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HOUSE BILL NO. 1145

Offered January 14, 2004

Prefiled January 14, 2004

A BILL to amend and reenact §§ 2.2-4310 and 2.2-4343 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 15.2-965.1, relating to participation of small, women- and minority-owned businesses in government procurement.

Patrons—McDonnell and Baskerville

Referred to Committee on General Laws

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-4310 and 2.2-4343 of the Code of Virginia are amended and reenacted, and that the Code of Virginia is amended by adding a section numbered 15.2-965.1 as follows:

§ 2.2-4310. Discrimination prohibited; participation of small, women- and minority-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, or any other basis prohibited by state law relating to discrimination in employment. Whenever solicitations are made, each public body shall include businesses selected from a list made available by the Department of Minority Business Enterprise.

B. All public bodies shall establish programs consistent with this chapter to facilitate the participation of small businesses and businesses owned by women and minorities in procurement transactions. The programs established shall be in writing and shall include cooperation with the Department of Minority Business Enterprise, the United States Small Business Administration, and other public or private agencies. State agencies shall submit annual progress reports on minority business procurement to the Department of Minority Business Enterprise.

C. *Whenever there exists a rational basis for small business enhancement or an analysis that documents statistically significant disparity between the availability and utilization of women- and minority-owned businesses, the Governor is authorized and encouraged to require state agencies to implement appropriate remedies consistent with prevailing law. For the purposes of this subsection, "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.*

D. 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.

§ 2.2-4343. Exemption from operation of chapter for certain transactions.

A. The provisions of this chapter shall not apply to:

1. The Virginia Port Authority in the exercise of any of its powers in accordance with Chapter 10 (§ 62.1-128 et seq.) of Title 62.1, provided the Authority implements, by policy or regulation adopted by the Board of Commissioners and approved by the Department of General Services, procedures to ensure fairness and competitiveness in the procurement of goods and services and in the administration of its capital outlay program. This exemption shall be applicable only so long as such policies and procedures meeting the requirements remain in effect.

2. The Virginia Retirement System for selection of services related to the management, purchase or sale of authorized investments, including but not limited to actuarial services. Selection of these services shall be governed by the standard set forth in § 51.1-124.30.

3. The State Treasurer in the selection of investment management services related to the external management of funds shall be governed by the standard set forth in § 2.2-4514, and shall be subject to competitive guidelines and policies that are set by the Commonwealth Treasury Board and approved by the Department of General Services.

4. The Department of Social Services or local departments of social services for the acquisition of motor vehicles for sale or transfer to Temporary Assistance to Needy Families (TANF) recipients.

5. The University of Virginia in the selection of services related to the management and investment of its endowment funds, endowment income, or gifts pursuant to § 23-76.1. However, selection of these services shall be governed by the Uniform Management of Institutional Funds Act (§ 55-268.1 et seq.) as required by § 23-76.1.

6. The Board of the Virginia College Savings Plan for the selection of services related to the operation and administration of the Plan, including, but not limited to, contracts or agreements for the

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59 management, purchase, or sale of authorized investments or actuarial, record keeping, or consulting
60 services. However, such selection shall be governed by the standard set forth in § 23-38.80.

61 7. Public institutions of higher education for the purchase of Items for resale at retail bookstores and
62 similar retail outlets operated by such institutions. However, such purchase procedures shall provide for
63 competition where practicable.

64 8. The purchase of goods and services by agencies of the legislative branch that may be specifically
65 exempted therefrom by the Chairman of the Committee on Rules of either the House of Delegates or the
66 Senate. Nor shall the contract review provisions of § 2.2-2011 apply to such procurements. The
67 exemption shall be in writing and kept on file with the agency's disbursement records.

68 9. Any town with a population of less than 3,500, except as stipulated in the provisions of
69 §§ 2.2-4305, 2.2-4308, 2.2-4311, 2.2-4315, 2.2-4330, 2.2-4333 through 2.2-4338, 2.2-4343.1, and
70 2.2-4367 through 2.2-4377.

71 10. Any county, city or town whose governing body has adopted, by ordinance or resolution,
72 alternative policies and procedures which are (i) based on competitive principles and (ii) generally
73 applicable to procurement of goods and services by such governing body and its agencies, except as
74 stipulated in subdivision 12.

75 This exemption shall be applicable only so long as such policies and procedures, or other policies
76 and procedures meeting the requirements of § 2.2-4300, remain in effect in such county, city or town.
77 Such policies and standards may provide for incentive contracting which offers a contractor whose bid is
78 accepted the opportunity to share in any cost savings realized by the locality when project costs are
79 reduced by such contractor, without affecting project quality, during construction of the project. The fee,
80 if any, charged by the project engineer or architect for determining such cost savings shall be paid as a
81 separate cost and shall not be calculated as part of any cost savings.

82 11. Any school division whose school board has adopted, by policy or regulation, alternative policies
83 and procedures which are (i) based on competitive principles and (ii) generally applicable to
84 procurement of goods and services by the school board, except as stipulated in subdivision 12.

