

HOUSE BILL 1370

P2

2lr0143

By: **Chair, Health and Government Operations Committee (By Request – Departmental – Transportation) (By Request – Departmental – Minority Affairs, Office of) and Delegates Pendergrass, Bromwell, Cullison, Donoghue, Hubbard, A. Kelly, Morhaim, Nathan–Pulliam, Oaks, Pena–Melnyk, Reznik, and Tarrant**

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Assigned to: Rules and Executive Nominations

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Committee Report: Favorable with amendments

House action: Adopted

Read second time: March 19, 2012

CHAPTER _____

1 AN ACT concerning

2 **Procurement – Minority Business Participation**

3 FOR the purpose of establishing certain legislative findings; replacing a certain
4 numerical percentage goal with a biennial process by which the State’s overall
5 minority business enterprise participation goal shall be established, based on
6 certain factors, and adopted by regulation; requiring the Special Secretary of
7 Minority Affairs, in consultation with the Secretary of Transportation and the
8 Attorney General, to establish certain guidelines biennially for units to follow
9 while determining whether to set certain subgoals for certain minority groups;
10 requiring the Special Secretary of Minority Affairs, in establishing the
11 guidelines, to provide for public participation by consulting with certain
12 persons; requiring the Special Secretary of Minority Affairs to adopt certain
13 regulations; clarifying the factors to be used by certain units in evaluating each
14 contract to determine the appropriate minority business enterprise
15 participation goals for the contract; requiring certain units to monitor and
16 collect certain data and institute corrective actions relating to contractor
17 compliance; prohibiting the use of quotas and certain goal setting processes;
18 requiring the Special Secretary of Minority Affairs, in consultation with the
19 Secretary of Transportation and the Attorney General, to establish through
20 regulation certain procedures related to participation of minority business

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 enterprises as prime contractors; establishing circumstances under which a
2 minority business enterprise participation schedule may not be amended;
3 clarifying that minority business enterprise participation schedules are part of
4 certain contracts; prohibiting a contractor from terminating certified minority
5 business enterprises under certain circumstances; requiring that certain
6 bidders or offerors complete certain documents; requiring that certain
7 documents completed by bidders or offerors be made part of certain contracts;
8 requiring that all contracts relating to minority business enterprise
9 participation contain certain provisions; continuing until a certain date the
10 provisions of the State Procurement Law relating to procurement from minority
11 businesses; requiring the certification agency, in consultation with the General
12 Assembly and the Office of the Attorney General, to initiate a certain study of
13 the Minority Business Enterprise Program for certain purposes; authorizing the
14 Board of Public Works to adopt certain regulations; requiring the final report of
15 the study to be submitted to the Legislative Policy Committee before a certain
16 date; making the provisions of this Act severable; defining certain terms; and
17 generally relating to minority business participation in State procurement.

18 BY repealing and reenacting, with amendments,
19 Article – State Finance and Procurement
20 Section 14–301, 14–302, 14–303, and 14–309
21 Annotated Code of Maryland
22 (2009 Replacement Volume and 2011 Supplement)

23 BY adding to
24 Article – State Finance and Procurement
25 Section 14–301.1
26 Annotated Code of Maryland
27 (2009 Replacement Volume and 2011 Supplement)

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

30 **Article – State Finance and Procurement**

31 14–301.

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

33 (b) “Certification” means the determination that a legal entity is a minority
34 business enterprise for the purposes of this subtitle.

35 (c) “Certification agency” means the agency designated by the Board of
36 Public Works under § 14–303(b) of this subtitle to certify and decertify minority
37 business enterprises.

1 (d) “Certified minority business enterprise” means a minority business
2 enterprise that holds a certification.

3 (e) “Economically disadvantaged individual” means a socially disadvantaged
4 individual whose ability to compete in the free enterprise system has been impaired
5 due to diminished capital and credit opportunities as compared to others in the same
6 or similar line of business who are not socially disadvantaged.

7 (f) (1) “Minority business enterprise” means any legal entity, except a
8 joint venture, that is:

9 (i) organized to engage in commercial transactions;

10 (ii) at least 51% owned and controlled by 1 or more individuals
11 who are socially and economically disadvantaged; and

12 (iii) managed by, and the daily business operations of which are
13 controlled by, one or more of the socially and economically disadvantaged individuals
14 who own it.

