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SENATE BILL NO. 662

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee on General Laws
on February 21, 2006)

(Patron Prior to Substitute—Senator Miller)

A BILL to amend and reenact §§ 2.2-1401 through 2.2-1404, 2.2-1405, 2.2-3705.6, 2.2-4310, 15.2-965.1, and 18.2-213.1 of the Code of Virginia, relating to the Department of Minority Business Enterprise; certification of small, women- or minority-owned businesses.

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-1401 through 2.2-1404, 2.2-1405, 2.2-3705.6, 2.2-4310, 15.2-965.1, and 18.2-213.1 of the Code of Virginia are amended and reenacted as follows:

§ 2.2-1401. Definitions.

As used in this chapter unless the context requires a different meaning:

"Certification" means the process by which a business or business enterprise is determined to be a small, women- or minority-owned business enterprise for the purpose of reporting small, women-owned, and minority-owned business participation in state contracts and purchases pursuant to §§ 2.2-1404 and 2.2-1405.

"Disadvantaged business enterprise" means a small business concern, as defined in 49 CFR Parts 23 and 26, that is at least 51% owned by one or more socially and economically disadvantaged individuals, or, in the case of any corporation, partnership, or limited liability company or other entity, at least 51% of the equity ownership is owned by one or more socially and economically disadvantaged individuals and the management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

"Minority business enterprise" means a business enterprise that is owned and controlled by one or more socially and economically disadvantaged persons. Such disadvantage may arise from cultural, racial, ethnic, economic circumstances or background or other similar cause. Such persons include, but are not limited to Blacks, Hispanic Americans, Asian Americans, American Indians, Eskimos, and Aleuts.

"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 Marianas, 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. "Eskimo or Aleut" means a person having origins in any of the peoples of Northern Canada, Greenland, Alaska, or Eastern Siberia and who is regarded as such in the community of which this person claims to be a part.

4. "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.

5. "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 concern that is at least 51% owned by one or more minority individuals or in the case of a corporation, partnership, or limited liability company or other entity, at least 51% of the equity ownership interest in the corporation, partnership, or limited liability company or other entity is owned by one or more minority individuals and both the management and daily business operations are controlled by one or more minority individuals.

"Small business" means an independently owned and operated business which, together with affiliates, has 250 or fewer employees, or average annual gross receipts of \$10 million or less averaged over the previous three years.

"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 concern that is at least 51% 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% of the equity ownership interest is owned by one

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60 or more women who are U.S. citizens or legal resident aliens, and both the management and daily
61 business operations are controlled by one or more women who are U.S. citizens or legal resident aliens.

62 § 2.2-1402. Additional powers and duties of Department.

63 The Department shall have the following additional powers and duties:

64 1. Coordinate as consistent with law the plans, programs and operations of the state government that
65 affect or may contribute to the establishment, preservation, and strengthening of *small, women- and*
66 *minority business enterprise-owned businesses*.

67 2. Promote the mobilization of activities and resources of state and local governments, businesses and
68 trade associations, universities, foundations, professional organizations, and volunteer and other groups
69 towards the growth of *minority business enterprises small businesses and businesses owned by women*
70 *and minorities*, and facilitate the coordination of the efforts of these groups with those of state
71 departments and agencies.

72 3. Establish a center for the development, collection, summarization, and dissemination of
73 information that will be helpful to persons and organizations throughout the nation in undertaking or
74 promoting ~~the establishment and successful operation of~~ *procurement from small, women- and minority*
75 *business enterprise-owned businesses*.

76 4. Within constraints of law and availability of funds, and according to the Director's discretion,
77 provide technical and management assistance to *small, women- and minority business enterprises-owned*
78 *businesses*, and defray all or part of the costs of pilot or demonstration projects that are designed to
79 overcome the special problems of *small, women- and minority business enterprises-owned businesses*.

80 5. Manage the Capital Access Fund for Disadvantaged Businesses created pursuant to § 2.2-2311,
81 and, in cooperation with the Small Business Financing Authority, determine the qualifications, terms,
82 and conditions for the use of such Fund.

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

88 § 2.2-1403. Powers of Director.

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

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

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

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

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

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

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

108 7. Recommend appropriate legislative or executive actions.