85 This exemption shall be applicable only so long as such policies and procedures, or other policies or
86 procedures meeting the requirements of § 2.2-4300, remain in effect in such school division. This
87 provision shall not exempt any school division from any centralized purchasing ordinance duly adopted
88 by a local governing body.

89 12. Notwithstanding the exemptions set forth in subdivisions 9 through 11, the provisions of
90 subsections C and D of § 2.2-4303, and §§ 2.2-4305, 2.2-4308, 2.2-4311, 2.2-4315, 2.2-4317, 2.2-4330,
91 2.2-4333 through 2.2-4338, 2.2-4343.1, and 2.2-4367 through 2.2-4377 shall apply to all counties, cities
92 and school divisions, and to all towns having a population greater than 3,500 in the Commonwealth.

93 The method for procurement of professional services set forth in subdivision 3 a of § 2.2-4301 in the
94 definition of competitive negotiation shall also apply to all counties, cities and school divisions, and to
95 all towns having a population greater than 3,500, where the cost of the professional service is expected
96 to exceed \$30,000 in the aggregate or for the sum of all phases of a contract or project. A school board
97 that makes purchases through its public school foundation or purchases educational technology through
98 its educational technology foundation, either as may be established pursuant to § 22.1-212.2:2 shall be
99 exempt from the provisions of this chapter, except, relative to such purchases, the school board shall
100 comply with the provisions of §§ 2.2-4311 and 2.2-4367 through 2.2-4377.

101 13. A public body ~~which~~that is also a utility operator may purchase services through or participate in
102 contracts awarded by one or more utility operators ~~which~~that are not public bodies for utility marking
103 services as required by the Underground Utility Damage Prevention Act (§ 56-265.14 et seq.). A
104 purchase of services under this subdivision may deviate from the procurement procedures set forth in
105 this chapter upon a determination made in advance by the public body and set forth in writing that
106 competitive sealed bidding is either not practicable or not fiscally advantageous to the public, and the
107 contract is awarded based on competitive principles.

108 14. Procurement of any construction or planning and design services for construction by a Virginia
109 nonprofit corporation or organization not otherwise specifically exempted when (i) the planning, design
110 or construction is funded by state appropriations of \$10,000 or less or (ii) the Virginia nonprofit
111 corporation or organization is obligated to conform to procurement procedures that are established by
112 federal statutes or regulations, whether those federal procedures are in conformance with the provisions
113 of this chapter.

114 15. Purchases, exchanges, gifts or sales by the Citizens' Advisory Council on Furnishing and
115 Interpreting the Executive Mansion.

116 16. The Eastern Virginia Medical School in the selection of services related to the management and
117 investment of its endowment and other institutional funds. The selection of these services shall, however,
118 be governed by the Uniform Management of Institutional Funds Act (§ 55-268.1 et seq.).

119 17. The Department of Corrections in the selection of pre-release and post-incarceration services.

120 18. The Board of the Chippokes Plantation Farm Foundation in entering into agreements with

persons for the construction, operation, and maintenance of projects consistent with the Chippokes Plantation State Park Master Plan approved by the Director of the Department of Conservation and Recreation pursuant to the requirements of § 10.1-200.1 and designed to further an appreciation for rural living and the contributions of the agricultural, forestry, and natural resource based industries of the Commonwealth, provided such projects are supported solely by private or nonstate funding.

19. The purchase of goods and services by a local governing body or any authority, board, department, instrumentality, institution, agency or other unit of state government when such purchases are made under a remedial plan established by the Governor pursuant to subsection C of § 2.2-4310 or by a chief administrative officer of a county, city or town pursuant to § 15.2-965.1.

B. Where a procurement transaction involves the expenditure of federal assistance or contract funds, the receipt of which is conditioned upon compliance with mandatory requirements in federal laws or regulations not in conformance with the provisions of this chapter, a public body may comply with such federal requirements, notwithstanding the provisions of this chapter, only upon the written determination of the Governor, in the case of state agencies, or the governing body, in the case of political subdivisions, that acceptance of the grant or contract funds under the applicable conditions is in the public interest. Such determination shall state the specific provision of this chapter in conflict with the conditions of the grant or contract.

§ 15.2-965.1. Participation of small, women- and minority-owned businesses.

Any locality may enact an ordinance providing that whenever there exists a rational basis for small business enhancement, or an analysis documents that a statistically significant disparity exists between the availability and utilization of women- and minority- owned businesses, the chief executive of the local governing entity shall be authorized and encouraged to require implementation of appropriate remedies consistent with prevailing law.

2. That any analysis performed by the Governor or a locality that is used as a basis for determining the existence of discrimination based on race or gender in the awarding of contracting opportunities shall comply with the procedural and evidentiary standards established by the United States Supreme Court in *The City of Richmond v. J. A. Croson Company*, 488 U.S. 469, (1985) and any subsequent decisions of the United States Supreme Court concerning such standards.