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SENATE BILL NO. 1394

Offered January 9, 2019

Prefiled January 8, 2019

A BILL to amend and reenact §§ 2.2-1604, 2.2-1605, 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—Dance; Delegate: Levine

Referred to Committee on General Laws and Technology

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-1604, 2.2-1605, 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 (i) a business is determined to be a small, women-owned, or minority-owned business or (ii) an employment services organization, for the purpose of reporting small, women-owned, and minority-owned business and employment services organization 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.

"Field of operation" means the business activity as selected by the applicant from the latest edition of the North American Industry Classification System (NAICS), based on the average employment for the preceding 12 months and annual average gross receipts for the preceding three years.

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

"Small business" means:

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59 1. Prior to July 1, 2019, a business that is at least 51 percent independently owned and controlled by
60 one or more individuals who are U.S. citizens or legal resident aliens and, together with affiliates, has
61 250 or fewer employees or average annual gross receipts of \$10 million or less averaged over the
62 previous three years. One or more of the individual owners shall control both the management and daily
63 business operations of the small business.

64 2. On or after July 1, 2019, a business that is not dominant in its field of operation, as determined
65 by the Department, and is at least 51 percent independently owned and operated by one or more
66 individuals who are U.S. citizens or legal resident aliens and, together with affiliates, has 250 or fewer
67 employees and average annual gross receipts, excluding the cost of goods and equipment, of \$10 million
68 or less averaged over the previous three years. One or more of the individual owners shall control both
69 the management and daily business operations of the small business.

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

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

77 **§ 2.2-1605. Powers and duties of Department.**

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

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

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

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

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

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

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

101 7. Receive and coordinate, with the appropriate state agency, the investigation of complaints that a
102 business certified pursuant to this chapter has failed to comply with its subcontracting plan under
103 subsection D of § 2.2-4310. If the Department determines that a business certified pursuant to this
104 chapter has failed to comply with the subcontracting plan, the business shall provide a written
105 explanation; and

106 8. Annually review forms and processes related to small business certification to reduce the
107 administrative and paperwork burden on small businesses seeking certification and recertification.

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

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

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

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

118 4. Make available to existing businesses, in conjunction and cooperation with localities, chambers of
119 commerce, and other public and private groups, basic information and pertinent factors of interest and
120 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 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.

§ 2.2-1606.1. Businesses certified as a small business prior to July 1, 2019; extension of certification.

Any business holding a valid certification as a small business prior to July 1, 2019, shall have the expiration date of such certification extended for an additional one-year period. At the end of that 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 businesses and employment services organizations.

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, which list shall include all companies and organizations certified by the Department.

B. All public bodies shall establish programs consistent with this chapter to facilitate the participation of small businesses, businesses owned by women, minorities, and service disabled veterans, and employment services organizations 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 (i) small, women-owned, and minority-owned business procurement, (ii) service disabled veteran-owned business procurement, and (iii) employment services organization procurement to the Department of Small Business and Supplier Diversity in a form specified by the Department of Small Business and Supplier Diversity. Contracts and subcontracts awarded to employment services organizations and service disabled veteran-owned businesses shall be credited toward the small business, women-owned, and minority-owned business contracting and subcontracting goals of state agencies and contractors. 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 or employment services organization 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. Any enhancement or remedial measure authorized by the Governor pursuant to this subsection for state public bodies may allow for small businesses certified by the Department of Small Business and Supplier Diversity or a subcategory of small businesses established as a part of the enhancement program to have a price preference over noncertified businesses competing for the same contract award on designated procurements, provided that the bid of the certified small business or the business in such subcategory of small businesses established as a part of an enhancement program does not exceed the low bid by more than five percent.

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:

"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

182 Services.

183 *"Field of operation" means the business activity as selected by the applicant from the latest edition*
184 *of the North American Industry Classification System (NAICS), based on the average employment for the*
185 *preceding 12 months and annual average gross receipts for the preceding three years.*

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

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

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

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

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

201 "Minority-owned business" means a business that is at least 51 percent owned by one or more
202 minority individuals who are U.S. citizens or legal resident aliens, or in the case of a corporation,
203 partnership, or limited liability company or other entity, at least 51 percent of the equity ownership
204 interest in the corporation, partnership, or limited liability company or other entity is owned by one or
205 more minority individuals who are U.S. citizens or legal resident aliens, and both the management and
206 daily business operations are controlled by one or more minority individuals, or any historically black
207 college or university as defined in § 2.2-1604, regardless of the percentage ownership by minority
208 individuals or, in the case of a corporation, partnership, or limited liability company or other entity, the
209 equity ownership interest in the corporation, partnership, or limited liability company or other entity.

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

214 "Service disabled veteran business" means a business that is at least 51 percent owned by one or
215 more service disabled veterans or, in the case of a corporation, partnership, or limited liability company
216 or other entity, at least 51 percent of the equity ownership interest in the corporation, partnership, or
217 limited liability company or other entity is owned by one or more individuals who are service disabled
218 veterans and both the management and daily business operations are controlled by one or more
219 individuals who are service disabled veterans.

220 "Small business" means:

221 1. *Prior to July 1, 2019, a business, independently owned and controlled by one or more individuals*
222 *who are U.S. citizens or legal resident aliens; and, together with affiliates, has 250 or fewer employees,*
223 *or annual gross receipts of \$10 million or less averaged over the previous three years. One or more of*
224 *the individual owners shall control both the management and daily business operations of the small*
225 *business.*

226 2. *On or after July 1, 2019, a business that is not dominant in its field of operation, as determined*
227 *by the Department, and is at least 51 percent independently owned and operated by one or more*
228 *individuals who are U.S. citizens or legal resident aliens and, together with affiliates, has 250 or fewer*
229 *employees and average annual gross receipts, excluding the cost of goods and equipment, of \$10 million*
230 *or less averaged over the previous three years. One or more of the individual owners shall control both*
231 *the management and daily business operations of the small business.*

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

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

239 **2. That the Secretary of Commerce and Trade shall evaluate the small business certification**
240 **program effective on and after July 1, 2019, at three-year intervals and report the findings of the**
241 **evaluations to the Governor and General Assembly in the following manner: (i) on or before**
242 **December 1, 2022, submit a report covering the period July 1, 2019, to June 30, 2022, and (ii) on**
243 **or before December 1, 2025, submit a report covering the period July 1, 2022, to June 30, 2025.**

244 Such reports shall be submitted as provided in the procedures of the Division of Legislative
245 Automated Systems for the processing of legislative documents and reports and shall be posted on
246 the General Assembly's website. All agencies, authorities, and institutions of the Commonwealth
247 shall cooperate and provide upon request all available data necessary for the review required to
248 assist the Director of the Department of Small Business and Supplier Diversity to carry out the
249 process delineated in § 2.2-1606.1 of the Code of Virginia, as created by this act. Such data shall
250 be exempt from disclosure pursuant to subdivision 20 of § 2.2-3705.6 of the Code of Virginia and
251 shall be used by the Director of the Department of Small Business and Supplier Diversity for the
252 limited purpose of facilitating the review required to carry out the process delineated in
253 § 2.2-1606.1 of the Code of Virginia, as created by this act.
254 3. That the Department of Small Business and Supplier Diversity shall establish an educational
255 outreach initiative to inform and prepare businesses for the changes in the small business
256 certification program that will take effect pursuant to this act.