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

17 **(G) “MINORITY BUSINESS ENTERPRISE PARTICIPATION SCHEDULE”**
18 **MEANS A SCHEDULE INCLUDED IN THE SUBMISSION OF A BID OR OFFER THAT**
19 **IDENTIFIES:**

20 **(1) THE CERTIFIED MINORITY BUSINESS ENTERPRISES THAT A**
21 **BIDDER OR OFFEROR AGREES TO USE IN THE PERFORMANCE OF THE**
22 **CONTRACT; AND**

23 **(2) THE PERCENTAGE OF CONTRACT VALUE ATTRIBUTED TO**
24 **EACH CERTIFIED MINORITY BUSINESS ENTERPRISE.**

25 **[(g)] (H)** (1) Subject to paragraphs (2) and (3) of this subsection,
26 “personal net worth” means the net value of the assets of an individual remaining
27 after total liabilities are deducted.

28 (2) “Personal net worth” includes the individual’s share of assets held
29 jointly or as community property with the individual’s spouse.

30 (3) “Personal net worth” does not include:

31 (i) the individual’s ownership interest in the applicant or a
32 certified minority business enterprise;

1 (ii) the individual's equity in his or her primary place of
2 residence; or

3 (iii) up to \$500,000 of the cash value of any qualified retirement
4 savings plans or individual retirement accounts.

5 **[(h)] (I)** "Race-neutral measure" means a method that is or can be used to
6 assist all small businesses.

7 **[(i)] (J)** (1) Subject to paragraphs (2) and (3) of this subsection, **AND IN**
8 **ACCORDANCE WITH THE STATE'S MOST RECENT DISPARITY STUDY**, "socially and
9 economically disadvantaged individual" means a citizen or lawfully admitted
10 permanent resident of the United States who is:

11 (i) in any of the following minority groups:

12 1. African American – an individual having origins in
13 any of the black racial groups of Africa;

14 2. American Indian/Native American – an individual
15 having origins in any of the original peoples of North America and who is a
16 documented member of a North American tribe, band, or otherwise has a special
17 relationship with the United States or a state through treaty, agreement, or some
18 other form of recognition. This includes an individual who claims to be an American
19 Indian/Native American and who is regarded as such by the American Indian/Native
20 American community of which the individual claims to be a part, but does not include
21 an individual of Eskimo or Aleutian origin;

22 3. Asian – an individual having origins in the Far East,
23 Southeast Asia, or the Indian subcontinent, and who is regarded as such by the
24 community of which the person claims to be a part;

25 4. Hispanic – an individual of Mexican, Puerto Rican,
26 Cuban, Central or South American, or other Spanish culture or origin, regardless of
27 race, and who is regarded as such by the community of which the person claims to be a
28 part;

29 5. physically or mentally disabled –
30 **NOTWITHSTANDING THE STATE'S MOST RECENT DISPARITY STUDY**, an individual
31 who has an impairment that substantially limits one or more major life activities, who
32 is regarded generally by the community as having such a disability, and whose
33 disability has substantially limited his or her ability to engage in competitive
34 business; or

35 6. women – a woman, regardless of race or ethnicity; or

1 (ii) otherwise found by the certification agency to be a socially
2 and economically disadvantaged individual.

3 (2) There is a rebuttable presumption that an individual who is a
4 member of a minority group under paragraph (1)(i) of this subsection is socially and
5 economically disadvantaged.

6 (3) An individual whose personal net worth exceeds \$1,500,000, as
7 adjusted annually for inflation according to the Consumer Price Index, may not be
8 found to be economically disadvantaged.

9 **[(j)] (k)** “Socially disadvantaged individual” means an individual who has
10 been subjected to racial or ethnic prejudice or cultural bias within American society
11 because of membership in a group and without regard to individual qualities. Social
12 disadvantage must stem from circumstances beyond the control of the individual.

13 **14-301.1.**

14 **THE GENERAL ASSEMBLY FINDS THE FOLLOWING:**

15 **(1) THE STATE OF MARYLAND WISHES TO PROVIDE ALL OF ITS**
16 **CITIZENS WITH EQUAL ACCESS TO BUSINESS FORMATION AND BUSINESS**
17 **GROWTH OPPORTUNITIES;**

18 **(2) THE ELIMINATION OF DISCRIMINATION AGAINST**
19 **MINORITY- AND WOMEN-OWNED BUSINESSES IS OF PARAMOUNT IMPORTANCE**
20 **TO THE FUTURE WELFARE OF THE STATE;**

