

Chapter 340

(Senate Bill 4)

AN ACT concerning

Minority Business Enterprises – Program Participation – Requirements and Reauthorization

FOR the purpose of requiring minority business enterprises serving as subcontractors on certain procurement contracts to submit certain documentation to the procurement officer of the unit and to the contractor; ~~clarifying what constitutes good cause for the purposes of removal of a minority business enterprise after commencement of work on a contract;~~ altering the termination date for certain provisions of law concerning the Minority Business Enterprise Program; altering the date by which the final report on a certain study is required to be submitted to the Legislative Policy Committee; altering certain findings of the General Assembly; making a conforming change; and generally relating to minority business enterprise program participation.

BY repealing and reenacting, with amendments,
Article – State Finance and Procurement
Section ~~14-302~~ 14-301.1, 14-303, and 14-309
Annotated Code of Maryland
(2015 Replacement Volume and 2016 Supplement)

BY repealing and reenacting, with amendments,
Chapter 154 of the Acts of the General Assembly of 2012, as amended by Chapters 200
and 201 of the Acts of the General Assembly of 2013
Section 2

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) 1. Except for leases of real property, each unit shall structure procurement procedures, consistent with the purposes of this subtitle, to try to achieve an overall percentage goal of the unit's total dollar value of procurement contracts being made directly or indirectly to certified minority business enterprises.~~

~~2. Notwithstanding subsubparagraph 1 of this subparagraph, the following contracts may not be counted as part of a unit's total dollar value of procurement contracts:~~

~~A. a procurement contract awarded in accordance with Subtitle 1 of this title;~~

~~B. a procurement contract awarded to a not-for-profit entity in accordance with requirements mandated by State or federal law; and~~

~~C. a procurement by the Maryland Developmental Disabilities Administration of the Department of Health and Mental Hygiene for family and individual support services, community residential services, resource coordination services, behavioral support services, vocational and day services, and respite services, as those terms are defined in regulations adopted by the Department of Health and Mental Hygiene.~~

~~(ii) 1. The overall percentage goal shall be established on a biennial basis by the Special Secretary of Minority Affairs, in consultation with the Secretary of Transportation and the Attorney General.~~

~~2. During any year in which there is a delay in establishing the overall goal, the previous year's goal will apply.~~

~~(iii) 1. In consultation with the Secretary of Transportation and the Attorney General, the Special Secretary of Minority Affairs shall establish guidelines on a biennial basis for each unit to consider while determining whether to set subgoals for the minority groups listed in § 14-301(k)(1)(i) 1, 2, 3, 4, and 6 of this subtitle.~~

~~2. During any year in which there is a delay in establishing the subgoal guidelines, the previous year's subgoal guidelines will apply.~~

~~(iv) 1. The Special Secretary of Minority Affairs, in consultation with the Secretary of Transportation and the Attorney General, shall establish goals and subgoal guidelines that, to the maximum extent feasible, approximate the level of minority business enterprise participation that would be expected in the absence of discrimination.~~

~~2. In establishing overall goals and subgoal guidelines, the Special Secretary of Minority Affairs shall provide for public participation by consulting with minority, women's, and general contractor groups, community organizations, and other officials or organizations that could be expected to have information concerning:~~

~~A. the availability of minority and women-owned businesses;~~

~~B. the effects of discrimination on opportunities for minority and women-owned businesses; and~~

~~C. the State's operation of the Minority Business Enterprise Program.~~

~~(v) In establishing overall goals, the factors to be considered shall include:~~

~~1. the relative availability of minority and women owned businesses to participate in State procurement as demonstrated by the State's most recent disparity study;~~

~~2. past participation of minority business enterprises in State procurement, except for procurement related to leases of real property; and~~

~~3. other factors that contribute to constitutional goal setting.~~

~~(vi) Notwithstanding § 12-101 of this article, the Special Secretary of Minority Affairs shall adopt regulations in accordance with Title 10, Subtitle 1 of the State Government Article setting forth the State's overall goal.~~

