

Senate Bill 295

By: Senators Fort of the 39th, Henson of the 41st, Lucas of the 26th, Butler of the 55th, Rhett of the 33rd and others

A BILL TO BE ENTITLED

AN ACT

1 To amend Chapter 5 of Title 50 of the Official Code of Georgia Annotated, relating to the
2 Department of Administrative Services, so as to define certain terms; to create the Division
3 of Supplier Diversity; to provide for appointment of a director; to provide for powers and
4 duties of the director; to create the position of minority and women owned business
5 enterprises state-wide advocate; to provide for appointment; to provide for duties; to provide
6 for provisions for state contracts; to provide for a state-wide disparity study; to provide for
7 contents; to provide for the structure of procurement contracts; to provide for rules and
8 regulations; to provide for the implementation of rules and regulations; to provide for
9 exceptions; to provide for related matters; to repeal conflicting laws; and for other purposes.

10 BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

11 **SECTION 1.**

12 Chapter 5 of Title 50 of the Official Code of Georgia Annotated, relating to the Department
13 of Administrative Services, is amended by adding a new article to read as follows:

14 "ARTICLE 5

15 50-5-150.

16 As used in this article, the term:

17 (1) 'Certified business' means a business verified as a minority owned business enterprise
or women owned business enterprise pursuant to Code Section 50-5-157.

19 (2) 'Contracting agency' means a state agency which is a party or a proposed party to a
state contract.

21 (3) 'Contractor' means an individual; a business enterprise, including a sole
proprietorship, partnership, corporation, nonprofit corporation, or any other party to a
state contract; a bidder in conjunction with the award of a state contract; or a proposed
party to a state contract.

25 (4) 'Director' means the director of the Division of Supplier Diversity of the Department
26 of Administrative Services.

27 (5) 'Diversity practices' means a contractor's practices and policies with respect to:

28 (A) Utilizing certified businesses as subcontractors and suppliers in contracts awarded
29 by a state agency or other public corporation; and

30 (B) Entering into partnerships, joint ventures, or other similar arrangements with
31 certified businesses pursuant to applicable statutes or regulations governing an entity's
32 utilization of minority and women owned business enterprises.

33 (6) 'Division' means the Division of Supplier Diversity of the Department of
34 Administrative Services.

35 (7) 'Minority and women owned business enterprises' means both a minority owned
36 business enterprise and a women owned business enterprise.

37 (8) 'Minority group member' means a United States citizen or permanent resident alien
38 who is and can demonstrate membership in one of the following groups:

39 (A) African American persons having origins in any of the African racial groups;

40 (B) Hispanic persons of Mexican, Puerto Rican, Dominican, Cuban, or Central or
41 South American origin, regardless of race;

42 (C) Native American or Alaskan native persons having origins in any of the original
43 peoples of North America; or

44 (D) Asian or Pacific Islander persons having origins in any of the East Asian countries,
45 Southeast Asia, the Indian subcontinent, or the Pacific Islands.

46 (9) 'Minority owned business enterprise' means a business enterprise, including a sole
47 proprietorship, partnership, or corporation, that is:

48 (A) At least 70 percent owned by one or more minority group members;

49 (B) An enterprise in which the ownership interest of such minority group members is
50 real, substantial, and continuing;

51 (C) An enterprise in which such minority ownership has and exercises the authority to
52 control independently the day-to-day business decisions of the enterprise; and

53 (D) Authorized to do business in this state and is independently owned and operated.

54 (10) 'State agency' means a state department; a division, board, commission, or bureau
55 of any state department; or a state authority.

56 (11) 'State contract' means:

57 (A) A written agreement or purchase order instrument providing for a total expenditure
58 in excess of \$35,000.00 whereby a contracting agency is committed to expend or does
59 expend funds in return for labor, services such as legal, financial, and other professional
60 services, supplies, equipment, materials, or any combination of the foregoing to be
61 performed for or rendered or furnished to the contracting agency;

62 (B) A written agreement in excess of \$100,000.00 whereby a contracting agency is
63 committed to expend or does expend funds for the acquisition, construction, demolition,
64 replacement, major repair, or renovation of real property and improvements thereon;
65 and

66 (C) A written agreement in excess of \$100,000.00 whereby the owner of a state
67 assisted housing project is committed to expend or does expend funds for the
68 acquisition, construction, demolition, replacement, major repair, or renovation of real
69 property and improvements thereon for such project.

70 (12) 'State-wide advocate' means the person appointed by the commissioner of
71 administrative services to serve in the capacity of the minority and women owned
72 business enterprises state-wide advocate.

73 (13) 'Subcontract' means an agreement providing for a total expenditure in excess of
74 \$25,000.00 for the construction, demolition, replacement, major repair, renovation,
75 planning, or design of real property and improvements thereon between a contractor and
76 any individual or business enterprise, including a sole proprietorship, partnership,
77 corporation, or nonprofit corporation, in which a portion of a contractor's obligation under
78 a state contract is undertaken or assumed, but such agreement shall not include any
79 construction, demolition, replacement, major repair, renovation, planning, or design of
80 real property or improvements thereon for the beneficial use of the contractor.

