,
727 develop objective measures of educational-related performance and institutional performance benchmarks
728 for such objective measures. At a minimum, the State Council shall develop such objective measures
729 and institutional performance benchmarks for the goals and objectives set forth in subdivisions B 1
730 through B 10 and B 12. In addition, the Governor shall develop objective measures of financial and
731 administrative management performance and related institutional performance benchmarks for the goals
732 and objectives set forth in subdivision B 11.

733 As provided in subsection C of § 23-9.6:1.01, any public institution of higher education that has been
734 certified during the fiscal year by the State Council of Higher Education for Virginia as meeting the
735 institutional performance benchmarks in effect for the fiscal year as set forth in the general appropriation

act shall be provided the financial benefits under § 2.2-5005. Such benefits shall first be provided as determined under such section.

D. 1. The restructured financial and operational authority set forth in Subchapter 3 (§ 23-38.91 et seq.) of this chapter shall only be granted in accordance with the expressed terms of a management agreement between the public institution of higher education and the Commonwealth.

No restructured financial or operational authority set forth in Subchapter 3 (§ 23-38.91 et seq.) of this chapter shall be granted to a public institution of higher education unless such authority is expressly included in the management agreement. In addition, the only implied authority that shall be granted from entering into a management agreement is that implied authority that is actually necessary to carry out the expressed grant of restructured financial or operational authority. As a matter of law, the initial presumption shall be that any restructured financial or operational authority set forth in Subchapter 3 is not included in the management agreement. These requirements shall also apply to any other provision included in Subchapter 3.

2. No public institution of higher education shall enter into a management agreement unless:

a. (i) Its most current and unenhanced bond rating received from (a) Moody's Investors Service, Inc., (b) Standard & Poor's, Inc., or (c) Fitch Investor's Services, Inc. is at least AA- (i.e., AA minus) or its equivalent, provided that such bond rating has been received within the last three years of the date that the initial agreement is entered into or (ii) the institution has (a) participated in decentralization pilot programs in the areas of finance and capital outlay, (b) demonstrated management competency in those two areas as evidenced by a written certification from the Cabinet Secretary or Secretaries designated by the Governor, (c) received additional operational authority under a memorandum of understanding pursuant to § 23-38.90 in at least one functional area, and (d) demonstrated management competency in that area for a period of at least two years. In submitting "The Budget Bill" for calendar year 2005 pursuant to subsection A of § 2.2-1509, the Governor shall include criteria for determining whether or not an institution has demonstrated the management competency required by clause (ii) of this subdivision;

b. An absolute two-thirds, or more, of the institution's governing body shall have voted in the affirmative for a resolution expressing the sense of the body that the institution is qualified to be, and should be, governed by the provisions of Subchapter 3 (§ 23-38.91 et seq.) of this chapter, which resolution shall be included in the initial management agreement;

c. The institution agrees to reimburse the Commonwealth for any additional costs to the Commonwealth in providing health or other group insurance benefits to employees, and in undertaking any risk management program, that are attributable to the institution's exercise of any restructured financial or operational authority set forth in Subchapter 3. The institution's agreement to reimburse the Commonwealth for such additional costs shall be expressly included in each management agreement with the institution. The Secretary of Finance and the Secretary of Administration, in consultation with the Virginia Retirement System and the affected institutions, shall establish procedures for determining any amounts to be paid by each institution and a mechanism for transferring the appropriate amounts directly and solely to the programs whose costs have been affected.

In developing management agreements, public institutions of higher education shall give consideration to potential future impacts of tuition increases on the Virginia College Savings Plan (§ 23-38.75) and shall discuss such potential impacts with parties participating in development of such agreements. The chief executive officer of the Virginia College Savings Plan shall provide to the institution and such parties the Plan's assumptions underlying the contract pricing of the program; and

d. Before executing a management agreement with the Commonwealth that affects insurance or benefit programs administered by the Virginia Retirement System, the Governor shall transmit a draft of the relevant provisions to the Board of Trustees of the Virginia Retirement System, which shall review the relevant provisions in order to ensure compliance with the applicable provisions of Title 51.1, administrative policies and procedures and federal regulations governing retirement plans. The Board shall advise the Governor and appropriate Cabinet Secretaries of any conflicts.

