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**HOUSE BILL NO. 1671**

Offered January 12, 2011

Prefiled January 10, 2011

A *BILL to amend and reenact §§ 2.2-1400, 2.2-1401, 2.2-1403, 2.2-1404, 2.2-1405, 2.2-3705.6, 2.2-4310, 15.2-965.1, 18.2-213.1, and 23-38.88 of the Code of Virginia, relating to public procurement; person with a disability-owned business.*

Patrons—Pogge; Senator: Hanger

Referred to Committee on General Laws

**Be it enacted by the General Assembly of Virginia:**

1. **That §§ 2.2-1400, 2.2-1401, 2.2-1403, 2.2-1404, 2.2-1405, 2.2-3705.6, 2.2-4310, 15.2-965.1, 18.2-213.1, and 23-38.88 of the Code of Virginia are amended and reenacted as follows:**

§ 2.2-1400. Creation of Department of Minority Business Enterprise; appointment of Director; offices; personnel.

A. There is created within the Office of the Governor a Department of Minority Business Enterprise (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, *person with a disability-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.

## § 2.2-1401. Definitions.

As used in this chapter unless the context requires a different meaning:

"Certification" means the process by which a business is determined to be a small, women-owned, or minority-owned business for the purpose of reporting small, women-owned, and minority-owned business participation in state contracts and purchases pursuant to §§ 2.2-1404 and 2.2-1405.

"Disability" means the same as that term is defined in the Americans with Disabilities Act, 42 U.S.C. 12102, as amended.

"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% *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% *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.

"Person with a disability-owned business" means a business that is at least 51 percent owned by one or more persons with a disability 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 percent of the equity ownership interest in the corporation, partnership, or limited liability company or other entity is owned by one or more persons with a disability who are U.S. citizens or legal resident aliens, both the

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59 *management and daily business operations are controlled by one or more persons with a disability, and*  
60 *at least 30 percent of the workforce of such business are persons with disabilities.*

61 "Small business" means a business that is at least 51% *percent* independently owned and controlled  
62 by one or more individuals who are U.S. citizens or legal resident aliens, and together with affiliates,  
63 has 250 or fewer employees, or average annual gross receipts of \$10 million or less averaged over the  
64 previous three years. One or more of the individual owners shall control both the management and daily  
65 business operations of the small business.

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

68 "Women-owned business" means a business that is at least 51% *percent* owned by one or more  
69 women who are U.S. citizens or legal resident aliens, or in the case of a corporation, partnership, or  
70 limited liability company or other entity, at least 51% *percent* of the equity ownership interest is owned  
71 by one or more women who are citizens of the United States or legal resident aliens, and both the  
72 management and daily business operations are controlled by one or more women.

73 § 2.2-1403. Powers of Director.

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

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

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

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

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

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

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

94 7. Recommend appropriate legislative or executive actions.

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

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

109 § 2.2-1404. Interdepartmental Board; cooperation with Department.

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

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

120 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, *person with a disability-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, *person with a disability-owned*, and minority-owned businesses and to support small, women-owned, *person with a disability-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, *person with a disability-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, *person with a disability-owned*, and minority-owned businesses during the previous fiscal year.

§ 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.

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

185 11. a. Memoranda, staff evaluations, or other records prepared by the responsible public entity, its  
186 staff, outside advisors, or consultants exclusively for the evaluation and negotiation of proposals filed  
187 under the Public-Private Transportation Act of 1995 (§ 56-556 et seq.) or the Public Private Education  
188 Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.), where (i) if such records were made public  
189 prior to or after the execution of an interim or a comprehensive agreement, § 56-573.1:1 or 56-575.17  
190 notwithstanding, the financial interest or bargaining position of the public entity would be adversely  
191 affected, and (ii) the basis for the determination required in clause (i) is documented in writing by the  
192 responsible public entity; and

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

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

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

207 3. Stating the reasons why protection is necessary.

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

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

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

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

236 13. Trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), or confidential  
237 proprietary records that are not generally available to the public through regulatory disclosure or  
238 otherwise, provided by a (a) bidder or applicant for a franchise or (b) franchisee under Chapter 21  
239 (§ 15.2-2100 et seq.) of Title 15.2 to the applicable franchising authority pursuant to a promise of  
240 confidentiality from the franchising authority, to the extent the records relate to the bidder's, applicant's,  
241 or franchisee's financial capacity or provision of new services, adoption of new technologies or  
242 implementation of improvements, where such new services, technologies or improvements have not been  
243 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 applicable franchising authority serves on the management board or as an officer of the bidder, applicant, or franchisee.

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

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

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

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

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

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

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

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

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

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

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

23. Records submitted as a grant application, or accompanying a grant application, to the Virginia Tobacco Indemnification and Community Revitalization Commission to the extent such records contain (i) trade secrets as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), (ii) financial records of a grant applicant that is not a public body, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise, or (iii) research-related information produced or collected by the applicant in the conduct of or as a result of study or research on medical, rehabilitative, scientific, technical, technological, or scholarly issues, when such information has not been publicly released, published, copyrighted, or patented, if the disclosure of such information would be harmful to the competitive position of the applicant; and memoranda, staff evaluations, or other records prepared by the Commission or its staff exclusively for the evaluation of grant applications. The exclusion provided by this subdivision shall apply to grants that are consistent with the powers of and in furtherance of the performance of the duties of the Commission pursuant to § 3.2-3103.