109 8. Adopt ~~reasonable regulations in accordance with the Administrative Process Act (§ 2.2-4000 et~~
110 ~~seq.)~~ to implement a certification ~~program~~ *programs* for *small, women- and minority business*
111 *enterprises-owned businesses*, which regulations shall be exempt from the Administrative Process Act
112 (*§ 2.2-4000 et seq.*) pursuant to subdivision B 2 of § 2.2-4002. Such certification ~~process~~ *programs* shall
113 ~~include consideration of other states' laws that may deny certification to vendors from states that deny~~
114 ~~like certifications to Virginia-based small, women- or minority business enterprises and that may -owned~~
115 ~~businesses or that provide a preference for small, women- or minority business enterprises -owned~~
116 ~~businesses based in that state that is not available to Virginia-based businesses. The regulations shall (i)~~
117 ~~establish minimum requirements for certification of small, women- and minority-owned businesses; (ii)~~
118 ~~provide a process for evaluating existing local, state, private sector, and federal certification programs~~
119 ~~that meet the minimum requirements; and (iii) mandate certification, without any additional paperwork~~
120 ~~or fee, of any prospective state vendor that has obtained certification under any certification program~~
121 ~~that is determined to meet the minimum requirements established in the regulations.~~

9. Establish an interdepartmental board in accordance with § 2.2-1404 to supply the Director with information useful in promoting minority business activity.

§ 2.2-1404. Interdepartmental Board; cooperation with Department.

A. The Interdepartmental Board established by the Director shall be composed of heads of the several departments and agencies of state government or their respective designees, whose functions affect *small, women- and minority business enterprise-owned businesses*. The participating departments and agencies shall be determined by the Director of the Department. The Interdepartmental Board shall meet at the call of the Director and shall supply the Director with information useful in promoting *small, women- and minority-owned* business activity.

B. The head of each participating state department and agency or their designees shall furnish information, assistance, and reports to, and shall otherwise cooperate with, the Director in the performance of his duties as needed.

C. The head of each participating state department or agency shall, when so requested by the Director, designate an assistant or such other similar official to have primary and continuing responsibility for the participation and cooperation of that department or agency in matters concerning *small, women- and minority business enterprise-owned businesses*.

D. Each participating state department or agency shall, within constraints of law and availability of funding, continue all current efforts to foster and promote minority business enterprises and to support the *small, women- and minority-owned business program programs*, and shall cooperate with the Director in increasing the total state effort.

§ 2.2-1405. Reports and recommendations; collection of data.

The Director shall, from time to time, submit directly or through an assistant to the Governor his recommendations for legislation or other action as he deems desirable to promote the purposes of this chapter.

The Director shall report, on or before November 1 of each year, to the Governor and the General Assembly the identity of the state departments and agencies failing to submit annual progress reports on *small, women- and minority-owned* business procurement required by § 2.2-4310, and the nature and extent of such lack of compliance. The annual report shall include recommendations on the ways to improve compliance with the provisions of § 2.2-4310 and such other related matters as the Director deems appropriate.

The Director, with the assistance of the Comptroller, shall develop and implement a systematic data collection process that will provide information for a report to the Governor and General Assembly on state expenditures to *small, women- and minority business enterprises -owned businesses* during the previous fiscal year.

§ 2.2-3705.6. Exclusions to application of chapter; proprietary records and trade secrets.

The following records are excluded from the provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law:

1. Proprietary information gathered by or for the Virginia Port Authority as provided in § 62.1-132.4 or 62.1-134.1.

2. Financial statements not publicly available filed with applications for industrial development financings in accordance with Chapter 49 (§ 15.2-4900 et seq.) of Title 15.2.

3. Confidential proprietary records, voluntarily provided by private business pursuant to a promise of confidentiality from the Department of Business Assistance, the Virginia Economic Development Partnership, the Virginia Tourism Authority, or local or regional industrial or economic development authorities or organizations, used by the Department, the Partnership, the Authority, or such entities for business, trade and tourism development; and memoranda, working papers or other records related to businesses that are considering locating or expanding in Virginia, prepared by such entities, where competition or bargaining is involved and where, if such records are made public, the financial interest of the governmental unit would be adversely affected.

4. Information that was filed as confidential under the Toxic Substances Information Act (§ 32.1-239 et seq.), as such Act existed prior to July 1, 1992.

5. Fisheries data that would permit identification of any person or vessel, except when required by court order as specified in § 28.2-204.

6. Confidential financial statements, balance sheets, trade secrets, and revenue and cost projections provided to the Department of Rail and Public Transportation, provided such information is exempt under the federal Freedom of Information Act or the federal Interstate Commerce Act or other laws administered by the Surface Transportation Board or the Federal Railroad Administration with respect to data provided in confidence to the Surface Transportation Board and the Federal Railroad Administration.

7. Confidential proprietary records related to inventory and sales, voluntarily provided by private energy suppliers to the Department of Mines, Minerals and Energy, used by that Department for energy

contingency planning purposes or for developing consolidated statistical information on energy supplies.