21 **(3) THE GENERAL ASSEMBLY HAS RECEIVED AND CAREFULLY**
22 **REVIEWED THE DISPARITY STUDY ENTITLED “THE STATE OF MINORITY- AND**
23 **WOMEN-OWNED BUSINESS ENTERPRISE: EVIDENCE FROM MARYLAND”**
24 **COMMISSIONED BY THE GENERAL ASSEMBLY AND PUBLISHED ON FEBRUARY**
25 **17, 2011 (THE STUDY), AND FINDS THAT THE STUDY PROVIDES A STRONG BASIS**
26 **IN EVIDENCE DEMONSTRATING PERSISTENT DISCRIMINATION AGAINST**
27 **MINORITY- AND WOMEN-OWNED BUSINESSES;**

28 **(4) BASED ON ITS REVIEW OF THE STUDY, THE GENERAL**
29 **ASSEMBLY FINDS THAT:**

30 **(i) THERE ARE SUBSTANTIAL AND STATISTICALLY**
31 **SIGNIFICANT ADVERSE DISPARITIES BETWEEN THE AVAILABILITY AND**
32 **UTILIZATION OF MINORITIES AND WOMEN IN THE PRIVATE SECTOR IN THE SAME**
33 **GEOGRAPHIC MARKETS AND INDUSTRY CATEGORIES IN WHICH THE STATE DOES**
34 **BUSINESS;**

1 **(II) THE STATE WOULD BECOME A PASSIVE PARTICIPANT IN**
2 **PRIVATE SECTOR RACIAL AND GENDER DISCRIMINATION IF IT CEASED OR**
3 **CURTAILED ITS REMEDIAL EFFORTS, INCLUDING THE OPERATION OF THE**
4 **MINORITY BUSINESS ENTERPRISE PROGRAM;**

5 **(III) THERE ARE SUBSTANTIAL AND STATISTICALLY**
6 **SIGNIFICANT ADVERSE DISPARITIES FOR ALL RACIAL AND ETHNIC GROUPS AND**
7 **NONMINORITY WOMEN COMBINED IN ALL MAJOR CONTRACTING CATEGORIES IN**
8 **STATE PROCUREMENT;**

9 **(IV) THERE ARE SUBSTANTIAL AND STATISTICALLY**
10 **SIGNIFICANT ADVERSE DISPARITIES FOR ALL INDIVIDUAL RACIAL AND ETHNIC**
11 **GROUPS AND FOR NONMINORITY WOMEN IN MOST MAJOR INDUSTRY**
12 **CATEGORIES IN STATE PROCUREMENT;**

13 **(V) THERE IS AMPLE EVIDENCE THAT DISCRIMINATION IN**
14 **THE PRIVATE SECTOR HAS DEPRESSED FIRM FORMATION AND FIRM GROWTH**
15 **AMONG MINORITY AND NONMINORITY WOMEN ENTREPRENEURS; AND**

16 **(VI) THERE IS POWERFUL AND PERSUASIVE QUALITATIVE**
17 **AND ANECDOTAL EVIDENCE OF DISCRIMINATION AGAINST MINORITY AND**
18 **NONMINORITY WOMEN BUSINESS OWNERS IN BOTH THE PUBLIC AND PRIVATE**
19 **SECTORS;**

20 **(5) AS A RESULT OF ONGOING DISCRIMINATION AND THE**
21 **PRESENT DAY EFFECTS OF PAST DISCRIMINATION, MINORITY- AND**
22 **WOMEN-OWNED BUSINESSES COMBINED CONTINUE TO BE VERY SIGNIFICANTLY**
23 **UNDERUTILIZED RELATIVE TO THEIR AVAILABILITY TO PERFORM WORK IN THE**
24 **SECTORS IN WHICH THE STATE DOES BUSINESS;**

25 **(6) MINORITY PRIME CONTRACTORS ALSO ARE SUBJECT TO**
26 **DISCRIMINATION AND CONFRONT ESPECIALLY DAUNTING BARRIERS IN**
27 **ATTEMPTING TO COMPETE WITH VERY LARGE AND LONG-ESTABLISHED**
28 **NONMINORITY COMPANIES;**

29 **(7) DESPITE THE FACT THAT THE STATE HAS EMPLOYED, AND**
30 **CONTINUES TO EMPLOY, NUMEROUS AND ROBUST RACE-NEUTRAL**
31 **REMEDIES, INCLUDING AGGRESSIVE OUTREACH AND ADVERTISING, TRAINING**
32 **AND EDUCATION, SMALL BUSINESS PROGRAMS, EFFORTS TO IMPROVE ACCESS**
33 **TO CAPITAL, AND OTHER EFFORTS, THERE IS A STRONG BASIS IN EVIDENCE**
34 **THAT DISCRIMINATION PERSISTS EVEN IN PUBLIC SECTOR PROCUREMENT**
35 **WHERE THESE EFFORTS HAVE BEEN EMPLOYED;**

