



*Commonwealth of Virginia
Office of the Governor*

Executive Order

NUMBER THIRTY-FIVE (2019)

ADVANCING EQUITY FOR SMALL-, WOMEN-, MINORITY-, AND SERVICE DISABLED VETERAN-OWNED BUSINESSES IN STATE CONTRACTING

Importance of the Issue

State contracting provides the catalyst for economic opportunity and expands access for many businesses. As part of this process, it is imperative for Virginia to maximize the participation of small businesses, including those owned by women, minorities, and service disabled veterans, in state contractual work. For Virginia to remain competitive and continue to advance its small business goals, significant work must be done for a more transparent, equitable, and inclusive process.

Furthermore, Virginia must work to maximize participation of a diverse group of vendors in state contractual work. Virginia has a long history of racial inequality and disenfranchisement of minority communities. We have made some progress in the last six decades since the civil rights movement began, but not enough. Additionally, in June we celebrate the centennial anniversary of Congress passing the women's right to vote. One hundred years later, however, women are more likely to live in poverty, economic gender inequality continues, and women are underrepresented in elected office, business, and the workforce.

The Commonwealth conducted procurement disparity studies in 2002 and 2009. The 2002 study resulted in a 2004 report, which found that from 1998 to 2002, only 1.27 percent of total state contracts were awarded to women-owned and minority-owned businesses. The 2009 study which was published in a 2011 report found that for 2007, 2.82 percent of total state contracts were awarded to women-owned and minority-owned businesses. While this showed movement, the update found continued disparity between the availability and utilization of women-owned and minority-owned businesses in all business categories of prime contractors including (i) construction, (ii) architecture and engineering, (iii) professional services, (iv) nonprofessional services, and (v) goods and supplies. As part of the effort under this Executive Order, a new disparity study must be conducted.

Directive

To provide for a more equitable and inclusive process, I am directing the following executive branch agencies and institutions of higher education that have statutory authority over procurement, in conjunction with the Department of Small Business and Supplier Diversity (DSBSD), as provided in § 2.2-1605(A)(6) of the *Code of Virginia*, to implement the requirements herein within their respective areas of procurement authority: Department of General Services (DGS), Virginia Information Technologies Agency (VITA), Virginia Department of Transportation (VDOT), those institutions of higher education that have autonomy in procurement granted under the Restructured Higher Education Financial and Administrative Operations Act (Code of Virginia § 23.1-1000, *et seq.*), and all other executive branch agencies that have statutory authority for procurement.

For purposes of this Executive Order: 1) “Executive Branch Agency” shall mean all entities in the executive branch, including agencies, authorities, commissions, departments, and all institutions of higher education; 2) “small businesses” shall include, but not be limited to, small, any subcategory of small, small women-owned, small minority-owned, or small service disabled veteran-owned businesses (SWaM).

Initiatives

With a continuing rational basis for small business enhancement, and pursuant to the authority vested in me as Governor under Article V of the Constitution of Virginia, § 2.2-4310(C) of the *Code of Virginia*, and applicable Memoranda of Understanding and Management Agreements entered into pursuant to Code of Virginia § 23.1-1000, *et seq.*, I hereby direct my Cabinet Secretaries and all Executive Branch Agencies as follows:

1. That the Commonwealth exceed a target goal of 42 percent of discretionary spending for Executive Branch Agencies with small businesses certified by DSBSD, which would be the highest percentage of expenditures since FY 2004. This percentage applies to discretionary spending in categories from which the Commonwealth derives procurement orders, prime contracts, and subcontracts. DSBSD, in consultation with Executive Branch Agencies with procurement responsibilities, shall advance this procurement goal. Further, for all new capital outlay construction solicitations issued, Executive Branch Agencies shall include a requirement for a target goal of 50 percent subcontracting to small businesses.

Each Executive Branch Agency shall submit annual agency SWaM plans to DSBSD on September 1, to include promotion and utilization of: small, any subcategory of small, small women-owned, small minority-owned, small service disabled veteran-owned, and employment service organizations. Executive Branch Agencies shall review and update their goals, policies, and procedures to conform with this Executive Order and the implementing regulations adopted pursuant to § 2.2-1605(A)(6) of the *Code of Virginia* and thereby ensure that a greater percentage of purchases is made from certified small businesses in goods, services, and construction categories from which the Commonwealth makes its purchases.