81 (14) 'Utilization plan' means a plan prepared by a contractor and submitted in connection
82 with a proposed state contract. Such plan shall identify certified businesses, if known,
83 that have committed to perform work in connection with the proposed state contract as
84 well as any certified business, if known, which the contractor intends to use in connection
85 with the contractor's performance of the proposed state contract. Such plan shall
86 specifically contain a list, including the name, address, and telephone number, of each
87 certified business with which the contractor intends to subcontract.

88 (15) 'Women owned business enterprise' means a business enterprise, including a sole
89 proprietorship, partnership, or corporation, that is:

90 (A) At least 70 percent owned by one or more United States citizens or permanent
91 resident aliens who are women;

92 (B) An enterprise in which the ownership interest of such women is real, substantial,
93 and continuing;

94 (C) An enterprise in which such women ownership has and exercises the authority to
95 control independently the day-to-day business decisions of the enterprise; and

96 (D) Authorized to do business in this state and is independently owned and operated.

97 50-5-151.

98 (a) There is created within the Department of Administrative Services the Division of
99 Supplier Diversity. The head of the division shall be the director, who shall be appointed
100 by and hold office at the pleasure of the commissioner of administrative services. It shall
101 be the duty of the director to assist the Governor in the formulation and implementation of
102 laws and policies relating to minority and women owned business enterprises.

103 (b) The director may appoint such deputies, assistants, and other employees as may be
104 needed for the performance of the duties prescribed in this article. The director may
105 request and shall receive from any state agency such assistance as may be necessary to
106 carry out the provisions of this article.

107 (c) The director shall have the following powers and duties:

108 (1) To encourage and assist contracting agencies in their efforts to increase participation
109 by minority and women owned business enterprises on state contracts and subcontracts
110 so as to facilitate the award of a fair share of such state contracts and subcontracts to
111 them;

112 (2) To develop standardized forms and reporting documents necessary to implement this
113 article;

114 (3) To conduct educational programs consistent with the purposes of this article;

115 (4) To review periodically the practices and procedures of each contracting agency for
116 compliance with the provisions of this article and to require such contracting agencies to
117 file periodic reports with the division as to the participation level of minority and women
118 owned business enterprises in the awarding of state contracts;

119 (5) To report to the Governor and the chairpersons of the Senate Finance Committee and
120 the House Committee on Ways and Means on January 1 of each year the level of minority
121 and women owned business enterprises participating in each contracting agency's state
122 contracts, the activities of the division, and the effort by each contracting agency to
123 promote employment of minority group members and women and to promote and
124 increase participation by certified businesses with respect to state contracts and
125 subcontracts so as to facilitate the award of a fair share of state contracts to such certified
126 businesses. The director may recommend new activities and programs to effectuate the
127 purposes of this article;

128 (6) To prepare and update periodically a directory of certified businesses which shall,
129 wherever practicable, be divided into categories of labor, services, supplies, equipment,
130 materials, and recognized construction trades and which shall indicate areas or locations
131 of this state where such certified businesses are available to perform services;

132 (7) To appoint independent hearing officers who by contract or terms of employment
133 shall preside over adjudicatory hearings for the division and who are assigned no other
134 work by the division;

135 (8) To file a complaint when the director has knowledge that a contractor may have
136 violated the provisions of this article and such violation is unrelated, separate, or distinct
137 from the state contract as expressed by its terms; and

138 (9) To streamline the state certification process to accept federal and municipal
139 corporation certifications.

140 (d) The director may provide assistance to, and facilitate access to, programs serving
141 certified businesses as well as applicants to ensure that such certified businesses benefit,
142 as needed, from technical, managerial, financial, and general business assistance; training;
143 marketing; organizational and personnel skill development; project management assistance;
144 technology assistance; bond and insurance education assistance; and other business
145 development assistance. In addition, the director may, either independently or in
146 conjunction with other state agencies:

147 (1) Develop a clearinghouse of information on programs and services provided by
148 entities that may assist such certified businesses;

149 (2) Review bonding and paperwork requirements imposed by contracting agencies that
150 may unnecessarily impede the ability of such certified businesses to compete; and

151 (3) Seek to maximize utilization by minority and women owned business enterprises of
152 available federal resources, including but not limited to federal grants, loans, loan
153 guarantees, surety bonding guarantees, technical assistance, and programs and services
154 of the federal Small Business Administration.

155 50-5-152.

156 (a) There is established within the division the office of the minority and women owned
157 business enterprises state-wide advocate. The state-wide advocate shall be appointed by
158 the commissioner of administrative services.