3. Each initial management agreement with an institution shall remain in effect for a period of three years. Subsequent management agreements with the institution shall remain in effect for a period of five years.

If an existing agreement is not renewed or a new agreement executed prior to the expiration of the three-year or five-year term, as applicable, the existing agreement shall remain in effect on a provisional basis for a period not to exceed one year. If, after the expiration of the provisional one-year period, the management agreement has not been renewed or a new agreement executed, the institution shall no longer be granted any of the financial or operational authority set forth in Subchapter 3 (§ 23-38.91 et seq.) of this chapter, unless and until such time as a new management agreement is entered into between the institution and the Commonwealth.

The Joint Legislative Audit and Review Commission, in cooperation with the Auditor of Public

797 Accounts, shall conduct a review relating to the initial management agreement with each public
798 institution of higher education. The review shall cover a period of at least the first 24 months from the
799 effective date of the management agreement. The review shall include, but shall not be limited to, the
800 degree of compliance with the expressed terms of the management agreement, the degree to which the
801 institution has demonstrated its ability to manage successfully the administrative and financial operations
802 of the institution without jeopardizing the financial integrity and stability of the institution, the degree to
803 which the institution is meeting the objectives described in subsection B, and any related impact on
804 students and employees of the institution from execution of the management agreement. The Joint
805 Legislative Audit and Review Commission shall make a written report of its review no later than June
806 30 of the third year of the management agreement. The Joint Legislative Audit and Review Commission
807 is authorized, but not required, to conduct a similar review of any management agreement entered into
808 subsequent to the initial agreement.

809 4. The right and power by the Governor to void a management agreement shall be expressly included
810 in each management agreement. The management agreement shall provide that if the Governor makes a
811 written determination that a public institution of higher education that has entered into a management
812 agreement with the Commonwealth is not in substantial compliance with the terms of the agreement or
813 with the requirements of this chapter in general, (i) the Governor shall provide a copy of that written
814 determination to the chairmen of the Board of Visitors or other governing body of the public institution
815 of higher education and to the members of the General Assembly, and (ii) the institution shall develop
816 and implement a plan of corrective action, satisfactory to the Governor, for purposes of coming into
817 substantial compliance with the terms of the management agreement and with the requirements of this
818 chapter, as soon as practicable, and shall provide a copy of such corrective action plan to the members
819 of the General Assembly. If after a reasonable period of time after the corrective action plan has been
820 implemented by the institution, the Governor determines that the institution is not yet in substantial
821 compliance with the management agreement or the requirements of this chapter, the Governor may void
822 the management agreement. Upon the Governor voiding a management agreement, the affected public
823 institution of higher education shall not be allowed to exercise any restructured financial or operational
824 authority pursuant to the provisions of Subchapter 3 (§ 23-38.91 et seq.) unless and until the institution
825 enters into a subsequent management agreement with the Secretary or Secretaries designated by the
826 Governor or the void management agreement is reinstated by the General Assembly.

827 5. A management agreement with a public institution of higher education shall not grant any of the
828 restructured financial or operational authority set forth in Subchapter 3 (§ 23-38.91 et seq.) of this
829 chapter to the Virginia Cooperative Extension and Agricultural Experiment Station, the University of
830 Virginia College at Wise, or the Virginia Institute of Marine Sciences or to an affiliated entity of the
831 institution unless such intent, as well as the degree of the restructured financial or operational authority
832 to be granted, is expressly included in the management agreement.

