

NOTE: This bill has been prepared for the signatures of the appropriate legislative officers and the Governor. To determine whether the Governor has signed the bill or taken other action on it, please consult the legislative status sheet, the legislative history, or the Session Laws.



SENATE BILL 19-135

BY SENATOR(S) Williams A. and Rodriguez, Bridges, Court, Danielson, Donovan, Fenberg, Fields, Foote, Garcia, Ginal, Gonzales, Lee, Moreno, Pettersen, Priola, Story, Tate, Todd, Winter, Zenzinger;
also REPRESENTATIVE(S) Buckner and Buentello, Coleman, Cutter, Duran, Exum, Galindo, Herod, Jackson, Melton, Michaelson Jenet, Valdez A., Esgar, Gonzales-Gutierrez, Hooton, Kennedy, Kipp, Valdez D., Weissman.

CONCERNING METHODS TO DETERMINE WHETHER DISPARITIES INVOLVING CERTAIN HISTORICALLY UNDERUTILIZED BUSINESSES EXIST WITHIN THE STATE PROCUREMENT PROCESS, AND, IN CONNECTION THEREWITH, COMMISSIONING A STUDY TO MAKE SUCH DETERMINATION, REQUIRING THE DEPARTMENT OF PERSONNEL TO TRACK CONTRACTS AWARDED TO HISTORICALLY UNDERUTILIZED BUSINESSES, AND, MAKING AN APPROPRIATION.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. In Colorado Revised Statutes, **add** part 10 to article 103 of title 24 as follows:

PART 10

Capital letters or bold & italic numbers indicate new material added to existing law; dashes through words or numbers indicate deletions from existing law and such material is not part of the act.

PROCUREMENT DISPARITY STUDY

24-103-1001. Legislative declaration. (1) THE GENERAL ASSEMBLY HEREBY FINDS, DETERMINES, AND DECLARES THAT:

(a) IT IS IMPERATIVE AND THE PUBLIC POLICY OF COLORADO THAT THE STATE PROCUREMENT PROCESS BE FREE FROM BIAS SO THAT ALL QUALIFIED PERSONS AND ENTITIES MAY COMPETE FOR STATE BUSINESS;

(b) A FAIR PROCUREMENT PROCESS NOT ONLY ENSURES JUSTICE AND FAIRNESS IN STATE CONTRACTING BUT WILL BROADEN THE PROCUREMENT CONTRACTOR POOL, WHICH WILL RESULT IN EFFICIENCIES STATEWIDE AND, AS WARRANTED, PROMOTE THE GROWTH OF HISTORICALLY UNDERUTILIZED BUSINESSES, THEREBY CREATING JOBS AND STIMULATING THE STATE'S ECONOMY;

(c) ALTHOUGH STUDIES ESTABLISHING DISCRIMINATION IN PROCUREMENT FOR CERTAIN INDUSTRIES OR IN CERTAIN LOCALITIES HAVE BEEN CONDUCTED, A COMPREHENSIVE ANALYSIS OF STATE CONTRACTS AWARDED TO HISTORICALLY UNDERUTILIZED BUSINESSES HAS NOT YET BEEN COMMISSIONED;

(d) THE UNITED STATES SUPREME COURT HAS RECOGNIZED THAT DISPARITY STUDIES ARE TOOLS THAT SEEK TO QUALIFY AND QUANTIFY PAST DISCRIMINATION AND RECOMMEND CERTAIN CORRECTIVE MEASURES AS MAY BE WARRANTED BY THE STUDY'S FINDINGS;

(e) IF ANY DISPARITIES EXIST, SUCH A STUDY IS ESSENTIAL TO THE ULTIMATE ACHIEVEMENT OF A MARKETPLACE IN WHICH HISTORICALLY UNDERUTILIZED BUSINESSES ARE NOT SUBJECT TO DISCRIMINATION AND CAN OBTAIN A FAIR MARKET SHARE OF CONTRACT EXPENDITURES; AND

(f) THEREFORE, IT IS THE INTENT OF THE GENERAL ASSEMBLY, CONSISTENT WITH THE CODE'S STATED POLICIES OF ENSURING THE FAIR AND EQUITABLE TREATMENT OF PERSONS WHO DEAL WITH THE PROCUREMENT SYSTEM AND FOSTERING EFFECTIVE BROAD-BASED COMPETITION WITHIN THE FREE ENTERPRISE SYSTEM, THAT AN INDEPENDENT STUDY BE COMMISSIONED TO:

(I) DETERMINE THE FREQUENCY WITH WHICH STATE CONTRACTS ARE AWARDED TO HISTORICALLY UNDERUTILIZED BUSINESSES AND THE

MONETARY AMOUNTS OF SUCH AWARDS, COMPARED TO THE FREQUENCY AND SIZE OF CONTRACTS AWARDED TO OTHER BUSINESSES; AND

(II) TO THE EXTENT THAT THE STUDY ESTABLISHES THAT DISPARITIES ATTRIBUTABLE TO PAST OR PRESENT DISCRIMINATION EXIST OR INHERE IN THE STATE PROCUREMENT PROCESS, TO RECOMMEND REMEDIAL MEASURES TO ADDRESS THE EFFECTS OF THAT DISCRIMINATION.

