

Chapter 252

(House Bill 456)

AN ACT concerning

Procurement – Minority Business Participation

FOR the purpose of repealing the requirement that certain procurement procedures try to achieve the result that a certain percentage of a unit's total dollar value of procurement contracts be made to certified minority business enterprises; clarifying that it is a goal that a certain percentage of a unit's total dollar value of procurement contracts be made to certified minority business enterprises; requiring the Governor's Office of Minority Affairs, in consultation with the State Department of Transportation and the Office of the Attorney General, to establish certain guidelines for units to follow while determining whether to set certain subgoals for certain minority groups; requiring units to implement a program that enables the unit to evaluate each contract to determine the appropriate minority business enterprise participation goals for the contract based on certain factors; requiring certain units to make certain determinations on whether certain contractors have demonstrated taking certain steps to achieve certain goals, including complying with certain requirements; requiring certain waivers to be granted if certain contractors demonstrate certain good-faith efforts; prohibiting certain units from requiring certain contractors to renegotiate certain subcontracts under certain circumstances; authorizing certain units to waive certain requirements under certain circumstances; requiring certain units to issue and forward to the Office of Minority Affairs certain written waiver determinations; requiring certain units to submit certain annual reports to the Board of Public Works and the Governor's Office of Minority Affairs; requiring the Board of Public Works to adopt certain regulations; continuing until a certain date the provisions of the State Procurement Law relating to procurement from minority businesses; ~~requiring a certain study and a final report on the study by a certain date;~~ declaring the intent of the General Assembly; making the provisions of this Act severable; and generally relating to minority business participation in State procurement.

BY repealing and reenacting, with amendments,
 Article – State Finance and Procurement
 Section 14-302, 14-303, and 14-309
 Annotated Code of Maryland
 (2009 Replacement Volume and 2010 Supplement)

~~BY repealing and reenacting, with amendments,
 Chapter 116 of the Acts of the General Assembly of 1995, as amended by
 Chapters 495 and 496 of the Acts of the General Assembly of 2000;~~

~~Chapter 339 of the Acts of the General Assembly of 2001, and Chapter 359 of the Acts of the General Assembly of 2006~~

~~Section 2~~

Preamble

WHEREAS, The State of Maryland wishes to provide all of its citizens with equal access to business formation and business growth opportunities; and

WHEREAS, The elimination of discrimination against minority- and women-owned businesses is of great importance to the future welfare of the State; and

WHEREAS, The disparity study entitled “The State of Minority- and Women-Owned Business Enterprise: Evidence from Maryland” commissioned by the General Assembly and published on February 17, 2011 (the “Study”) provides a strong basis in evidence that demonstrates persistent discrimination against minority- and women-owned businesses, including:

(1) Substantial and statistically significant adverse disparities between the availability and utilization of minorities and women in every major contracting category examined by the Study;

(2) Substantial and statistically significant adverse disparities for all racial and ethnic groups and nonminority women combined in all major contracting categories;

(3) Substantial and statistically significant adverse disparities for all racial and ethnic groups and for nonminority women in most major industry categories;

(4) Substantial and statistically significant evidence of discrimination in the private sector in the same industry categories in which the State of Maryland does business for all minorities and nonminority women, which has depressed firm formation and firm growth among minority and nonminority women entrepreneurs; and

(5) Powerful and persuasive qualitative evidence of discrimination against minority and nonminority women business owners; and

WHEREAS, Despite the fact that since 2001, the State has aspired to achieve a minority business enterprise participation goal of 25% of its total contract dollars awarded, overall State utilization of minority business enterprises for the 5 years covered by the Study was less than 20%; and

WHEREAS, This Act ensures that race-neutral efforts will be used to the maximum extent feasible and that race-conscious measures will be used only where

necessary to eliminate discrimination that was not alleviated by race-neutral efforts; and

WHEREAS, Ending discrimination against minority- and women-owned businesses requires ending discrimination in prime contracting as well as subcontracting in Maryland contracting markets; and

WHEREAS, If the Minority Business Enterprise Program imposes a burden on nonminority businesses, the State is committed to limiting the burden as much as possible; and

WHEREAS, The establishment of control (zero goals) contracts has been viewed favorably as a method of determining whether minority business enterprise participation occurs in the absence of goals; and

WHEREAS, Improvements in Minority Business Enterprise Program development, implementation, evaluation, and compliance are essential tools to the State goal to eliminate business discrimination in the Maryland contracting markets; and

WHEREAS, The State is extending the existing Minority Business Enterprise Program for 1 year to allow time to evaluate and propose additional improvements to the Program; now, therefore,

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That the Laws of Maryland read as follows:

Article – State Finance and Procurement

14-302.

