

Chapter 155

(House Bill 389)

AN ACT concerning

Procurement – Minority Business Enterprises – Revisions

FOR the purpose of requiring a procurement officer, in an invitation for bids or a request for proposals, to include a certain summary of the factors used to determine the expected degree of minority business enterprise participation for the contract; ~~authorizing certain entities to retain certification as a minority business enterprise if the entity participates as a mentor in a certain mentorship program and under certain circumstances; requiring the Special Secretary for the Office of Small, Minority, and Women Business Affairs to establish certain statewide minority business enterprise participation goals by industry type in a certain manner; establishing that certain statewide goals by industry type apply under certain circumstances;~~ requiring each unit of the Executive Branch of State government to annually report the results of certain compliance assessments to the Governor's Office of Small, Minority, and Women Business Affairs; authorizing the Special Secretary to waive the requirement for a unit to report certain information under certain circumstances; requiring the ~~Office to maintain and publish on its website a list of prime contractors who, based on the results of the compliance assessments,~~ Governor's Office of Small, Minority, and Women Business Affairs and the Office of State Procurement, in consultation with the Office of the Attorney General and Board of Public Works, to adopt by regulation criteria used to determine that a prime contractor has persistently fail failed to meet contract goals; requiring the results of certain compliance assessments to be included in certain criteria; requiring the Governor's Office of Small, Minority, and Women Business Affairs to refer certain prime contractors to the Office of the Attorney General for debarment; authorizing the Board of Public Works to debar a person for a certain period of time under certain circumstances; requiring certain units of the Executive Branch of State government to designate certain procurements for the small business reserve under certain circumstances; requiring certain standards and guidelines relating to participation in the small business reserve program to allow for the registration of certain businesses without the need to file certain paperwork; establishing that certain procurements may be exempt from designation for the small business reserve under certain circumstances; making certain provisions of law relating to the prompt payment of subcontractors apply to all State contracts, rather than only State contracts for construction; creating the position of Minority Business Enterprise Ombudsman in the Governor's Office of Small, Minority, and Women Business Affairs; establishing certain duties and authority of the Ombudsman; ~~altering the definition of "responsible bidder or offeror" to exclude contractors who persistently fail to meet contract goals, based on the results of certain compliance assessments~~ requiring the Ombudsman, Governor's Office of Small, Minority, and Women Business Affairs, and the Department of Legislative Services to submit certain

reports on or before certain dates; and generally relating to procurement and minority business enterprises.

~~BY repealing and reenacting, without amendments,
Article – State Finance and Procurement
Section ~~11-101(a)~~
Annotated Code of Maryland
(~~2021 Replacement Volume~~)~~

BY repealing and reenacting, with amendments,
Article – State Finance and Procurement
Section ~~11-101(e)~~, 13-103(a), 13-104(b), ~~14-301(f)~~, ~~14-302(a)(1)~~, ~~14-303~~, and
14-303(b)(2), ~~14-305~~, 14-305, and 14-502(f); ~~and~~ 15-226 to be under the
amended part “Part IV. Prompt Payment of Subcontractors”; and 16-203(d)
Annotated Code of Maryland
(2021 Replacement Volume)

BY adding to
Article – State Finance and Procurement
Section 14-301(e-1) and 14-502.1
Annotated Code of Maryland
(2021 Replacement Volume)

BY adding to
Article – State Government
Section 9-303.3
Annotated Code of Maryland
(2021 Replacement Volume)

~~BY repealing and reenacting, with amendments,
Article – State Government
Section ~~9-305(b)(7)~~
Annotated Code of Maryland
(~~2021 Replacement Volume~~)~~

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

Article – State Finance and Procurement

~~11-101.~~

- (a) ~~In this Division II the following words have the meanings indicated unless:~~
- (1) ~~the context clearly requires a different meaning; or~~

~~(2) a different definition is provided for a particular title or provision.~~

~~(e) "Responsible bidder or offeror" means a person who:~~

~~(1) has the capability in all respects to perform fully the requirements for a procurement contract; [and]~~

~~(2) possesses the integrity and reliability that will ensure good faith performance; AND~~

~~(3) IS NOT A CONTRACTOR WHO PERSISTENTLY FAILS TO MEET CONTRACT GOALS AS DETERMINED UNDER § 14-305(C)(2) OF THIS ARTICLE.~~

13-103.

(a) (1) Whenever procurement is based on competitive sealed bids, a procurement officer shall seek bids by issuing an invitation for bids.