2. Continue the subcategory of small businesses eligible for micro business designation, which includes those certified small businesses that have no more than 25 employees and no more than \$3 million in average annual revenue over the three-year period prior to certification.
3. Conduct an updated disparity study on women- and minority-owned business participation in the Commonwealth's procurement transactions. The 2004 and 2011 disparity study reports provided an analysis that documented a statistically significant disparity between the availability and utilization of women-owned and minority-owned businesses, indicating a need for a narrowly-tailored race and gender conscious program. However, these studies need to be updated to ensure that any policy derived there from will withstand legal scrutiny. As required in § 2.2-4310 of the *Code of Virginia*, I hereby direct the DSBSD to contract with a qualified, independent third party to conduct a disparity assessment on the status of women-owned and minority-owned business participation in the Commonwealth's procurement transactions. This study shall: (i) determine if disparity exists and (ii) if so, determine why the disparity exists and what solutions or remedies could be implemented, specifically evaluating narrowly-tailored race and gender conscious programs. I further direct all Executive Branch Agencies to support and provide requested data to DSBSD to facilitate this comprehensive study.
4. Executive Branch Agencies shall formulate policies and procedures for a set-aside program, which shall, at a minimum, require that purchases up to \$100,000 for goods, nonprofessional services, and construction, and up to \$80,000 for professional services, be set aside for award to DSBSD-certified small businesses when the price quoted is fair and reasonable and does not exceed 5 percent of the lowest responsive and responsible noncertified bidder. Purchases up to \$10,000 shall be set aside for award to micro businesses when the price quoted is fair and reasonable and does not exceed 5 percent of the lowest responsive and responsible noncertified bidder.
5. Executive branch agencies shall formulate policies and procedures to require a small business subcontracting plan in all procurements over \$100,000. Each bidder/offeree shall be required to submit their bid/proposal and their small business sub-contracting plan using DGS's central electronic procurement system, except for VDOT contracts for highway construction and design projects. Such plans shall identify all planned utilization of (i) small businesses, (ii) subcategory of small businesses, (iii) small women-owned businesses, (iv) small minority-owned businesses, and (v) small service disabled veteran-owned businesses.
6. Each prime contractor shall be required to report compliance with its small sub-contracting plans using DGS's central electronic procurement system, except for VDOT contracts for highway construction and design projects. Before final payment is made, the purchasing agency shall confirm that the prime contractor certified compliance with the contract's small business subcontracting plan. If there are any variances between the prime contractor's required small business subcontracting plan and the actual participation, the prime contractor shall provide a written explanation to the purchasing

agency. The written explanation shall be kept with the contract file and made available upon request.

Contracts and renewals shall include a provision allowing final payment to be withheld until the prime contractor complies with its small business subcontracting plan. Prior to entering into a new contract or renewing a contract with a prime contractor, a purchasing agency shall review a contractor's record of compliance with small business subcontracting plan requirements. A prime contractor's failure to meet satisfactorily designated small business subcontracting procurement plan requirements shall be considered in the prospective award or renewal of any future contracts with the prime contractor.

7. To ensure that all SWaM businesses have one central site to provide transparency to all Virginia opportunities and contracts, Executive Branch Agencies shall utilize DGS's central electronic procurement system to post current and future procurement and subcontracting opportunities. Executive Branch Agencies shall use DGS's central electronic procurement system beginning at the point of requisitioning for all procurement actions, including but not limited to technology, transportation, professional services, and construction. This data will also be instrumental in the facilitation of the disparity study.
8. Notwithstanding paragraphs 5, 6, and 7, institutions of higher education with statutory authority for procurement shall provide such data or plans as required using DGS's central electronic procurement system or by integration or interface with the DGS system.
9. Institutions of higher education shall work with the Secretary of Administration, Secretary of Commerce and Trade, and the Secretary of Education to define best practices and assist the Commonwealth in its work to advance equity for small-, women-, minority-, and service disabled veteran-owned businesses in state contracting.