1 **(8) THIS SUBTITLE ENSURES THAT RACE-NEUTRAL EFFORTS**
2 **WILL BE USED TO THE MAXIMUM EXTENT FEASIBLE AND THAT**
3 **RACE-CONSCIOUS MEASURES WILL BE USED ONLY WHERE NECESSARY TO**
4 **ELIMINATE DISCRIMINATION THAT WAS NOT ALLEVIATED BY RACE-NEUTRAL**
5 **EFFORTS;**

6 **(9) THIS SUBTITLE CONTINUES AND ENHANCES EFFORTS TO**
7 **ENSURE THAT THE STATE LIMITS THE BURDEN ON NONMINORITY BUSINESSES**
8 **AS MUCH AS POSSIBLE BY ENSURING THAT ALL GOALS ARE DEVELOPED USING**
9 **THE BEST AVAILABLE DATA AND THAT WAIVERS ARE AVAILABLE WHENEVER**
10 **CONTRACTORS MAKE GOOD FAITH EFFORTS; AND**

11 **(10) STATE EFFORTS TO SUPPORT THE DEVELOPMENT OF**
12 **COMPETITIVELY VIABLE MINORITY- AND WOMEN-OWNED BUSINESS**
13 **ENTERPRISES WILL ASSIST IN REDUCING DISCRIMINATION AND CREATING JOBS**
14 **FOR ALL CITIZENS OF MARYLAND.**

15 14-302.

16 (a) (1) (i) Except for leases of real property, each unit shall structure
17 procurement procedures, consistent with the purposes of this subtitle, to try to achieve
18 an overall **PERCENTAGE** goal [of 25%] of the unit's total dollar value of procurement
19 contracts being made directly or indirectly to certified minority business enterprises.

20 **(II) 1. THE OVERALL PERCENTAGE GOAL SHALL BE**
21 **ESTABLISHED ON A BIENNIAL BASIS BY THE SPECIAL SECRETARY OF MINORITY**
22 **AFFAIRS, IN CONSULTATION WITH THE SECRETARY OF TRANSPORTATION AND**
23 **THE ATTORNEY GENERAL.**

24 **2. DURING ANY YEAR IN WHICH THERE IS A DELAY**
25 **IN ESTABLISHING THE OVERALL GOAL, THE PREVIOUS YEAR'S GOAL WILL**
26 **APPLY.**

27 **[(ii)] (III) 1. In consultation with the [State Department]**
28 **SECRETARY of Transportation and the [Office of the] Attorney General, the**
29 **[Governor's Office] SPECIAL SECRETARY of Minority Affairs shall establish**
30 **guidelines ON A BIENNIAL BASIS for each unit to consider while determining whether**
31 **to set subgoals for the minority groups listed in [§ 14-301(i)(1)(i)1, 2, 3, 4,] §**
32 **14-301(J)(1)(I)1, 2, 3, 4, and 6 of this subtitle.**

33 **2. DURING ANY YEAR IN WHICH THERE IS A DELAY**
34 **IN ESTABLISHING THE SUBGOAL GUIDELINES, THE PREVIOUS YEAR'S SUBGOAL**
35 **GUIDELINES WILL APPLY.**

1 (IV) 1. THE SPECIAL SECRETARY OF MINORITY
 2 AFFAIRS, IN CONSULTATION WITH THE SECRETARY OF TRANSPORTATION AND
 3 THE ATTORNEY GENERAL, SHALL ESTABLISH GOALS AND SUBGOAL GUIDELINES
 4 THAT, TO THE MAXIMUM EXTENT FEASIBLE, APPROXIMATE THE LEVEL OF
 5 MINORITY BUSINESS ENTERPRISE PARTICIPATION THAT WOULD BE EXPECTED
 6 IN THE ABSENCE OF DISCRIMINATION.

7 2. IN ESTABLISHING OVERALL GOALS AND SUBGOAL
 8 GUIDELINES, THE SPECIAL SECRETARY OF MINORITY AFFAIRS SHALL PROVIDE
 9 FOR PUBLIC PARTICIPATION BY CONSULTING WITH MINORITY, WOMEN’S, AND
 10 GENERAL CONTRACTOR GROUPS, COMMUNITY ORGANIZATIONS, AND OTHER
 11 OFFICIALS OR ORGANIZATIONS THAT COULD BE EXPECTED TO HAVE
 12 INFORMATION CONCERNING:

