

HOUSE BILL 306

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P2

2001 Regular Session  
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By: **The Speaker (Administration) and Delegates R. Baker, Benson, Bobo, Branch, Bronrott, Brown, Burns, Carlson, Clagett, Cole, C. Davis, D. Davis, DeCarlo, Dobson, Doory, Gladden, Griffith, Grosfeld, Harrison, Healey, Hecht, Hill, Hixson, Howard, Hubbard, A. Jones, V. Jones, Kirk, Marriott, McIntosh, Menes, Montague, Nathan-Pulliam, Oaks, Paige, Patterson, Petzold, Phillips, Proctor, Rawlings, Sher, Shriver, Swain, Turner, and Valderrama**

Introduced and read first time: January 26, 2001  
Assigned to: Commerce and Government Matters

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A BILL ENTITLED

1 AN ACT concerning

2 **Procurement - Minority Business Participation**

3 FOR the purpose of continuing until a certain date the provisions of the State  
4 Procurement Law relating to procurement from minority businesses; altering  
5 the percentage of the total dollar value of procurement by units of State  
6 government that is made directly or indirectly from certified minority  
7 businesses which units of State government are to seek to achieve; altering  
8 certain provisions relating to the structure of procurement procedures by units  
9 of State government; defining certain terms; altering certain definitions;  
10 authorizing a certain certification agency to adopt certain regulations; requiring  
11 the Board of Public Works to adopt regulations under certain circumstances;  
12 altering certain reporting requirements; requiring a certain study and the  
13 issuance of a certain report by a certain date; making provisions of this Act  
14 severable; and generally relating to minority business participation in State  
15 procurement.

16 BY repealing and reenacting, with amendments,  
17 Article - State Finance and Procurement  
18 Section 14-301, 14-302, 14-303, 14-305, and 14-309  
19 Annotated Code of Maryland  
20 (1995 Replacement Volume and 2000 Supplement)

21 BY repealing and reenacting, without amendments,  
22 Article - State Finance and Procurement  
23 Section 14-304, 14-307, and 14-308  
24 Annotated Code of Maryland  
25 (1995 Replacement Volume and 2000 Supplement)

1 BY repealing and reenacting, with amendments,  
2 Chapter 116 of the Acts of the General Assembly of 1995, as amended by  
3 Chapters 495 and 496 of the Acts of the General Assembly of 2000  
4 Section 2

5 Preamble

6 WHEREAS, In January 1989, the Supreme Court of the United States, in City  
7 of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989) held that state and local minority  
8 business programs should be narrowly tailored to remedy the effects of past  
9 discrimination;

10 WHEREAS, In compliance with the requirements of Chapters 495 and 496 of  
11 the 2000 Session of the General Assembly, the Maryland Department of  
12 Transportation entered into a contract with National Economic Research Associates,  
13 Inc., to conduct a Minority Business Utilization Study;

14 WHEREAS, The report prepared by National Economic Research Associates,  
15 Inc. has come before the General Assembly of Maryland, hearings have been held, and  
16 the General Assembly has considered the report and all evidence upon which  
17 National Economic Research Associates, Inc. relied in reaching its findings and  
18 conclusions regarding the Minority Business Enterprise Program;

19 WHEREAS, The General Assembly finds that there is a history in Maryland of  
20 discrimination against African Americans, Hispanics, Asians, American Indians, and  
21 women;

22 WHEREAS, The General Assembly finds that in the State marketplace,  
23 businesses owned and controlled by African Americans, Hispanics, Asians, American  
24 Indians, and women are underutilized, and this disparity taken with other evidence  
25 demonstrates that this underutilization is the product of current, continuing  
26 discrimination against such persons in the State marketplace;

27 WHEREAS, The General Assembly finds that the Maryland Minority Business  
28 Enterprise Program has not eradicated the impact of past discrimination or precluded  
29 ongoing discrimination;

30 WHEREAS, The General Assembly finds that race-neutral and gender-neutral  
31 measures of assisting minority firms to date have been not been effective; and

32 WHEREAS, The General Assembly concludes that continuation of a narrowly  
33 tailored program, which meets the requirements of Croson and later decisions, and  
34 continuation of race-neutral and gender-neutral means of assisting minority firms  
35 are essential to the ultimate achievement of a marketplace in which minority firms  
36 will not be subject to discrimination and will be able to obtain a fair share of private  
37 and public contract expenditures without the aid of the Minority Business Enterprise  
38 Program; now, therefore,

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

3 **Article - State Finance and Procurement**

4 14-301.