In order for the records specified in this subdivision to be excluded from the provisions of this chapter, the applicant shall make a written request to the Commission:

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, records or other materials for which protection is sought; and

3. Stating the reasons why protection is necessary.

The Commission shall determine whether the requested exclusion from disclosure is necessary to protect the trade secrets, financial records or research-related information of the applicant. The Commission shall make a written determination of the nature and scope of the protection to be afforded by it under this subdivision.

§ 2.2-4310. Discrimination prohibited; participation of small, women-owned, person with a disability-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.

B. All public bodies shall establish programs consistent with this chapter to facilitate the participation of small businesses and businesses owned by women, *persons with a disability*, 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*, *person with a disability-owned*, and minority-owned business procurement and on service disabled veteran-owned business procurement to the Department of Minority Business Enterprise in a form specified by the Department of Minority Business Enterprise. The Department of Minority Business Enterprise 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*, *person with a disability-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:

"Disability" means the same as that term is defined in the Americans with Disabilities Act, 42 U.S.C. 12102, as amended.

"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% *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% *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.

*"Person with a disability-owned business" means a business that is at least 51 percent owned by one or more persons with a disability 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 percent of the equity ownership interest in the corporation, partnership, or limited liability company or other entity is owned by one or more persons with a disability who are U.S. citizens or legal resident aliens, both the management and daily business operations are controlled by one or more persons with a disability, and at least 30 percent of the workforce of such business are persons with disabilities.*

"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% *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% *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% *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% *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-owned, person with a disability-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, *person with a disability-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, *person with a disability-owned*, or minority-owned business that is certified by the Department of Minority Business Enterprises 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.

§ 18.2-213.1. Obtaining certification as small, women-owned, person with a disability-owned, or minority-owned business, or disadvantaged business by deception; penalty.

A. Except as otherwise provided by § 18.2-498.3, a person shall be guilty of a Class 1 misdemeanor if, in the course of business, he:

1. Fraudulently obtains or retains certification as a small, women-owned, *person with a disability-owned*, or minority-owned business or disadvantaged business;

2. Willfully makes a false statement knowing it to be untrue, whether by affidavit, report or other representation, to an official or employee of a public body for the purpose of influencing the certification or denial of certification of any business entity as a small, women-owned, *person with a disability-owned*, or minority-owned business, or disadvantaged business;

3. Willfully obstructs or impedes any agency official or employee who is investigating the qualifications of a business entity which has requested certification as a small, women-owned, *person with a disability-owned*, or minority-owned business, or disadvantaged business; or

4. Fraudulently obtains public moneys reserved for or allocated or available to small, women-owned, *person with a disability-owned*, or minority-owned businesses or disadvantaged business.

B. For the purposes of this section, "minority-owned business," ~~and~~ "small business," ~~and~~ "women-owned business," ~~and~~ "*person with a disability-owned business*" shall have the same meaning as those terms are defined in § 2.2-1401 and "disadvantaged business" shall mean the same as that term is defined in § 2.2-2311.

§ 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 operating/income 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, *person with a disability-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 are met, in addition to such other responsibilities as may be prescribed by law. Each such institution shall commit to the Governor and the General Assembly to:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

551 and objectives set forth in subdivision B 11.

552 As provided in subsection C of § 23-9.6:1.01, any public institution of higher education that has been  
553 certified during the fiscal year by the State Council of Higher Education for Virginia as meeting the  
554 institutional performance benchmarks in effect for the fiscal year as set forth in the general appropriation  
555 act shall be provided the financial benefits under § 2.2-5005. Such benefits shall first be provided as  
556 determined under such section.

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

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

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

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

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

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

594 In developing management agreements, public institutions of higher education shall give  
595 consideration to potential future impacts of tuition increases on the Virginia College Savings Plan  
596 (§ 23-38.75) and shall discuss such potential impacts with parties participating in development of such  
597 agreements. The chief executive officer of the Virginia College Savings Plan shall provide to the  
598 institution and such parties the Plan's assumptions underlying the contract pricing of the program; and

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

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

608 If an existing agreement is not renewed or a new agreement executed prior to the expiration of the  
609 three-year or five-year term, as applicable, the existing agreement shall remain in effect on a provisional  
610 basis for a period not to exceed one year. If, after the expiration of the provisional one-year period, the  
611 management agreement has not been renewed or a new agreement executed, the institution shall no  
612 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 Accounts, shall conduct a review relating to the initial management agreement with each public institution of higher education. The review shall cover a period of at least the first 24 months from the effective date of the management agreement. The review shall include, but shall not be limited to, the degree of compliance with the expressed terms of the management agreement, the degree to which the institution has demonstrated its ability to manage successfully the administrative and financial operations of the institution without jeopardizing the financial integrity and stability of the institution, the degree to which the institution is meeting the objectives described in subsection B, and any related impact on students and employees of the institution from execution of the management agreement. The Joint Legislative Audit and Review Commission shall make a written report of its review no later than June 30 of the third year of the management agreement. The Joint Legislative Audit and Review Commission is authorized, but not required, to conduct a similar review of any management agreement entered into subsequent to the initial agreement.

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

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

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

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