(2) Subject to subsection (b) of this section, an invitation for bids shall include:

(i) the specifications of the procurement contract, including the expected degree of minority business enterprise participation, as provided in § 14-303(b) of this article;

(II) A SUMMARY OF THE FACTORS USED TO DETERMINE THE EXPECTED DEGREE OF MINORITY BUSINESS ENTERPRISE PARTICIPATION FOR THE PROCUREMENT CONTRACT, INCLUDING SUBCONTRACTING OPPORTUNITIES IDENTIFIED FOR THE PROJECT, ANY APPLICABLE NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM CODES LINKED TO THE SUBCONTRACTING OPPORTUNITIES, AND THE NUMBER OF CERTIFIED MINORITY BUSINESS ENTERPRISES IN THOSE INDUSTRIES;

[(ii)] (III) whether the procurement contract will be awarded based on the lowest bid price, the lowest evaluated bid price or, if the procurement is subject to § 11-202(3) of this article, the bid most favorable to the State;

[(iii)] (IV) if the procurement contract will be based on evaluated bid price, the objective measurable criteria by which the lowest evaluated bid price will be determined; and

[(iv)] (V) if the Secretary of General Services, the Secretary of Transportation, or the Chancellor of the University System of Maryland has so designated, the small business preference.

13-104.

(b) (1) Whenever procurement is based on competitive sealed proposals, a procurement officer shall seek proposals by issuing a request for proposals.

(2) A request for proposals shall include a statement of:

(i) the scope of the procurement contract, including the expected degree of minority business enterprise participation, as provided in § 14-303(b) of this article;

(II) A SUMMARY OF THE FACTORS USED TO DETERMINE THE EXPECTED DEGREE OF MINORITY BUSINESS ENTERPRISE PARTICIPATION FOR THE PROCUREMENT CONTRACT, INCLUDING SUBCONTRACTING OPPORTUNITIES IDENTIFIED FOR THE PROJECT, ANY APPLICABLE NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM CODES LINKED TO THE SUBCONTRACTING OPPORTUNITIES, AND THE NUMBER OF CERTIFIED MINORITY BUSINESS ENTERPRISES IN THOSE INDUSTRIES;

~~[(ii)]~~ **(III)** the factors, including price, that will be used in evaluating proposals; and

~~[(iii)]~~ **(IV)** the relative importance of each factor.

14-301.

~~(f) "Minority business enterprise" means:~~

~~(1) any legal entity, except a joint venture, that is:~~

~~[(1)] (I) organized to engage in commercial transactions;~~

~~[(2)] (II) at least 51% owned and controlled by 1 or more individuals who are socially and economically disadvantaged; and~~

~~[(3)] (III) managed by, and the daily business operations of which are controlled by, one or more of the socially and economically disadvantaged individuals who own it; OR~~

~~(2) AN ENTITY THAT:~~

~~(i) HAS GRADUATED OR OTHERWISE IS NO LONGER CERTIFIED UNDER THE TERMS OF THE GRADUATION PROGRAM ESTABLISHED IN ACCORDANCE WITH § 14-303(B)(15) OF THIS SUBTITLE; AND~~

~~(H) HAS BEEN AUTHORIZED TO RETAIN CERTIFICATION UNDER § 9-305(B)(7) OF THE STATE GOVERNMENT ARTICLE.~~

(E-1) "INDUSTRY TYPE" MEANS THE FOLLOWING PROCUREMENT CATEGORIES:

(1) CONSTRUCTION;

(2) ARCHITECTURAL AND ENGINEERING SERVICES AND OTHER CONSTRUCTION-RELATED PROFESSIONAL SERVICES;

(3) MAINTENANCE;

(4) INFORMATION TECHNOLOGY;

(5) SERVICES; AND

(6) GOODS, SUPPLIES, AND EQUIPMENT.

~~14-302.~~

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

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

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

~~B. a procurement contract awarded to a nonprofit entity in accordance with requirements mandated by State or federal law; and~~

~~C. a procurement by the Maryland Developmental Disabilities Administration of the Maryland Department of Health 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 Maryland Department of Health.~~

~~(ii) 1. The overall percentage goal shall be established on a biennial basis by the Special Secretary for the Office of Small, Minority, and Women~~

~~Business 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 FOR THE OFFICE OF SMALL, MINORITY, AND WOMEN BUSINESS AFFAIRS SHALL ESTABLISH STATEWIDE GOALS BY INDUSTRY TYPE ON A BIENNIAL BASIS.~~

~~2. IN ESTABLISHING STATEWIDE GOALS BY INDUSTRY TYPE, THE SPECIAL SECRETARY FOR THE OFFICE OF SMALL, MINORITY, AND WOMEN BUSINESS AFFAIRS SHALL USE THE SAME METHODOLOGY USED TO DEVELOP THE OVERALL STATEWIDE GOAL UNDER SUBPARAGRAPH (II) OF THIS PARAGRAPH, WITH CONSIDERATION GIVEN TO AVAILABILITY AND UTILIZATION OF MINORITY BUSINESS ENTERPRISES IN THE INDUSTRY.~~

~~3. DURING ANY YEAR IN WHICH THERE IS A DELAY IN ESTABLISHING THE STATEWIDE GOALS BY INDUSTRY TYPE, THE PREVIOUS YEAR'S GOALS WILL APPLY.~~

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

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

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

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

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

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

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

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

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

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

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

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

14-303.