159 (b) The state-wide advocate shall act as a liaison for minority and women owned business
160 enterprises to assist them in obtaining technical, managerial, financial, and other business
161 assistance for certified businesses and applicants. The state-wide advocate shall investigate
162 complaints brought by or on behalf of minority and women owned business enterprises
163 concerning certification delays and instances of violations of law by state agencies. The
164 state-wide advocate shall assist certified businesses and applicants in the certification
165 process. Other functions of the state-wide advocate shall be directed by the commissioner
166 of administrative services. The state-wide advocate may request and the director may

167 appoint staff and employees of the division to support the administration of the office of
168 the state-wide advocate.

169 (c) The state-wide advocate shall establish a toll-free number at the Department of
170 Administrative Services to be used to answer questions concerning the minority and
171 women owned business enterprises certification process.

172 (d) The state-wide advocate shall report to the director and commissioner of administrative
173 services by November 15 of each year on all activities related to fulfilling the obligations
174 of the office of the state-wide advocate. The director shall include the unedited text of the
175 state-wide advocate's report within the reports submitted by the director to the Governor
176 and the chairpersons of the Senate Finance Committee and the House Committee on Ways
177 and Means.

178 50-5-153.

179 (a) As used in this Code section, the term 'affirmative action' means recruitment,
180 employment, job assignments, promotions, upgrades, demotions, transfers, layoffs, or
181 terminations and rates of pay or other forms of compensation.

182 (b) All state contracts and all documents soliciting bids or proposals for state contracts
183 shall contain or make reference to the following provisions:

184 (1) The contractor shall not discriminate against employees or applicants for employment
185 because of race, creed, color, national origin, sex, age, disability, or marital status and
186 will undertake or continue existing programs of affirmative action to ensure that minority
187 group members and women are afforded equal employment opportunities without
188 discrimination;

189 (2) At the request of the contracting agency, the contractor shall request each
190 employment agency or labor union, or authorized representative of workers with which
191 it has a collective bargaining or other agreement or understanding, to furnish a written
192 statement that such employment agency, labor union, or representative will not
193 discriminate on the basis of race, creed, color, national origin, sex, age, disability, or
194 marital status and that such employment agency, labor union, or representative will
195 affirmatively cooperate in the implementation of the contractor's obligations provided in
196 this Code section;

197 (3) The contractor shall state in all solicitations or advertisements for employees that, in
198 the performance of the state contract, all qualified applicants will be afforded equal
199 employment opportunities without discrimination because of race, creed, color, national
200 origin, sex, age, disability, or marital status;

201 (4) The contractor shall include the provisions of paragraph (1) of this subsection in
202 every subcontract, except as provided in paragraph (6) of this subsection, in such a

203 manner that the provisions will be binding upon each subcontractor as to work in
204 connection with the state contract;

205 (5) The provisions of this Code section shall not be binding upon contractors or
206 subcontractors in the performance of work or the provision of services or any other
207 activity that is unrelated, separate, or distinct from the state contract as expressed by its
208 terms;

209 (6) In the implementation of this Code section, the contracting agency shall consider
210 compliance by a contractor or subcontractor with the requirements of any federal law
211 concerning equal employment opportunity which effectuates the purpose of this Code
212 section. The contracting agency shall determine whether the imposition of the
213 requirements of this Code section duplicate or conflict with any such law, and if such
214 duplication or conflict exists, the contracting agency shall waive the applicability of this
215 Code section to the extent of such duplication or conflict;

216 (7) The director shall promulgate rules and regulations to ensure that contractors and
217 subcontractors undertake programs of affirmative action and equal employment
218 opportunity as required by this Code section. Such rules and regulations as they pertain
219 to any particular agency shall be developed after consultation with contracting agencies.
220 Such rules and regulations may require a contractor, after notice in a bid solicitation, to
221 submit an equal employment opportunity program after bid opening and prior to the
222 award of any contract and may require the contractor or subcontractor to submit
223 compliance reports relating to the contractor's or subcontractor's operation and
224 implementation of any equal employment opportunity program in effect as of the date the
225 contract is executed. The contracting agency may recommend to the director that the
226 director take appropriate action according to the procedures set forth in Code Section
227 50-5-158 against the contractor for noncompliance with the requirements of this Code
228 section. The contracting agency shall be responsible for monitoring compliance with this
229 Code section; and

230 (8) The requirements of this Code section shall not apply to any employment outside this
231 state, application for employment outside this state, or solicitations or advertisements
232 therefor or any existing programs of affirmative action regarding employment outside this
233 state, and the effect of the contract provisions required by paragraph (1) of this Code
234 section shall be so limited.

235 50-5-154.

236 (a) The director is authorized and directed to commission a state-wide disparity study
237 regarding the participation of minority and women owned business enterprises in state
238 contracts to be delivered to the Governor and the chairpersons of the Senate Finance

239 Committee and the House Committee on Ways and Means no later than 12 months after
240 the effective date of this article, and such study shall be updated every two years from the
241 date of the most current study. The study shall be prepared by an entity independent of the
242 Department of Administrative Services and selected through a request for proposal process.

