

HOUSE No. 4511

The Commonwealth of Massachusetts



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February 27, 2020

To the Honorable Senate and House of Representatives,

I am filing for your consideration a bill entitled “An Act to Expand Opportunities for Minority and Women Business Enterprises in Public Construction Projects.”

This legislation is critical to the continuing effectiveness of the Commonwealth’s Affirmative Marketing Program, a program that ensures minority-owned businesses (“MBE”) and woman-owned businesses (“WBE”) providing construction and design related services have full and fair opportunities to work on public building projects.

Forty years ago, legislation was enacted to ensure that minority and woman-owned businesses were provided with opportunities that were not otherwise available to them in the private construction market. That law secured opportunities for MBEs and WBEs to work on the Commonwealth’s public construction projects. As a result, the Affirmative Marketing Program has helped these businesses to grow and become key contributors to the construction and renovation of our public buildings.

To ensure the Affirmative Marketing Program can continue to grow and improve for years to come, we must make some necessary changes to the law. My proposed legislation does so in several ways.

First, this legislation affords new opportunities for MBE and WBE firms to provide services directly to general contractors on smaller projects. Currently, bids for most

subcontracted work over \$25,000 are subject to what is called a filed sub-bid requirement, a process that requires interested subcontractors to comply with certification, bonding and other requirements and to submit bids to the awarding authority. These requirements can discourage smaller MBE and WBE firms from participating on public building projects because of the administrative burden and cost. This legislation proposes to increase the thresholds governing when filed sub-bids would be required, so as to only require them when the subcontracted work costs more than \$50,000 and the overall project cost exceeds \$1 million. These higher thresholds will increase opportunities for not only minority and women-owned firms but also for veteran-owned and other small and local businesses.

Other key components of the legislation expand opportunities for MBEs and WBEs on Division of Capital Asset Management and Maintenance (“DCAMM”) and other public projects in areas where they have not been readily available. Currently, over 50% of public building work is subcontracted out by means of filed sub-bids, yet these sub-bids are not currently subject to MBE and WBE participation goals. This legislation will allow DCAMM to set MBE and WBE participation goals for this subcontracted work on projects over \$5 million. This change will open countless opportunities for MBE/WBE firms to work as sub-subcontractors on these projects. Lastly, this bill will allow MBE and WBE participation goals to be set for work on projects controlled by state agencies other than DCAMM.

As a Commonwealth, we want to continue to provide opportunities for all businesses to work on our public building projects, particularly minority and women-owned businesses, so that all can be active participants in the growth and building of our Commonwealth.

Respectfully submitted,

Charles D. Baker,
Governor

The Commonwealth of Massachusetts

**In the One Hundred and Ninety-First General Court
(2019-2020)**

An Act to expand opportunities for minority and women business enterprises in public construction projects.

Whereas, The deferred operation of this act would tend to defeat its purpose, which is to make certain changes in law relative to the participation of minority and women businesses enterprises, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. Section 6 of chapter 7C of the General Laws, as appearing in the 2018
2 Official Edition, is hereby amended by striking out subsection (a) and inserting in place thereof
3 the following subsection:-

4 (a) The general court finds that: (1) the Massachusetts commission against discrimination
5 conducted hearings and investigations which documented a history of discrimination against
6 minorities and women in the commonwealth; (2) in 1994, the executive office of transportation
7 and construction produced a disparity study which documented a history of discrimination
8 against minority and women owned businesses, in which the commonwealth's agencies were
9 participants; (3) in 1996 the division of capital planning and operations produced a disparity
10 study which documented discrimination against minority and women owned businesses in
11 construction in Massachusetts; (4) in 2010 the division of capital asset management produced a

12 disparity study which documented discrimination against minority and women owned businesses
13 in construction and design in Massachusetts; (5) in 2017 the division of capital asset
14 management and maintenance produced a disparity study which documented discrimination
15 against minority and women owned businesses in construction and design in Massachusetts; (6)
16 this discrimination against minorities and women currently negatively affects the availability and
17 utilization of minority and women owned businesses in state contracting; (7) the commonwealth
18 has a compelling interest in promoting the use of minority owned businesses and women owned
19 businesses through the use of the available and qualified pool of minority and women owned
20 businesses; (8) it is the policy of the commonwealth to promote equal opportunity in the market
21 and, to that end, to encourage full participation of minority and women owned businesses in all
22 areas of state contracting, including contracts for construction, design, goods and services; and
23 (9) in order to advance that policy, the commonwealth shall include language in all state
24 construction contracts and state assisted construction contracts setting forth the participation
25 goals of minority and women workers to be employed on each such contract and the processes
26 and procedures to ensure compliance with those workforce participation goals, including
27 reporting and enforcement provisions.

