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HOUSE BILL NO. 971

Offered January 13, 2016

Prefiled January 12, 2016

A BILL to amend and reenact §§ 2.2-1604, 2.2-1605, 2.2-1606, and 2.2-4310 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 2.2-1606.1, relating to the Department of Small Business and Supplier Diversity; implementation of certification programs for small businesses; definition of small business; report.

Patrons—Lopez, Peace, Torian, Yost, Albo, Anderson, Bagby, Bell, John J., Boysko, Bulova, Filler-Corn, Helsel, Heretick, Hodges, Keam, Kory, Krizek, Leftwich, LeMunyon, Levine, Mason, McQuinn, Murphy, Plum, Rasoul, Sickles, Simon, Sullivan, Taylor, Toscano, Villanueva and Watts

Referred to Committee on General Laws

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-1604, 2.2-1605, 2.2-1606, and 2.2-4310 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 2.2-1606.1 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.

"Dominant business activity" means the business activity as selected by the applicant and confirmed by the Department that either (i) engages the majority of the employees of the business, or a plurality of the employees if the applicant is involved in more than one business activity, or (ii) generates the highest annual revenues when compared to other activities of the business.

"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.

"Historically black colleges and university" includes any college or university that was established prior to 1964; whose principal mission was, and is, the education of black Americans; and that is accredited by a nationally recognized accrediting agency or association determined by the Secretary of Education.

"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, or any historically black college or university, regardless of the percentage ownership by minority individuals or, in the case of a

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57 corporation, partnership, or limited liability company or other entity, the equity ownership interest in the
58 corporation, partnership, or limited liability company or other entity.

59 "Small business" means:

60 1. *Prior to July 1, 2017, a business that is at least 51 percent independently owned and controlled by*
61 *one or more individuals who are U.S. citizens or legal resident aliens and, together with affiliates, has*
62 *250 or fewer employees or average annual gross receipts of \$10 million or less averaged over the*
63 *previous three years. One or more of the individual owners shall control both the management and daily*
64 *business operations of the small business.*

65 2. *On or after July 1, 2017, a business that is at least 51 percent independently owned and*
66 *controlled by one or more individuals who are U.S. citizens or legal resident aliens and that, together*
67 *with affiliates, meets the small business size standards established by the regulations of the U.S. Small*
68 *Business Administration on the basis of the dominant business activity of the business. One or more of*
69 *the individual owners shall control both the management and daily business operations of the small*
70 *business.*

71 "State agency" means any authority, board, department, instrumentality, institution, agency, or other
72 unit of state government. "State agency" does not include any county, city, or town.

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

78 **§ 2.2-1605. Powers and duties of Department.**

79 A. The Department shall have the following powers and duties:

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

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

87 3. *Implement certification programs for small, women-owned, and minority-owned businesses and*
88 *employment services organizations in accordance with regulations established by the Director pursuant*
89 *to § 2.2-1606. The Department shall contract with one or more independent certifying entities to assist*
90 *in the certification of small, women-owned, and minority-owned businesses and employment services*
91 *organizations, unless the Director makes a written determination that entering into such contract is not*
92 *practicable or is imprudent. In addition, the Department shall periodically review forms and processes*
93 *related to certification to reduce the administrative and paperwork burden on businesses seeking*
94 *certification and recertification;*

95 ~~3.~~ 4. Establish a center for the development, collection, summarization, and dissemination of
96 information that will be helpful to persons and organizations throughout the nation in undertaking or
97 promoting procurement from small, women-owned, and minority-owned businesses;

98 ~~4.~~ 5. Consistent with prevailing law and availability of funds, and according to the Director's
99 discretion, provide technical and management assistance to small, women-owned, and minority-owned
100 businesses and defray all or part of the costs of pilot or demonstration projects that are designed to
101 overcome the special problems of small, women-owned, and minority-owned businesses;

102 ~~5.~~ 6. Advise the Small Business Financing Authority on the management and administration of the
103 Small, Women-owned, and Minority-owned Business Loan Fund created pursuant to § 2.2-2311.1;

104 ~~6.~~ 7. Implement any remediation or enhancement measure for small, women-owned, or
105 minority-owned businesses as may be authorized by the Governor pursuant to subsection C of
106 § 2.2-4310 and develop regulations, consistent with prevailing law, for program implementation. Such
107 regulations shall be developed in consultation with the state agencies with procurement responsibility
108 and promulgated by those agencies in accordance with applicable law; and

109 ~~7.~~ 8. Receive and coordinate, with the appropriate state agency, the investigation of complaints that a
110 business certified pursuant to this chapter has failed to comply with its subcontracting plan under
111 subsection D of § 2.2-4310. If the Department determines that a business certified pursuant to this
112 chapter has failed to comply with the subcontracting plan, the business shall provide a written
113 explanation.

114 B. In addition, the Department shall serve as the liaison between the Commonwealth's existing
115 businesses and state government in order to promote the development of Virginia's economy. To that
116 end, the Department shall:

117 1. Encourage the training or retraining of individuals for specific employment opportunities at new or
118 expanding business facilities in the Commonwealth;

2. Develop and implement programs to assist small businesses in the Commonwealth in order to promote their growth and the creation and retention of jobs for Virginians;

3. Establish an industry program that is the principal point of communication between basic employers in the Commonwealth and the state government that will address issues of significance to business;

4. Make available to existing businesses, in conjunction and cooperation with localities, chambers of commerce, and other public and private groups, basic information and pertinent factors of interest and concern to such businesses;

5. Develop statistical reports on job creation and the general economic conditions in the Commonwealth; and

6. Administer the Small Business Jobs Grant Fund Program and the Small Business Investment Grant Fund described in Article 2 (§ 2.2-1611 et seq.).

