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SENATE BILL NO. 691

Offered January 22, 2010

A BILL to amend and reenact §§ 2.2-1402, 2.2-1403, 2.2-4310, and 15.2-965.1 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 2.2-1403.1, relating to Department of Minority Business Enterprise; small, women-owned, and minority-owned businesses; enhancement or remedial measures.

Patron—Obenshain

Referred to Committee on General Laws and Technology

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-1402, 2.2-1403, 2.2-4310, and 15.2-965.1 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 2.2-1403.1 as follows:

§ 2.2-1402. Additional powers and duties of Department.

The Department shall have the following additional powers and duties:

1. Coordinate as consistent with prevailing law the plans, programs and operations of the state government that affect or may contribute to the establishment, preservation, and strengthening of small, women-owned, and minority-owned businesses.

2. Promote the mobilization of activities and resources of state and local governments, businesses and trade associations, universities, foundations, professional organizations, and volunteer and other groups towards the growth of small businesses and businesses owned by women and minorities, and facilitate the coordination of the efforts of these groups with those of state departments and agencies.

3. Establish a center for the development, collection, summarization, and dissemination of information that will be helpful to persons and organizations throughout the nation in undertaking or promoting procurement from small, women-owned, and minority-owned businesses.

4. Consistent with prevailing law and availability of funds, and according to the Director's discretion, provide technical and management assistance to small, women-owned, and minority-owned businesses, and defray all or part of the costs of pilot or demonstration projects that are designed to overcome the special problems of small, women-owned, and minority-owned businesses.

5. Manage the Capital Access Fund for Disadvantaged Businesses created pursuant to § 2.2-2311, and, in cooperation with the Small Business Financing Authority, determine the qualifications, terms, and conditions for the use of such Fund.

6. Implement any remediation or enhancement measure for small, women-owned, or minority-owned businesses as may be authorized by the Governor pursuant to subsection C of § 2.2-4310 and develop regulations, consistent with prevailing law, for program implementation. Such regulations shall be developed in consultation with the state agencies with procurement responsibility and promulgated by those agencies in accordance with applicable law.

7. *Receive and investigate complaints that a business certified pursuant to § 2.2-1403.1 has subcontracted more than 60 percent of a contract awarded pursuant to a remedial or enhancement measure under subsection C of § 2.2-4310.*

§ 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

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59 governmental and private activities in furtherance of the objectives of this chapter.

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

62 7. Recommend appropriate legislative or executive actions.

63 8. Adopt regulations to implement certification programs *required in § 2.2-1403.1* for small,
64 women-owned, and minority-owned businesses, which regulations shall be exempt from the
65 Administrative Process Act (§ 2.2-4000 et seq.) pursuant to subdivision B 2 of § 2.2-4002. Such
66 certification programs shall deny certification to vendors from states that deny like certifications to
67 Virginia-based small, women-owned or minority-owned businesses or that provide a preference for
68 small, women-owned, or minority-owned businesses based in that state that is not available to
69 Virginia-based businesses. The regulations shall (i) establish minimum requirements for certification of
70 small, women- and minority-owned businesses; (ii) provide a process for evaluating existing local, state,
71 private sector, and federal certification programs that meet the minimum requirements; and (iii) mandate
72 certification, without any additional paperwork, of any prospective state vendor that has obtained
73 certification under any certification program that is determined to meet the minimum requirements
74 established in the regulations.

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

77 § 2.2-1403.1. *Certification of small, women-owned, and minority-owned businesses; revocation of*
78 *certification.*

79 A. *The Director shall establish programs for the certification of small, women-owned, and*
80 *minority-owned businesses.*

81 B. *The regulations shall:*

82 1. *Establish minimum requirements for certification of small, women-owned, and minority-owned*
83 *businesses;*

84 2. *Provide a process for evaluating existing local, state, private sector, and federal certification*
85 *programs that meet the minimum requirements;*

86 3. *Mandate certification, without any additional paperwork, of any prospective state vendor that has*
87 *obtained certification under any certification program that is determined to meet the minimum*
88 *requirements established in the regulations; and*

89 4. *Deny certification to vendors from states that deny like certifications to Virginia-based small,*
90 *women-owned, or minority-owned businesses or that provide a preference for small, women-owned, or*
91 *minority-owned businesses based in that state that is not available to Virginia-based businesses.*

92 C. *If the Director determines that a business certified pursuant this section has violated the contract*
93 *provision required by subsection D of § 2.2-4310, the certification of such business shall be revoked for*
94 *a period of one year. After the one-year period, the business may reapply for certification.*

95 § 2.2-4310. *Discrimination prohibited; participation of small, women-, minority- and service disabled*
96 *veteran-owned business.*

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

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

113 C. Whenever there exists (i) a rational basis for small business enhancement or (ii) a persuasive
114 analysis that documents a statistically significant disparity between the availability and utilization of
115 women-owned and minority-owned businesses, the Governor is authorized and encouraged to require
116 state agencies to implement appropriate enhancement or remedial measures consistent with prevailing
117 law. *Such enhancement or remedial measures shall require state agencies to solicit bids from all*
118 *qualified vendors and not be limited to bids submitted by businesses certified by the Department of*
119 *Minority Business Enterprise pursuant to § 2.2-1403.1. Any enhancement or remedial measure*
120 *implemented pursuant to this section shall not exceed three percent of the total value of all vendor*

contracts calculated against the costs of accepting the lowest competent and qualifying bids.

D. In the solicitation or awarding of contracts with a small, women-owned, minority-owned, or service disabled veteran-owned business, all public bodies shall include in every contract of more than \$10,000 the following:

"During the performance of this contract, the contractor agrees that no more than 60 percent of the contracted work will be subcontracted to another contractor, except where (i) there is a bona fide occupational qualification reasonably necessary to the normal operation of the contractor or (ii) such contractor is the lowest responsible and responsive bidder. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this clause. Notices, advertisements, and solicitations placed in accordance with federal law, rule, or regulation shall be deemed sufficient posting."

E. 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.F. 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%~~ 51 percent 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%~~ 51 percent 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%~~ 51 percent 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%~~ 51 percent 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%~~ 51 percent 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%~~ 51 percent 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-, and minority-owned businesses.

A. Any locality may enact an ordinance providing that whenever there exists (i) a rational basis for

182 small business enhancement, or (ii) a persuasive analysis that documents a statistically significant
183 disparity between the availability and utilization of women- and minority-owned businesses, the chief
184 executive of the local governing entity shall be authorized and encouraged to require implementation of
185 appropriate enhancement and remedial measures consistent with prevailing law.

186 B. A small, women-owned, or minority-owned business that is certified by the Department of
187 Minority Business Enterprises pursuant to ~~§ 2.2-1403~~ § 2.2-1403.1 shall not be required by any locality
188 to obtain any additional certification to participate in any program designed to enhance the participation
189 of such businesses as vendors or to remedy any documented disparity.