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## SENATE BILL NO. 318

Senate Amendments in [ ] — January 18, 2018

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.

Patron Prior to Engrossment—Senator Ruff

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, 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 (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.

"Dominant business activity" means the business activity as selected by the applicant and confirmed by the Department.

"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 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:

1. Prior to July 1, 2019, a business that is at least 51 percent independently owned and controlled by

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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 at least 51 percent independently owned and*  
65 *controlled by one or more individuals who are U.S. citizens or legal resident aliens and, together with*  
66 *affiliates, meets the small business size standards established by the regulations of the U.S. Small*  
67 *Business Administration on the basis of the dominant business activity of the business. One or more of*  
68 *the individual owners shall control both the management and daily business operations of the small*  
69 *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. *Implement certification programs for small, women-owned, and minority-owned businesses [ ,*  
88 *service disabled veteran-owned businesses, ] and employment services organizations in accordance with*  
89 *regulations established by the Director pursuant to § 2.2-1606. The Department shall contract with one*  
90 *or more independent certifying entities to assist in the certification of small, women-owned, and*  
91 *minority-owned businesses and employment services organizations. Any contract entered into pursuant to*  
92 *this subdivision shall provide that the Director may terminate the contract on the basis of performance*  
93 *or a written determination by the Director that continuing the contract is not practicable or is*  
94 *imprudent. In the event that a contract is terminated, the Director shall within 60 days of such*  
95 *termination contract with one or more independent certifying entities. In addition, the Department shall*  
96 *periodically review forms and processes related to certification to reduce the administrative and*  
97 *paperwork burden on businesses seeking certification and recertification;*

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

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

105 5. 6. Advise the Small Business Financing Authority on the management and administration of the  
106 Small, Women-owned, and Minority-owned Business Loan Fund created pursuant to § 2.2-2311.1;

107 6. 7. Implement any remediation or enhancement measure for small, women-owned, or  
108 minority-owned businesses as may be authorized by the Governor pursuant to subsection C of  
109 § 2.2-4310 and develop regulations, consistent with prevailing law, for program implementation. Such  
110 regulations shall be developed in consultation with the state agencies with procurement responsibility  
111 and promulgated by those agencies in accordance with applicable law; and

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

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

120 1. Encourage the training or retraining of individuals for specific employment opportunities at new or  
121 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 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, and private sector certification programs that meet the minimum requirements; and (iii) mandate certification without any additional paperwork of any small, women-owned, or minority-owned business that has obtained (a) certification under any federal certification program or (b) certification under any other 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. The regulations shall also require as a prerequisite for approval that any out-of-state business applying for certification in Virginia as a small, women-owned, or minority-owned business have the equivalent certification in the business's state of origin. An out-of-state business located in a state that does not have a small, women-owned, or minority-owned business certification program shall be exempt from the requirements of this provision.

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 and recertification.**

183 A. Beginning July 1, 2019, the regulations adopted by the Director to implement the certification  
184 program for small businesses pursuant to § 2.2-1606 shall establish a three-year certification period for  
185 small businesses.

186 B. Any business holding a valid certification as a small business prior to July 1, 2019, shall have the  
187 expiration date of such certification extended for a three-year period. At the end of that three-year  
188 period, the business shall be required to meet the requirements for certification in effect at that time.

189 C. Notwithstanding any provision of federal law restricting the length of time a business may  
190 participate in the federal small business program, there shall be no limitation on the number of times  
191 that a business may renew its certification as a small business provided that the business meets all other  
192 criteria at the time of each renewal.

193 **§ 2.2-4310. Discrimination prohibited; participation of small, women-owned, minority-owned,**  
194 **and service disabled veteran-owned business and employment services organization.**

195 A. In the solicitation or awarding of contracts, no public body shall discriminate against a bidder or  
196 offeror because of race, religion, color, sex, national origin, age, disability, status as a service disabled  
197 veteran, or any other basis prohibited by state law relating to discrimination in employment. Whenever  
198 solicitations are made, each public body shall include businesses selected from a list made available by  
199 the Department of Small Business and Supplier Diversity, which list shall include all companies and  
200 organizations certified by the Department.