~~(2) The Special Secretary of Minority Affairs, in consultation with the Secretary of Transportation and the Attorney General, shall establish guidelines for each unit to consider when determining the appropriate minority business enterprise participation percentage goal for a procurement contract in accordance with paragraph (3) of this subsection.~~

~~(3) Each unit shall:~~

~~(i) consider the practical severability of all contracts and, in accordance with § 11-201 of this article, may not bundle contracts;~~

~~(ii) implement a program that will enable the unit to evaluate each contract to determine the appropriate minority business enterprise participation goals, if any, for the contract based 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;~~

~~3. the contract goal guidelines established under paragraph (2) of this subsection;~~

~~4. the subgoal guidelines established under paragraph (1)(iii) of this subsection; and~~

~~5. other factors that contribute to constitutional goal setting;~~

~~(iii) monitor and collect data with respect to prime contractor compliance with contract goals; and~~

~~(iv) institute corrective action when prime contractors do not make good faith efforts to comply with contract goals.~~

~~(4) Units may not use quotas or any project goal setting process that:~~

~~(i) solely relies on the State's overall numerical goal, or any other jurisdiction's overall numerical goal; or~~

~~(ii) fails to incorporate the analysis outlined in paragraph (3)(ii) of this subsection.~~

~~(5) (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.~~

~~(6) Each unit shall meet the maximum feasible portion of the State's overall goal established in accordance with this subsection by using race neutral measures to facilitate minority business enterprise participation in the procurement process.~~

~~(7) 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) 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.~~

~~(8) The Special Secretary of Minority Affairs shall:~~

~~(i) in consultation with the Secretary of Transportation and the Attorney General, establish procedures governing how the participation of minority business enterprise prime contractors is counted toward contract goals; and~~

~~(ii) notwithstanding § 12-101 of this article, adopt regulations setting forth the procedures established in accordance with this paragraph.~~

~~(9) (i) 1. If a contractor, including a certified minority business enterprise, 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 (7) 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.~~

~~(10) (i) 1. This paragraph applies to a bidder or offeror after submission of a bid or proposal and before the execution of a contract with an expected degree of minority business enterprise participation.~~

~~2. If the bidder or offeror determines that a minority business enterprise identified in the minority business enterprise participation schedule has become or will become unavailable or ineligible to perform the work required under the contract, the bidder or offeror shall notify the unit within 72 hours of making the determination.~~

~~(ii) 1. If a minority business enterprise identified in the minority business enterprise participation schedule submitted with a bid or offer has become or will become unavailable or ineligible to perform the work required under the contract, the bidder or offeror may submit a written request with the unit to amend the minority business enterprise participation schedule.~~

~~2. The request to amend the minority business enterprise participation schedule shall indicate the bidder's or offeror's efforts to substitute another certified minority business enterprise to perform the work that the unavailable or ineligible minority business enterprise would have performed.~~

~~(iii) A minority business enterprise participation schedule may not be amended unless:~~

~~1. the bidder or offeror provides a satisfactory explanation of the reason for inclusion of the unavailable or ineligible firm on the minority business enterprise participation schedule; and~~

~~2. the amendment is approved by the unit's procurement officer after consulting with the unit's minority business enterprise liaison.~~

~~(11) (i) This paragraph applies after execution of a contract with an expected degree of minority business enterprise participation.~~

~~(ii) The minority business enterprise participation schedule, including any amendment, shall be attached to and made a part of the executed contract.~~

~~(iii) 1. A contractor may not terminate or otherwise cancel the contract of a certified minority business enterprise subcontractor listed in the minority business enterprise participation schedule without showing good cause and obtaining the prior written consent of the minority business enterprise liaison and approval of the head of the unit.~~

~~2. FOR PURPOSES OF THIS SECTION, GOOD CAUSE FOR REMOVAL OF A CERTIFIED MINORITY BUSINESS ENTERPRISE AFTER CONTRACT EXECUTION INCLUDES BUT IS NOT LIMITED TO DOCUMENTED NONPERFORMANCE BY THE MINORITY BUSINESS ENTERPRISE OR ELECTION BY THE MINORITY BUSINESS ENTERPRISE TO CEASE WORK ON THE CONTRACT.~~

