



# COMMONWEALTH of VIRGINIA

Office of the Attorney General

Kenneth T. Cuccinelli, II  
Attorney General

900 East Main Street  
Richmond, Virginia 23219  
804-786-2071  
FAX 804-786-1991  
Virginia Relay Services  
800-828-1120  
7-1-1

June 29, 2012

Ms. Ida O. McPherson  
Director, Department of Minority Business Enterprise  
1111 East Main Street, Suite 300  
Richmond, Virginia 23219

Dear Ms. McPherson:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.<sup>1</sup>

## Issue Presented

You ask whether the Department of Minority Business Enterprise (“the Department”) may certify as a “small business” a Florida-based company meeting the Virginia definition of “small business” when the State of Florida has no separate small business certification program and denies Virginia firms the benefits of its “minority business enterprise” certification program.

## Response

It is my opinion that the Department may not certify a Florida-based firm as a “small business” in Virginia, because Florida makes a “minority business enterprise” certification available to certain small businesses based in Florida but does not permit similar businesses based in Virginia to apply for that certification or its associated benefits.

## Applicable Law and Discussion

Pursuant to § 2.2-1403(8) of the *Code of Virginia*, the Director of Virginia’s Department of Minority Business Enterprise is authorized to “[a]dopt regulations to implement certification programs for small, women- and minority-owned businesses . . . .” Generally, such certification programs are not limited to Virginia-based enterprises;<sup>2</sup> however, § 2.2-1403(8) further provides that

Such certification programs shall deny certification to vendors from states that deny like certifications to Virginia-based small, women-owned or minority-owned businesses or

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<sup>1</sup> This opinion revises and supersedes my letter to you dated May 11, 2012, which is hereby withdrawn.

<sup>2</sup> See 7 VA. ADMIN. CODE § 10-21-130 (2012) (providing that the Department may certify a non-Virginia based business if it meets the applicable eligibility standards for certification as a small, women-owned or minority-owned business). See also VA. CODE ANN. § 2.2-1401 (2011) (defining “minority individual,” “minority-owned business,” and “small business” to require the individuals or owners to be citizens of the United States or legal resident aliens).

that provide a preference for small, women-owned, or minority-owned businesses based in that state that is not available to Virginia-based businesses.

The determination of whether Florida businesses are eligible for certification in Virginia, therefore, depends on Florida's treatment of Virginia-based firms when they apply for like certifications in Florida.

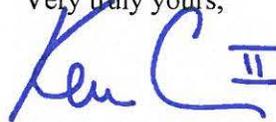
While Virginia certifies small, women-owned, and minority-owned businesses separately, Florida combines all three criteria in the certification it provides under the label "minority business enterprise."<sup>3</sup> Therefore, the eligibility of Virginia firms to seek this certification in Florida is a precondition of Florida-based firms' eligibility to seek all three certifications in Virginia. In particular, small businesses seeking certification with Florida's Division of Purchasing do so within the framework of this certification, but it is available only to small businesses that are domiciled in Florida.<sup>4</sup> Because Florida's certification and its associated benefits<sup>5</sup> are not available to small businesses based in Virginia, the Department, pursuant to § 2.2-1403(8), is precluded from certifying a Florida-based business as a small business in Virginia.<sup>6</sup>

### Conclusion

Accordingly, it is my opinion that the Department may not certify a Florida-based firm as a "small business" in Virginia, because Florida makes a "minority business enterprise" certification available to certain small businesses based in Florida but does not permit similar businesses based in Virginia to apply for that certification or its associated benefits.

With kindest regards, I am

Very truly yours,



Kenneth T. Cuccinelli, II  
Attorney General

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<sup>3</sup> See FLA. STAT. § 288.703 (2012) (defining "minority business enterprise" as a "small business concern . . . owned by minority persons" and defining "minority person" as a Florida resident who has certain racial or ethnic origins or who is an "American woman"). See also FLA. STAT. § 287.0943(1) (2012) (Office of Supplier Diversity to confirm certification criteria); and FLA. ADMIN. CODE ANN. r.60A-9.001 (2012) and r.60A-9.005 (2012) (setting forth certification criteria consistent with the above definitions).

<sup>4</sup> See FLA. ADMIN. CODE ANN. r.60A-9.005(5) (2012) ("The applicant must demonstrate that it is domiciled in Florida"). See also FLA. STAT. § 288.703 ("Minority business enterprise" must be "domiciled in Florida," and "Minority person" must be a "lawful permanent resident of Florida").

<sup>5</sup> See, e.g., "Benefits of a State of Florida Certified Business Enterprise," available at [http://www.dms.myflorida.com/other\\_programs/office\\_of\\_supplier\\_diversity\\_osd/certification/benefits\\_of\\_a\\_state\\_of\\_florida\\_certified\\_business\\_enterprise](http://www.dms.myflorida.com/other_programs/office_of_supplier_diversity_osd/certification/benefits_of_a_state_of_florida_certified_business_enterprise) (indicating such businesses are "the first tier of businesses referred to state agencies seeking to include supplier diversity as a part of their purchase order and contract opportunities" and that such certification is "Florida's premier stamp of approval for minority, women, and service-disabled veteran business enterprises. It is widely accepted across the State of Florida in the private sector as well as cities, counties, school districts, hospitals, water management districts and other quasi governmental entities.").

<sup>6</sup> The intent of § 2.2-1403(8) is generally to make Virginia's certification programs for small businesses, women-owned businesses, and minority-owned businesses available to businesses owned by United States citizens or legal resident aliens in other states, but to do so in a manner that maintains an incentive for other states to provide reciprocity to Virginia firms.