28 SECTION 2. Subsection (b) of said section 6 of said chapter 7C, as so appearing, is
29 hereby amended by striking out, in line 27, the word “equality” and inserting in place thereof the
30 following words:- equal opportunity.

31 SECTION 3. Said subsection (b) of said section 6 of said chapter 7C, as so appearing, is
32 hereby further amended by striking out, in lines 31 through 33, inclusive, the definition of
33 “capital facility project” and inserting in place thereof the following definition:-

34 “Capital facility project”, shall have the same meaning as found in section 1 when the
35 project is (1) under the control of the division of capital asset management and maintenance, or
36 (2) has received a delegation of authority from the division of capital asset management and
37 maintenance which specifies that this section shall apply;.

38 SECTION 4. The definition of “supplier diversity office” in said subsection (b) of said
39 chapter 6 of said chapter 7C, as so appearing, is hereby amended by adding the following
40 words:- of chapter 7.

41 SECTION 5. Subsection (c) of said section 6 of said chapter 7C, as so appearing, is
42 hereby amended by striking out, each time it appears, in lines 88, 90, and 96 to 97, the word
43 “participation” and inserting in place thereof the words:- annual program participation.

44 SECTION 6. Said section 6 of said chapter 7C, as so appearing, is hereby further
45 amended by striking out subsection (d) and inserting in place thereof the following subsection:-

46 (d) Not later than January 15 of each year, the commissioner, in consultation with the
47 director of the supplier diversity office, shall establish annual program participation goals for
48 minority-owned businesses and women-owned businesses. The annual program participation
49 goals established under this section shall apply to capital facility projects and state assisted
50 building projects. The participation goals shall be expressed as overall annual program goals
51 which shall be applicable to the total dollar amount of contracts awarded for construction work
52 and design services on capital facility projects and state assisted building projects for the
53 calendar year. The commissioner shall publish in the central register, established under section
54 20A of chapter 9, the annual program participation goals for minority-owned businesses and for
55 women-owned businesses on capital facility projects and state assisted building projects. The

56 annual program participation goals for minority owned businesses and women owned businesses
57 shall remain in effect until revised goals are established and published under this subsection.

58 SECTION 7. Subsection (e) of said section 6 of said chapter 7C, as so appearing, is
59 hereby amended by striking out, in line 132, the words “may, for an individual capital facility
60 project, adjust” and inserting in place thereof the following words:- when appropriate, shall
61 establish for an individual capital facility project

62 SECTION 8. Subsection (f) of said section 6 of said chapter 7C, as so appearing, is
63 hereby amended by striking out, in lines 139 to 140, the words “at any time before the award of a
64 contract.”.

65 SECTION 9. Subsection (h) of said section 6 of said chapter 7C, as so appearing, is
66 hereby amended by striking out, in lines 152 to 153, the words “within the office of the
67 commissioner”.

68 SECTION 10. Said subsection (h) of said section 6 of said chapter 7C, as so appearing, is
69 hereby further amended by adding the following sentence:- Each other state agency, or at its
70 discretion the corresponding secretariat, shall be responsible for the overall management,
71 monitoring and enforcement of the affirmative marketing program, as the program relates to
72 capital facility projects under the control of the state agency or its corresponding secretariat.

73 SECTION 11. Said section 6 of said chapter 7C, as so appearing, is hereby further
74 amended by striking out subsection (k) and inserting in place thereof the following 2
75 subsections:-

76 (k) The provisions of this subsection shall apply only to filed sub-bids procured under
77 section 44F of chapter 149 and trade contractor bids procured under subsection (a) of section 8 of
78 chapter 149A. For purposes of this subsection “applicable projects” shall mean any project
79 procured by the division of capital asset management and maintenance under sections 44A
80 through 44J of chapter 149 or sections 1 through 12 of chapter 149A with an overall estimated
81 cost of \$5,000,000 or more and the provisions of this subsection shall apply only to filed sub-bid
82 or construction management at risk trade bids on such projects. On applicable projects, the
83 awarding authority may establish minority business enterprise and women business enterprise
84 participation goals for any of the filed sub-bid classes of work under section 44F of chapter 149
85 and for any of the trade contractor classes of work under subsection (a) of section 8 of chapter
86 149A which it deems reasonable after considering the size and scope of the work and sub-
87 subcontracting availability. The total minority business enterprise and women business
88 enterprise participation goal set by the division for a particular class of work shall not exceed 10
89 per cent of the value of the filed sub-bid or trade contractor work for that class of work.

