

HOUSE BILL 433

P2

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CF SB 309

By: **The Speaker (By Request – Administration) and Delegates Kipke, McConkey, and West**

Introduced and read first time: January 26, 2017

Assigned to: Health and Government Operations

A BILL ENTITLED

1 AN ACT concerning

2 **State Finance and Procurement – Small and Minority Business Participation**

3 FOR the purpose of clarifying what constitutes good cause for the purpose of removal of a
4 certified minority business enterprise after the execution of a contract; authorizing
5 a certain unit to apply a certain percentage of certain costs toward achieving certain
6 goals under certain circumstances; authorizing a certain unit to apply the total
7 amount of certain fees or commissions toward certain goals under certain
8 circumstances; prohibiting a certain unit from applying any portion of certain costs
9 toward certain goals; repealing the definition of “designated procurement unit” in
10 the Small Business Reserve Program; altering a requirement that certain units
11 structure certain procurement procedures to achieve a certain minimum percentage
12 of the unit’s total dollar value of certain contracts to be made directly to small
13 businesses; providing that a certain unit may apply only certain payments toward
14 its overall annual Small Business Reserve payment; requiring the Special Secretary
15 of Minority Affairs, in consultation with the Attorney General, to establish certain
16 standards and guidelines at a certain regular interval; defining a certain term;
17 making conforming changes; and generally relating to small and minority business
18 participation in State procurement.

19 BY repealing and reenacting, with amendments,
20 Article – State Finance and Procurement
21 Section 14–302 and 14–502 through 14–505
22 Annotated Code of Maryland
23 (2015 Replacement Volume and 2016 Supplement)

24 BY repealing and reenacting, with amendments,
25 Article – State Finance and Procurement
26 Section 14–501
27 Annotated Code of Maryland
28 (2015 Replacement Volume and 2016 Supplement)

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.

[Brackets] indicate matter deleted from existing law.



(As enacted by Chapter 8 of the Acts of the General Assembly of 2016)

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 subparagraph 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.

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

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

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

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

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

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

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

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

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

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

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

31 (3) Each unit shall:

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

1 (ii) implement a program that will enable the unit to evaluate each
2 contract to determine the appropriate minority business enterprise participation goals, if
3 any, for the contract based on:

4 1. the potential subcontract opportunities available in the
5 prime procurement contract;

6 2. the availability of certified minority business enterprises
7 to respond competitively to the potential subcontract opportunities;

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

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

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

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

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

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

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

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

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

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

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

31 (7) If a unit establishes minority business enterprise participation goals for
32 a contract, a contractor, including a contractor that is a certified minority business
33 enterprise, shall:

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

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

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

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

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

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

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

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

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

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

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

24 (9) (i) 1. If a contractor, including a certified minority business
25 enterprise, does not achieve all or a part of the minority business enterprise participation
26 goals on a contract, the unit shall make a finding of whether the contractor has
27 demonstrated that the contractor took all necessary and reasonable steps to achieve the
28 goals, including compliance with paragraph (7) of this subsection.

29 2. A waiver of any part of the minority business enterprise
30 goals for a contract shall be granted if a contractor provides a reasonable demonstration of
31 good–faith efforts to achieve the goals.

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

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

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

11 2. The head of the unit shall:

12 A. keep one copy of the waiver determination and the reasons
13 for the determination; and

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

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

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

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

23 2. the number of waiver requests received;

24 3. the number of waiver requests granted; and

25 4. any other information specifically requested by the Board.

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

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

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

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

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

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

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

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

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

21 (iii) 1. **FOR PURPOSES OF THIS SUBPARAGRAPH, GOOD**
22 **CAUSE FOR REMOVAL OF A CERTIFIED MINORITY BUSINESS ENTERPRISE AFTER**
23 **CONTRACT EXECUTION INCLUDES DOCUMENTED NONPERFORMANCE BY THE**
24 **MINORITY BUSINESS ENTERPRISE OR ELECTION BY THE CERTIFIED MINORITY**
25 **BUSINESS ENTERPRISE TO CEASE WORK ON THE CONTRACT.**

26 [1.] 2. A contractor may not terminate or otherwise cancel
27 the contract of a certified minority business enterprise subcontractor listed in the minority
28 business enterprise participation schedule without showing good cause and obtaining the
29 prior written consent of the minority business enterprise liaison and approval of the head
30 of the unit.

