

VIRGINIA ACTS OF ASSEMBLY -- 2016 SESSION

CHAPTER 641

An Act to amend and reenact §§ 2.2-115 and 2.2-3104.01 of the Code of Virginia, relating to the Commonwealth's Development Opportunity Fund; political contributions; reporting.

[S 750]

Approved April 1, 2016

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-115 and 2.2-3104.01 of the Code of Virginia are amended and reenacted as follows:

§ 2.2-115. Commonwealth's Development Opportunity Fund.

A. As used in this section, unless the context requires otherwise:

"New job" means employment of an indefinite duration, created as the direct result of the private investment, for which the firm pays the wages and standard fringe benefits for its employee, requiring a minimum of either (i) 35 hours of the employee's time a week for the entire normal year of the firm's operations, which "normal year" must consist of at least 48 weeks or (ii) 1,680 hours per year.

Seasonal or temporary positions, positions created when a job function is shifted from an existing location in the Commonwealth to the location of the economic development project, positions with suppliers, and multiplier or spin-off jobs shall not qualify as new jobs. The term "new job" shall include positions with contractors provided that all requirements included within the definition of the term are met.

"Prevailing average wage" means that amount determined by the Virginia Employment Commission to be the average wage paid workers in the city or county of the Commonwealth where the economic development project is located. The prevailing average wage shall be determined without regard to any fringe benefits.

"Private investment" means the private investment required under this section.

B. There is created the Commonwealth's Development Opportunity Fund (the Fund) to be used by the Governor to attract economic development prospects and secure the expansion of existing industry in the Commonwealth. The Fund shall consist of any funds appropriated to it by the general appropriation act and revenue from any other source, public or private. The Fund shall be established on the books of the Comptroller, and any funds remaining in the Fund at the end of a biennium shall not revert to the general fund but shall remain in the Fund. Interest earned on the Fund shall be credited to the Fund. The Governor shall report to the Chairmen of the House Committees on Appropriations and Finance and the Senate Committee on Finance as funds are awarded in accordance with this section.

C. Funds shall be awarded from the Fund by the Governor as grants or loans to political subdivisions. The criteria for making such grants or loans shall include (i) job creation, (ii) private capital investment, and (iii) anticipated additional state tax revenue expected to accrue to the state and affected localities as a result of the capital investment and jobs created. Loans shall be approved by the Governor and made in accordance with guidelines established by the Virginia Economic Development Partnership and approved by the Comptroller. Loans shall be interest-free unless otherwise determined by the Governor and shall be repaid to the Fund. The Governor may establish the interest rate to be charged; otherwise, any interest charged shall be at market rates as determined by the State Treasurer and shall be indicative of the duration of the loan. The Virginia Economic Development Partnership shall be responsible for monitoring repayment of such loans and reporting the receivables to the Comptroller as required.

Beginning with the five fiscal years from fiscal year 2006-2007 through fiscal year 2010-2011, and for every five fiscal years' period thereafter, in general, no less than one-third of the moneys appropriated to the Fund in every such five-year period shall be awarded to counties and cities having an annual average unemployment rate that is greater than the final statewide average unemployment rate for the calendar year that immediately precedes the calendar year of the award. However, if such one-third requirement will not be met because economic development prospects in such counties and cities are unable to fulfill the applicable minimum private investment and new jobs requirements set forth in this section, then any funds remaining in the Fund at the end of the five-year period that would have otherwise been awarded to such counties and cities shall be made available for awards in the next five fiscal years' period.

D. Funds may be used for public and private utility extension or capacity development on and off site; public and private installation, extension, or capacity development of high-speed or broadband Internet access, whether on or off site; road, rail, or other transportation access costs beyond the funding capability of existing programs; site acquisition; grading, drainage, paving, and any other activity required to prepare a site for construction; construction or build-out of publicly or privately owned buildings; training; or grants or loans to an industrial development authority, housing and redevelopment

authority, or other political subdivision for purposes directly relating to any of the foregoing. However, in no case shall funds from the Fund be used, directly or indirectly, to pay or guarantee the payment for any rental, lease, license, or other contractual right to the use of any property.

It shall be the policy of the Commonwealth that moneys in the Fund shall not be used for any economic development project in which a business relocates or expands its operations in one or more Virginia localities and simultaneously closes its operations or substantially reduces the number of its employees in another Virginia locality. The Secretary of Commerce and Trade shall enforce this policy and for any exception thereto shall promptly provide written notice to the Chairmen of the Senate Finance and House Appropriations Committees, which notice shall include a justification for any exception to such policy.