90 Notwithstanding any general law or contractual provisions to the contrary, on division
91 projects filed sub-bidders and trade contractors in the classes of work listed in section 44F of
92 chapter 149 and referenced in section 8 of chapter 149A respectively shall be permitted to meet
93 the minority business enterprise and women business enterprise participation goals by (i)
94 subcontracting out any portion of the trade work which the sub-bidder or trade contractor would
95 otherwise perform with employees on its own payroll; (ii) by subcontracting out portions of the
96 trade work which is customarily performed by sub-trade subcontractors within the trade; or (iii)
97 by utilizing other subcontractors or material suppliers. The division shall establish a good faith

98 pre bid waiver process for filed sub-bid and trade contractors requesting a reduction or waiver of
99 a participation goal.

100 (l) The commissioner shall promulgate regulations necessary to implement this section.

101 SECTION 12. Paragraph (a) of subsection (1) of section 44F of chapter 149 of the
102 General Laws, as so appearing, is hereby amended by striking out, each time it appears, in lines 6
103 and 42, the figure “\$25,000” and inserting in place thereof the following words:- \$50,000 and
104 the cost of the project is estimated to exceed \$1,000,000.

105 SECTION 13. Said paragraph (a) of said subsection (1) of said section 44F of said
106 chapter 149, as so appearing, is hereby further amended by inserting after the third sentence the
107 following sentence:- Provided however, that a sub-bidder may subcontract out any portion of its
108 work in order to meet minority business enterprise and women business enterprise goals set on
109 division of capital asset management and maintenance projects as set forth in subsection (k) of
110 section 6 of chapter 7C.

111 SECTION 14. Subsection (2) of said section 44F of said chapter 149, as so appearing, is
112 hereby amended by inserting, in line 60, after the word “furnish” the following words:- or, to the
113 extent permitted by M.G.L. c. 149, § 44F, subcontract for,.

114 SECTION 15. Paragraph (a) of section 8 of said chapter 149A, as so appearing, is hereby
115 amended by inserting after the first sentence the following sentence:- Trade contractors may
116 subcontract out any portion of their work in order to meet minority business enterprise and
117 women business enterprise goals set on division of capital asset management and maintenance
118 projects as set forth in subsection (k) of section 6 of chapter 7C.

119 SECTION 16. Subsection (g) of said section 8 of said chapter 149A, as so appearing, is
120 hereby amended by striking out subparagraphs (6) and (7) and inserting in place thereof the
121 following 2 subparagraphs:-

122 (6) a trade contractor bid form that shall require, without limitation, a listing of price,
123 addenda, alternates and allowances, if any, for the trade work; certification that the trade
124 contractor will perform the complete trade work with employees on his own payroll, except for
125 work customarily performed by sub-trade subcontractors within the trade; and the names of all
126 sub-trade subcontractors to be used if awarded the trade contract and each sub-trade contract
127 sum; provided, however, that a trade contractor may subcontract out any portion of its work in
128 order to meet minority business enterprise and women business enterprise goals set on division
129 of capital asset management and maintenance projects as set forth in subsection (k) of section 6
130 of chapter 7C;

131 (7) an affidavit that all sub-trade subcontractors named on the bid form have been
132 prequalified by the trade contractor using criteria similar to the criteria for the prequalification of
133 trade contractors; provided, however, that this paragraph shall not apply to sub-trade
134 subcontractors whose work contributes to the minority business enterprise and women business
135 enterprise goals set on division of capital asset management and maintenance projects as set forth
136 in section subsection (k) of section 6 of chapter 7C.

137 SECTION 17. Subsection (k) of said section 8 of said chapter 149A, as so appearing, is
138 hereby amended by inserting, in line 247, after the word “furnish” the following words:- or, to
139 the extent permitted by M.G.L. c. 149A, § 8, subcontract for,.

140 SECTION 18. This act shall take effect upon its passage.