243 The purpose of such study is:

244 (1) To determine whether there is a disparity between the number of qualified minority
245 and women owned business enterprises ready, willing, and able to perform state contracts
246 for commodities, services, and construction and the number of such contractors actually
247 engaged to perform such contracts and to determine what changes, if any, should be made
248 to state policies affecting minority and women owned business enterprises; and
249 (2) To determine whether there is a disparity between the number of qualified minority
250 group members and women ready, willing, and able with respect to labor markets,
251 qualifications, and other relevant factors to participate in contractor employment and
252 management level bodies, including boards of directors, and as senior executive officers
253 within contracting agencies and the number of such minority group members and women
254 actually employed or affiliated with state contractors in the aforementioned capacities and
255 to determine what changes, if any, should be made to state policies affecting minority
256 group members and women with regard to state contractors' employment and
257 appointment practices relative to diverse group members.

258 Such study shall include, but not be limited to, an analysis of the history of programs for
259 minority and women owned business enterprises and their effectiveness as a means of
260 securing and ensuring participation by minority group members and women and a disparity
261 analysis by market area and region of this state. Such study shall distinguish among male
262 minority group members, female minority group members, and nonminority females in the
263 statistical analysis.

264 (b) The director shall transmit the disparity study to the Governor and the chairpersons of
265 the Senate Finance Committee and the House Committee on Ways and Means upon
266 completion and shall post such study on the website of the Department of Administrative
267 Services.

268 50-5-155.

269 (a) Each state agency shall structure procurement procedures for contracts made directly
270 or indirectly to minority and women owned business enterprises, consistent with the
271 purposes of this article, to achieve the following results with regard to total annual
272 state-wide procurement:

273 (1) Construction industry for certified minority owned business enterprises: 14.34
274 percent:

275 (2) Construction industry for certified women owned business enterprises: 8.41 percent;
276 (3) Construction related professional services industry for certified minority owned
277 business enterprises: 13.21 percent;
278 (4) Construction related professional services industry for certified women owned
279 business enterprises: 11.32 percent;
280 (5) Nonconstruction related services industry for certified minority owned business
281 enterprises: 19.60 percent;
282 (6) Nonconstruction related services industry for certified women owned business
283 enterprises: 17.44 percent;
284 (7) Commodities industry for certified minority owned business enterprises: 16.11
285 percent;
286 (8) Commodities industry for certified women owned business enterprises: 10.93
287 percent;
288 (9) Overall state agency total dollar value of procurement for certified minority owned
289 business enterprises: 16.53 percent;
290 (10) Overall state agency total dollar value of procurement for certified women owned
291 business enterprises: 12.39 percent; and
292 (11) Overall state agency total dollar value of procurement for certified businesses: 28.92
293 percent.

294 (b) The director shall ensure that each state agency has been provided with a copy of the
295 most current study.

296 (c) Each state agency shall develop and adopt agency-specific goals based on the findings
297 of the most current study.

298 (d) The director shall promulgate rules and regulations pursuant to the goals established
299 in subsection (a) of this Code section that provide measures and procedures to ensure that
300 certified businesses shall be given the opportunity for maximum feasible participation in
301 the performance of state contracts and to assist in the contracting agency's identification
302 of those state contracts for which certified businesses may best bid to actively and
303 affirmatively promote and assist their participation in the performance of state contracts so
304 as to facilitate the contracting agency's achievement of the maximum feasible portion of
305 the goals for state contracts to such certified businesses.

306 (e) The director shall promulgate rules and regulations that:

307 (1) Provide for the certification and decertification of minority and women owned
308 business enterprises for all state agencies through a single process that meets applicable
309 requirements;

310 (2) Require that each contract solicitation document accompanying each solicitation sets
311 forth the expected degree of participation by minority and women owned business
312 enterprises based, in part, on:

313 (A) The potential subcontract opportunities available in the prime procurement
314 contract; and

315 (B) The availability, as contained within the study, of certified businesses to respond
316 competitively to potential subcontract opportunities;

317 (3) Require that each state agency provide a current list of certified businesses to each
318 prospective contractor;

319 (4) Allow a contractor that is a certified business enterprise to use the work it performs
320 to meet requirements for use of certified businesses as subcontractors;

321 (5) Provide for joint ventures, which a bidder may count toward meeting participation
322 by minority and women owned business enterprises;

323 (6) Consistent with subsection (i) of this Code section, provide for circumstances under
324 which a contracting agency may waive obligations of the contractor relating to
325 participation by minority and women owned business enterprises;

326 (7) Require that a contracting agency verify that minority and women owned business
327 enterprises listed in a successful bid are actually participating to the extent listed in the
328 project for which the bid was submitted;

329 (8) Provide for the collection of statistical data by each contracting agency concerning
330 actual participation by minority and women owned business enterprises; and

331 (9) Require each contracting agency to consult the most current disparity study when
332 calculating agency-wide and contract-specific participation goals pursuant to this article.