13 A. THE AVAILABILITY OF MINORITY- AND
 14 WOMEN- OWNED BUSINESSES;

15 B. THE EFFECTS OF DISCRIMINATION ON
 16 OPPORTUNITIES FOR MINORITY- AND WOMEN- OWNED BUSINESSES; AND

17 C. THE STATE’S OPERATION OF THE MINORITY
 18 BUSINESS ENTERPRISE PROGRAM.

19 (V) IN ESTABLISHING OVERALL GOALS, THE FACTORS TO BE
 20 CONSIDERED SHALL INCLUDE:

21 1. THE RELATIVE AVAILABILITY OF MINORITY- AND
 22 WOMEN-OWNED BUSINESSES TO PARTICIPATE IN STATE PROCUREMENT AS
 23 DEMONSTRATED BY THE STATE’S MOST RECENT DISPARITY STUDY;

24 2. PAST PARTICIPATION OF MINORITY BUSINESS
 25 ENTERPRISES IN STATE PROCUREMENT, EXCEPT FOR PROCUREMENT RELATED
 26 TO LEASES OF REAL PROPERTY; AND

27 3. OTHER FACTORS THAT CONTRIBUTE TO
 28 CONSTITUTIONAL GOAL SETTING.

29 (VI) NOTWITHSTANDING § 12-101 OF THIS ARTICLE, THE
 30 SPECIAL SECRETARY OF MINORITY AFFAIRS SHALL ADOPT REGULATIONS IN
 31 ACCORDANCE WITH TITLE 10, SUBTITLE 1 OF THE STATE GOVERNMENT
 32 ARTICLE SETTING FORTH THE STATE’S OVERALL GOAL.

33 (2) Each unit shall:

1 (i) consider the practical severability of ALL contracts AND, IN
2 ACCORDANCE WITH § 11-201 OF THIS ARTICLE, MAY NOT BUNDLE CONTRACTS;
3 [and]

4 (ii) implement a program that will enable the unit to evaluate
5 each contract to determine the appropriate minority business enterprise participation
6 goals, IF ANY, for the contract based[, in part,] on:

7 1. the potential subcontract opportunities available in
8 the prime procurement contract;

9 2. the availability of certified minority business
10 enterprises to respond competitively to the potential subcontract opportunities; [and]

11 3. the guidelines established under paragraph (1)(ii) of
12 this subsection; AND

13 4. OTHER FACTORS THAT CONTRIBUTE TO
14 CONSTITUTIONAL GOAL SETTING;

15 (III) MONITOR AND COLLECT DATA WITH RESPECT TO PRIME
16 CONTRACTOR COMPLIANCE WITH CONTRACT GOALS; AND

17 (IV) INSTITUTE CORRECTIVE ACTION WHEN PRIME
18 CONTRACTORS DO NOT MAKE GOOD-FAITH EFFORTS TO COMPLY WITH
19 CONTRACT GOALS.

20 (3) UNITS MAY NOT USE QUOTAS OR ANY PROJECT
21 GOAL-SETTING PROCESS THAT:

22 (I) SOLELY RELIES ON THE STATE'S OVERALL NUMERICAL
23 GOAL, OR ANY OTHER JURISDICTION'S OVERALL NUMERICAL GOAL; OR

24 (II) FAILS TO INCORPORATE THE ANALYSIS OUTLINED IN
25 PARAGRAPH (2)(II) OF THIS SUBSECTION.

26 [(3)] (4) (i) A woman who is also a member of an ethnic or racial
27 minority group may be certified in that category in addition to the gender category.

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

1 **[(4)] (5)** Each unit shall meet the maximum feasible portion of the
2 **[goals] STATE'S OVERALL GOAL** established in accordance with this subsection by
3 using race-neutral measures to facilitate minority business enterprise participation in
4 the procurement process.

5 **[(5)] (6)** If a unit establishes minority business enterprise
6 participation goals for a contract, a contractor, including a contractor that is a certified
7 minority business enterprise, shall:

8 (i) identify specific work categories appropriate for
9 subcontracting;

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

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

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

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

18 (iv) offer to provide reasonable assistance to minority business
19 enterprises to fulfill bonding requirements or to obtain a waiver of those requirements;

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

23 (vi) upon acceptance of a bid or proposal, provide the unit with a
24 list of minority businesses with whom the contractor negotiated, including price quotes
25 from minority and nonminority firms.