~~2.3. The unit shall send a copy of the written consent obtained under subparagraph 1 of this subparagraph to the Governor's Office of Minority Affairs.~~

~~(iv) A minority business enterprise participation schedule may not be amended after the date of contract execution unless the request is approved by the head of the unit and the contract is amended.~~

~~(12) 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(k)(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.~~

~~(13) (i) Except as provided in subparagraph (ii) of this paragraph, a not-for-profit entity participating as a minority business enterprise on a procurement contract awarded by a unit before July 1, 2015, may continue to participate in the contract until the contract expires or otherwise terminates, including all options, renewals, and other extensions.~~

~~(ii) 1. The not-for-profit entity's participation may not be counted toward achieving the minority business enterprise participation goals in this subsection.~~

~~2. The unit may not require that a certified minority business enterprise be substituted for the not-for-profit entity in order to meet the minority business enterprise goals for the procurement contract.~~

~~(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.~~

14-301.1.

The General Assembly finds the following:

(1) the State of Maryland wishes to provide all of its citizens with equal access to business formation and business growth opportunities;

(2) the elimination of discrimination against minority- and women-owned businesses is of paramount importance to the future welfare of the State;

(3) the General Assembly has received and carefully reviewed 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] **“BUSINESS DISPARITIES IN THE MARYLAND MARKET AREA” COMMISSIONED BY THE GENERAL ASSEMBLY AND PUBLISHED ON FEBRUARY 8, 2017** (the Study), and finds that the Study provides a strong basis in evidence demonstrating persistent discrimination against minority- and women-owned businesses;

(4) based on its review of the Study, the General Assembly finds that:

(i) there are substantial and statistically significant adverse disparities [between the availability and utilization of minorities and women] **THAT ARE CONSISTENT WITH DISCRIMINATION AGAINST MINORITIES AND NONMINORITY WOMEN IN WAGES, FIRM FORMATION, ENTREPRENEURIAL EARNINGS, AND ACCESS TO CAPITAL** in the private sector in the same geographic markets and industry categories in which the State does business;

(ii) the State would become a passive participant in private sector racial and gender discrimination if it ceased or curtailed its remedial efforts, including the operation of the Minority Business Enterprise Program;

(iii) there are substantial and statistically significant adverse disparities [for all racial and ethnic groups and nonminority women combined in all major contracting categories in State procurement] THAT ARE CONSISTENT WITH DISCRIMINATION AGAINST MINORITIES AND NONMINORITY WOMEN IN STATE PROCUREMENT;

(iv) there are substantial and statistically significant adverse disparities [for all individual racial and ethnic groups and for nonminority women in most major industry categories in State procurement] THAT ARE CONSISTENT WITH DISCRIMINATION AGAINST ALL INDIVIDUAL MINORITY GROUPS AND FOR NONMINORITY WOMEN IN MOST MAJOR INDUSTRY CATEGORIES IN STATE PROCUREMENT;

(v) there is ample evidence that discrimination in the private sector has depressed firm formation and firm growth among minority and nonminority women entrepreneurs; and

(vi) there is powerful and persuasive qualitative [and anecdotal] evidence, BOTH STATISTICAL AND ANECDOTAL, of discrimination against minority and nonminority women business owners in both the public and private sectors;

(5) as a result of ongoing discrimination and the present day effects of past discrimination, minority- and women-owned businesses combined continue to be very significantly underutilized relative to their availability to perform work in the [sectors] OVERWHELMING MAJORITY OF THE PROCUREMENT CATEGORIES in which the State does business;

(6) minority prime contractors also are subject to discrimination and confront especially daunting barriers in attempting to compete with very large and long-established nonminority companies;

(7) despite the fact that the State has employed, and continues to employ, numerous and robust race-neutral remedies, including aggressive outreach and advertising, training and education, small business programs, efforts to improve access to capital, and other efforts, there is a strong basis in evidence that discrimination persists even in public sector procurement where these efforts have been employed;