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

~~(ii) The Board shall keep a record of information regarding any waivers requested in accordance with § 14-302(a)(9)(i) of this subtitle and subsection (b)(12) of this section and submit a copy of the record to the General Assembly on or before October 1 of each year, in accordance with § 2-1257 of the State Government Article.~~

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

(b) These regulations shall include:

~~(1) provisions:~~

~~(i) designating one State agency to certify and decertify minority business enterprises for all units through a single process that meets applicable federal~~

~~requirements, including provisions that promote and facilitate the submission of some or all of the certification application through an electronic process;~~

~~(ii) for the purpose of certification under this subtitle, that promote and facilitate certification of minority business enterprises that have received certification from a federal or a county program that uses a certification process substantially similar to the process established in accordance with item (i) of this item, including a provision that provides for certification of a business as a minority business enterprise if the business:~~

~~1. has obtained certification under the federal Disadvantaged Business Enterprise Program; and~~

~~2. meets the eligibility requirements of the Minority Business Enterprise Program;~~

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

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

(2) a requirement that the solicitation document accompanying each solicitation:

(I) set forth the expected degree of minority business enterprise participation based, in part, on the factors set forth in § 14-302(a)(3)(ii) of this subtitle; AND

(II) INCLUDE A SUMMARY OF THE FACTORS USED TO DETERMINE THE EXPECTED DEGREE OF MINORITY BUSINESS ENTERPRISE PARTICIPATION, INCLUDING SUBCONTRACTING OPPORTUNITIES IDENTIFIED FOR THE PROJECT, ANY APPLICABLE NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM CODES LINKED TO THE SUBCONTRACTING OPPORTUNITIES, AND THE NUMBER OF CERTIFIED MINORITY BUSINESS ENTERPRISES IN THOSE INDUSTRIES;

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

~~(4) a requirement that within 10 days after notice from the prime contractor of the State's intent to award a contract, each minority business enterprise~~

~~servicing as a subcontractor on the contract complete a document setting forth the percentage and type of work assigned to the subcontractor under the contract and submit copies of the completed form to both the procurement officer and the contractor;~~

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

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

~~(ii) a provision that prohibits a unit from assessing liquidated damages for an indefinite delivery contract or an indefinite performance contract if a unit fails to request the performance or delivery of a task for which:~~

~~1. a minority business enterprise subcontractor was named on the participation schedule; or~~

~~2. a minority business enterprise subcontractor was named on the participation schedule and qualified based on the subcontractor's existing North American Industry Classification System code;~~

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

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

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

~~[(10)] (9) provisions designed to ensure that a fiscal disadvantage to the State does not result from an inadequate response by minority business enterprises to a request for bids;~~

~~[(11)] (10) provisions relating to joint ventures, under which a bidder may count toward meeting its minority business enterprise participation goal, the minority business enterprise portion of the joint venture;~~

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

~~[(13)](12) provisions requiring a monthly submission to the unit by minority business enterprises acknowledging all payments received in the preceding 30 days under a contract governed by this subtitle;~~

~~[(14)](13) a requirement that a unit shall verify and maintain data concerning payments received by minority business enterprises, including a requirement that, upon completion of a project, the unit shall compare the total dollar value actually received by minority business enterprises with the amount of contract dollars initially awarded, and an explanation of any discrepancies therein;~~

~~[(15)](14) a requirement that a unit verify that minority business enterprises listed in a successful bid are actually participating to the extent listed in the project for which the bid was submitted;~~

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

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

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

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

~~[(20)](19) a requirement that each unit work with the Governor's Office of Small, Minority, and Women Business Affairs to designate certain procurements as being excluded from the requirements of § 14-302(a) of this subtitle;~~

~~[(21)](20) provisions promoting and providing for the counting and reporting of minority business enterprises certified as both a woman-owned business and a business owned by a member of an ethnic or racial group in accordance with § 14-302(a)(5) of this subtitle; and~~

~~[(22)](21) other provisions that the Board considers necessary or appropriate to encourage participation by minority business enterprises and to protect the integrity of the procurement process.~~

(e) ~~The regulations adopted under this section shall specify that:~~

~~(1) a unit may not allow a business to participate as if it were a certified minority business enterprise if the business's certification is pending; AND~~

~~(2) A UNIT SHALL ALLOW A BUSINESS TO PARTICIPATE AS A CERTIFIED MINORITY BUSINESS ENTERPRISE IF THE CERTIFICATION HAS BEEN GRANTED UNDER § 9-305(B)(7) OF THE STATE GOVERNMENT ARTICLE.~~

14-305.