(a) (1) (I) Except for leases of real property [and except as provided in paragraphs (2) and (3) of this subsection], each unit shall structure procurement procedures, consistent with the purposes of this subtitle, to try to achieve [the following results]:

[(i) a minimum of 7% of the unit's total dollar value of procurement contracts is to be made directly or indirectly from certified minority business enterprises classified by the certification agency as African American-owned businesses;

(ii) a minimum of 10% of the unit's total dollar value of procurement contracts is to be made directly or indirectly from certified minority business enterprises classified by the certification agency as women-owned businesses; and

(iii)] an overall GOAL [minimum] of 25% of the unit's total dollar value of procurement contracts [is to be] BEING made directly or indirectly [from all] TO certified minority business enterprises.

(II) IN CONSULTATION WITH THE STATE DEPARTMENT OF TRANSPORTATION AND THE OFFICE OF THE ATTORNEY GENERAL, THE GOVERNOR'S OFFICE OF MINORITY AFFAIRS SHALL ESTABLISH GUIDELINES FOR EACH UNIT TO CONSIDER WHILE DETERMINING WHETHER TO SET SUBGOALS FOR THE MINORITY GROUPS LISTED IN § 14-301(I)(1)(I)1, 2, 3, 4, AND 6 OF THIS SUBTITLE.

(2) [(i) Except as provided in paragraph (3) of this subsection, in procurement for construction, each unit shall structure procurement procedures, consistent with the purposes of this subtitle, to try to achieve the following results:

1. a minimum of 7% of the unit's total dollar value of construction contracts is to be made directly or indirectly from certified minority business enterprises classified by the certification agency as African American-owned businesses;

2. a minimum of 10% of the unit's total dollar value of construction contracts is to be made directly or indirectly from certified minority business enterprises classified by the certification agency as women-owned businesses; and

3. an overall minimum of 25% of the unit's total dollar value of construction contracts is to be made directly or indirectly from all certified minority business enterprises.

(ii) The] EACH unit shall:

[1.] (I) consider the practical severability of [the construction projects] CONTRACTS; and

[2.] (II) implement a program that will enable the unit to evaluate each contract to determine the [appropriateness of the goal] APPROPRIATE MINORITY BUSINESS ENTERPRISE PARTICIPATION GOALS FOR THE CONTRACT BASED, IN PART, ON:

1. THE POTENTIAL SUBCONTRACT OPPORTUNITIES AVAILABLE IN THE PRIME PROCUREMENT CONTRACT;

2. THE AVAILABILITY OF CERTIFIED MINORITY BUSINESS ENTERPRISES TO RESPOND COMPETITIVELY TO THE POTENTIAL SUBCONTRACT OPPORTUNITIES; AND

3. THE GUIDELINES ESTABLISHED UNDER PARAGRAPH (1)(II) OF THIS SUBSECTION.

[(3) With respect to the Maryland Department of Transportation, the provisions of paragraph (2)(i) of this subsection shall apply only to construction contracts in excess of \$50,000.]

[(4) (3) (i) A woman who is also a member of an ethnic or racial minority group may be certified in that category in addition to the gender category.

(ii) For purposes of achieving the goals in this subsection, a certified minority business enterprise may participate in a procurement contract and be counted as a woman-owned business, or as a business owned by a member of an ethnic or racial group, but not both, if the business has been certified in both categories.

[(5) (4) Each unit shall meet the maximum feasible portion of the goals [stated in paragraphs (1), (2), and (3) of] ESTABLISHED IN ACCORDANCE WITH this subsection by using race-neutral measures to facilitate minority business enterprise participation in the procurement process.

[(6) (5) [To achieve the result specified in paragraph (1) or (2) of this subsection,] IF A UNIT ESTABLISHES MINORITY BUSINESS ENTERPRISE PARTICIPATION GOALS FOR A CONTRACT, a contractor, including a contractor that is a certified minority business enterprise, shall:

(i) identify specific work categories appropriate for subcontracting;

(ii) at least 10 days before bid opening, solicit minority business enterprises, through written notice that:

1. describes the categories of work under item (i) of this paragraph; and

2. provides information regarding the type of work being solicited and specific instructions on how to submit a bid;

(iii) attempt to make personal contact with the firms in item (ii) of this paragraph;

(iv) [assist] OFFER TO PROVIDE REASONABLE ASSISTANCE TO minority business enterprises to fulfill bonding requirements or to obtain a waiver of those requirements;

(v) in order to publicize contracting opportunities to minority business enterprises, attend prebid OR PREPROPOSAL meetings or other meetings scheduled by the unit; and

(vi) upon acceptance of a bid OR PROPOSAL, provide the unit with a list of minority businesses with whom the contractor negotiated, including price quotes from minority and nonminority firms.