24-103-1002. Definitions. AS USED IN THIS PART 10, UNLESS THE CONTEXT OTHERWISE REQUIRES:

(1) "CONTRACT" HAS THE SAME MEANING AS SET FORTH IN SECTION 24-101-301 (9) AND INCLUDES PUBLIC-PRIVATE PARTNERSHIPS AND OTHER AGREEMENTS FOR PUBLIC-PRIVATE FINANCING.

(2) "CONTRACTOR" MEANS ANY PERSON WHO IS A PARTY TO A CONTRACT.

(3) "HISTORICALLY UNDERUTILIZED BUSINESS" MEANS A BUSINESS:

(a) THAT IS AT LEAST FIFTY-ONE PERCENT OWNED BY ONE OR MORE INDIVIDUALS WHO ARE:

(I) UNITED STATES CITIZENS OR PERMANENT RESIDENT ALIENS; AND

(II) ONE OR MORE OF THE FOLLOWING:

(A) MEMBERS OF A RACIAL OR ETHNIC MINORITY GROUP;

(B) NON-HISPANIC CAUCASIAN WOMEN;

(C) PERSONS WITH PHYSICAL OR MENTAL DISABILITIES; OR

(D) MEMBERS OF THE LESBIAN, GAY, BISEXUAL, AND TRANSGENDER COMMUNITY; AND

(b) FOR WHICH THE MINORITY OWNERSHIP CONTROLS BOTH THE MANAGEMENT AND DAY-TO-DAY BUSINESS DECISIONS.

(4) "PERSONS WITH PHYSICAL OR MENTAL DISABILITIES" MEANS

PERSONS WHO:

(a) HAVE IMPAIRMENTS THAT SUBSTANTIALLY LIMIT ONE OR MORE MAJOR LIFE ACTIVITIES;

(b) ARE REGARDED GENERALLY BY THE COMMUNITY AS HAVING A DISABILITY; AND

(c) WHOSE DISABILITIES SUBSTANTIALLY LIMIT THEIR ABILITIES TO ENGAGE IN COMPETITIVE BUSINESS.

(5) "RACIAL OR ETHNIC MINORITY GROUP" MEANS:

(a) AFRICAN AMERICAN PERSONS, MEANING INDIVIDUALS HAVING ORIGINS IN ANY OF THE BLACK RACIAL GROUPS;

(b) HISPANIC AMERICAN PERSONS, INCLUDING PERSONS OF MEXICAN, PUERTO RICAN, CUBAN, CENTRAL OR SOUTH AMERICAN, OR OTHER SPANISH OR PORTUGUESE CULTURE OR ORIGIN, REGARDLESS OF RACE;

(c) ASIAN AMERICAN PERSONS, INCLUDING PERSONS WHOSE ORIGINS ARE FROM JAPAN, CHINA, TAIWAN, KOREA, VIETNAM, LAOS, CAMBODIA, THE PHILIPPINES, SAMOA, THE UNITED STATES TERRITORIES OF THE PACIFIC, OR THE NORTHERN MARIANA ISLANDS; OR PERSONS WHOSE ORIGINS ARE FROM SUBCONTINENT ASIA, INCLUDING PERSONS WHOSE ORIGINS ARE FROM INDIA, PAKISTAN, BANGLADESH, SRI LANKA, BHUTAN, OR NEPAL; OR

(d) NATIVE AMERICAN PERSONS, INCLUDING PERSONS WHO ARE AMERICAN INDIANS, ESKIMOS, ALEUTS, OR HAWAIIANS OF POLYNESIAN DESCENT.

(6) "SUBCONTRACTOR" MEANS ANY PERSON WHO IS A PARTY TO A CONTRACT WITH A CONTRACTOR.

24-103-1003. Disparity study - report. (1) (a) THE EXECUTIVE DIRECTOR SHALL COMMISSION A STATE DISPARITY STUDY REGARDING THE PARTICIPATION OF HISTORICALLY UNDERUTILIZED BUSINESSES IN STATE CONTRACTS ENTERED INTO BY ALL PRINCIPAL DEPARTMENTS OF THE EXECUTIVE BRANCH OF STATE GOVERNMENT AS SPECIFIED IN SECTION

24-1-110, INCLUDING ANY DIVISION, OFFICE, AGENCY, OR OTHER UNIT CREATED WITHIN A PRINCIPAL DEPARTMENT AND INCLUDING INSTITUTIONS OF HIGHER EDUCATION AND THE COLORADO COMMISSION ON HIGHER EDUCATION; EXCEPT THAT THE STUDY SHALL NOT INCLUDE THOSE ENTITIES THAT HAVE ELECTED TO BE EXEMPT FROM THE CODE PURSUANT TO SECTION 24-101-105 (1)(b). THE STUDY SHALL INCLUDE STATE CONTRACTS ENTERED INTO DURING THE 2014-15, 2015-16, 2016-17, AND 2017-18 STATE FISCAL YEARS.