31 [2.] 3. The unit shall send a copy of the written consent
32 obtained under subparagraph [1] 2 of this subparagraph to the Governor's Office of
33 Minority Affairs.

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

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

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

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

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

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

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

21 **(14) (I) FOR PURPOSES OF THIS PARAGRAPH AND PARAGRAPH (15)**
22 **OF THIS SUBSECTION, "REGULAR DEALER":**

23 **1. MEANS A FIRM THAT OWNS, OPERATES, OR MAINTAINS**
24 **A STORE, A WAREHOUSE, OR ANY OTHER ESTABLISHMENT IN WHICH THE**
25 **MATERIALS, SUPPLIES, ARTICLES, OR EQUIPMENT ARE OF THE GENERAL**
26 **CHARACTER DESCRIBED BY THE SPECIFICATIONS REQUIRED UNDER THE CONTRACT**
27 **AND ARE BOUGHT, KEPT IN STOCK, OR REGULARLY SOLD OR LEASED TO THE PUBLIC**
28 **IN THE USUAL COURSE OF BUSINESS; AND**

29 **2. DOES NOT INCLUDE A PACKAGER, A BROKER, A**
30 **MANUFACTURER'S REPRESENTATIVE, OR ANY OTHER PERSON THAT ARRANGES OR**
31 **EXPEDITES TRANSACTIONS.**

32 **(II) A UNIT MAY APPLY ONLY 60% OF THE COSTS OF THE**
33 **MATERIALS AND SUPPLIES PROVIDED BY THE CERTIFIED MINORITY BUSINESS**
34 **ENTERPRISE IF THE CERTIFIED MINORITY BUSINESS ENTERPRISE IS A REGULAR**

- 1 (10) the Department of Labor, Licensing, and Regulation;
- 2 (11) the Department of Natural Resources;
- 3 (12) the State Department of Education;
- 4 (13) the Department of State Police;
- 5 (14) the Department of Public Safety and Correctional Services;
- 6 (15) the Department of Transportation;
- 7 (16) the University System of Maryland;
- 8 (17) the Maryland Port Commission;
- 9 (18) the State Retirement Agency;
- 10 (19) the Maryland Insurance Administration;
- 11 (20) the Maryland Stadium Authority;
- 12 (21) the State Lottery and Gaming Control Agency;
- 13 (22) the Morgan State University; and
- 14 (23) the Maryland Transportation Authority.
- 15 (c)] “Small business” means:
- 16 (1) a certified minority business enterprise, as defined in § 14–301 of this
17 title, that meets the criteria specified under item (2) of this subsection; or
- 18 (2) a business, other than a broker, that meets the following criteria:
- 19 (i) the business is independently owned and operated;
- 20 (ii) the business is not a subsidiary of another business;
- 21 (iii) the business is not dominant in its field of operation; and
- 22 (iv) 1. A. the wholesale operations of the business did not
23 employ more than 50 persons in its most recently completed 3 fiscal years;
- 24 B. the retail operations of the business did not employ more
25 than 25 persons in its most recently completed 3 fiscal years;

1 C. the manufacturing operations of the business did not
2 employ more than 100 persons in its most recently completed 3 fiscal years;

3 D. the service operations of the business did not employ more
4 than 100 persons in its most recently completed 3 fiscal years;

5 E. the construction operations of the business did not employ
6 more than 50 persons in its most recently completed 3 fiscal years; and

7 F. the architectural and engineering services of the business
8 did not employ more than 100 persons in its most recently completed 3 fiscal years; or

9 2. A. the gross sales of the wholesale operations of the
10 business did not exceed an average of \$4,000,000 in its most recently completed 3 fiscal
11 years;

12 B. the gross sales of the retail operations of the business did
13 not exceed an average of \$3,000,000 in its most recently completed 3 fiscal years;

14 C. the gross sales of the manufacturing operations of the
15 business did not exceed an average of \$2,000,000 in its most recently completed 3 fiscal
16 years;

17 D. the gross sales of the service operations of the business did
18 not exceed an average of \$10,000,000 in its most recently completed 3 fiscal years;

19 E. the gross sales of the construction operations of the
20 business did not exceed an average of \$7,000,000 in its most recently completed 3 fiscal
21 years; and

22 F. the gross sales of the architectural and engineering
23 services of the business did not exceed an average of \$4,500,000 in its most recently
24 completed 3 fiscal years.