[(7) (i) The unit shall make a finding whether the contractor complied, in good faith, with paragraph (6) of this subsection.

(ii) If the unit finds the contractor complied with paragraph (6) of this subsection, the unit may not require the contractor to renegotiate any subcontract in order to achieve a different result.]

(6) (I) 1. IF A CONTRACTOR DOES NOT ACHIEVE ALL OR A PART OF THE MINORITY BUSINESS ENTERPRISE PARTICIPATION GOALS ON A CONTRACT, THE UNIT SHALL MAKE A FINDING OF WHETHER THE CONTRACTOR HAS DEMONSTRATED THAT THE CONTRACTOR TOOK ALL NECESSARY AND REASONABLE STEPS TO ACHIEVE THE GOALS, INCLUDING COMPLIANCE WITH PARAGRAPH (5) OF THIS SUBSECTION.

2. A WAIVER OF ANY PART OF THE MINORITY BUSINESS ENTERPRISE GOALS FOR A CONTRACT SHALL BE GRANTED IF A CONTRACTOR PROVIDES A REASONABLE DEMONSTRATION OF GOOD-FAITH EFFORTS TO ACHIEVE THE GOALS.

(II) IF THE UNIT DETERMINES THAT A WAIVER SHOULD BE GRANTED IN ACCORDANCE WITH SUBPARAGRAPH (I) OF THIS PARAGRAPH, THE UNIT MAY NOT REQUIRE THE CONTRACTOR TO RENEGOTIATE ANY SUBCONTRACT IN ORDER TO ACHIEVE A DIFFERENT RESULT.

(III) THE HEAD OF THE UNIT MAY WAIVE ANY OF THE REQUIREMENTS OF THIS SUBSECTION RELATING TO THE ESTABLISHMENT, USE, AND WAIVER OF CONTRACT GOALS FOR A SOLE SOURCE, EXPEDITED, OR EMERGENCY PROCUREMENT IN WHICH THE PUBLIC INTEREST CANNOT REASONABLY ACCOMMODATE USE OF THOSE REQUIREMENTS.

(IV) 1. EXCEPT FOR WAIVERS GRANTED IN ACCORDANCE WITH SUBPARAGRAPH (III) OF THIS PARAGRAPH, WHEN A WAIVER DETERMINATION IS MADE, THE UNIT SHALL ISSUE THE DETERMINATION IN WRITING.

2. THE HEAD OF THE UNIT SHALL:

A. KEEP ONE COPY OF THE WAIVER DETERMINATION AND THE REASONS FOR THE DETERMINATION; AND

B. FORWARD ONE COPY OF THE WAIVER DETERMINATION TO THE GOVERNOR'S OFFICE OF MINORITY AFFAIRS.

(V) ON OR BEFORE JULY 31 OF EACH YEAR, EACH UNIT SHALL SUBMIT DIRECTLY TO THE BOARD OF PUBLIC WORKS AND THE GOVERNOR'S OFFICE OF MINORITY AFFAIRS AN ANNUAL REPORT OF WAIVERS REQUESTED AND WAIVERS GRANTED UNDER THIS PARAGRAPH.

(VI) THE REPORT REQUIRED UNDER SUBPARAGRAPH (V) OF THIS PARAGRAPH SHALL CONTAIN THE FOLLOWING INFORMATION ON THOSE CONTRACTS WHERE THE UNIT CONSIDERED A CONTRACTOR'S REQUEST FOR WAIVER OF ALL OR A PORTION OF THE MINORITY BUSINESS ENTERPRISE GOALS:

1. THE CONTRACT TITLES, NUMBERS, AND DATES;

2. THE NUMBER OF WAIVER REQUESTS RECEIVED;

3. THE NUMBER OF WAIVER REQUESTS GRANTED;

AND

4. ANY OTHER INFORMATION SPECIFICALLY REQUESTED BY THE BOARD.

[(8)] (7) If, during the performance of a contract, a certified minority business enterprise contractor or subcontractor becomes ineligible to participate in the Minority Business Enterprise Program because one or more of its owners has a personal net worth that exceeds the amount specified in § 14-301(i)(3) of this subtitle:

(i) that ineligibility alone may not cause the termination of the certified minority business enterprise's contractual relationship for the remainder of the term of the contract; and

(ii) the certified minority business enterprise's participation under the contract shall continue to be counted toward the program and contract goals.