201 B. All public bodies shall establish programs consistent with this chapter to facilitate the participation  
202 of small businesses, businesses owned by women, minorities, and service disabled veterans, and  
203 employment services organizations in procurement transactions. The programs established shall be in  
204 writing and shall comply with the provisions of any enhancement or remedial measures authorized by  
205 the Governor pursuant to subsection C or, where applicable, by the chief executive of a local governing  
206 body pursuant to § 15.2-965.1, and shall include specific plans to achieve any goals established therein.  
207 State agencies shall submit annual progress reports on (i) small, women-owned, and minority-owned  
208 business procurement, (ii) service disabled veteran-owned business procurement, and (iii) employment  
209 services organization procurement to the Department of Small Business and Supplier Diversity in a form  
210 specified by the Department of Small Business and Supplier Diversity. Contracts and subcontracts  
211 awarded to employment services organizations shall be credited toward the small business,  
212 women-owned, and minority-owned business contracting and subcontracting goals of state agencies and  
213 contractors. The Department of Small Business and Supplier Diversity shall make information on service  
214 disabled veteran-owned procurement available to the Department of Veterans Services upon request.

215 C. Whenever there exists (i) a rational basis for small business or employment services organization  
216 enhancement or (ii) a persuasive analysis that documents a statistically significant disparity between the  
217 availability and utilization of women-owned and minority-owned businesses, the Governor is authorized  
218 and encouraged to require state agencies to implement appropriate enhancement or remedial measures  
219 consistent with prevailing law. Any enhancement or remedial measure authorized by the Governor  
220 pursuant to this subsection for state public bodies may allow for small businesses certified by the  
221 Department of Small Business and Supplier Diversity or a subcategory of small businesses established as  
222 a part of the enhancement program to have a price preference over noncertified businesses competing for  
223 the same contract award on designated procurements, provided that the bid of the certified small  
224 business or the business in such subcategory of small businesses established as a part of an enhancement  
225 program does not exceed the low bid by more than five percent.

226 D. In awarding a contract for services to a small, women-owned, or minority-owned business that is  
227 certified in accordance with § 2.2-1606, or to a business identified by a public body as a service  
228 disabled veteran-owned business where the award is being made pursuant to an enhancement or remedial  
229 program as provided in subsection C, the public body shall include in every such contract of more than  
230 \$10,000 the following:

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

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

238 F. As used in this section:

239 "Dominant business activity" means the business activity as selected by the applicant and confirmed  
240 by the Department of Small Business and Supplier Diversity.

241 "Employment services organization" means an organization that provides community-based  
242 employment services to individuals with disabilities that is an approved Commission on Accreditation of  
243 Rehabilitation Facilities (CARF) accredited vendor of the Department for Aging and Rehabilitative  
244 Services.

"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, 2019*, 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 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, 2019*, 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, 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, 2019, 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, 2022, submit a report covering the period July 1, 2019, to July 1, 2022, and (ii) on or before December 1, 2025, submit a report covering the period July 1, 2022, to July 1, 2025. 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**

306 and provide upon request all available data necessary for the review required to assist the  
307 Director of the Department of Small Business and Supplier Diversity to carry out the process  
308 delineated in § 2.2-1606.1 of the Code of Virginia, as created by this act. Such data shall be  
309 exempt from disclosure pursuant to subdivision 20 of § 2.2-3705.6 of the Code of Virginia and  
310 shall be used by the Director of the Department of Small Business and Supplier Diversity for the  
311 limited purpose of facilitating the review required to carry out the process delineated in  
312 § 2.2-1606.1 of the Code of Virginia, as created by this act.

313 3. That on or before December 31, 2018, the Department of Small Business and Supplier Diversity  
314 shall enter into a memorandum of understanding with appropriate agencies for the purpose of  
315 establishing provisions for the sharing of information, consistent with the requirements of state  
316 and federal law, to assist the Department of Small Business and Supplier Diversity in its role to  
317 confirm the dominate business activity of applicants for certification as small businesses. The  
318 memorandum of understanding shall provide that, to the maximum extent practicable, verification  
319 of whether an applicant meets the applicable size standards to qualify as a small business shall be  
320 performed by the relevant agency in response to a written request, provided via regular mail or  
321 electronic mail, from the Department of Small Business and Supplier Diversity.

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