

# SENATE BILL 4

P2

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(PRE-FILED)

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By: **Chair, Education, Health, and Environmental Affairs Committee (By Request –  
Departmental – Office of Minority Affairs)**

Requested: November 15, 2016

Introduced and read first time: January 11, 2017

Assigned to: Education, Health, and Environmental Affairs

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## A BILL ENTITLED

1 AN ACT concerning

2 **Minority Business Enterprises – Program Participation – Requirements and**  
3 **Reauthorization**

4 FOR the purpose of requiring minority business enterprises serving as subcontractors on  
5 certain procurement contracts to submit certain documentation to the procurement  
6 officer of the unit and to the contractor; clarifying what constitutes good cause for the  
7 purposes of removal of a minority business enterprise after commencement of work on  
8 a contract; altering the termination date for certain provisions of law concerning the  
9 Minority Business Enterprise Program; altering the date by which the final report on  
10 a certain study is required to be submitted to the Legislative Policy Committee;  
11 making a conforming change; and generally relating to minority business enterprise  
12 program participation.

13 BY repealing and reenacting, with amendments,  
14 Article – State Finance and Procurement  
15 Section 14–302, 14–303, and 14–309  
16 Annotated Code of Maryland  
17 (2015 Replacement Volume and 2016 Supplement)

18 BY repealing and reenacting, with amendments,  
19 Chapter 154 of the Acts of the General Assembly of 2012, as amended by Chapters 200  
20 and 201 of the Acts of the General Assembly of 2013  
21 Section 2

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

24 **Article – State Finance and Procurement**

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EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.

[Brackets] indicate matter deleted from existing law.



1 14–302.

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

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

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

11 B. a procurement contract awarded to a not-for-profit entity  
12 in accordance with requirements mandated by State or federal law; and

13 C. a procurement by the Maryland Developmental Disabilities  
14 Administration of the Department of Health and Mental Hygiene for family and individual  
15 support services, community residential services, resource coordination services, behavioral  
16 support services, vocational and day services, and respite services, as those terms are defined  
17 in regulations adopted by the Department of Health and Mental Hygiene.

18 (ii) 1. The overall percentage goal shall be established on a  
19 biennial basis by the Special Secretary of Minority Affairs, in consultation with the Secretary  
20 of Transportation and the Attorney General.

21 2. During any year in which there is a delay in establishing  
22 the overall goal, the previous year's goal will apply.

23 (iii) 1. In consultation with the Secretary of Transportation and  
24 the Attorney General, the Special Secretary of Minority Affairs shall establish guidelines on  
25 a biennial basis for each unit to consider while determining whether to set subgoals for the  
26 minority groups listed in § 14–301(k)(1)(i)1, 2, 3, 4, and 6 of this subtitle.

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

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

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

1                   A.     the availability of minority– and women–owned businesses;

2                   B.     the effects of discrimination on opportunities for  
3 minority– and women–owned businesses; and

4                   C.     the State’s operation of the Minority Business Enterprise  
5 Program.

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

8                   1.     the relative availability of minority– and women–owned  
9 businesses to participate in State procurement as demonstrated by the State’s most recent  
10 disparity study;

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

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

14                   (vi)   Notwithstanding § 12–101 of this article, the Special Secretary of  
15 Minority Affairs shall adopt regulations in accordance with Title 10, Subtitle 1 of the State  
16 Government Article setting forth the State’s overall goal.

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

22                   (3)    Each unit shall:

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

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

28                   1.     the potential subcontract opportunities available in the  
29 prime procurement contract;

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



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

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

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

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

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

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

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

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

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

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

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

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

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

2. The head of the unit shall:

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

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

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

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

1. the contract titles, numbers, and dates;

2. the number of waiver requests received;

3. the number of waiver requests granted; and

4. any other information specifically requested by the Board.