(b) (1) The provisions of §§ 14-301(f) and 14-303 of this subtitle and subsection (a) of this section are inapplicable to the extent that any unit determines the provisions to be in conflict with any applicable federal program requirement.

(2) The determination under this subsection shall be included with the report required under § 14-305 of this subtitle.

14-303.

(a) (1) (i) In accordance with Title 10, Subtitle 1 of the State Government Article, the Board shall adopt regulations consistent with the purposes of this Division II to carry out the requirements of this subtitle.

(ii) The Board shall keep a record of [the number of] INFORMATION REGARDING ANY waivers requested [and the number of waivers granted each year under] IN ACCORDANCE WITH § 14-302(A)(5)(I) OF THIS SUBTITLE AND subsection (b)(8) of this section and submit a copy of the record to the General Assembly on or before October 1 of each year, in accordance with § 2-1246 of the State Government Article.

(iii) The Board shall keep a record of the aggregate number and the identity of minority business enterprises that receive certification under the process established by the Board under subsection (b)(1) of this section and submit a copy of the record to the General Assembly on or before October 1 of each year, in accordance with § 2-1246 of the State Government Article.

(2) The regulations shall establish procedures to be followed by units, prospective contractors, and successful bidders or offerors to maximize notice to, and the opportunity to participate in the procurement process by, a broad range of minority business enterprises.

(b) These regulations shall include:

(1) provisions:

(i) designating one State agency to certify and decertify minority business enterprises for all units through a single process that meets applicable federal requirements, including provisions that promote and facilitate the submission of some or all of the certification application through an electronic process;

(ii) for the purpose of certification under this subtitle, that promote and facilitate certification of minority business enterprises that have received

certification from the U.S. Small Business Administration or a county that uses a certification process substantially similar to the process established in accordance with item (i) of this item;

(iii) requiring the agency designated to certify minority business enterprises to complete the agency's review of an application for certification and notify the applicant of the agency's decision within 90 days of receipt of a complete application that includes all of the information necessary for the agency to make a decision; and

(iv) authorizing the agency designated to certify minority business enterprises to extend the notification requirement established under item (iii) of this item once, for no more than an additional 60 days, if the agency provides the applicant with a written notice and explanation;

(2) a requirement that the solicitation document accompanying each solicitation set forth the expected degree of minority business enterprise participation based, in part, on[:] **THE FACTORS SET FORTH IN § 14-302(A)(2)(II) OF THIS SUBTITLE**

[(i) the potential subcontract opportunities available in the prime procurement contract; and

(ii) the availability of certified minority business enterprises to respond competitively to the potential subcontract opportunities];

(3) a requirement that the unit provide a current list of certified minority business enterprises to each prospective contractor;

(4) provisions to ensure the uniformity of requests for bids on subcontracts;

(5) provisions relating to the timing of requests for bids on subcontracts and of submission of bids on subcontracts;

(6) provisions designed to ensure that a fiscal disadvantage to the State does not result from an inadequate response by minority business enterprises to a request for bids;

(7) provisions relating to joint ventures, under which a bidder may count toward meeting its minority business enterprise participation goal, the minority business enterprise portion of the joint venture;

(8) consistent with § 14-302(a)[(6)](5) of this subtitle, provisions relating to any circumstances under which a unit may waive obligations of the contractor relating to minority business enterprise participation;

(9) provisions requiring a monthly submission to the unit by minority business enterprises acknowledging all payments received in the preceding 30 days under a contract governed by this subtitle;

(10) a requirement that a unit shall verify and maintain data concerning payments received by minority business enterprises, including a requirement that, upon completion of a project, the unit shall compare the total dollar value actually received by minority business enterprises with the amount of contract dollars initially awarded, and an explanation of any discrepancies therein;

(11) a requirement that a unit verify that minority business enterprises listed in a successful bid are actually participating to the extent listed in the project for which the bid was submitted;

(12) provisions establishing a graduation program based on the financial viability of the minority business enterprise, using annual gross receipts or other economic indicators as may be determined by the Board;