Collaborative Agency Efforts

The above initiatives will spur creativity, promote economic development, and encourage procurement participation by small businesses, including those owned by women, minorities, and service disabled veterans. In support of the initiatives set out above, I further direct the following actions to be taken by Cabinet Secretaries and Executive Branch Agencies:

1. DSBSD, in conjunction with DGS, VITA, VDOT, and institutions of higher education with procurement autonomy, shall implement initiatives to enhance the development of small businesses in Virginia. Such initiatives shall include, but not be limited to:
 - Information on access to capital, including contract financing, bonding support, and other opportunities for economic development as well as management and technical assistance programs;

- Partnerships and outreach with local business groups, chambers of commerce, and other organizations to develop a diverse vendor base; and
 - Statewide mentor protégé programs.
2. DSBSD, in collaboration with DGS and institutions of higher education with procurement autonomy, shall conduct a vendor outreach training program throughout the Commonwealth. Such training shall include instructions on how to obtain certification from DSBSD as well as registration with and research through the DGS's central electronic procurement system. The training should encourage SWaM participation and help businesses overcome identified barriers.
 3. Executive Branch Agencies shall review the efficacy of implementing other small business enhancement tools and processes, such as:
 - Unbundling contracts;
 - Relaxing the requirement for mandatory attendance at pre-bid meetings;
 - Expanding time to respond to small purchase solicitations; and
 - Streamlining the paperwork required of small businesses.
 4. All Executive Branch Agencies shall include updated SWaM regulations and/or guidelines to reflect the requirements of this Executive Order in purchasing manuals, regulations, and guidelines.
 5. Executive Branch Agencies shall actively recruit small businesses to seek certification from DSBSD, to register on DGS's central procurement system, and to compete for state procurement opportunities.
 6. VDOT, for road and bridge construction, and DGS, for construction, shall develop guidelines to be used by Executive Branch Agencies in making construction mobilization payments to businesses when reasonable and necessary to facilitate contract initiation.
 7. The Virginia Economic Development Partnership (VEDP) shall send DSBSD its regular report to the Secretary of Commerce and Trade on new economic development announcements of business activity in the Commonwealth, including those announcements in which VEDP provided an administered economic incentive. Such report will enable DSBSD to ascertain in a timely manner what opportunities the activity may bring for Virginia's SWaM businesses.
 8. Each Executive Branch Agencies shall designate a SWaM equity champion to ensure equity in the solicitation of procurement proposals/bids and awarding of contracts.
 9. DSBSD, in collaboration from DGS, VITA, and institutions of higher education with procurement autonomy, shall develop equity in procurement trainings for agency heads,

presidents of institutions of higher education, and senior managers with procurement oversight. Such training shall be completed annually.

10. DSBSD and DGS may coordinate with the Virginia Association of Counties, the Virginia Municipal League, and the Virginia Association of Governmental Purchasing to identify opportunities for state and local government entities to collaborate in order to maximize procurement equity for small businesses.

Reporting Requirements

1. Cabinet Secretaries shall monitor their agencies' and higher education institutions' spending with all certified small businesses and meet with the Governor, or his designee, quarterly to discuss the agencies' performance. DSBSD shall develop a standard reporting format for such purposes. The report shall include information on purchases made from all certified small businesses. In addition, the Secretary of Commerce and Trade will assess overall state performance and report quarterly to the Governor.

Each Cabinet Secretary shall evaluate the performance of their agencies and institutions of higher education in implementing these directives. DSBSD, in cooperation with each Cabinet Secretary, shall provide quarterly reports to the Secretary of Commerce and Trade regarding the Commonwealth's progress in enhancing opportunities for SWaM businesses. The reports shall delineate the Commonwealth's spending in detail by SWaM category and agency.

2. Executive Branch Agencies with procurement responsibilities shall review practices, procedures, and proposal evaluation criteria to identify and remove barriers or limitations to SWaM participation. A section on "barriers or limitations" shall be included in annual Executive Branch Agency SWaM plans. SWaM plans shall be developed and submitted to DSBSD by September 1. DSBSD shall submit the annual SWaM Plan Compliance Report to the Secretary of Commerce and Trade on October 1 of each fiscal year.

Effective Date of this Order

This Executive Order rescinds and replaces Executive Order 20 (2014), issued by Governor Terence R. McAuliffe and shall be effective upon its signing and shall remain in full force and effect unless amended or rescinded by further executive order.

Given under my hand and under the Seal of the Commonwealth of Virginia, this 3rd day of July 2019.



A handwritten signature in black ink, reading "Ralph S. Northam", written over a horizontal line.

Ralph S. Northam, Governor

Attest:

A handwritten signature in black ink, reading "Kelly Thomasson", written over a horizontal line.

Kelly Thomasson, Secretary of the Commonwealth