(8) NOTWITHSTANDING THE LEVELS OF PARTICIPATION ACHIEVED WHEN RACE-CONSCIOUS MEASURES ARE USED, IN THE ABSENCE OF MINORITY BUSINESS ENTERPRISE PARTICIPATION GOALS FOR STATE PROCUREMENT, THERE IS A SUBSTANTIAL DECREASE IN THE OVERALL UTILIZATION OF MINORITY- AND WOMEN-OWNED BUSINESSES;

[(8)] (9) this subtitle 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;

[(9)] (10) this subtitle continues and enhances efforts to ensure that the State limits the burden on nonminority businesses as much as possible by ensuring that all goals are developed using the best available data and that waivers are available whenever contractors make good faith efforts; [and]

(11) THIS SUBTITLE ENSURES THAT THE OPERATION OF THE MINORITY BUSINESS ENTERPRISE PROGRAM IS CONSISTENT WITH THE STUDY DATA AND NARROWLY TAILORED TO THE COMPELLING INTERESTS OF THE STATE; AND

[(10)] (12) State efforts to support the development of competitively viable minority- and women-owned business enterprises will assist in reducing discrimination and creating jobs for all citizens of Maryland.

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 information regarding any waivers requested in accordance with § 14-302(a)(9)(i) of this subtitle and subsection [(b)(11)] **(B)(12)** 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)(3)(ii) of this subtitle;

(3) a requirement that bidders or offerors complete a document setting forth the percentage of the total dollar amount of the contract that the bidder or offeror agrees will be performed by certified minority business enterprises;

(4) A REQUIREMENT THAT WITHIN 10 DAYS AFTER NOTICE FROM THE STATE OF PRIME CONTRACTOR OF THE STATE'S INTENT TO AWARD A CONTRACT, EACH MINORITY BUSINESS ENTERPRISE SERVING AS A SUBCONTRACTOR ON THE CONTRACT COMPLETE A DOCUMENT SETTING FORTH THE PERCENTAGE AND TYPE OF WORK ~~IT WILL PERFORM~~ ASSIGNED TO THE SUBCONTRACTOR UNDER THE CONTRACT AND SUBMIT COPIES OF THE COMPLETED FORM TO BOTH THE PROCUREMENT OFFICER AND THE CONTRACTOR;

[(4)] (5) a requirement that the solicitation documents completed and submitted by the bidder or offeror in connection with its minority business enterprise participation commitment must be attached to and made a part of the contract;

[(5)] (6) a requirement that all contracts containing minority business enterprise participation goals shall contain a liquidated damages provision that applies in the event that the contractor fails to comply in good faith with the provisions of this subtitle or the pertinent terms of the applicable contract;

~~[(6)] (7)~~ a requirement that the unit provide a current list of certified minority business enterprises to each prospective contractor;

~~[(7)] (8)~~ provisions to ensure the uniformity of requests for bids on subcontracts;

~~[(8)] (9)~~ provisions relating to the timing of requests for bids on subcontracts and of submission of bids on subcontracts;

~~[(9)] (10)~~ 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;

~~[(10)] (11)~~ 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;

~~[(11)] (12)~~ consistent with § 14–302(a)(9) of this subtitle, provisions relating to any circumstances under which a unit may waive obligations of the contractor relating to minority business enterprise participation;

~~[(12)] (13)~~ 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;

~~[(13)] (14)~~ 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;

~~[(14)] (15)~~ 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;

~~[(15)] (16)~~ 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;

~~[(16)] (17)~~ 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;

~~[(17)] (18)~~ provisions promoting and providing for the counting and reporting of certified minority business enterprises as prime contractors;

[(18)] (19) provisions establishing standards to require a minority business enterprise to perform a commercially useful function on a contract;

[(19)] (20) 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

[(20)] (21) 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.

14-309.

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, [2017] ~~2018~~ 2022.

Chapter 154 of the Acts of 2012, as amended by Chapters 200 and 201 of the Acts of 2013

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, in accordance with § 2-1246 of the State Government Article, before September 30, [2016] ~~2017~~ 2021, so that the General Assembly may review the report before the [2017] ~~2018~~ 2022 Session.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect July 1, 2017.

Approved by the Governor, April 18, 2017.