(a) (1) Within 90 days after the end of the fiscal year, each unit shall report to the Governor’s Office of Small, Minority, and Women Business Affairs, the certification agency, and, subject to § 2-1257 of the State Government Article, the Joint Committee on Fair Practices and Personnel Oversight.

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

(i) state the total number and value of procurement contracts between the unit and certified minority business enterprises, by specific category of minority business enterprise **AND BY INDUSTRY TYPE**, including whether the minority business enterprise participated as a prime contractor or as a subcontractor;

(ii) indicate the percentage that those procurement contracts represent, by specific category of minority business enterprise **AND BY INDUSTRY TYPE**, of the total number and value of procurement contracts;

(iii) state the total number and the names of certified minority business enterprises that participated as prime contractors or as subcontractors on procurement contracts awarded by a unit;

(iv) for each minority business included in the report under item (iii) of this paragraph, list all procurement contracts awarded by a unit to the minority business enterprise, including a description of the contract **AND INDUSTRY TYPE**; [and]

(V) PROVIDE THE RESULTS OF EACH COMPLIANCE ASSESSMENT CONDUCTED BY THE UNIT UNDER § 14-303(B)(14)(B)(15) OF THIS SUBTITLE, INCLUDING FOR EACH CONTRACT COMPLETED DURING THE FISCAL YEAR:

1. THE NAMES OF EACH PRIME CONTRACTOR AND EACH ~~MINORITY BUSINESS~~ SUBCONTRACTOR THAT PARTICIPATED IN THE CONTRACT;

2. THE TYPE OF GOOD OR SERVICE PROVIDED BY THE CONTRACT;

3. THE MINORITY BUSINESS ENTERPRISE PARTICIPATION GOAL FOR THE CONTRACT;

4. WHETHER A WAIVER WAS GRANTED FOR THE MINORITY BUSINESS ENTERPRISE PARTICIPATION GOAL;

5. THE TOTAL DOLLAR VALUE OF PAYMENTS MADE TO EACH PRIME CONTRACTOR AND BY EACH PRIME CONTRACTOR TO EACH SUBCONTRACTOR DURING THE CONTRACT TERM;

6. WHETHER EACH SUBCONTRACTOR IS A CERTIFIED MINORITY BUSINESS ENTERPRISE; AND

7. IF APPLICABLE, A DESCRIPTION OF FACTORS THAT MAY HAVE CONTRIBUTED TO FAILURE TO ACHIEVE THE MINORITY BUSINESS ENTERPRISE PARTICIPATION GOAL FOR THE CONTRACT, INCLUDING DOCUMENTED NONPERFORMANCE OR UNAVAILABILITY OF A MINORITY BUSINESS ENTERPRISE; AND

[(v)] (VI) contain other such information as required by the Governor's Office of Small, Minority, and Women Business Affairs and the certification agency and approved by the Board.

(3) As to procurement contracts for architectural services and engineering services reported under paragraph (2) of this subsection, the report shall identify by separate category of minority business enterprise procurements for:

- (i) architectural services; and
- (ii) engineering services.

(4) A report under this subsection shall be in a form prescribed by the Governor's Office of Small, Minority, and Women Business Affairs and the certification agency and approved by the Board.

(5) THE SPECIAL SECRETARY FOR THE OFFICE OF SMALL, MINORITY, AND WOMEN BUSINESS AFFAIRS MAY WAIVE THE REQUIREMENT FOR A UNIT TO REPORT MINORITY BUSINESS PARTICIPATION BY INDUSTRY TYPE UNDER PARAGRAPH (2) OF THIS SUBSECTION IF THE SPENDING THRESHOLD FOR THE INDUSTRY TYPE IS TOO LOW FOR THE UNIT TO PROVIDE SUFFICIENT DATA.

(b) (1) On or before December 31 of each year, the Governor's Office of Small, Minority, and Women Business Affairs shall submit to the Board of Public Works and, subject to § 2-1257 of the State Government Article, to the Legislative Policy Committee a report summarizing the information the Office receives under subsection (a) of this section.

(2) IF APPLICABLE, THE REPORT SUBMITTED UNDER PARAGRAPH (1) OF THIS SUBSECTION SHALL INCLUDE MINORITY BUSINESS ENTERPRISE PARTICIPATION DATA FOR EACH UNIT BY INDUSTRY TYPE.

~~(2)~~ (3) This report may be prepared in conjunction with the annual report required under § 9-306 of the State Government Article.

(C) (1) IN THIS SUBSECTION, “MITIGATING FACTORS” INCLUDES DOCUMENTED NONPERFORMANCE OR UNAVAILABILITY OF A MINORITY BUSINESS ENTERPRISE DESIGNATED FOR A CONTRACT.

