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SENATE BILL NO. 781

Offered January 9, 2013

Prefiled December 18, 2012

A *BILL to amend and reenact § 2.2-4310 of the Code of Virginia, relating to the Virginia Public Procurement Act; women-owned and minority-owned businesses; remedial measures.*

Patrons—McEachin and Herring

Referred to Committee on General Laws and Technology

Whereas, the United States Supreme Court in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), a case involving the City of Richmond's minority business enterprise program, ruled that remedies may be employed to address past discrimination; and

Whereas, the Supreme Court recognized that disparity studies are tools that seek to qualify and quantify past discrimination and recommend certain corrective measures based on findings; and

Whereas, the Supreme Court established in *Croson* a requirement that a disparity study be conducted by an independent entity to qualify and quantify past discrimination; and

Whereas, in 2004, MGT of America, Inc. (MGT) a Procurement Disparity Study for the Commonwealth (2004 Disparity Study); and

Whereas, the 2004 Disparity Study found that over \$111.3 million in state contracts had been awarded to women-owned and minority-owned businesses that were prime vendors during fiscal years 1998 through 2002, only 1.26 percent of the total state contracts awarded during that time period; and

Whereas, on November 5, 2009, the Commonwealth of Virginia contracted with MGT to conduct a two-phase comprehensive update of the 2004 Disparity Study; and

Whereas, on January 13, 2010, MGT submitted its final report titled "A Disparity Study for the Commonwealth of Virginia" (2010 Disparity Study); and

Whereas, the 2010 Disparity Study found consistent and significant disparity between the availability and utilization of women-owned and minority-owned businesses between July 1, 2006, and June 30, 2009, in all business categories of prime contractors including (i) construction, (ii) architecture and engineering, (iii) professional services, (iv) nonprofessional services, and (v) goods and supplies vendors; and

Whereas, it is imperative that the Commonwealth of Virginia maximize the participation of its citizens in the numerous commercial opportunities offered in state procurement; and

Whereas, the record provided by the 2004 and 2010 Disparity Studies documents that the Commonwealth's historical record of buying goods and services from women-owned and minority-owned businesses must be improved; and

Whereas, it is essential for the Commonwealth to remain competitive to assure that all businesses and business owners have an equal opportunity to share in state procurement; now, therefore

Be it enacted by the General Assembly of Virginia:

1. That § 2.2-4310 of the Code of Virginia is amended and reenacted as follows:

§ 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.

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- 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

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59 analysis that documents a statistically significant disparity between the availability and utilization of
60 women-owned and minority-owned businesses, the Governor is ~~authorized and encouraged to~~ shall
61 require state agencies to implement appropriate enhancement or remedial measures consistent with
62 prevailing law. *Such enhancement or remedial measures shall consist of narrowly tailored procurement*
63 *policies to address documented statistical disparities between the availability and utilization of*
64 *women-owned and minority-owned businesses and may include, but shall not be limited to, (a) joint*
65 *venture programs, (b) vendor rotation, (c) prime contractor women-owned and minority-owned business*
66 *subcontracting plans, (d) state agency performance measures, and (e) contract sizing.*

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

71 E. As used in this section:

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

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

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

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

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

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

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

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

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

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

110 "Women-owned business" means a business that is at least ~~51%~~ 51 percent owned by one or more
111 women who are U.S. citizens or legal resident aliens, or in the case of a corporation, partnership, or
112 limited liability company or other entity, at least ~~51%~~ 51 percent of the equity ownership interest is
113 owned by one or more women who are U.S. citizens or legal resident aliens, and both the management
114 and daily business operations are controlled by one or more women.