26 **(7) THE SPECIAL SECRETARY OF MINORITY AFFAIRS SHALL:**

27 **(I) IN CONSULTATION WITH THE SECRETARY OF**
28 **TRANSPORTATION AND THE ATTORNEY GENERAL, ESTABLISH PROCEDURES**
29 **GOVERNING HOW THE PARTICIPATION OF MINORITY BUSINESS ENTERPRISE**
30 **PRIME CONTRACTORS IS COUNTED TOWARD CONTRACT GOALS; AND**

31 **(II) NOTWITHSTANDING § 12-101 OF THIS ARTICLE, ADOPT**
32 **REGULATIONS SETTING FORTH THE PROCEDURES ESTABLISHED IN**
33 **ACCORDANCE WITH THIS PARAGRAPH.**

1 **[(6)] (8)** (i) 1. If a contractor, **INCLUDING A CERTIFIED**
2 **MINORITY BUSINESS ENTERPRISE**, does not achieve all or a part of the minority
3 business enterprise participation goals on a contract, the unit shall make a finding of
4 whether the contractor has demonstrated that the contractor took all necessary and
5 reasonable steps to achieve the goals, including compliance with paragraph **[(5)] (6)** of
6 this subsection.

7 2. A waiver of any part of the minority business
8 enterprise goals for a contract shall be granted if a contractor provides a reasonable
9 demonstration of good-faith efforts to achieve the goals.

10 (ii) If the unit determines that a waiver should be granted in
11 accordance with subparagraph (i) of this paragraph, the unit may not require the
12 contractor to renegotiate any subcontract in order to achieve a different result.

13 (iii) The head of the unit may waive any of the requirements of
14 this subsection relating to the establishment, use, and waiver of contract goals for a
15 sole source, expedited, or emergency procurement in which the public interest cannot
16 reasonably accommodate use of those requirements.

17 (iv) 1. Except for waivers granted in accordance with
18 subparagraph (iii) of this paragraph, when a waiver determination is made, the unit
19 shall issue the determination in writing.

20 2. The head of the unit shall:

21 A. keep one copy of the waiver determination and the
22 reasons for the determination; and

23 B. forward one copy of the waiver determination to the
24 Governor's Office of Minority Affairs.

25 (v) On or before July 31 of each year, each unit shall submit
26 directly to the Board of Public Works and the Governor's Office of Minority Affairs an
27 annual report of waivers requested and waivers granted under this paragraph.

28 (vi) The report required under subparagraph (v) of this
29 paragraph shall contain the following information on those contracts where the unit
30 considered a contractor's request for waiver of all or a portion of the minority business
31 enterprise goals:

32 1. the contract titles, numbers, and dates;

33 2. the number of waiver requests received;

34 3. the number of waiver requests granted; and

1 4. any other information specifically requested by the
2 Board.

3 ~~[(7)]~~ **(9)** (i) [In this paragraph, “MBE participation schedule”
4 means a schedule included in the submission of a bid or offer that identifies:

5 1. the certified minority business enterprises that a
6 bidder or offeror agrees to use in the performance of the contract; and

7 2. the percentage of contract value attributed to each
8 certified minority business enterprise.

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

12 2. If the bidder or offeror determines that a minority
13 business enterprise identified in the **[MBE] MINORITY BUSINESS ENTERPRISE**
14 participation schedule has become or will become unavailable or **[is]** ineligible to
15 perform the work required under the contract, the bidder or offeror shall notify the
16 unit within 72 hours of making the determination.

17 ~~[(iii)]~~ **(II)** 1. If a minority business enterprise identified in
18 the **[MBE] MINORITY BUSINESS ENTERPRISE** participation schedule submitted with
19 a bid or offer has become or will become unavailable or **[is]** ineligible to perform the
20 work required under the contract, the bidder or offeror may submit a written request
21 with the unit to amend the **[MBE] MINORITY BUSINESS ENTERPRISE** participation
22 schedule.

23 2. The request to amend the **[MBE] MINORITY**
24 **BUSINESS ENTERPRISE** participation schedule shall indicate the bidder’s or offeror’s
25 efforts to substitute another certified minority business enterprise to perform the work
26 that the unavailable or ineligible minority business enterprise would have performed.

27 **[3. Except as provided in subparagraph 4 of this**
28 **subparagraph, an MBE]**

29 **(III) A MINORITY BUSINESS ENTERPRISE** participation
30 schedule may not be amended unless:

31 **1. THE BIDDER OR OFFEROR PROVIDES A**
32 **SATISFACTORY EXPLANATION OF THE REASON FOR INCLUSION OF THE**
33 **UNAVAILABLE OR INELIGIBLE FIRM ON THE MINORITY BUSINESS ENTERPRISE**
34 **PARTICIPATION SCHEDULE; AND**

1 **2.** the amendment is approved by the unit's procurement
2 officer after consulting with the unit's **[MBE] MINORITY BUSINESS ENTERPRISE**
3 liaison.