5 (a) In this subtitle the following words have the meanings indicated.

6 (b) "Certification" means the determination that a legal entity is a minority  
7 business enterprise for the purposes of this subtitle.

8 (c) "Certification agency" means the agency designated by the Board of Public  
9 Works under § 14-303(b) of this subtitle to certify and decertify minority business  
10 enterprises.

11 (d) "Certified minority business enterprise" means a minority business  
12 enterprise that holds a certification.

13 (E) "ECONOMICALLY DISADVANTAGED INDIVIDUAL" MEANS A SOCIALLY  
14 DISADVANTAGED INDIVIDUAL WHOSE ABILITY TO COMPETE IN THE FREE  
15 ENTERPRISE SYSTEM HAS BEEN IMPAIRED DUE TO DIMINISHED CAPITAL AND  
16 CREDIT OPPORTUNITIES AS COMPARED TO OTHERS IN THE SAME OR SIMILAR LINE  
17 OF BUSINESS WHO ARE NOT SOCIALLY DISADVANTAGED.

18 [(e)] (F) (1) "Minority business enterprise" means any legal entity, except a  
19 joint venture, that is:

20 (i) organized to engage in commercial transactions; [and]

21 (ii) at least 51% owned and controlled by 1 or more individuals who  
22 are [members of a group that is disadvantaged] socially [or] AND economically  
23 DISADVANTAGED[, including:

24 1. African Americans;

25 2. American Indians;

26 3. Asians;

27 4. Hispanics;

28 5. women; or

29 6. physically or mentally disabled individuals]; AND

30 (III) MANAGED BY, AND THE DAILY BUSINESS OPERATIONS OF  
31 WHICH ARE CONTROLLED BY, ONE OR MORE OF THE SOCIALLY AND ECONOMICALLY  
32 DISADVANTAGED INDIVIDUALS WHO OWN IT.

1           (2)     "Minority business enterprise" includes a not for profit entity  
2 organized to promote the interests of physically or mentally disabled individuals.

3     (G)     (1)     SUBJECT TO PARAGRAPH (2) OF THIS SUBSECTION, "PERSONAL NET  
4 WORTH" MEANS THE NET VALUE OF THE ASSETS OF AN INDIVIDUAL REMAINING  
5 AFTER TOTAL LIABILITIES ARE DEDUCTED.

6           (2)     "PERSONAL NET WORTH" DOES NOT INCLUDE:

7                   (I)     THE INDIVIDUAL'S OWNERSHIP INTEREST IN THE APPLICANT  
8 OR A CERTIFIED MINORITY BUSINESS ENTERPRISE;

9                   (II)    THE INDIVIDUAL'S EQUITY IN HIS OR HER PRIMARY PLACE OF  
10 RESIDENCE; OR

11                   (III)   THE INDIVIDUAL'S SHARE OF ASSETS HELD JOINTLY OR AS  
12 COMMUNITY PROPERTY WITH THE INDIVIDUAL'S SPOUSE.

13     (H)     "RACE-CONSCIOUS MEASURE" MEANS A METHOD THAT IS FOCUSED  
14 SPECIFICALLY ON ASSISTING ONLY MINORITY INDIVIDUALS.

15     (I)     "RACE-NEUTRAL MEASURE" MEANS A METHOD THAT IS OR CAN BE USED  
16 TO ASSIST ALL SMALL BUSINESSES.

