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HOUSE BILL NO. 2347

Offered January 23, 2015

A *BILL to amend and reenact §§ 2.2-1604, 2.2-4310, 2.2-4336, 2.2-4337, and 15.2-965.1 of the Code of Virginia, relating to public procurement; enhanced procurement opportunities for small businesses and microbusinesses.*

 Patron—Taylor

Referred to Committee on General Laws

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-1604, 2.2-4310, 2.2-4336, 2.2-4337, and 15.2-965.1 of the Code of Virginia are amended and reenacted as follows:

§ 2.2-1604. 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 §§ 2.2-1608 and 2.2-1610.

"Department" means the Department of Small Business and Supplier Diversity or any division of the Department to which the Director has delegated or assigned duties and responsibilities.

"Employment services organization" means an organization that provides community-based employment services to individuals with disabilities that is an approved Commission on Accreditation of Rehabilitation Facilities (CARF) accredited vendor of the Department for Aging and Rehabilitative Services.

"Microbusiness" means a business that has been certified by the Department of Small Business and Supplier Diversity as a small business and has (i) 25 or fewer employees and (ii) an average annual revenues of \$3 million or less over the previous three years.

"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 Islands, 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.

"Small business" means a business that is at least 51 percent 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 average 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" does 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

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59 operations are controlled by one or more women.

60 **§ 2.2-4310. Discrimination prohibited; participation of small, women-owned, minority-owned,**
61 **and service disabled veteran-owned business.**

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

67 B. All public bodies shall establish programs consistent with this chapter to facilitate the participation
68 of small businesses, *microbusinesses* and businesses owned by women, minorities, and service disabled
69 veterans in procurement transactions. The programs established shall be in writing and shall comply with
70 the provisions of any enhancement or remedial measures authorized by the Governor pursuant to
71 subsection C or, where applicable, by the chief executive of a local governing body pursuant to
72 § 15.2-965.1, and shall include specific plans to achieve any goals established therein. State agencies
73 shall submit annual progress reports on small *business*, *microbusiness*, women-owned *business*, and
74 minority-owned business procurement and on service disabled veteran-owned business procurement to
75 the Department of Small Business and Supplier Diversity in a form specified by the Department of
76 Small Business and Supplier Diversity. The Department of Small Business and Supplier Diversity shall
77 make information on service disabled veteran-owned procurement available to the Department of
78 Veterans Services upon request.

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

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

88 E. As used in this section:

89 *"Microbusiness" means a business that has been certified by the Department of Small Business and*
90 *Supplier Diversity as a small business and has (i) 25 or fewer employees and (ii) average annual*
91 *revenues of \$3 million or less over the previous three years.*

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

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

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

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

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

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

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

117 *"Service disabled veteran business" means a business that is at least 51 percent owned by one or*
118 *more service disabled veterans or, in the case of a corporation, partnership, or limited liability company*
119 *or other entity, at least 51 percent of the equity ownership interest in the corporation, partnership, or*
120 *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.

§ 2.2-4336. Bid bonds.

A. Except in cases of emergency, all bids or proposals for nontransportation-related construction contracts in excess of \$500,000 or transportation-related projects authorized under Article 2 (§ 33.2-208 et seq.) of Chapter 2 of Title 33.2 that are in excess of \$250,000 and partially or wholly funded by the Commonwealth shall be accompanied by a bid bond from a surety company selected by the bidder that is authorized to do business in Virginia, as a guarantee that if the contract is awarded to the bidder, he will enter into the contract for the work mentioned in the bid. The amount of the bid bond shall not exceed five percent of the amount bid.

B. For nontransportation-related construction contracts in excess of \$100,000 but less than \$500,000, where the bid bond requirements are waived, prospective contractors shall be prequalified for each individual project in accordance with § 2.2-4317. *A locality may waive the requirement for prequalification upon a written determination made in advance by the local governing body that waiving the requirement is in the best interests of the locality.*

C. No forfeiture under a bid bond shall exceed the lesser of (i) the difference between the bid for which the bond was written and the next low bid, or (ii) the face amount of the bid bond.

D. Nothing in this section shall preclude a public body from requiring bid bonds to accompany bids or proposals for construction contracts anticipated to be less than \$500,000 for nontransportation-related projects or \$250,000 for transportation-related projects authorized under Article 2 (§ 33.2-208 et seq.) of Chapter 2 of Title 33.2 and partially or wholly funded by the Commonwealth.

§ 2.2-4337. Performance and payment bonds.