~~(2) THE GOVERNOR’S OFFICE OF SMALL, MINORITY, AND WOMEN BUSINESS AFFAIRS SHALL MAINTAIN AND PUBLISH ON ITS WEBSITE A LIST OF PRIME CONTRACTORS WHO, BASED ON THE RESULTS OF THE COMPLIANCE ASSESSMENTS RECEIVED UNDER SUBSECTION (A)(2)(V) OF THIS SECTION, PERSISTENTLY FAIL AND THE OFFICE OF STATE PROCUREMENT IN THE DEPARTMENT OF GENERAL SERVICES, IN CONSULTATION WITH THE OFFICE OF THE ATTORNEY GENERAL AND THE BOARD OF PUBLIC WORKS, SHALL ADOPT BY REGULATION CRITERIA USED TO DETERMINE THAT A PRIME CONTRACTOR HAS PERSISTENTLY FAILED TO MEET CONTRACT GOALS IN THE ABSENCE OF MITIGATING FACTORS.~~

~~(3) THE SPECIAL SECRETARY FOR THE OFFICE OF SMALL, MINORITY, AND WOMEN BUSINESS AFFAIRS MAY ADOPT REGULATIONS NECESSARY TO CARRY OUT THE REQUIREMENTS OF THIS SUBSECTION.~~

(3) THE CRITERIA ADOPTED UNDER PARAGRAPH (2) OF THIS SUBSECTION SHALL INCLUDE THE RESULTS OF THE COMPLIANCE ASSESSMENTS MADE UNDER SUBSECTION (A)(2)(V) OF THIS SECTION.

(4) THE GOVERNOR’S OFFICE OF SMALL, MINORITY, AND WOMEN BUSINESS AFFAIRS SHALL REFER PRIME CONTRACTORS IDENTIFIED UNDER THE CRITERIA ADOPTED UNDER PARAGRAPH (2) OF THIS SUBSECTION TO THE OFFICE OF THE ATTORNEY GENERAL FOR DEBARMENT UNDER § 16-203(D)(4) OF THIS ARTICLE.

14-502.

(f) (1) The Special Secretary for the Office of Small, Minority, and Women Business Affairs, in consultation with the Attorney General, shall establish standards and guidelines for participation in the Small Business Reserve Program every 5 years.

(2) THE STANDARDS AND GUIDELINES ESTABLISHED UNDER PARAGRAPH (1) OF THIS SUBSECTION SHALL ALLOW FOR THE REGISTRATION OF

BUSINESSES FOR PARTICIPATION IN THE SMALL BUSINESS RESERVE PROGRAM WITHOUT THE NEED TO FILE ANY ADDITIONAL PAPERWORK OTHER THAN EVIDENCE THAT THE BUSINESS:

(I) IS A SMALL BUSINESS UNDER THIS SUBTITLE; AND

(II) 1. IS CERTIFIED AS A MINORITY BUSINESS ENTERPRISE UNDER SUBTITLE 3 OF THIS TITLE;

2. IS CERTIFIED UNDER THE FEDERAL DISADVANTAGED BUSINESS ENTERPRISE PROGRAM; OR

3. IS QUALIFIED AS A SMALL BUSINESS UNDER SUBTITLE 2 OF THIS TITLE.

14-502.1.

(A) (1) THIS SECTION APPLIES TO A PROCUREMENT BY ANY UNIT OR AGENCY OF THE EXECUTIVE BRANCH OF STATE GOVERNMENT FOR GOODS, SUPPLIES, SERVICES, MAINTENANCE, CONSTRUCTION, CONSTRUCTION-RELATED SERVICES, ARCHITECTURAL SERVICES, OR ENGINEERING SERVICES.

(2) THIS SECTION DOES NOT APPLY TO:

(I) PROCUREMENTS MADE UNDER SUBTITLE 1 OF THIS TITLE;

(II) PROCUREMENTS INVOLVING EXPENDITURES OF FEDERAL DOLLARS, TO THE EXTENT THAT INCLUSION IN THE SMALL BUSINESS RESERVE PROGRAM CONFLICTS WITH FEDERAL LAW OR GRANT PROVISIONS;

(III) PROCUREMENTS WITH A TOTAL DOLLAR VALUE UNDER \$50,000;

(IV) THE PROCUREMENT OF HUMAN, SOCIAL, CULTURAL, OR EDUCATIONAL SERVICES; OR

(V) TERM AND MASTER CONTRACTS EXEMPTED UNDER SUBSECTION (C) OF THIS SECTION.

(B) (1) A PROCUREMENT WITH A TOTAL DOLLAR VALUE BETWEEN \$50,000 AND \$500,000 SHALL BE DESIGNATED FOR THE SMALL BUSINESS RESERVE.