4 **(10) (I) THIS PARAGRAPH APPLIES AFTER EXECUTION OF A**
5 **CONTRACT WITH AN EXPECTED DEGREE OF MINORITY BUSINESS ENTERPRISE**
6 **PARTICIPATION.**

7 **(II) THE MINORITY BUSINESS ENTERPRISE PARTICIPATION**
8 **SCHEDULE, INCLUDING ANY AMENDMENT, SHALL BE ATTACHED TO AND MADE A**
9 **PART OF THE EXECUTED CONTRACT.**

10 **(III) 1. A CONTRACTOR MAY NOT TERMINATE OR**
11 **OTHERWISE CANCEL THE CONTRACT OF A CERTIFIED MINORITY BUSINESS**
12 **ENTERPRISE SUBCONTRACTOR LISTED IN THE MINORITY BUSINESS**
13 **ENTERPRISE PARTICIPATION SCHEDULE WITHOUT SHOWING GOOD CAUSE AND**
14 **OBTAINING THE PRIOR WRITTEN CONSENT OF THE MINORITY BUSINESS**
15 **ENTERPRISE LIAISON AND APPROVAL OF THE HEAD OF THE UNIT.**

16 **2. THE UNIT SHALL SEND A COPY OF THE WRITTEN**
17 **CONSENT OBTAINED UNDER SUBSUBPARAGRAPH 1 OF THIS SUBPARAGRAPH TO**
18 **THE GOVERNOR'S OFFICE OF MINORITY AFFAIRS.**

19 **[4.] (IV) [An MBE] A MINORITY BUSINESS**
20 **ENTERPRISE** participation schedule may not be amended after the date of contract
21 execution unless the request is approved by the head of the unit and the contract is
22 amended.

23 **[(8)] (11)** If, during the performance of a contract, a certified minority
24 business enterprise contractor or subcontractor becomes ineligible to participate in the
25 Minority Business Enterprise Program because one or more of its owners has a
26 personal net worth that exceeds the amount specified in § 14-301(i)(3) of this subtitle:

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

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

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

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

3 14–303.

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

7 (ii) The Board shall keep a record of information regarding any
8 waivers requested in accordance with [~~§ 14–302(a)(5)(i)~~] **§ 14–302(A)(8)(I)** of this
9 subtitle and subsection [~~(b)(8)~~] **(B)(11)** of this section and submit a copy of the record
10 to the General Assembly on or before October 1 of each year, in accordance with §
11 2–1246 of the State Government Article.

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

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

21 (b) These regulations shall include:

22 (1) provisions:

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

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

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

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

5 (2) a requirement that the solicitation document accompanying each
6 solicitation set forth the expected degree of minority business enterprise participation
7 based, in part, on the factors set forth in § 14-302(a)(2)(ii) of this subtitle;

8 **(3) A REQUIREMENT THAT BIDDERS OR OFFERORS COMPLETE A**
9 **DOCUMENT SETTING FORTH THE PERCENTAGE OF THE TOTAL DOLLAR AMOUNT**
10 **OF THE CONTRACT THAT THE BIDDER OR OFFEROR AGREES WILL BE**
11 **PERFORMED BY CERTIFIED MINORITY BUSINESS ENTERPRISES;**

12 **(4) A REQUIREMENT THAT THE SOLICITATION DOCUMENTS**
13 **COMPLETED AND SUBMITTED BY THE BIDDER OR OFFEROR IN CONNECTION**
14 **WITH ITS MINORITY BUSINESS ENTERPRISE PARTICIPATION COMMITMENT MUST**
15 **BE ATTACHED TO AND MADE A PART OF THE CONTRACT;**

16 **(5) A REQUIREMENT THAT ALL CONTRACTS CONTAINING**
17 **MINORITY BUSINESS ENTERPRISE PARTICIPATION GOALS SHALL CONTAIN A**
18 **LIQUIDATED DAMAGES PROVISION THAT APPLIES IN THE EVENT THAT THE**
19 **CONTRACTOR FAILS TO COMPLY IN GOOD FAITH WITH THE PROVISIONS OF THIS**
20 **SUBTITLE OR THE PERTINENT TERMS OF THE APPLICABLE CONTRACT;**

21 **[(3)] (6)** a requirement that the unit provide a current list of certified
22 minority business enterprises to each prospective contractor;

23 **[(4)] (7)** provisions to ensure the uniformity of requests for bids on
24 subcontracts;

25 **[(5)] (8)** provisions relating to the timing of requests for bids on
26 subcontracts and of submission of bids on subcontracts;