(13) a requirement that a bid or proposal based on a solicitation with an expected degree of minority business enterprise participation identify the specific commitment of certified minority business enterprises at the time of submission;

(14) provisions promoting and providing for the counting and reporting of certified minority business enterprises as prime contractors; [and]

(15) PROVISIONS ESTABLISHING STANDARDS TO REQUIRE A MINORITY BUSINESS ENTERPRISE TO PERFORM A COMMERCIALY USEFUL FUNCTION ON A CONTRACT;

(16) A REQUIREMENT THAT EACH UNIT WORK WITH THE GOVERNOR'S OFFICE OF MINORITY AFFAIRS TO DESIGNATE CERTAIN PROCUREMENTS AS BEING EXCLUDED FROM THE REQUIREMENTS OF § 14-302(A) OF THIS SUBTITLE; AND

[(15)] (17) other provisions that the Board considers necessary or appropriate to encourage participation by minority business enterprises and to protect the integrity of the procurement process.

(c) The regulations adopted under this section shall specify that a unit may not allow a business to participate as if it were a certified minority business enterprise if the business's certification is pending.

The provisions of §§ 14–301 through 14–305 of this subtitle, and any regulations adopted under those sections, shall be of no effect and may not be enforced after July 1, [2011] ~~2016~~ 2012.

~~Chapter 116 of the Acts of 1995, as amended by Chapters 495 and 496 of the Acts of 2000, Chapter 339 of the Acts of 2001, and Chapter 359 of the Acts of 2006~~

~~SECTION 2. AND BE IT FURTHER ENACTED, That the Certification Agency, in consultation with the General Assembly and the Office of the Attorney General, shall initiate a study of the Minority Business Enterprise Program to evaluate the Program's continued compliance with the requirements of the Croson decision and any subsequent federal or constitutional requirements. In preparation for the study, the Board of Public Works may adopt regulations authorizing a unit of State government to require bidders and offerors to submit information necessary for the conduct of the study. The Board of Public Works may designate that certain information received in accordance with regulations adopted under this section shall be confidential. Notwithstanding that certain information may be designated by the Board of Public Works as confidential, the certification agency may provide the information to any person that is under contract with the certification agency to assist in conducting the study. The study shall also evaluate race neutral programs and other methods that can be used to address the needs of minority businesses. The final report on the study shall be submitted to the Legislative Policy Committee of the General Assembly prior to [September 30, 2010] SEPTEMBER 30, 2015, so that the General Assembly may review the report prior to the [2011] ~~2016~~ Session.~~

SECTION 2. AND BE IT FURTHER ENACTED, That having considered the evidence of discrimination against minority and women-owned businesses included in the study entitled "The State of Minority- And Women-Owned Business Enterprise: Evidence From Maryland" published on February 17, 2011, and other evidence generally available to the General Assembly, it is the intent of the General Assembly to eliminate discrimination against minority and women-owned businesses doing business in Maryland contracting markets in a manner that:

- (1) complies with the United States and Maryland Constitutions;
- (2) is effective and narrowly tailored to achieve the goal of eliminating business discrimination based on race and gender in Maryland contracting markets;
- (3) makes full and effective use of race-neutral measures;
- (4) is focused on operating an effective Minority Business Enterprise Program targeted at eliminating the discrimination thoroughly documented in the Study;

(5) to the maximum extent feasible under federal constitutional law, provides for flexibility in the operations of the Program and the use of numerical targets or goals;

(6) prohibits the use of rigid and inflexible quotas;

(7) ensures that any use of numerical targets in overall aspirational State goals and in contract goals, includes the use of good faith waivers and is narrowly tailored to reflect the best available evidence of the actual, relative availability of minority business enterprises in Maryland contracting markets;

(8) to the maximum extent feasible, limits and ameliorates burdens on nonminority business enterprises resulting from the operation of the Program; and

(9) ensures that the beneficiaries of the Program are drawn from those groups that have suffered discrimination in Maryland contracting markets.

SECTION 3. AND BE IT FURTHER ENACTED, That, if any of the provisions of this Act or the application thereof, to any person or circumstance, is held invalid for any reason in a court of competent jurisdiction, the invalidity does not affect the other provisions or any other application of this Act which can be given effect without the invalid provision or application, and for this purpose the provisions of this Act are declared severable.

SECTION ~~2~~ 4. AND BE IT FURTHER ENACTED, That this Act shall take effect July 1, 2011.

Approved by the Governor, May 10, 2011.