C. All agencies of the Commonwealth shall assist the Department upon request and furnish such information and assistance as the Department may require in the discharge of its duties.

§ 2.2-1606. Powers of Director.

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

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

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

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

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

5. Convene business leaders, educators, and other representatives of the private sector who are engaged in assisting the development of small, women-owned, and minority-owned business programs or who could contribute to their development for the purpose of proposing, evaluating, or coordinating governmental and private activities in furtherance of the objectives of this chapter.

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

7. Recommend appropriate legislative or executive actions.

8. Adopt regulations to implement certification programs for small, women-owned, and minority-owned businesses and employment services organizations, which regulations shall be exempt from the Administrative Process Act (§ 2.2-4000 et seq.) pursuant to subdivision B 2 of § 2.2-4002. Such certification programs shall allow applications for certification to be submitted by electronic means as authorized by § 59.1-496 and the applicant to affix thereto his electronic signature, as defined in § 59.1-480. Such certification programs shall deny certification to vendors from states that deny like certifications to Virginia-based small, women-owned, or minority-owned businesses and employment services organizations or that provide a preference for small, women-owned, or minority-owned businesses and employment services organizations based in that state that is not available to Virginia-based businesses. The regulations shall (i) establish minimum requirements for certification of small, *businesses and for certification of* women-owned, and minority-owned businesses and employment services organizations; (ii) provide a process for evaluating existing local, state, private sector, and federal certification programs that meet the minimum requirements; and (iii) mandate certification, without any additional paperwork, of any prospective state vendor that has obtained certification under any certification program that is determined to meet the minimum requirements established in the regulations and of any employment services organization that has been approved by the Department for Aging and Rehabilitative Services.

9. Establish an interdepartmental board in accordance with § 2.2-1608 to supply the Director with information useful in promoting minority business activity.

§ 2.2-1606.1. Additional powers of Director; provisions related to small business certification.

A. Beginning July 1, 2017, the regulations adopted by the Director to implement the certification program for small businesses pursuant to § 2.2-1606 shall establish a three-year certification period for small businesses.

B. Any business holding a valid certification as a small business as of July 1, 2017, shall have the expiration date of such certification extended for a three-year period. At the end of that three-year period, the business shall be required to meet the requirements for certification in effect at that time.

§ 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 Small Business and Supplier Diversity.

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-owned, and minority-owned business procurement and on service disabled veteran-owned business procurement to the Department of Small Business and Supplier Diversity in a form specified by the Department of Small Business and Supplier Diversity. The Department of Small Business and Supplier Diversity 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 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 awarding a contract for services to a small, women-owned, or minority-owned business that is certified in accordance with § 2.2-1606, or to a business identified by a public body as a service disabled veteran-owned business where the award is being made pursuant to an enhancement or remedial program as provided in subsection C, the public body shall include in every such contract of more than \$10,000 the following:

"If the contractor intends to subcontract work as part of its performance under this contract, the contractor shall include in the proposal a plan to subcontract to small, women-owned, minority-owned, and service disabled veteran-owned businesses."

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

F. As used in this section:

"Dominant business activity" means the business activity as selected by the applicant and confirmed by the Department that either (i) engages the majority of the employees of the business, or a plurality of the employees if the applicant is involved in more than one business activity, or (ii) generates the highest annual revenues when compared to other activities of the business.

"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, or any historically black college or university as defined in § 2.2-1604, regardless of the percentage ownership by minority

individuals or, in the case of a corporation, partnership, or limited liability company or other entity, the equity ownership interest in the corporation, partnership, or limited liability company or other entity.

"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

1. Prior to July 1, 2017, 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 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.

2. On or after July 1, 2017, 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 that, together with affiliates, meets the small business size standards established by the regulations of the U.S. Small Business Administration on the basis of the dominant business activity of the business. 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. That the Secretary of Commerce and Trade shall evaluate the small business certification program effective on and after July 1, 2017, at three-year intervals and report the findings of the evaluations to the Governor and General Assembly in the following manner: (i) on or before December 1, 2020, submit a report covering the period July 1, 2017, to July 1, 2020, and (ii) on or before December 1, 2023, submit a report covering the period July 1, 2020, to July 1, 2023. Such reports shall be submitted as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents and reports and shall be posted on the General Assembly's website. All agencies, authorities, and institutions of the Commonwealth shall cooperate and provide upon request all available data necessary for the review required to assist the Director of the Department of Small Business and Supplier Diversity to carry out the process delineated in § 2.2-1606.1 of this act. Such data shall be used by the Director only to facilitate the review required to carry out the process delineated in § 2.2-1606.1 of this act.

3. That on or before December 31, 2016, the Department of Small Business and Supplier Diversity shall enter into a Memorandum of Understanding with appropriate agencies for the purpose of establishing provisions for the sharing of information, consistent with the requirements of state and federal law, to assist the Department of Small Business and Supplier Diversity in its role to confirm the dominate business activity of applicants for certification as small businesses.

4. That the Department of Small Business and Supplier Diversity shall establish an educational outreach initiative to inform and prepare businesses for the changes in the small business certification program that will take effect pursuant to this act.