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

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

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

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

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

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

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

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

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

(iii) 1. A contractor may not terminate or otherwise cancel the contract of a certified minority business enterprise subcontractor listed in the minority business enterprise participation schedule without showing good cause and obtaining the prior written consent of the minority business enterprise liaison and approval of the head of the unit.

**2. FOR PURPOSES OF THIS SECTION, GOOD CAUSE FOR REMOVAL OF A CERTIFIED MINORITY BUSINESS ENTERPRISE AFTER CONTRACT EXECUTION INCLUDES BUT IS NOT LIMITED TO DOCUMENTED NONPERFORMANCE BY THE MINORITY BUSINESS ENTERPRISE OR ELECTION BY THE MINORITY BUSINESS ENTERPRISE TO CEASE WORK ON THE CONTRACT.**

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

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

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

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

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

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

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

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

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

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

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)(11)] **(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 § 2-1246 of the State Government Article.

(iii) The Board shall keep a record of the aggregate number and the identity of minority business enterprises that receive certification under the process established by the Board under subsection (b)(1) 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 § 2-1246 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 the U.S. Small Business Administration or a county that uses a certification process substantially similar to the process established in accordance with item (i) of this item;

(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 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;

(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 STATE OF INTENT TO AWARD A CONTRACT, EACH MINORITY BUSINESS ENTERPRISE SERVING AS A SUBCONTRACTOR ON THE CONTRACT COMPLETE A DOCUMENT SETTING FORTH THE PERCENTAGE AND TYPE OF WORK IT WILL PERFORM UNDER THE CONTRACT AND SUBMIT COPIES OF THE COMPLETED FORM TO BOTH THE PROCUREMENT OFFICER AND THE CONTRACTOR;**

**[(4)] (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;

**[(5)] (6)** 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;

1           ~~[(6)] (7)~~ a requirement that the unit provide a current list of certified  
2 minority business enterprises to each prospective contractor;

3           ~~[(7)] (8)~~ provisions to ensure the uniformity of requests for bids on  
4 subcontracts;

5           ~~[(8)] (9)~~ provisions relating to the timing of requests for bids on  
6 subcontracts and of submission of bids on subcontracts;

7           ~~[(9)] (10)~~ provisions designed to ensure that a fiscal disadvantage to the  
8 State does not result from an inadequate response by minority business enterprises to a  
9 request for bids;

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

13           ~~[(11)] (12)~~ consistent with § 14–302(a)(9) of this subtitle, provisions relating  
14 to any circumstances under which a unit may waive obligations of the contractor relating to  
15 minority business enterprise participation;

16           ~~[(12)] (13)~~ provisions requiring a monthly submission to the unit by minority  
17 business enterprises acknowledging all payments received in the preceding 30 days under a  
18 contract governed by this subtitle;

19           ~~[(13)] (14)~~ a requirement that a unit shall verify and maintain data  
20 concerning payments received by minority business enterprises, including a requirement  
21 that, upon completion of a project, the unit shall compare the total dollar value actually  
22 received by minority business enterprises with the amount of contract dollars initially  
23 awarded, and an explanation of any discrepancies therein;

24           ~~[(14)] (15)~~ a requirement that a unit verify that minority business  
25 enterprises listed in a successful bid are actually participating to the extent listed in the  
26 project for which the bid was submitted;

27           ~~[(15)] (16)~~ provisions establishing a graduation program based on the  
28 financial viability of the minority business enterprise, using annual gross receipts or other  
29 economic indicators as may be determined by the Board;

30           ~~[(16)] (17)~~ a requirement that a bid or proposal based on a solicitation with  
31 an expected degree of minority business enterprise participation identify the specific  
32 commitment of certified minority business enterprises at the time of submission;

33           ~~[(17)] (18)~~ provisions promoting and providing for the counting and reporting  
34 of certified minority business enterprises as prime contractors;

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

**[(20)] (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.

14-309.

**Chapter 154 of the Acts of 2012, as amended by Chapters 200 and 201 of the Acts of 2013**

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