333 (f) Solely for the purpose of providing the opportunity for meaningful participation by
334 certified businesses in the performance of state contracts as provided in this Code section,
335 state contracts shall include leases of real property by a state agency to a lessee where the
336 terms of such leases provide for the construction, demolition, replacement, major repair,
337 or renovation of real property and improvements thereon by such lessee and the cost of
338 such construction, demolition, replacement, major repair, or renovation of real property and
339 improvements thereon shall exceed the sum of \$100,000.00. Reports to the director
340 pursuant to Code Section 50-5-158 shall include activities with respect to all such state
341 contracts. Contracting agencies shall include or require to be included, with respect to state
342 contracts for the acquisition, construction, demolition, replacement, major repair, or
343 renovation of real property and improvements thereon, such provisions as may be
344 necessary to effectuate the provisions of this Code section in every bid specification and
345 state contract, including, but not limited to:

346 (1) Provisions requiring contractors to make a good faith effort to solicit active
347 participation by certified businesses provided to the contracting agency by the office of
348 the state-wide advocate;
349 (2) Requiring the parties to agree, as a condition of entering into such contract, to be
350 bound by the provisions of Code Section 50-5-159; and
351 (3) Requiring the contractor to include the provisions set forth in paragraphs (1) and (2)
352 of this subsection in every subcontract in a manner that the provisions will be binding
353 upon each subcontractor as to work in connection with such contract; provided, however,
354 that no such provisions shall be binding upon contractors or subcontractors in the
355 performance of work or the provision of services that are unrelated, separate, or distinct
356 from the state contract as expressed by its terms, and nothing in this Code section shall
357 authorize the director or any contracting agency to impose any requirement on a
358 contractor or subcontractor except with respect to a state contract.

359 (g) In the implementation of this Code section, the contracting agency shall:

360 (1) Consult the findings contained within the disparity study evidencing relevant industry
361 specific availability of certified businesses;
362 (2) Implement a program that will enable the contracting agency to evaluate each
363 contract to determine the appropriateness of the goal pursuant to subsection (a) of this
364 Code section;
365 (3) Consider where practicable the severability of construction projects and other
366 bundled contracts; and
367 (4) Consider compliance with the requirements of any federal law concerning
368 opportunities for minority and women owned business enterprises which effectuates the
369 purpose of this Code section. The contracting agency shall determine whether the
370 imposition of the requirements of this Code section duplicate or conflict with any such
371 law, and if such duplication or conflict exists, the contracting agency shall waive the
372 applicability of this Code section to the extent of such duplication or conflict.

373 (h)(1) Contracting agencies shall administer the rules and regulations promulgated by the
374 director in a good faith effort to meet the maximum feasible portion of the contracting
375 agency's goals adopted pursuant to this article and the regulations of the director. Such
376 rules and regulations shall require a contractor to submit a utilization plan after bids are
377 opened and when bids are required but prior to the award of a state contract; shall require
378 the contracting agency to review the utilization plan and to post the utilization plan and
379 any waivers of compliance issued pursuant to subsection (i) of this Code section on the
380 website of the contracting agency within a reasonable period of time as established by the
381 director; shall require the contracting agency to notify the contractor in writing within a
382 period of time specified by the director as to any deficiencies contained in the utilization

383 plan; shall require remedy thereof within a period of time specified by the director; shall
384 require the contractor to submit periodic compliance reports relating to the operation and
385 implementation of any utilization plan; shall not allow any automatic waivers but shall
386 allow a contractor to apply for a partial or total waiver of the requirements of
387 participation by minority and women owned business enterprises pursuant to subsections
388 (i) and (j) of this Code section; shall allow a contractor to file a complaint with the
389 director pursuant to subsection (k) of this Code section in the event a contracting agency
390 has failed or refused to issue a waiver of the requirements of participation by minority
391 and women owned business enterprises or has denied such request for a waiver; and shall
392 allow a contracting agency to file a complaint with the director pursuant to subsection (l)
393 of this Code section in the event a contractor is failing or has failed to comply with the
394 requirements of participation by minority and women owned business enterprises set
395 forth in the state contract where no waiver has been granted.

396 (2) The rules and regulations promulgated pursuant to this paragraph regarding a
397 utilization plan shall provide that where certified businesses have been identified within
398 a utilization plan, a contractor shall attempt, in good faith, to utilize such certified
399 businesses at least to the extent indicated. A contracting agency may require a contractor
400 to indicate, within a utilization plan, what measures and procedures such contractor
401 intends to take to comply with the provisions of this article but may not require, as a
402 condition of, award of, or compliance with, a contract that a contractor utilize a particular
403 certificate business in performance of the contract.