25 [(d)] (C) "Small business reserve" means those procurements that are limited to
26 responses from small businesses under § 14-502(b) of this subtitle.

27 14-502.

28 (a) Except as provided in subsection (d) of this section, this subtitle applies to all
29 procurements by a [designated procurement] unit.

30 (b) This subsection does not apply to procurements subject to Subtitle 1 of this
31 title.

1 (c) [A designated procurement] **TO THE EXTENT PRACTICABLE**, A unit shall
2 structure its procurement procedures to achieve a minimum of [10%] **15%** of the unit's
3 total dollar value of goods, supplies, services, maintenance, construction,
4 construction-related services, and architectural and engineering service contracts to be
5 made directly to small businesses.

6 (d) The total dollar value of procurements by a [designated procurement] unit
7 does not include the value of contracts to which this section does not apply because of a
8 conflict with federal law.

9 **(E) A UNIT MAY APPLY TOWARD THE UNIT'S OVERALL ANNUAL SMALL**
10 **BUSINESS RESERVE PAYMENT ACHIEVEMENT ONLY THOSE PAYMENTS RESULTING**
11 **FROM A PROCUREMENT THAT IS DESIGNATED A SMALL BUSINESS RESERVE**
12 **PROCUREMENT.**

13 **(F) THE SPECIAL SECRETARY OF MINORITY AFFAIRS, IN CONSULTATION**
14 **WITH THE ATTORNEY GENERAL, SHALL ESTABLISH STANDARDS AND GUIDELINES**
15 **FOR PARTICIPATION IN THE SMALL BUSINESS RESERVE PROGRAM EVERY 5 YEARS.**

16 14-503.

17 (a) The Governor's Office of Minority Affairs shall adopt regulations to establish
18 procedures for compiling and maintaining a comprehensive bidder's list of qualified small
19 businesses that shall be posted on the Internet.

20 (b) The Governor's Office of Minority Affairs shall:

21 (1) establish guidelines for Small Business Reserve Program
22 administration;

23 (2) ensure agency compliance with the Small Business Reserve Program;

24 (3) provide training and technical assistance to agency personnel; and

25 (4) collect data regarding the State's utilization of small business reserve
26 vendors.

27 (c) Each [designated procurement] unit shall ensure compliance with the
28 regulations set forth in subsection (a) of this section.

29 14-504.

30 (a) Any procurement by a [designated procurement] unit of goods, supplies,
31 services, maintenance, construction, construction-related services, architectural services,
32 and engineering services shall be eligible for designation for the small business reserve.

1 (b) A solicitation for procurement that has been designated for a small business
2 reserve shall be published in the same manner as required for an invitation for bids as set
3 forth in § 13–103(c) of this article.

4 (c) The procurement officer of a [designated procurement] unit shall award a
5 procurement contract designated for a small business reserve to the small business that
6 submits a responsive bid that:

7 (1) is the lowest bid price;

8 (2) if the invitation for bids so provides, is the lowest evaluated bid price;
9 or

10 (3) is the bid or proposal most favorable to the State within the small
11 business reserve.

12 14–505.

13 (a) Within 60 days after the enactment of the budget bill by the General
14 Assembly, each [designated procurement] unit shall submit a report to the Governor’s
15 Office of Minority Affairs that complies with the reporting requirements set forth in
16 COMAR 21.11.01.06.

17 (b) (1) Within 90 days after the end of each fiscal year, each unit shall submit
18 a report to the Governor’s Office of Minority Affairs that complies with the requirements of
19 paragraph (2) of this subsection.

20 (2) For the preceding fiscal year, the report shall:

21 (i) state the total number and the dollar value of payments the unit
22 made to small businesses under designated small business reserve contracts;

23 (ii) state the total number and the dollar value of payments the unit
24 made to small businesses under nondesignated small business reserve contracts, including
25 purchase card procurements;

26 (iii) state the total dollar value of payments the unit made under
27 procurement contracts; and

28 (iv) contain other such information as required by the Governor’s
29 Office of Minority Affairs.

30 (c) On or before December 31 of each year, the Governor’s Office of Minority
31 Affairs shall submit to the Board of Public Works and, subject to § 2–1246 of the State
32 Government Article, to the Legislative Policy Committee a report summarizing the
33 information the Office receives under subsection (b) of this section.

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