A. Except as provided in subsection H, upon the award of any (i) public construction contract exceeding \$500,000 awarded to any prime contractor; (ii) construction contract exceeding \$500,000 awarded to any prime contractor requiring the performance of labor or the furnishing of materials for buildings, structures or other improvements to real property owned or leased by a public body; (iii) construction contract exceeding \$500,000 in which the performance of labor or the furnishing of materials will be paid with public funds; or (iv) transportation-related projects exceeding \$350,000 that are partially or wholly funded by the Commonwealth, the contractor shall furnish to the public body the following bonds:

1. A performance bond in the sum of the contract amount conditioned upon the faithful performance of the contract in strict conformity with the plans, specifications and conditions of the contract. For transportation-related projects authorized under Article 2 (§ 33.2-208 et seq.) of Chapter 2 of Title 33.2, such bond shall be in a form and amount satisfactory to the public body.

2. A payment bond in the sum of the contract amount. The bond shall be for the protection of claimants who have and fulfill contracts to supply labor or materials to the prime contractor to whom the contract was awarded, or to any subcontractors, in furtherance of the work provided for in the contract, and shall be conditioned upon the prompt payment for all materials furnished or labor supplied or performed in the furtherance of the work. For transportation-related projects authorized under Article 2 (§ 33.2-208 et seq.) of Chapter 2 of Title 33.2 and partially or wholly funded by the Commonwealth, such bond shall be in a form and amount satisfactory to the public body.

"Labor or materials" shall include public utility services and reasonable rentals of equipment, but only for periods when the equipment rented is actually used at the site.

B. For nontransportation-related construction contracts in excess of \$100,000 but less than \$500,000, where the bid bond requirements are waived, prospective contractors shall be prequalified for each individual project in accordance with § 2.2-4317. *A locality may waive the requirement for prequalification upon a written determination made in advance by the local governing body that waiving the requirement is in the best interests of the locality.*

C. Each of the bonds shall be executed by one or more surety companies selected by the contractor

182 that are authorized to do business in Virginia.

183 D. If the public body is the Commonwealth, or any agency or institution thereof, the bonds shall be
184 payable to the Commonwealth of Virginia, naming also the agency or institution thereof. Bonds required
185 for the contracts of other public bodies shall be payable to such public body.

186 E. Each of the bonds shall be filed with the public body that awarded the contract, or a designated
187 office or official thereof.

188 F. Nothing in this section shall preclude a public body from requiring payment or performance bonds
189 for construction contracts below \$500,000 for nontransportation-related projects or \$350,000 for
190 transportation-related projects authorized under Article 2 (§ 33.2-208 et seq.) of Chapter 2 of Title 33.2
191 and partially or wholly funded by the Commonwealth.

192 G. Nothing in this section shall preclude the contractor from requiring each subcontractor to furnish a
193 payment bond with surety thereon in the sum of the full amount of the contract with such subcontractor
194 conditioned upon the payment to all persons who have and fulfill contracts that are directly with the
195 subcontractor for performing labor and furnishing materials in the prosecution of the work provided for
196 in the subcontract.

197 H. The performance and payment bond requirements of subsection A for transportation-related
198 projects that are valued in excess of \$250,000 but less than \$350,000 may only be waived by a public
199 body if the bidder provides evidence, satisfactory to the public body, that a surety company has declined
200 an application from the contractor for a performance or payment bond.

201 **§ 15.2-965.1. Participation of small businesses, microbusinesses, women-owned, and**
202 **minority-owned businesses.**

203 A. As used in this section:

204 *"Microbusiness" means a business that has been certified by the Department of Small Business and*
205 *Supplier Diversity as a small business and has (i) 25 or fewer employees and (ii) an average annual*
206 *revenue of \$3 million or less over the previous three years.*

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

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

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

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

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

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

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

233 *"Women-owned business" means a business that is at least 51 percent owned by one or more women*
234 *who are U.S. citizens or legal resident aliens, or in the case of a corporation, partnership, or limited*
235 *liability company or other entity, at least 51 percent of the equity ownership interest is owned by one or*
236 *more women who are U.S. citizens or legal resident aliens, and both the management and daily business*
237 *operations are controlled by one or more women.*

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

244 B. C. A small *business, microbusiness*, women-owned *business*, or minority-owned business that is
245 certified by the Department of Small Business and Supplier Diversity pursuant to § 2.2-1606 shall not be
246 required by any locality to obtain any additional certification to participate in any program designed to
247 enhance the participation of such businesses as vendors or to remedy any documented disparity.

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