(2) EACH UNIT OR AGENCY SHALL IMPLEMENT THIS SUBSECTION IN A MANNER CONSISTENT WITH ALL APPLICABLE STATUTES, INCLUDING THE REQUIREMENTS OF SUBTITLE 3 OF THIS TITLE.

(C) (1) A PROCUREMENT MAY BE EXEMPT FROM DESIGNATION UNDER SUBSECTION (B) OF THIS SECTION IF THE GOVERNOR’S OFFICE OF SMALL, MINORITY, AND WOMEN BUSINESS AFFAIRS CERTIFIES, CONCURRENTLY WITH REVIEW OF ANY WAIVER DETERMINATIONS FOR CERTIFIED MINORITY BUSINESS ENTERPRISE PARTICIPATION CONTRACT GOALS, THAT IT IS NOT PRACTICABLE TO DO SO.

(2) THE OFFICE OF STATE PROCUREMENT IN THE DEPARTMENT OF GENERAL SERVICES SHALL ASSIST THE GOVERNOR’S OFFICE OF SMALL, MINORITY, AND WOMEN BUSINESS AFFAIRS IN ESTABLISHING PROCEDURES AND GUIDELINES FOR THE EXEMPTION OF PROCUREMENTS UNDER PARAGRAPH (1) OF THIS SUBSECTION.

Part IV. [Construction Contracts –] Prompt Payment of Subcontractors.

15–226.

(a) In this section, “undisputed amount” means an amount owed by a contractor to a subcontractor for which there is no good faith dispute, including any retainage withheld.

(b) It is the policy of the State that, for work under a State procurement contract [for construction]:

(1) a contractor shall promptly pay to a subcontractor any undisputed amount to which the subcontractor is entitled; and

(2) a subcontractor shall promptly pay to a lower tier subcontractor any undisputed amount to which the lower tier subcontractor is entitled.

(c) (1) A contractor shall pay a subcontractor an undisputed amount to which the subcontractor is entitled within 10 days of receiving a progress or final payment from the State.

(2) If a contractor withholds payment from a subcontractor, within the time period in which payment normally would be made, the contractor shall:

(i) notify the subcontractor in writing and state the reason why payment is being withheld; and

(ii) provide a copy of the notice to the procurement officer.

(d) (1) If a subcontractor does not receive a payment within the required time period, the subcontractor may give written notice of the nonpayment to the procurement officer.

(2) The notice shall:

(i) indicate the name of the contractor, the project under which the dispute exists, and the amount in dispute;

(ii) provide an itemized description on which the amount is based;
and

(iii) if known, provide an explanation for any dispute concerning payment by the contractor.

(e) (1) Within 2 business days of receipt of written notice from a subcontractor, a representative of the unit designated by the procurement officer shall verbally contact the contractor to ascertain whether the amount withheld is an undisputed amount.

(2) If the representative of the unit decides that a part or all of the amount withheld is an undisputed amount, the representative of the unit shall instruct the contractor to pay the subcontractor the undisputed amount within 3 business days.

(3) The representative of the unit shall verbally communicate to the subcontractor the results of discussions with the contractor.

(4) If the contractor is instructed to pay the subcontractor and the subcontractor is not paid within the time instructed under paragraph (2) of this subsection, the subcontractor may report the nonpayment in writing to the procurement officer.

(f) (1) If the subcontractor notifies the procurement officer under subsection (e)(4) of this section that payment has not been made, the representative of the unit shall schedule a meeting to discuss the dispute with the unit's project manager, the contractor, and the subcontractor:

(i) at a time and location designated by the representative of the unit; but

(ii) not later than 10 days after receiving notice from the subcontractor under subsection (e)(4) of this section.

(2) The purpose of the meeting is to establish why the contractor has not paid the subcontractor in the required time period.

(3) The representative of the unit shall require the parties to provide at the meeting any information that the representative believes necessary to evaluate the dispute.

(4) If the representative of the unit determines that the contractor is delinquent in payment of an undisputed amount to the subcontractor, further progress payments to the contractor may be withheld until the subcontractor is paid.

(5) If payment is not paid to the subcontractor within 7 days after the representative of the unit determines that the contractor is delinquent in paying the subcontractor under this subsection, the representative shall schedule a second meeting to address the dispute:

(i) at a time and location designated by the representative of the unit; but

(ii) not later than 5 days after the close of the 7-day period.

(6) If, at the completion of the second meeting, the representative of the unit determines that the contractor continues to be delinquent in payments owed to the subcontractor, the representative:

(i) shall order that further payments to the contractor not be processed until payment to the subcontractor is verified;

(ii) may order that work under the contract be suspended based on the failure of the contractor to meet obligations under the contract; and

(iii) subject to paragraph (7) of this subsection, may require that the contractor pay a penalty to the subcontractor, in an amount not exceeding \$100 per day, from the date that payment was required under subsection (e)(2) of this section.