27 **[(6)] (9)** provisions designed to ensure that a fiscal disadvantage to
28 the State does not result from an inadequate response by minority business
29 enterprises to a request for bids;

30 **[(7)] (10)** provisions relating to joint ventures, under which a bidder
31 may count toward meeting its minority business enterprise participation goal, the
32 minority business enterprise portion of the joint venture;

33 **[(8)] (11)** consistent with **[(§ 14-302(a)(5)] § 14-302(A)(8)** of this
34 subtitle, provisions relating to any circumstances under which a unit may waive
35 obligations of the contractor relating to minority business enterprise participation;

1 **[(9)] (12)** provisions requiring a monthly submission to the unit by
2 minority business enterprises acknowledging all payments received in the preceding
3 30 days under a contract governed by this subtitle;

4 **[(10)] (13)** a requirement that a unit shall verify and maintain data
5 concerning payments received by minority business enterprises, including a
6 requirement that, upon completion of a project, the unit shall compare the total dollar
7 value actually received by minority business enterprises with the amount of contract
8 dollars initially awarded, and an explanation of any discrepancies therein;

9 **[(11)] (14)** a requirement that a unit verify that minority business
10 enterprises listed in a successful bid are actually participating to the extent listed in
11 the project for which the bid was submitted;

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

15 **[(13)] (16)** a requirement that a bid or proposal based on a solicitation
16 with an expected degree of minority business enterprise participation identify the
17 specific commitment of certified minority business enterprises at the time of
18 submission;

19 **[(14)] (17)** provisions promoting and providing for the counting and
20 reporting of certified minority business enterprises as prime contractors;

21 **[(15)] (18)** provisions establishing standards to require a minority
22 business enterprise to perform a commercially useful function on a contract;

23 **[(16)] (19)** a requirement that each unit work with the Governor's
24 Office of Minority Affairs to designate certain procurements as being excluded from
25 the requirements of § 14-302(a) of this subtitle; and

26 **[(17)] (20)** other provisions that the Board considers necessary or
27 appropriate to encourage participation by minority business enterprises and to protect
28 the integrity of the procurement process.

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

32 14-309.

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

4 SECTION 2. AND BE IT FURTHER ENACTED, That the Certification Agency,
5 in consultation with the General Assembly and the Office of the Attorney General,
6 shall initiate a study of the Minority Business Enterprise Program to evaluate the
7 Program’s continued compliance with the requirements of the Croson decision and any
8 subsequent federal or constitutional requirements. In preparation for the study, the
9 Board of Public Works may adopt regulations authorizing a unit of State government
10 to require bidders and offerors to submit information necessary for the conduct of the
11 study. The Board of Public Works may designate that certain information received in
12 accordance with regulations adopted under this section shall be confidential.
13 Notwithstanding that certain information may be designated by the Board of Public
14 Works as confidential, the Certification Agency may provide the information to any
15 person that is under contract with the Certification Agency to assist in conducting the
16 study. The study shall also evaluate race–neutral programs and other methods that
17 can be used to address the needs of minority businesses. The final report on the study
18 shall be submitted to the Legislative Policy Committee of the General Assembly, in
19 accordance with § 2–1246 of the State Government Article, before September 30, 2015,
20 so that the General Assembly may review the report before the 2016 Session.

21 SECTION 3. AND BE IT FURTHER ENACTED, That having considered the
22 evidence of discrimination against minority– and women–owned businesses included
23 in the study entitled “The State of Minority– and Women–Owned Business Enterprise:
24 Evidence from Maryland” published on February 17, 2011 (the Study), and other
25 evidence generally available to the General Assembly, it is the intent of the General
26 Assembly to eliminate discrimination against minority– and women–owned businesses
27 doing business in Maryland contracting markets in a manner that:

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

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

31 (3) makes full and effective use of race–neutral measures;

32 (4) is focused on operating an effective Minority Business Enterprise
33 Program targeted at eliminating the discrimination thoroughly documented in the
34 Study;

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

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

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

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

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

9 (10) promotes the development of competitively viable minority- and
10 women-owned businesses.

11 SECTION 4. AND BE IT FURTHER ENACTED, That if any provision of this
12 Act or the application thereof to any person or circumstance is held invalid for any
13 reason in a court of competent jurisdiction, the invalidity does not affect other
14 provisions or any other application of this Act which can be given effect without the
15 invalid provision or application, and for this purpose the provisions of this Act are
16 declared severable.

17 SECTION 5. AND BE IT FURTHER ENACTED, That this Act shall take effect
18 July 1, 2012.

Approved:

Governor.

Speaker of the House of Delegates.

President of the Senate.