

SENATE BILL 120

P2

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CF HB 456

By: **Senators Conway, Benson, Ferguson, Forehand, Gladden, Jones–Rodwell,
Kelley, King, Klausmeier, Pugh, and Ramirez**

Introduced and read first time: January 21, 2011

Assigned to: Education, Health, and Environmental Affairs

Committee Report: Favorable with amendments

Senate action: Adopted

Read second time: March 23, 2011

CHAPTER _____

1 AN ACT concerning

2 **Procurement – Minority Business Participation**

3 FOR the purpose of repealing the requirement that certain procurement procedures
4 try to achieve the result that a certain percentage of a unit’s total dollar value of
5 procurement contracts be made to certified minority business enterprises;
6 clarifying that it is a goal that a certain percentage of a unit’s total dollar value
7 of procurement contracts be made to certified minority business enterprises;
8 requiring the Governor’s Office of Minority Affairs, in consultation with the
9 State Department of Transportation and the Office of the Attorney General, to
10 establish certain guidelines for units to follow while determining whether to set
11 certain subgoals for certain minority groups; requiring units to implement a
12 program that enables the unit to evaluate each contract to determine the
13 appropriate minority business enterprise participation goals for the contract
14 based on certain factors; requiring certain units to make certain determinations
15 on whether certain contractors have demonstrated taking certain steps to
16 achieve certain goals, including complying with certain requirements; requiring
17 certain waivers to be granted if certain contractors demonstrate certain
18 good–faith efforts; prohibiting certain units from requiring certain contractors
19 to renegotiate certain subcontracts under certain circumstances; authorizing
20 certain units to waive certain requirements under certain circumstances;
21 requiring certain units to issue and forward to the Office of Minority Affairs
22 certain written waiver determinations; requiring certain units to submit certain
23 annual reports to the Board of Public Works and the Governor’s Office of
24 Minority Affairs; requiring the Board of Public Works to adopt certain

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.

[Brackets] indicate matter deleted from existing law.

Underlining indicates amendments to bill.

~~Strike out~~ indicates matter stricken from the bill by amendment or deleted from the law by amendment.



1 regulations; continuing until a certain date the provisions of the State
 2 Procurement Law relating to procurement from minority businesses; ~~requiring~~
 3 ~~a certain study and a final report on the study by a certain date;~~ declaring the
 4 intent of the General Assembly; making the provisions of this Act severable; and
 5 generally relating to minority business participation in State procurement.

6 BY repealing and reenacting, with amendments,
 7 Article – State Finance and Procurement
 8 Section 14–302, 14–303, and 14–309
 9 Annotated Code of Maryland
 10 (2009 Replacement Volume and 2010 Supplement)

11 ~~BY repealing and reenacting, with amendments,~~
 12 ~~Chapter 116 of the Acts of the General Assembly of 1995, as amended by~~
 13 ~~Chapters 495 and 496 of the Acts of the General Assembly of 2000,~~
 14 ~~Chapter 339 of the Acts of the General Assembly of 2001, and Chapter~~
 15 ~~359 of the Acts of the General Assembly of 2006~~
 16 ~~Section 2~~

17 Preamble

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

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

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

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

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

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

36 (4) Substantial and statistically significant evidence of discrimination
 37 in the private sector in the same industry categories in which the State of Maryland

1 does business for all minorities and nonminority women, which has depressed firm
2 formation and firm growth among minority and nonminority women entrepreneurs;
3 and

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

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

10 WHEREAS, This Act ensures that race-neutral efforts will be used to the
11 maximum extent feasible and that race-conscious measures will be used only where
12 necessary to eliminate discrimination that was not alleviated by race-neutral efforts;
13 and

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

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

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

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

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

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

32 **Article – State Finance and Procurement**

33 14-302.

34 (a) (1) (I) Except for leases of real property [and except as provided in
35 paragraphs (2) and (3) of this subsection], each unit shall structure procurement

1 procedures, consistent with the purposes of this subtitle, to try to achieve [the
2 following results:]

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

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

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

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

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

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

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

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

34 (ii) The] EACH unit shall:

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

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

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

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

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

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

15 [(4) (3) (i) A woman who is also a member of an ethnic or racial
16 minority group may be certified in that category in addition to the gender category.

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

22 [(5) (4) Each unit shall meet the maximum feasible portion of the
23 goals [stated in paragraphs (1), (2), and (3) of] ESTABLISHED IN ACCORDANCE WITH
24 this subsection by using race-neutral measures to facilitate minority business
25 enterprise participation in the procurement process.

26 [(6) (5) [To achieve the result specified in paragraph (1) or (2) of this
27 subsection,] IF A UNIT ESTABLISHES MINORITY BUSINESS ENTERPRISE
28 PARTICIPATION GOALS FOR A CONTRACT, a contractor, including a contractor that
29 is a certified minority business enterprise, shall:

30 (i) identify specific work categories appropriate for
31 subcontracting;

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

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

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

10 2. THE HEAD OF THE UNIT SHALL:

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

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

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

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

23 1. THE CONTRACT TITLES, NUMBERS, AND DATES;

24 2. THE NUMBER OF WAIVER REQUESTS RECEIVED;

25 3. THE NUMBER OF WAIVER REQUESTS GRANTED;

26 AND

27 4. ANY OTHER INFORMATION SPECIFICALLY
28 REQUESTED BY THE BOARD.

29 [(8) (7) If, during the performance of a contract, a certified minority
30 business enterprise contractor or subcontractor becomes ineligible to participate in the
31 Minority Business Enterprise Program because one or more of its owners has a
32 personal net worth that exceeds the amount specified in § 14-301(i)(3) of this subtitle:

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

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

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

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

12 14-303.

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

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

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

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

31 (b) These regulations shall include:

32 (1) provisions:

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

1 (ii) for the purpose of certification under this subtitle, that
2 promote and facilitate certification of minority business enterprises that have received
3 certification from the U.S. Small Business Administration or a county that uses a
4 certification process substantially similar to the process established in accordance
5 with item (i) of this item;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

26 **(16) A REQUIREMENT THAT EACH UNIT WORK WITH THE**
27 **GOVERNOR'S OFFICE OF MINORITY AFFAIRS TO DESIGNATE CERTAIN**
28 **PROCUREMENTS AS BEING EXCLUDED FROM THE REQUIREMENTS OF §**
29 **14-302(A) OF THIS SUBTITLE; AND**

30 [(15)] (17) other provisions that the Board considers necessary or
31 appropriate to encourage participation by minority business enterprises and to protect
32 the integrity of the procurement process.

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

1 14-309.

2 The provisions of §§ 14-301 through 14-305 of this subtitle, and any regulations
3 adopted under those sections, shall be of no effect and may not be enforced after July
4 1, [2011] **2016 2012**.

5 ~~Chapter 116 of the Acts of 1995, as amended by Chapters 495 and 496 of the~~
6 ~~Acts of 2000, Chapter 339 of the Acts of 2001, and Chapter 359 of the Acts of~~
7 ~~2006~~

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

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

32 (1) complies with the United States and Maryland Constitutions;

33 (2) is effective and narrowly tailored to achieve the goal of eliminating
34 business discrimination based on race and gender in Maryland contracting markets;

35 (3) makes full and effective use of race-neutral measures;

36 (4) is focused on operating an effective Minority Business Enterprise
37 Program targeted at eliminating the discrimination thoroughly documented in the
38 Study;

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

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

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

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

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

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

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

Approved:

Governor.

President of the Senate.

Speaker of the House of Delegates.