(7) A penalty may not be imposed under paragraph (6)(iii) of this subsection for any period that the representative of the unit determines the subcontractor was not diligent in reporting nonpayment to the procurement officer.

(g) (1) A contractor or a subcontractor may appeal a decision under subsection (f)(6) of this section to the procurement officer.

(2) The contractor shall comply with the procurement officer's decision.

(h) An act, failure to act, or decision of a procurement officer or a representative of a unit concerning a payment dispute between a contractor and subcontractor or between subcontractors under this section may not:

(1) affect the rights of the contracting parties under any other provision of law;

(2) be used as evidence on the merits of a dispute between the unit and the contractor or the contractor and subcontractor in any other proceeding; or

(3) result in liability against or prejudice the rights of the unit.

(i) A decision of a procurement officer or a representative of the unit designated by the procurement officer under this section is not subject to judicial review or the provisions of Part III of this subtitle.

(j) (1) A unit shall include in each State procurement contract [for construction] a provision:

(i) governing prompt payment to subcontractors; and

(ii) requiring inclusion of a similar provision in each subcontract at any tier.

(2) The contract provision shall establish procedures and remedies for the resolution of payment disputes similar to the process and remedies prescribed in subsections (c) through (g) of this section.

16-203.

(d) A person may be debarred from entering into a contract with the State:

(1) if the Board finds that the person was established or operates in a manner designed to evade the application of this title or to defeat the purpose of this title;

(2) if the person is a successor, assignee, subsidiary, or affiliate of a person who is debarred or suspended;

(3) EXCEPT AS PROVIDED UNDER ITEM (4) OF THIS SUBSECTION, for one of the following violations of a contract provision if the Board believes it to be serious enough to justify debarment:

(i) the deliberate failure, without good cause, to perform in accordance with the specifications, or within the time limit, provided in a contract; or

(ii) within the preceding 5 years, the failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts, unless the failure to perform or unsatisfactory performance was caused by acts beyond the control of the person;

(4) FOR A PERIOD NOT EXCEEDING 3 YEARS IF THE PERSON PERSISTENTLY FAILS TO MEET CONTRACT GOALS IN THE ABSENCE OF MITIGATING

FACTORS UNDER THE CRITERIA ESTABLISHED UNDER § 14-305(C)(2) OF THIS ARTICLE;

[(4)] (5) if the person is a competing contractor, or any officer, employee, representative, agent, or consultant of any competing contractor who violates § 13-211 of this article; or

[(5)] (6) for any other cause that the Board determines to be so serious as to affect the integrity of the procurement process.

Article – State Government

9-303.3.

(A) IN THIS SECTION, “OMBUDSMAN” MEANS THE MINORITY BUSINESS ENTERPRISE OMBUDSMAN IN THE OFFICE.

(B) THERE IS A MINORITY BUSINESS ENTERPRISE OMBUDSMAN APPOINTED BY THE SPECIAL SECRETARY.

(C) IN ACCORDANCE WITH THE STATE BUDGET, THE SPECIAL SECRETARY SHALL ALLOCATE THE STAFF AND OFFICE RESOURCES TO THE OMBUDSMAN NECESSARY FOR THE OMBUDSMAN TO FULFILL THE DUTIES OF THE OMBUDSMAN.

(D) THE OMBUDSMAN SHALL:

(1) ~~MAKE REASONABLE~~ ASSIST THE PROCUREMENT OFFICER MANAGING THE CONTRACT IN ATTEMPTS TO RESOLVE DISPUTES BETWEEN MINORITY BUSINESS ENTERPRISES AND PRIME CONTRACTORS, INCLUDING DISPUTES OVER CONTRACT SCOPE AND PAYMENTS; ~~AND~~

(2) SERVE AS A RESOURCE TO MINORITY BUSINESS ENTERPRISE LIAISONS, PROCUREMENT OFFICERS IN UNITS OF STATE GOVERNMENT, PRIME CONTRACTORS, AND MINORITY BUSINESS ENTERPRISES IN RESOLVING DISPUTES RELATED TO CONTRACTS THAT INCLUDE A MINORITY BUSINESS ENTERPRISE PARTICIPATION GOAL; ~~AND~~

(3) CONDUCT TRAININGS FOR PROCUREMENT OFFICERS IN UNITS OF STATE GOVERNMENT ON ENFORCEMENT OF THE REQUIREMENTS OF TITLE 14, SUBTITLE 3 OF THE STATE FINANCE AND PROCUREMENT ARTICLE, INCLUDING THE ASSESSMENT OF LIQUIDATED DAMAGES UNDER § 14-303(B)(6) OF THE STATE FINANCE AND PROCUREMENT ARTICLE.