E. 1. a. Except as provided in this subdivision, no grant or loan shall be awarded from the Fund unless the project involves a minimum private investment of \$5 million and creates at least 50 new jobs for which the average wage, excluding fringe benefits, is no less than the prevailing average wage. For projects, including but not limited to projects involving emerging technologies, for which the average wage of the new jobs created, excluding fringe benefits, is at least twice the prevailing average wage for that locality or region, the Governor shall have the discretion to require no less than one-half the number of new jobs as set forth for that locality in this subdivision.

b. Notwithstanding the provisions of subdivision a, a grant or loan may be awarded from the Fund if the project involves a minimum private investment of \$100 million and creates at least 25 new jobs for which the average wage, excluding fringe benefits, is no less than the prevailing average wage.

2. Notwithstanding the provisions of subdivision 1 a, in localities (i) with an annual unemployment rate for the most recent calendar year for which such data is available that is greater than the final statewide average unemployment rate for that calendar year or (ii) with a poverty rate for the most recent calendar year for which such data is available that exceeds the statewide average poverty rate for that year, a grant or loan may be awarded from the Fund pursuant to subdivision 1 a if the project involves a minimum private investment of \$2.5 million and creates at least 25 new jobs for which the average wage, excluding fringe benefits, is no less than 85 percent of the prevailing average wage.

3. Notwithstanding the provisions of subdivisions 1 a and 2, in localities (i) with an annual unemployment rate for the most recent calendar year for which such data is available that is greater than the final statewide average unemployment rate for that calendar year and (ii) with a poverty rate for the most recent calendar year for which such data is available that exceeds the statewide average poverty rate for that year, a grant or loan may be awarded from the Fund pursuant to such subdivisions if the project involves a minimum private investment of \$1.5 million and creates at least 15 new jobs for which the average wage, excluding fringe benefits, is no less than 85 percent of the prevailing average wage.

4. For projects that are eligible under subdivision 2 or 3, the average wage of the new jobs, excluding fringe benefits, shall be no less than 85 percent of the prevailing average wage. In addition, for projects in such localities, the Governor may award a grant or loan for a project paying less than 85 percent of the prevailing average wage but still providing customary employee benefits, only after the Secretary of Commerce and Trade has made a written finding that the economic circumstances in the area are sufficiently distressed (i.e., high unemployment or underemployment and negative economic forecasts) that assistance to the locality to attract the project is nonetheless justified. However, the minimum private investment and number of new jobs required to be created as set forth in this subsection shall still be a condition of eligibility for an award from the Fund. Such written finding shall promptly be provided to the chairs of the Senate Committee on Finance and the House Committee on Appropriations.

F. 1. The Virginia Economic Development Partnership shall assist the Governor in developing objective guidelines and criteria that shall be used in awarding grants or making loans from the Fund. The guidelines may require that as a condition of receiving any grant or loan incentive that is based on employment goals, a recipient company must provide copies of employer quarterly payroll reports that have been provided to the Virginia Employment Commission to verify the employment status of any position included in the employment goal. The guidelines may include a requirement for the affected locality or localities to provide matching funds which may be cash or in-kind, at the discretion of the Governor. The guidelines and criteria shall include provisions for geographic diversity and a cap on the amount of funds to be provided to any individual project. At the discretion of the Governor, this cap may be waived for qualifying projects of regional or statewide interest. In developing the guidelines and criteria, the Virginia Economic Development Partnership shall use the measure for Fiscal Stress published by the Commission on Local Government of the Department of Housing and Community Development for the locality in which the project is located or will be located as one method of determining the amount of assistance a locality shall receive from the Fund.

