

Senate Bill 421

By: Senators Jackson of the 2nd, Jones of the 10th and Tate of the 38th

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 penalties for violations; to provide for related matters; to repeal
10 conflicting laws; and for other purposes.

11 BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

12 style="text-align:center">**SECTION 1.**

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

15 style="text-align:center">"ARTICLE 5

16 50-5-150.

17 As used in this article, the term:

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

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

22 (3) 'Contractor' means an individual; a business enterprise, including a sole
23 proprietorship, partnership, corporation, nonprofit corporation, or any other party to a

24 state contract; a bidder in conjunction with the award of a state contract; or a proposed
 25 party to a state contract.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

57 (11) 'State contract' means:

58 (A) A written agreement or purchase order instrument providing for a total expenditure
 59 in excess of \$35,000.00 whereby a contracting agency is committed to expend or does
 60 expend funds in return for labor, services such as legal, financial, and other professional

61 services, supplies, equipment, materials, or any combination of the foregoing to be
62 performed for or rendered or furnished to the contracting agency;

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

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

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

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

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

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

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

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

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

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

98 50-5-151.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

156 50-5-152.

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

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

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

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

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

179 50-5-153.

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

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

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

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

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

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

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

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

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

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

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

236 50-5-154.

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

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

244 The purpose of such study is:

245 (1) To determine whether there is a disparity between the number of qualified minority
 246 and women owned business enterprises ready, willing, and able to perform state contracts
 247 for commodities, services, and construction and the number of such contractors actually
 248 engaged to perform such contracts and to determine what changes, if any, should be made
 249 to state policies affecting minority and women owned business enterprises; and

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

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

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

269 50-5-155.

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

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

- 276 (2) Construction industry for certified women owned business enterprises: 8.41 percent;
277 (3) Construction related professional services industry for certified minority owned
278 business enterprises: 13.21 percent;
279 (4) Construction related professional services industry for certified women owned
280 business enterprises: 11.32 percent;
281 (5) Nonconstruction related services industry for certified minority owned business
282 enterprises: 19.60 percent;
283 (6) Nonconstruction related services industry for certified women owned business
284 enterprises: 17.44 percent;
285 (7) Commodities industry for certified minority owned business enterprises: 16.11
286 percent;
287 (8) Commodities industry for certified women owned business enterprises: 10.93
288 percent;
289 (9) Overall state agency total dollar value of procurement for certified minority owned
290 business enterprises: 16.53 percent;
291 (10) Overall state agency total dollar value of procurement for certified women owned
292 business enterprises: 12.39 percent; and
293 (11) Overall state agency total dollar value of procurement for certified businesses: 28.92
294 percent.
- 295 (b) The director shall ensure that each state agency has been provided with a copy of the
296 most current study.
- 297 (c) Each state agency shall develop and adopt agency-specific goals based on the findings
298 of the most current study.
- 299 (d) The director shall promulgate rules and regulations pursuant to the goals established
300 in subsection (a) of this Code section that provide measures and procedures to ensure that
301 certified businesses shall be given the opportunity for maximum feasible participation in
302 the performance of state contracts and to assist in the contracting agency's identification
303 of those state contracts for which certified businesses may best bid to actively and
304 affirmatively promote and assist their participation in the performance of state contracts so
305 as to facilitate the contracting agency's achievement of the maximum feasible portion of
306 the goals for state contracts to such certified businesses.
- 307 (e) The director shall promulgate rules and regulations that:
- 308 (1) Provide for the certification and decertification of minority and women owned
309 business enterprises for all state agencies through a single process that meets applicable
310 requirements;

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

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

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

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

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

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

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

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

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

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

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

347 (1) Provisions requiring contractors to make a good faith effort to solicit active
 348 participation by certified businesses provided to the contracting agency by the office of
 349 the state-wide advocate;

350 (2) Requiring the parties to agree, as a condition of entering into such contract, to be
 351 bound by the provisions of Code Section 50-5-159; and

352 (3) Requiring the contractor to include the provisions set forth in paragraphs (1) and (2)
 353 of this subsection in every subcontract in a manner that the provisions will be binding
 354 upon each subcontractor as to work in connection with such contract; provided, however,
 355 that no such provisions shall be binding upon contractors or subcontractors in the
 356 performance of work or the provision of services that are unrelated, separate, or distinct
 357 from the state contract as expressed by its terms, and nothing in this Code section shall
 358 authorize the director or any contracting agency to impose any requirement on a
 359 contractor or subcontractor except with respect to a state contract.

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

361 (1) Consult the findings contained within the disparity study evidencing relevant industry
 362 specific availability of certified businesses;

363 (2) Implement a program that will enable the contracting agency to evaluate each
 364 contract to determine the appropriateness of the goal pursuant to subsection (a) of this
 365 Code section;

366 (3) Consider where practicable the severability of construction projects and other
 367 bundled contracts; and

368 (4) Consider compliance with the requirements of any federal law concerning
 369 opportunities for minority and women owned business enterprises which effectuates the
 370 purpose of this Code section. The contracting agency shall determine whether the
 371 imposition of the requirements of this Code section duplicate or conflict with any such
 372 law, and if such duplication or conflict exists, the contracting agency shall waive the
 373 applicability of this Code section to the extent of such duplication or conflict.

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

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

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

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

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

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

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

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

441 (A) Exhibited interest in submitting proposals for a particular project by attending a
 442 pre-bid conference; and

443 (B) Have responded in a timely fashion to the contractor's solicitations for timely
 444 competitive bid quotations prior to the contracting agency's bid date;

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

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

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

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

469 50-5-156.

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

484 50-5-157.

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

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

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

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

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

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

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

520 50-5-158.

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

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

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

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

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

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

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

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

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

560 (5) Contains a summary of:

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

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

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

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

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

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

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

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

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

594 50-5-159.

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

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

623 50-5-160.

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

634

SECTION 2.

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