833 6. Following the execution of each management agreement with a public institution of higher
834 education and submission of that management agreement to the Chairmen of the House Committee on
835 Appropriations, the House Committee on Education, the Senate Committee on Finance, and the Senate
836 Committee on Education and Health pursuant to § 23-38.97, the Governor shall include a
837 recommendation for approval of the management agreement in "The Budget Bill" submitted pursuant to
838 subsection A of § 2.2-1509 or in his gubernatorial amendments submitted pursuant to subsection E of
839 § 2.2-1509 due by the December 20 that immediately follows the date of submission of the management
840 agreement to such Committees. Following the General Assembly's consideration of whether to approve
841 or disapprove the management agreement as recommended, if the management agreement is approved as
842 part of the general appropriation act, it shall become effective on the effective date of such general
843 appropriation act. However, no management agreement shall be entered into by a public institution of
844 higher education and the Secretary or Secretaries designated by the Governor after November 15 of a
845 calendar year.

846 E. A covered institution and the members of its governing body, officers, directors, employees, and
847 agents shall be entitled to the same sovereign immunity to which they would be entitled if the institution
848 were not governed by this chapter; provided further, that the Virginia Tort Claims Act (§ 8.01-195.1 et
849 seq.) and its limitations on recoveries shall remain applicable with respect to institutions governed by
850 this chapter.

851 § 23-38.110. Procurement; discrimination prohibited; participation of small, women-owned, and
852 minority-owned business enterprises.

853 A. Subject to the express provisions of the management agreement described in § 23-38.88, covered
854 institutions may be exempt from the provisions of the Virginia Public Procurement Act (§ 2.2-4300 et
855 seq.), except for § 2.2-4342 (which section shall not be construed to require compliance with the
856 prequalification application procedures of subsection B of § 2.2-4317); provided, however, that any
857 deviations from the Virginia Public Procurement Act approved in a Management Agreement shall be
858 uniform across all covered institutions; and provided further that the governing body of a covered

institution shall adopt, and the covered institution shall comply with, policies for the procurement of goods and services, including professional services, that shall be based upon competitive principles and shall in each instance seek competition to the maximum practical degree. The policies shall implement a system of competitive negotiation for professional services pursuant to subdivisions 1, 2, and 3 a of the defined term "competitive negotiation" under § 2.2-4301, shall prohibit discrimination because of race, religion, color, sex or national origin of the bidder or offeror in the solicitation or award of contracts, shall incorporate the prompt payment principles of §§ 2.2-4350 and 2.2-4354, and shall consider the impact on correctional enterprises under § 53.1-47.

B. Such policies may, among other things, (i) provide for consideration of the dollar amount of the intended procurement, the term of the anticipated contract, and the likely extent of competition; (ii) implement a prequalification procedure for contractors or products; and (iii) include provisions for cooperative arrangements with other covered institutions, other public or private educational institutions, other public or private organizations or entities, including public-private partnerships, public bodies, charitable organizations, health care provider alliances or purchasing organizations or entities, state agencies or institutions of the Commonwealth or the several states, the District of Columbia, the territories and the United States, and any combination thereof. Nothing in this section shall preclude a covered institution from requesting and utilizing, and covered institutions are hereby encouraged to utilize, the assistance of the Virginia Information Technologies Agency in information technology procurements.

C. In the solicitation and awarding of contracts, no covered institution shall discriminate against a bidder or offeror because of race, religion, color, sex, national origin, age, disability, or any other basis prohibited by state or federal law. The procurement policies of a covered institution shall provide that, whenever solicitations are made seeking competitive procurement of goods or services, it shall be a priority of the institution to provide for fair and reasonable consideration of small, women-owned, and minority-owned businesses and to promote and encourage a diversity of suppliers.

D. As part of any procurement provisions of a management agreement, the governing board of a covered institution shall identify the public, educational, and operational interests served by any procurement rule or rules that deviate from those in the Virginia Public Procurement Act.

2. That all rules and regulations adopted pursuant to § 2.2-1403 of the Code of Virginia that are in effect on July 1, 2010, shall remain in full force and effect until altered, amended, or rescinded by the Department of Supplier Diversity and Procurement Advocacy.