404 (3) Without limiting other grounds for the disqualification of bids or proposals on the
405 basis of nonresponsibility, a contracting agency may disqualify the bid or proposal of a
406 contractor as being nonresponsible for failure to remedy notified deficiencies contained
407 in the utilization plan within a period of time specified in regulations promulgated by the
408 director after receiving notification of such deficiencies from the contracting agency.
409 When failure to remedy any notified deficiency in the utilization plan is a ground for
410 disqualification, such failure and all other grounds for disqualification shall be stated in
411 writing by the contracting agency. When the contracting agency states that a failure to
412 remedy any notified deficiency in the utilization plan is a ground for disqualification, the
413 contractor shall be entitled to an administrative hearing, on record, involving all grounds
414 stated by the contracting agency. Such hearing shall be conducted by the appropriate
415 authority of the contracting agency to review the determination of disqualification.

416 (i) When it appears that a contractor cannot, after a good faith effort, comply with the
417 requirements of participation by minority and women owned business enterprises set forth
418 in a particular state contract, a contractor may file a written application with the contracting
419 agency requesting a partial or total waiver of such participation requirements, setting forth

420 the reasons for such contractor's inability to meet any or all of such participation
421 requirements together with an explanation of the efforts undertaken by the contractor to
422 obtain the required participation by minority and women owned business enterprises. In
423 implementing the provisions of this Code section, the contracting agency shall consider the
424 number and types of minority and women owned business enterprises located in the region
425 in which the state contract is to be performed, the total dollar value of the state contract,
426 the scope of work to be performed, and the project size and term. If, based on such
427 considerations, the contracting agency determines there is not a reasonable availability of
428 contractors in the directory of certified businesses to furnish services for the project, it shall
429 issue a waiver of compliance to the contractor. In making such determination, the
430 contracting agency shall first consider the availability of other business enterprises located
431 in the region and shall thereafter consider the financial ability of minority and women
432 owned business enterprises located outside the region in which the contract is to be
433 performed to perform the state contract.

434 (j) For purposes of determining a contractor's good faith effort to comply with the
435 requirements of this Code section or to be entitled to a waiver therefrom, the contracting
436 agency shall consider whether:

437 (1) The contractor has advertised in general circulation media, trade association
438 publications, and minority focused and women focused media and, in such event, whether
439 or not certified businesses which have been solicited by the contractor:

440 (A) Exhibited interest in submitting proposals for a particular project by attending a
441 pre-bid conference; and
442 (B) Have responded in a timely fashion to the contractor's solicitations for timely
443 competitive bid quotations prior to the contracting agency's bid date;

444 (2) There has been written notification to appropriate certified businesses that appear in
445 the directory of certified businesses prepared pursuant to paragraph (6) of subsection (c)
446 of Code Section 50-5-151; and

447 (3) The contractor can reasonably structure the amount of work to be performed under
448 subcontracts in order to increase the likelihood of participation by certified businesses.

449 (k) In the event that a contracting agency fails or refuses to issue a waiver to a contractor
450 as requested within 20 days after having made application therefor pursuant to subsection
451 (i) of this Code section or if the contracting agency denies such application, in whole or in
452 part, the contractor may file a complaint with the director setting forth the facts and
453 circumstances giving rise to the contractor's complaint together with a demand for relief.
454 The contractor shall serve a copy of such complaint upon the contracting agency by
455 personal service or by certified mail, return receipt requested. The contracting agency shall
456 be afforded an opportunity to respond to such complaint in writing.

457 (I) If, after the review of a utilization plan or periodic compliance report and after such
458 contractor has been afforded an opportunity to respond to a notice of deficiency issued by
459 the contracting agency in connection therewith, it appears that a contractor is failing or
460 refusing to comply with the requirements of participation by minority and women owned
461 business enterprises as set forth in the state contract, and no waiver from such participation
462 requirements has been granted, the contracting agency may file a written complaint with
463 the director pursuant to Code Section 50-5-159 setting forth the facts and circumstances
464 giving rise to the contracting agency's complaint together with a demand for relief. The
465 contracting agency shall serve a copy of such complaint upon the contractor by personal
466 service or by certified mail, return receipt requested. The contractor shall be afforded an
467 opportunity to respond to such complaint in writing.

468 50-5-156.

469 The director shall promulgate rules and regulations setting forth measures and procedures
470 to require all contracting agencies, where practicable, feasible, and appropriate, to assess
471 the diversity practices of contractors submitting bids or proposals in connection with the
472 award of a state contract. Such rules and regulations shall take into account the nature of
473 the labor, services, supplies, equipment, or materials being procured by the state agency;
474 the method of procurement required to be used by a state agency to award the contract and
475 utilization plans required to be submitted pursuant to Code Section 50-5-155; and such
476 other factors as the director deems appropriate or necessary to promote the award of state
477 contracts to contractors having sound diversity practices. Such assessment shall not in any
478 way permit the automatic rejection of a bid or procurement contract proposal based on lack
479 of adherence to diversity practices. Each bid or proposal shall be analyzed on an individual
480 per-bid or per-proposal basis with the contractor's diversity practices considered as only
481 a part of a wider consideration of several factors when deciding to award or decline to
482 award a bid or proposal.