2. a. Notwithstanding any provision in this section or in the guidelines, each political subdivision that receives a grant or loan from the Fund shall enter into a contract with each business beneficiary of funds from the Fund. A person or entity shall be a business beneficiary of funds from the Fund if grant or loan moneys awarded from the Fund by the Governor are paid to a political subdivision and (i)

subsequently distributed by the political subdivision to the person or entity or (ii) used by the political subdivision for the benefit of the person or entity but never distributed to the person or entity.

b. The contract between the political subdivision and the business beneficiary shall provide in detail (i) the fair market value of all funds that the Commonwealth has committed to provide, (ii) the fair market value of all matching funds (or in-kind match) that the political subdivision has agreed to provide, (iii) how funds committed by the Commonwealth (including but not limited to funds from the Fund committed by the Governor) and funds that the political subdivision has agreed to provide are to be spent, (iv) the minimum private investment to be made and the number of new jobs to be created agreed to by the business beneficiary, (v) the average wage (excluding fringe benefits) agreed to be paid in the new jobs, (vi) the prevailing average wage, and (vii) the formula, means, or processes agreed to be used for measuring compliance with the minimum private investment and new jobs requirements, including consideration of any layoffs instituted by the business beneficiary over the course of the period covered by the contract.

The contract shall state the date by which the agreed upon private investment and new job requirements shall be met by the business beneficiary of funds from the Fund and may provide for the political subdivision to grant up to a 15-month extension of such date if deemed appropriate by the political subdivision subsequent to the execution of the contract. Any extension of such date granted by the political subdivision shall be in writing and promptly delivered to the business beneficiary, and the political subdivision shall simultaneously provide a copy of the extension to the Virginia Economic Development Partnership.

The contract shall provide that if the private investment and new job contractual requirements are not met by the expiration of the date stipulated in the contract, including any extension granted by the political subdivision, the business beneficiary shall be liable to the political subdivision for repayment of a portion of the funds provided under the contract. The contract shall include a formula for purposes of determining the portion of such funds to be repaid. The formula shall, in part, be based upon the fair market value of all funds that have been provided by the Commonwealth and the political subdivision and the extent to which the business beneficiary has met the private investment and new job contractual requirements. Any such funds repaid to the political subdivision that relate to the award from the Commonwealth's Development Opportunity Fund shall promptly be paid over by the political subdivision to the Commonwealth by payment remitted to the State Treasurer. Upon receipt by the State Treasurer of such payment, the Comptroller shall deposit such repaid funds into the Commonwealth's Development Opportunity Fund.

c. The contract shall be amended to reflect changes in the funds committed by the Commonwealth or agreed to be provided by the political subdivision.

d. Notwithstanding any provision in this section or in the guidelines, whenever layoffs instituted by a business beneficiary over the course of the period covered by a contract cause the net total number of the new jobs created to be fewer than the number agreed to, then the business beneficiary shall return the portion of any funds received pursuant to the repayment formula established by the contract.

3. Notwithstanding any provision in this section or in the guidelines, prior to executing any such contract with a business beneficiary, the political subdivision shall provide a copy of the proposed contract to the Attorney General. The Attorney General shall review the proposed contract (i) for enforceability as to its provisions and (ii) to ensure that it is in appropriate legal form. The Attorney General shall provide any written suggestions to the political subdivision within seven days of his receipt of the copy of the contract. The Attorney General's suggestions shall be limited to the enforceability of the contract's provisions and the legal form of the contract.

4. Notwithstanding any provision in this section or in the guidelines, a political subdivision shall not expend, distribute, pledge, use as security, or otherwise use any award from the Fund unless and until such contract as described herein is executed with the business beneficiary.

G. Within the 30 days immediately following June 30 and December 30 of each year, the Governor shall provide a report to the Chairmen of the House Committees on Appropriations and Finance and the Senate Committee on Finance which shall include, but is not limited to, the following information regarding grants and loans awarded from the Fund during the immediately preceding six-month period for economic development projects: the name of the company that is the business beneficiary of the grant or loan and the type of business in which it engages; the location (county, city, or town) of the project; the amount of the grant or loan committed from the Fund and the amount of all other funds committed by the Commonwealth from other sources and the purpose for which such grants, loans, or other funds will be used; the amount of all moneys or funds agreed to be provided by political subdivisions and the purposes for which they will be used; the number of new jobs agreed to be created by the business beneficiary; the amount of investment in the project agreed to be made by the business beneficiary; the timetable for the completion of the project and new jobs created; the prevailing average wage; and the average wage (excluding fringe benefits) agreed to be paid in the new jobs.

H. The Governor shall provide grants and commitments from the Fund in an amount not to exceed the dollar amount contained in the Fund. If the Governor commits funds for years beyond the fiscal years covered under the existing appropriation act, the State Treasurer shall set aside and reserve the

funds the Governor has committed, and the funds shall remain in the Fund for those future fiscal years. No grant or loan shall be payable in the years beyond the existing appropriation act unless the funds are currently available in the Fund.