(E) IN RESOLVING A DISPUTE UNDER SUBSECTION (D) OF THIS SECTION, THE OMBUDSMAN MAY:

(1) COMPEL PRIME CONTRACTORS AND MINORITY BUSINESS ENTERPRISES TO PROVIDE DOCUMENTATION RELATED TO CONTRACT PERFORMANCE AND PAYMENTS; AND

(2) ~~ORDER~~ ASSIST THE PROCUREMENT OFFICER MANAGING THE CONTRACT IN ORDERING ANY RELEVANT PAYMENTS TO BE MADE IN CONJUNCTION WITH A DISPUTE RESOLUTION.

(F) (1) EXCEPT AS PROVIDED IN PARAGRAPH (2) OF THIS SUBSECTION, WHEN RESOLVING A DISPUTE UNDER SUBSECTION (D) OF THIS SECTION, THE OMBUDSMAN MAY NOT DISCLOSE INFORMATION RECEIVED FROM A UNIT OF STATE GOVERNMENT, PRIME CONTRACTOR, OR MINORITY BUSINESS ENTERPRISE WITHOUT THE WRITTEN CONSENT OF THE PARTY FROM WHOM THE INFORMATION WAS OBTAINED.

(2) THE OMBUDSMAN MAY DISCLOSE INFORMATION RECEIVED UNDER THIS SECTION TO THE ASSISTANT ATTORNEY GENERAL ASSIGNED TO THE OFFICE.

~~9-305.~~

~~(b) Subject to the limitations of any law that governs the activities of other units of the Executive Branch of the State government, the Special Secretary shall:~~

~~(7) establish a mentoring program:~~

~~(i) in which larger and more established minority businesses can mentor start-up and small minority businesses; and~~

~~(ii) that incentivizes mentor participation by providing benefits to mentors, including:~~

~~1. special recognition on the Office website, and in the Office newsletter and participation updates;~~

~~2. a certificate of participation awarded by the Office;~~

~~3. the opportunity to present highlights of mentor and protege relationships at an annual appreciation event sponsored by the Office; [and]~~

~~4. increased networking and educational opportunities; AND~~

~~5. AUTHORIZATION FOR MINORITY BUSINESSES THAT HELD CERTIFICATION UNDER TITLE 14, SUBTITLE 3 OF THE STATE FINANCE AND PROCUREMENT ARTICLE AND HAVE BEEN DECERTIFIED TO OBTAIN OR RETAIN CERTIFICATION FOR A PERIOD OF TIME SET BY THE SPECIAL SECRETARY;~~

SECTION 2. AND BE IT FURTHER ENACTED, That, on or before December 1, 2023, the Minority Business Enterprise Ombudsman established under Section 1 of this Act shall report to the Senate Budget and Taxation Committee and the House Health and Government Operations Committee, in accordance with § 2–1257 of the State Government Article, on the activities of the Ombudsman, including whether the number of staff allocated to the Ombudsman is adequate to accomplish the requirements of § 9–303.3 of the State Government Article, as enacted under Section 1 of this Act.

SECTION 3. AND BE IT FURTHER ENACTED, That, on or before June 1, 2024, the Governor’s Office of Small, Minority, and Women Business Affairs shall study the use of liquidated damages by procurement officers under § 14–303(b)(6) of the State Finance and Procurement Article to enforce the requirements of Title 14, Subtitle 3 of the State Finance and Procurement Article and report to the Senate Budget and Taxation Committee and the House Health and Government Operations Committee, in accordance with § 2–1257 of the State Government Article, on:

- (1) the number of instances in which a procurement officer could have applied a liquidated damages penalty for failure of a contractor to comply in good faith with the provisions of Title 14, Subtitle 3 of the State Finance and Procurement Article;
- (2) the number of instances in which liquidated damages were actually assessed;
- (3) the amount of liquidated damages collected, if any;
- (4) the reasons for any failure to assess liquidated damages; and
- (5) recommendations for effective enforcement of the requirements of Title 14, Subtitle 3 of the State Finance and Procurement Article, including any suggested statutory changes.

SECTION 4. AND BE IT FURTHER ENACTED, That, on or before December 1, 2024, the Department of Legislative Services shall report to the Senate Budget and Taxation Committee and the House Health and Government Operations Committee, in accordance with § 2–1257 of the State Government Article, on:

- (1) the status of the recommendations included in the Department’s 2021 report “Evaluation of the Minority Business Enterprise Program”, including an assessment of:

(i) the effectiveness of changes implemented in response to the recommendations; and

(ii) for any recommendations that were not implemented or only partially implemented, whether the Department reaffirms its 2021 recommendation; and

(2) any updated findings and recommendations related to the Minority Business Enterprise Program.

SECTION ~~2~~ 5. AND BE IT FURTHER ENACTED, That this Act shall take effect July 1, 2022.

Approved by the Governor, April 21, 2022.