483 50-5-157.

484 (a) The director shall promulgate rules and regulations providing for the establishment of
485 a state-wide certification program, including rules and regulations governing the approval,
486 denial, or revocation of any such certification.

487 (b) For the purposes of this article, the office of the state-wide advocate shall be
488 responsible for verifying businesses as being owned, operated, and controlled by minority
489 group members or women and for certifying such verified businesses.

490 (c)(1) The director shall work with all municipal corporations that have a municipal
491 program for minority and women owned business enterprises to develop standards to

492 accept state certification to meet the municipal corporation's certification standards for
493 minority and women owned business enterprises.

494 (2) The director shall establish a procedure enabling the division to accept federal
495 certification verification for applicants of minority and women owned business
496 enterprises, provided that such standards comport with those required by the state
497 program for minority and women owned business enterprises, in lieu of requiring the
498 applicant to complete the state certification process. The director shall promulgate rules
499 and regulations to set forth criteria for the acceptance of federal certification.

500 (d) Following application for certification pursuant to this Code section, the director shall
501 provide the applicant with written notice of the status of the application, including notice
502 of any outstanding deficiencies, within 30 days. Within 60 days of submission of a final
503 completed application, the director shall provide the applicant with written notice of a
504 determination by the office approving or denying such certification and, in the event of a
505 denial, a statement setting forth the reasons for such denial. Upon a determination denying
506 or revoking certification, the business enterprise for which certification has been so denied
507 or revoked shall, upon written request made within 30 days from receipt of notice of such
508 determination, be entitled to a hearing before an independent hearing officer designated for
509 such purpose by the director. In the event that a request for a hearing is not made within
510 such 30 day period, such determination shall be deemed to be final. The independent
511 hearing officer shall conduct a hearing and, upon the conclusion of such hearing, issue a
512 written recommendation to the director to affirm, reverse, or modify such determination
513 of the director. Such written recommendation shall be issued to the parties. Within 30
514 days, the director, by order, must accept, reject, or modify such recommendation of the
515 hearing officer and set forth in writing the reasons therefor. The director shall serve a copy
516 of such order and reasons therefor upon the business enterprise by personal service or by
517 certified mail, return receipt requested.

518 (e) All certifications shall be valid for a period of three years.

519 50-5-158.

520 (a) Each contracting agency shall be responsible for monitoring state contracts under its
521 jurisdiction and recommending matters to the office of the state-wide advocate regarding
522 noncompliance with the provisions of this article so that such office may take such action
523 as is appropriate to ensure compliance with the provisions of this article, the rules and
524 regulations of the director issued pursuant to this article, and the contractual provisions
525 required pursuant to this article. All contracting agencies shall comply with the rules and
526 regulations of the office of the state-wide advocate and are directed to cooperate with such

527 office and to furnish to such office such information and assistance as may be required in
528 the performance of its functions under this article.

529 (b) Each contracting agency shall provide to prospective bidders a current copy of the
530 directory of certified businesses and a copy of the regulations.

531 (c) Each contracting agency shall report to the director the activities undertaken to promote
532 employment of minority group members and women and promote and increase
533 participation by certified businesses with respect to state contracts and subcontracts. Such
534 reports shall be submitted periodically, but not less frequently than annually, as required
535 by the director, and shall include such information as is necessary for the director to
536 determine whether the contracting agency and contractor have complied with the purposes
537 of this article, including, without limitation, a summary of all waivers of the requirements
538 of subsections (i) and (j) of Code Section 50-5-155 allowed by the contracting agency
539 during the period covered by the report, including a description of the basis of the waiver
540 request and the rationale for granting any such waiver. Each contracting agency shall also
541 include in such annual report whether or not it has been required to prepare a remedial
542 action plan and, if so, such plan and the extent to which the contracting agency has
543 complied with each element of such plan.

544 (d) The division shall issue an annual report which:

545 (1) Summarizes the report submitted by each contracting agency pursuant to subsection
546 (c) of this Code section;

547 (2) Contains such comparative or other information as the director deems appropriate,
548 including but not limited to goals compared to actual participation of minority and
549 women owned business enterprises in state contracting, to evaluate the effectiveness of
550 the activities undertaken by each such contracting agency to promote increased
551 participation by certified businesses with respect to state contracts and subcontracts;

552 (3) Contains a summary of all waivers of the requirements of subsections (i) and (j) of
553 Code Section 50-5-155 allowed by each contracting agency during the period covered by
554 the report, including a description of the basis of the waiver request and the rationale for
555 granting any such waiver;

556 (4) Describes any efforts to create a data base or other information storage and retrieval
557 system containing information relevant to contracting with minority and women owned
558 business enterprises; and

559 (5) Contains a summary of:

560 (A) All determinations of violations of this article by a contractor or a contracting
561 agency made during the period covered by the annual report pursuant to Code Section
562 50-5-151; and

563 (B) The penalties or sanctions, if any, assessed in connection with such determinations
564 and the rationale for such penalties or sanctions. Copies of the annual report shall be
565 provided to the commissioner of administrative services, the Governor, the President
566 of the Senate, the Speaker of the House of Representatives, the minority leader of the
567 Senate, and the minority leader of the House of Representatives and shall also be made
568 available to the public.