I. Any person or entity submitting an application for a grant or loan from the Fund shall certify, on a form acceptable to the Virginia Economic Development Partnership, that it shall not provide any contribution, gift, or other item with a value greater than \$100 to the Governor or to his campaign committee or a political action committee established on his behalf during (i) the period in which the person or entity's application for such award is pending and (ii) the one-year period immediately after any such award is made. Any person or entity who so certifies and who receives an award from the Fund shall repay, if such person or entity provided or provides such a contribution, gift, or other item of value during these periods, the amount of the award received within 90 days after receipt of written notice from the Virginia Economic Development Partnership. In addition, any person or entity that knowingly provided or provides such a contribution, gift, or other item of value during these periods in violation of this subsection shall be subject to a civil penalty of \$500 or up to two times the amount of the contribution or gift, whichever is greater, and the contribution, gift, or other item shall be returned to the donor. The attorney for the Commonwealth shall initiate civil proceedings to enforce the civil penalties. Any civil penalties collected shall be payable to the State Treasurer for deposit to the general fund and shall be used exclusively to fund the Virginia Conflict of Interest and Ethics Advisory Council. For purposes of this subsection, "entity" includes individuals who are officers, directors, or owners of or who have a controlling ownership interest in such entity. *On a quarterly basis, the Virginia Economic Development Partnership shall notify the Governor, his campaign committee, and his political action committee of awards from the Fund made in the prior quarter. Within 18 months of the date of each award from the Fund, the Governor, his campaign committee, and his political action committee shall submit to the Virginia Conflict of Interest and Ethics Advisory Council established in § 30-355 a report listing any contribution, gift, or other item with a value greater than \$100 provided by the business beneficiary of such award to the Governor, his campaign committee, or his political action committee, respectively, during (i) the period in which the business beneficiary's application for such award was pending and (ii) the one-year period immediately after any such award was made.*

§ 2.2-3104.01. Prohibited conduct; bids or proposals under the Virginia Public Procurement Act, Public-Private Transportation Act, and Public-Private Education Facilities and Infrastructure Act; loans or grants from the Commonwealth's Development Opportunity Fund.

A. Neither the Governor, his political action committee, or the Governor's Secretaries, if the Secretary is responsible to the Governor for an executive branch agency with jurisdiction over the matters at issue, shall knowingly solicit or accept a contribution, gift, or other item with a value greater than \$50 from any bidder, offeror, or private entity, or from an officer or director of such bidder, offeror, or private entity, who has submitted a bid or proposal to an executive branch agency that is directly responsible to the Governor pursuant to the Virginia Public Procurement Act (§ 2.2-4300 et seq.), the Public-Private Transportation Act of 1995 (§ 33.2-1800 et seq.), or the Public-Private Education Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.) (i) during the period between the submission of the bid and the award of the public contract under the Virginia Public Procurement Act or (ii) following the submission of a proposal under the Public-Private Transportation Act of 1995 or the Public-Private Education Facilities and Infrastructure Act of 2002 until the execution of a comprehensive agreement thereunder.

B. Neither the Governor, his campaign committee, nor a political action committee established on his behalf shall knowingly solicit or accept a contribution, gift, or other item with a value greater than \$100 from any person or entity that has submitted an application for a grant or loan from the Commonwealth's Development Opportunity Fund during the period in which the person or entity's application for such an award is pending and for the one-year period immediately after any such award is made. For purposes of this subsection, "entity" includes individuals who are officers, directors, or owners of or who have a controlling ownership interest in such entity.

C. The provisions of this section shall apply only for public contracts, proposals, or comprehensive agreements where the stated or expected value of the contract is \$5 million or more ~~or for grants or loans from the Commonwealth's Development Opportunity Fund regardless of the value of the grant or loan.~~ The provisions of this section shall not apply to contracts awarded as the result of competitive sealed bidding as set forth in § 2.2-4302.1.

~~D.~~ C. Any person who knowingly violates this section shall be subject to a civil penalty of \$500 or up to two times the amount of the contribution or gift, whichever is greater, and the contribution, gift, or other item shall be returned to the donor. The attorney for the Commonwealth shall initiate civil proceedings to enforce the civil penalties. Any civil penalties collected shall be payable to the State Treasurer for deposit to the general fund and shall be used exclusively to fund the Council.