8. Confidential proprietary information furnished to the Board of Medical Assistance Services or the Medicaid Prior Authorization Advisory Committee pursuant to Article 4 (§ 32.1-331.12 et seq.) of Chapter 10 of Title 32.1.

9. Proprietary, commercial or financial information, balance sheets, trade secrets, and revenue and cost projections provided by a private transportation business to the Virginia Department of Transportation and the Department of Rail and Public Transportation for the purpose of conducting transportation studies needed to obtain grants or other financial assistance under the Transportation Equity Act for the 21st Century (P.L. 105-178) for transportation projects, provided such information is exempt under the federal Freedom of Information Act or the federal Interstate Commerce Act or other laws administered by the Surface Transportation Board or the Federal Railroad Administration with respect to data provided in confidence to the Surface Transportation Board and the Federal Railroad Administration. However, the exemption provided by this subdivision shall not apply to any wholly owned subsidiary of a public body.

10. Confidential information designated as provided in subsection D of § 2.2-4342 as trade secrets or proprietary information by any person who has submitted to a public body an application for prequalification to bid on public construction projects in accordance with subsection B of § 2.2-4317.

11. Confidential proprietary records that are voluntarily provided by a private entity pursuant to a proposal filed with a public entity or an affected local jurisdiction under the Public-Private Transportation Act of 1995 (§ 56-556 et seq.) or the Public-Private Education Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.), pursuant to a promise of confidentiality from the responsible public entity or affected local jurisdiction, used by the responsible public entity or affected local jurisdiction for purposes related to the development of a qualifying transportation facility or qualifying project; and memoranda, working papers or other records related to proposals filed under the Public-Private Transportation Act of 1995 or the Public-Private Education Facilities and Infrastructure Act of 2002, where, if such records were made public, the financial interest of the public or private entity involved with such proposal or the process of competition or bargaining would be adversely affected. In order for confidential proprietary information to be excluded from the provisions of this chapter, the private entity shall (i) invoke such exclusion upon submission of the data or other materials for which protection from disclosure is sought, (ii) identify the data or other materials for which protection is sought, and (iii) state the reasons why protection is necessary. For the purposes of this subdivision, the terms "affected local jurisdiction," "public entity" and "private entity" shall be defined as they are defined in the Public-Private Transportation Act of 1995 or in the Public-Private Education Facilities and Infrastructure Act of 2002. However, nothing in this subdivision shall be construed to prohibit the release of procurement records as required by § 56-573.1 or 56-575.16. Procurement records shall not be interpreted to include proprietary, commercial or financial information, balance sheets, financial statements, or trade secrets that may be provided by the private entity as evidence of its qualifications.

12. Confidential proprietary information or trade secrets, not publicly available, provided by a private person or entity to the Virginia Resources Authority or to a fund administered in connection with financial assistance rendered or to be rendered by the Virginia Resources Authority where, if such information were made public, the financial interest of the private person or entity would be adversely affected, and, after June 30, 1997, where such information was provided pursuant to a promise of confidentiality.

13. Confidential proprietary records that are provided by a franchisee under § 15.2-2108 to its franchising authority pursuant to a promise of confidentiality from the franchising authority that relates to the franchisee's potential provision of new services, adoption of new technologies or implementation of improvements, where such new services, technologies or improvements have not been implemented by the franchisee on a nonexperimental scale in the franchise area, and where, if such records were made public, the competitive advantage or financial interests of the franchisee would be adversely affected. In order for confidential proprietary information to be excluded from the provisions of this chapter, the franchisee shall (i) invoke such exclusion upon submission of the data or other materials for which protection from disclosure is sought, (ii) identify the data or other materials for which protection is sought, and (iii) state the reason why protection is necessary.

14. Documents and other information of a proprietary nature furnished by a supplier of charitable gaming supplies to the Department of Charitable Gaming pursuant to subsection E of § 18.2-340.34.

15. Records and reports related to Virginia apple producer sales provided to the Virginia State Apple Board pursuant to §§ 3.1-622 and 3.1-624.

16. Trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.) of Title 59.1, submitted by CMRS providers as defined in § 56-484.12 to the Wireless Carrier E-911 Cost Recovery Subcommittee created pursuant to § 56-484.15, relating to the provision of wireless E-911 service.

17. Records submitted as a grant application, or accompanying a grant application, to the

Commonwealth Health Research Board pursuant to Chapter 22 (§ 23-277 et seq.) of Title 23 to the extent such records contain proprietary business or research-related information produced or collected by the applicant in the conduct of or as a result of study or research on medical, rehabilitative, scientific, technical or scholarly issues, when such information has not been publicly released, published, copyrighted or patented, if the disclosure of such information would be harmful to the competitive position of the applicant.