569 (e) Each contracting agency that substantially fails to meet the goals supported by the
570 disparity study, as defined by regulation of the director, shall be required to submit to the
571 director a remedial action plan to remedy such failure.

572 (f) If it is determined by the director that any contracting agency has failed to act in good
573 faith to implement the remedial action plan pursuant to subsection (e) of this Code section
574 within one year, the director shall provide written notice of such a finding, which shall be
575 publicly available, and direct implementation of remedial actions to:

576 (1) Assure that sufficient and effective solicitation efforts to minority and women owned
577 business enterprises are being made by such contracting agency;

578 (2) Divide contract requirements, when economically feasible, into quantities that will
579 expand the participation of minority and women owned business enterprises;

580 (3) Eliminate extended experience or capitalization requirements, when
581 programmatically and economically feasible, that will expand participation by minority
582 and women owned business enterprises;

583 (4) Identify specific proposed contracts as particularly attractive or appropriate for
584 participation by minority and women owned business enterprises with such identification
585 to result from and be coupled with the efforts of paragraphs (1), (2), and (3) of this
586 subsection; and

587 (5) Upon a finding by the director that an agency has failed to take affirmative measures
588 to implement the remedial action plan and to follow any of the remedial actions set forth
589 by the director, and in the absence of any objective progress toward the contracting
590 agency's goals, require some or all of the contracting agency's procurement, for a
591 specified period of time, to be placed under the direction and control of another agency
592 or agencies.

593 50-5-159.

594 Upon receipt by the director of a complaint by a contracting agency that a contractor has
595 violated the provisions of a state contract which have been included to comply with the
596 provisions of this article or by a contractor that a contracting agency has violated such
597 provisions or has failed or refused to issue a waiver where one has been applied for
598 pursuant to subsection (i) of Code Section 50-5-155 or has denied such application, the

599 director shall attempt to resolve the matter giving rise to such complaint. If efforts to
600 resolve such matter to the satisfaction of all parties are unsuccessful, the director shall refer
601 the matter, within 30 days of the receipt of the complaint, to the division's hearing officers.
602 Upon conclusion of the administrative hearing, the hearing officer shall submit to the
603 director his or her decision regarding the alleged violation of the contract and
604 recommendations regarding the imposition of sanctions, fines, or penalties. The director,
605 within ten days of receipt of the decision, shall file a determination of such matter and shall
606 cause a copy of such determination along with a copy of this article to be served upon the
607 contractor by personal service or by certified mail, return receipt requested. The penalties
608 imposed for any violation which is premised upon either a fraudulent or intentional
609 misrepresentation by the contractor or the contractor's willful and intentional disregard of
610 the requirements of participation by minority and women owned business enterprises
611 included in the contract may include a determination that the contractor shall be ineligible
612 to submit a bid to any contracting agency or be awarded any such contract for a period not
613 to exceed one year following the final determination; provided, however, that if a
614 contractor has previously been determined to be ineligible to submit a bid pursuant to this
615 article, the penalties imposed for any subsequent violation, if such violation occurs within
616 five years of the first violation, may include a determination that the contractor shall be
617 ineligible to submit a bid to any contracting agency or be awarded any such contract for a
618 period not to exceed five years following the final determination. The division shall
619 maintain a website listing all contractors that have been deemed ineligible to submit a bid
620 pursuant to this Code section and the date after which each contractor shall once again
621 become eligible to submit bids.

622 50-5-160.

623 Every contracting agency shall include a provision in its state contracts expressly providing
624 that any contractor that willfully and intentionally fails to comply with the requirements
625 of participation by minority and women owned business enterprises as set forth in such
626 state contract shall be liable to the contracting agency for liquidated or other appropriate
627 damages and shall provide for other appropriate remedies on account of such breach. A
628 contracting agency that elects to proceed against a contractor for breach of contract as
629 provided in this Code section shall be precluded from seeking enforcement pursuant to
630 Code Section 50-5-159; provided, however, that the contracting agency shall include a
631 summary of all enforcement actions undertaken pursuant to this Code section in its annual
632 report submitted pursuant to subsection (c) of Code Section 50-5-158."

633

SECTION 2.

634 All laws and parts of laws in conflict with this Act are repealed.