17     (J)     (1)     SUBJECT TO PARAGRAPHS (2) AND (3) OF THIS SUBSECTION,  
18 "SOCIALY AND ECONOMICALLY DISADVANTAGED INDIVIDUAL" MEANS A CITIZEN  
19 OR LAWFULLY ADMITTED PERMANENT RESIDENT OF THE UNITED STATES WHO IS:

20                   (I)     IN ANY OF THE FOLLOWING MINORITY GROUPS:

21                           1.     AFRICAN AMERICAN - AN INDIVIDUAL HAVING ORIGINS  
22 IN ANY OF THE BLACK RACIAL GROUPS OF AFRICA;

23                           2.     AMERICAN INDIAN/NATIVE AMERICAN - AN INDIVIDUAL  
24 HAVING ORIGINS IN ANY OF THE ORIGINAL PEOPLES OF NORTH AMERICA AND WHO  
25 IS A DOCUMENTED MEMBER OF A NORTH AMERICAN TRIBE, BAND, OR OTHERWISE  
26 HAS A SPECIAL RELATIONSHIP WITH THE UNITED STATES OR A STATE THROUGH  
27 TREATY, AGREEMENT, OR SOME OTHER FORM OF RECOGNITION. THIS INCLUDES AN  
28 INDIVIDUAL WHO CLAIMS TO BE AN AMERICAN INDIAN/NATIVE AMERICAN AND WHO  
29 IS REGARDED AS SUCH BY THE AMERICAN INDIAN/NATIVE AMERICAN COMMUNITY  
30 OF WHICH THE INDIVIDUAL CLAIMS TO BE A PART, BUT DOES NOT INCLUDE AN  
31 INDIVIDUAL OF ESKIMO OR ALEUTIAN ORIGIN;

32                           3.     ASIAN - AN INDIVIDUAL HAVING ORIGINS IN THE FAR  
33 EAST, SOUTHEAST ASIA, OR THE INDIAN SUBCONTINENT, AND WHO IS REGARDED AS  
34 SUCH BY THE COMMUNITY OF WHICH THE PERSON CLAIMS TO BE A PART;

35                           4.     HISPANIC - AN INDIVIDUAL OF MEXICAN, PUERTO RICAN,  
36 CUBAN, CENTRAL OR SOUTH AMERICAN, OR OTHER SPANISH CULTURE OR ORIGIN,



1 (III) AN OVERALL MINIMUM OF 25% OF THE UNIT'S TOTAL DOLLAR  
2 VALUE OF PROCUREMENT CONTRACTS IS TO BE MADE DIRECTLY OR INDIRECTLY  
3 FROM ALL CERTIFIED MINORITY BUSINESS ENTERPRISES.

4 (2) (I) Except as provided in paragraph (3) of this subsection, in  
5 procurement for construction, each unit shall[:

6 (i)] structure procurement procedures, consistent with the purposes  
7 of this subtitle, to try to achieve the [result that a minimum of 14% of the unit's total  
8 dollar value of construction contracts is made directly or indirectly from certified  
9 minority business enterprises; and] FOLLOWING RESULTS:

10 1. A MINIMUM OF 7% OF THE UNIT'S TOTAL DOLLAR VALUE  
11 OF CONSTRUCTION CONTRACTS IS TO BE MADE DIRECTLY OR INDIRECTLY FROM  
12 CERTIFIED MINORITY BUSINESS ENTERPRISES CLASSIFIED BY THE CERTIFICATION  
13 AGENCY AS AFRICAN AMERICAN-OWNED BUSINESSES;

14 2. A MINIMUM OF 10% OF THE UNIT'S TOTAL DOLLAR VALUE  
15 OF CONSTRUCTION CONTRACTS IS TO BE MADE DIRECTLY OR INDIRECTLY FROM  
16 CERTIFIED MINORITY BUSINESS ENTERPRISES CLASSIFIED BY THE CERTIFICATION  
17 AGENCY AS WOMEN-OWNED BUSINESSES; AND

18 3. AN OVERALL MINIMUM OF 25% OF THE UNIT'S TOTAL  
19 DOLLAR VALUE OF CONSTRUCTION CONTRACTS IS TO BE MADE DIRECTLY OR  
20 INDIRECTLY FROM ALL CERTIFIED MINORITY BUSINESS ENTERPRISES.