18. Confidential proprietary records and trade secrets developed and held by a local public body (i) providing telecommunication services pursuant to § 56-265.4:4 and (ii) providing cable television services pursuant to Article 1.1 (§ 15.2-2108.2 et seq.) of Chapter 2 of Title 15.2, to the extent that disclosure of such records would be harmful to the competitive position of the locality. In order for confidential proprietary information or trade secrets to be excluded from the provisions of this chapter, the locality in writing shall (i) invoke the protections of this subdivision, (ii) identify with specificity the records or portions thereof for which protection is sought, and (iii) state the reasons why protection is necessary.

19. Confidential proprietary records and trade secrets developed by or for a local authority created in accordance with the Virginia Wireless Service Authorities Act (§ 15.2-5431.1 et seq.) to provide qualifying communications services as authorized by Article 5.1 (§ 56-484.7:1 et seq.) of Chapter 15 of Title 56, where disclosure of such information would be harmful to the competitive position of the authority, except that records required to be maintained in accordance with § 15.2-2160 shall be released.

20. *Trade secrets as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.) or financial records of a business, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise, provided to the Department of Minority Business Enterprise as part of an application for (i) certification as a small, women- or minority-owned business in accordance with Chapter 14 (2.2-1400 et seq.) of this title or (ii) a claim made by a disadvantaged business or an economically disadvantaged individual against the Capital Access Fund for Disadvantaged Businesses created pursuant to § 2.2-2311. In order for such trade secrets or financial records to be excluded from the provisions of this chapter, the business shall (a) invoke such exclusion upon submission of the data or other materials for which protection from disclosure is sought, (b) identify the data or other materials for which protection is sought, and (c) state the reasons why protection is necessary.*

§ 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 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- and minority-owned business procurement to the Department of Minority Business Enterprise in a form specified by the Department of Minority Business Enterprise.

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- 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. 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.

E. As used in this section:

"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 Marianas, 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. "Eskimo or Aleut" means a person having origins in any of the peoples of Northern Canada, Greenland, Alaska, or Eastern Siberia and who is regarded as such in the community of which this person claims to be a part.

4. "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.

5. "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 concern that is at least 51% owned by one or more minority individuals or in the case of a corporation, partnership, or limited liability company or other entity, at least 51% of the equity ownership interest in the corporation, partnership, or limited liability company or other entity is owned by one or more minority individuals and both the management and daily business operations are controlled by one or more minority individuals.

"Small business" means an independently owned and operated business which, together with affiliates, has 250 or fewer employees, or average annual gross receipts of \$10 million or less averaged over the previous three years.

"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 concern that is at least 51% 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% 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 who are U.S. citizens or legal resident aliens.

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

A. Any locality may enact an ordinance providing that 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- and minority-owned businesses, the chief executive of the local governing entity shall be authorized and encouraged to require implementation of appropriate enhancement and remedial measures consistent with prevailing law.

B. A small, women- or minority-owned business that is certified by the Department of Minority Business Enterprises pursuant to § 2.2-1403 shall not be required by any locality to obtain any additional certification to participate in any program designed to enhance the participation of such businesses as vendors or to remedy any documented disparity.

§ 18.2-213.1. Obtaining certification as small, women- or minority-owned business, or disadvantaged business enterprise by deception; penalty.

A. Except as otherwise provided by § 18.2-498.3, a person shall be guilty of a Class 1 misdemeanor if, in the course of business, he:

1. Fraudulently obtains or retains certification as a ~~minority~~ small, women- or minority-owned business or disadvantaged business enterprise;

2. Willfully makes a false statement knowing it to be untrue, whether by affidavit, report or other representation, to an official or employee of a public body for the purpose of influencing the certification or denial of certification of any business entity as a small, women- or minority-owned business, or disadvantaged business enterprise;

3. Willfully obstructs or impedes any agency official or employee who is investigating the qualifications of a business entity which has requested certification as a small, women- or minority-owned business, or disadvantaged business enterprise; or

4. Fraudulently obtains public moneys reserved for or allocated or available to small, women- or minority-owned businesses or disadvantaged business enterprises.

B. For the purposes of this section, "disadvantaged business enterprise," "minority-owned business enterprise," and "small business" and "women-owned business" shall have the same meaning as those terms are defined in § 2.2-1400 and "disadvantaged business enterprise" means a small business that is both owned and controlled by minorities or by women. This means that minorities or women must own fifty-one percent of the business, and that they must control the management and daily operations of the

368 business. Minorities include Blacks, Hispanics, Asian Americans, American Indians and Alaskan Natives
369 and members of other groups or other individuals who the Small Business Administration (SBA) has
370 determined are economically and socially disadvantaged under Section 8 (a) of the Small Business Act
371 2.2-1401.