21 (ii) THE UNIT SHALL:

22 1. consider the practical severability of the construction  
23 projects; AND

24 2. IMPLEMENT A PROGRAM THAT WILL ENABLE THE UNIT  
25 TO EVALUATE EACH CONTRACT TO DETERMINE THE APPROPRIATENESS OF THE  
26 GOAL.

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

30 (4) EACH UNIT SHALL MEET THE MAXIMUM FEASIBLE PORTION OF THE  
31 GOALS STATED IN PARAGRAPHS (1), (2), AND (3) OF THIS SUBSECTION BY USING  
32 RACE-NEUTRAL MEASURES TO FACILITATE MINORITY BUSINESS ENTERPRISE  
33 PARTICIPATION IN THE PROCUREMENT PROCESS.

34 (5) To achieve the result specified in paragraph (1) or (2) of this subsection, a  
35 contractor, INCLUDING A CONTRACTOR THAT IS A CERTIFIED MINORITY BUSINESS  
36 ENTERPRISE, shall:

37 (i) identify specific work categories appropriate for subcontracting;

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

3 1. describes the categories of work under item (i) of this  
4 subparagraph; and

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

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

9 (iv) assist minority business enterprises to fulfill bonding  
10 requirements or to obtain a waiver of those requirements;

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

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

17 [(5)] (6) (i) The unit shall make a finding whether the contractor  
18 complied, in good faith, with paragraph [(4)] (5) of this subsection.

19 (ii) If the unit finds the contractor complied with paragraph [(4)]  
20 (5) of this subsection, the unit may not require the contractor to renegotiate any  
21 subcontract in order to achieve a different result.

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

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

28 14-303.

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

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

36 (b) These regulations shall include:

1 (1) provisions designating one agency to certify and decertify minority  
2 business enterprises for all units through a single process that meets applicable  
3 federal requirements;

4 (2) a requirement that the solicitation document accompanying each  
5 solicitation set forth the expected degree of minority business enterprise participation  
6 based, in part, on:

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

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

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

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

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

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

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

23 (8) consistent with [§ 14-302(a)(4)] § 14-302(A)(5) of this subtitle,  
24 provisions relating to any circumstances under which a unit may waive obligations of  
25 the contractor relating to minority business enterprise participation;

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

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

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

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

4 (13) other provisions that the Board considers necessary or appropriate to  
5 encourage participation by minority business enterprises and to protect the integrity  
6 of the procurement process.

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

10 14-304.

11 (a) In the same manner and with the same fees as provided by law in civil  
12 cases, in a matter regarding the decertification of a certified minority business  
13 enterprise, the certification agency may:

14 (1) subpoena witnesses;

15 (2) administer oaths; and

16 (3) compel the production of records, books, papers, and other  
17 documents.

18 (b) If a person fails to comply with a subpoena issued under subsection (a) of  
19 this section, or fails to produce documents or other evidence, on petition of the  
20 certification agency, a court of competent jurisdiction may pass an order directing  
21 compliance with the subpoena or compelling the production of documents or other  
22 evidence.

23 14-305.

24 (a) (1) Within 90 days after the end of the fiscal year, each unit shall report  
25 to the Governor's Office of Minority Affairs AND THE CERTIFICATION AGENCY.

26 (2) A report under this subsection shall for the preceding fiscal year:

27 (i) state the total number and value of procurement contracts  
28 between the unit and certified minority business enterprises, by specific category of  
29 minority business enterprise;

30 (ii) indicate the percentage that those procurement contracts  
31 represent, by specific category of minority business enterprise, of the total number  
32 and value of procurement contracts; and

33 (iii) contain other such information as required by the Governor's  
34 Office of Minority Affairs AND THE CERTIFICATION AGENCY and approved by the  
35 Board.

1 (3) A report under this subsection shall be in a form prescribed by the  
2 Governor's Office of Minority Affairs AND THE CERTIFICATION AGENCY and approved  
3 by the Board.

4 (b) (1) On or before December 31 of each year, the Governor's Office of  
5 Minority Affairs shall submit to the Board of Public Works and, subject to § 2-1246 of  
6 the State Government Article, to the Legislative Policy Committee a report  
7 summarizing the information the Office receives under subsection (a) of this section.

8 (2) This report may be prepared in conjunction with the annual report  
9 required under § 9-306 of the State Government Article.

10 14-307.

11 The Legislative Policy Committee shall direct at least 1 standing committee of  
12 the House of Delegates and at least 1 standing committee of the State Senate to  
13 review annually the performance of units as reported under § 14-305 of this subtitle.  
14 14-308.

15 (a) (1) A person may not:

16 (i) fraudulently obtain, hold, or attempt to obtain or hold  
17 certification;

18 (ii) aid another person in performing an act prohibited under item  
19 (i) of this paragraph;

20 (iii) willfully obstruct, impede, or attempt to obstruct or impede a  
21 State official or employee investigating the qualifications of a business entity that has  
22 requested certification;

23 (iv) fraudulently obtain, attempt to obtain, or aid another person in  
24 fraudulently obtaining or attempting to obtain, public moneys to which the person is  
25 not entitled under this subtitle; or

26 (v) in any minority business enterprise matter administered under  
27 this subtitle:

28 1. willfully falsify, conceal, or cover up a material fact by any  
29 scheme or device;

30 2. make a false or fraudulent statement or representation; or

31 3. use a false writing or document that the person knows to  
32 contain a false or fraudulent statement or entry.

33 (2) A person who violates any provision of this subsection is guilty of a  
34 felony and on conviction is subject to a fine not exceeding \$20,000 or imprisonment  
35 not exceeding 5 years or both.

1 (b) (1) A person may not make a false statement about whether an entity  
2 has certification.

3 (2) A person who violates this subsection is guilty of a misdemeanor and  
4 on conviction is subject to a fine not exceeding \$2,500 or imprisonment not exceeding  
5 1 year or both.

6 14-309.

7 The provisions of §§ 14-301 through 14-305 of this subtitle, and any regulations  
8 adopted under those sections, shall be of no effect and may not be enforced after July  
9 1, [2002] 2006.

10 **Chapter 116 of the Acts of 1995, as amended by Chapters 495 and 496 of the**  
11 **Acts of 2000**

12 SECTION 2. AND BE IT FURTHER ENACTED, That the Certification Agency,  
13 in consultation with the General Assembly and the Office of the Attorney General,  
14 shall initiate a study of the Minority Business Enterprise Program to evaluate the  
15 Program's continued compliance with the requirements of the Croson decision and  
16 any subsequent federal or constitutional requirements. IN PREPARATION FOR THE  
17 STUDY, THE CERTIFICATION AGENCY MAY ADOPT REGULATIONS AUTHORIZING A  
18 UNIT OF STATE GOVERNMENT TO REQUIRE BIDDERS AND OFFERORS TO SUBMIT  
19 INFORMATION NECESSARY FOR THE CONDUCT OF THE STUDY. The study shall also  
20 evaluate race neutral programs and other methods that can be used to address the  
21 needs of minority businesses. [An executive summary of the study shall be submitted  
22 to the Legislative Policy Committee of the General Assembly by December 1, 2000.]  
23 The final report on the study shall be submitted to the Legislative Policy Committee  
24 of the General Assembly prior to [January 10, 2001] SEPTEMBER 30, 2005 so that the  
25 General Assembly may review the report [during] PRIOR TO the [2001] 2006 Session.

26 SECTION 2. AND BE IT FURTHER ENACTED, That if any provision of this  
27 Act or the application thereof to any person or circumstance is held invalid for any  
28 reason in a court of competent jurisdiction, the invalidity does not affect other  
29 provisions or any other application of this Act which can be given effect without the  
30 invalid provision or application, and for this purpose the provisions of this Act are  
31 declared severable.

32 SECTION 3. AND BE IT FURTHER ENACTED, That if any provision of this  
33 Act is held invalid for any reason in a court of competent jurisdiction, and any  
34 remaining valid portions of this Act are held to be incomplete and incapable of being  
35 executed in accordance with legislative intent, the Board of Public Works shall adopt  
36 regulations governing the administration of this Act, to be applied in a manner that is  
37 consistent with the court's opinion.

38 SECTION 4. AND BE IT FURTHER ENACTED, That this Act shall take effect  
39 July 1, 2001.