(b) (I) THE STUDY MUST BE CONDUCTED, AND A FINAL REPORT PREPARED, BY AN ENTITY INDEPENDENT OF THE DEPARTMENT THAT IS SELECTED IN RESPONSE TO A REQUEST FOR PROPOSAL ISSUED IN ACCORDANCE WITH THIS CODE.

(II) THE ENTITIES SUBJECT TO THE STUDY PURSUANT TO SUBSECTION (1)(a) OF THIS SECTION SHALL COOPERATE FULLY WITH THE INDEPENDENT CONTRACTOR ENGAGED TO CONDUCT THE STUDY.

(c) THE STUDY AND FINAL REPORT SETTING FORTH THE STUDY'S METHODOLOGIES, FINDINGS, AND RECOMMENDATIONS MUST BE PROVIDED BY DECEMBER 1, 2020, TO:

(I) THE MEMBERS OF THE GENERAL ASSEMBLY; AND

(II) THE EXECUTIVE DIRECTOR, WHO SHALL TRANSMIT A COPY OF THE DISPARITY STUDY FINAL REPORT PRODUCED PURSUANT TO THIS SECTION TO THE DIRECTOR OF THE MINORITY BUSINESS OFFICE CREATED IN SECTION 24-49.5-102, WHICH SHALL POST THE REPORT ON THAT OFFICE'S OFFICIAL WEBSITE.

(d) THE EXECUTIVE DIRECTOR OR THE EXECUTIVE DIRECTOR'S DESIGNEE SHALL INCLUDE THE FINDINGS AND RECOMMENDATIONS FROM THE FINAL REPORT REQUIRED BY SUBSECTION (1)(c) OF THIS SECTION IN ITS REPORT TO THE APPLICABLE HOUSE AND SENATE COMMITTEES OF REFERENCE REQUIRED BY THE "STATE MEASUREMENT FOR ACCOUNTABLE, RESPONSIVE, AND TRANSPARENT (SMART) GOVERNMENT ACT", PART 2 OF ARTICLE 7 OF TITLE 2.

(2) (a) THE PURPOSES OF THE DISPARITY STUDY UNDERTAKEN PURSUANT TO THIS SECTION ARE:

(I) TO DETERMINE WHETHER THERE IS A DISPARITY BETWEEN THE NUMBER OF QUALIFIED HISTORICALLY UNDERUTILIZED BUSINESSES THAT ARE READY, WILLING, AND ABLE TO PERFORM STATE CONTRACTS FOR GOODS AND SERVICES, AND THE NUMBER OF SUCH CONTRACTORS ACTUALLY ENGAGED TO PERFORM SUCH CONTRACTS, WHICH INFORMATION MUST BE ASCERTAINED BY EVALUATING THE PRIME CONTRACTS AND SUBCONTRACTS AWARDED IN THE FOLLOWING INDUSTRIES:

(A) CONSTRUCTION, INCLUDING NEW CONSTRUCTION, REMODELING, RENOVATION, MAINTENANCE, DEMOLITION AND REPAIR OF ANY PUBLIC STRUCTURE OR BUILDING, PIPELINE CONSTRUCTION, AND OTHER PUBLIC IMPROVEMENTS;

(B) ARCHITECTURE AND ENGINEERING, INCLUDING CONSTRUCTION MANAGEMENT, LANDSCAPE ARCHITECTURE, PLANNING, SURVEYING, MAPPING SERVICES, AND DESIGN, BUILD, AND CONSTRUCTION SERVICES;

(C) PROFESSIONAL SERVICES, INCLUDING LEGAL SERVICES, ACCOUNTING, INFORMATION TECHNOLOGY SERVICES, MEDICAL SERVICES, TECHNICAL SERVICES, RESEARCH PLANNING, AND CONSULTING SERVICES;

(D) BROKERAGE AND INVESTMENT, INCLUDING BANKING, ASSET MANAGEMENT, STATE RETIREMENT, AND PENSION SERVICES; AND

(E) GOODS AND SERVICES THAT MAY BE PROVIDED OR PERFORMED WITHOUT PROFESSIONAL LICENSURE OR SPECIAL EDUCATION OR TRAINING, INCLUDING, BUT NOT LIMITED TO, GOODS AND SERVICES RELATING TO MATERIALS, SUPPLIES, EQUIPMENT, MAINTENANCE, PERSONNEL, PHARMACEUTICALS, AND FOOD;

(II) TO DETERMINE WHETHER, OF THE TOTAL AMOUNT SPENT ON STATE CONTRACTS IN A FISCAL YEAR, THERE IS A DISPARITY BETWEEN THE PERCENTAGE OF SPENDING ATTRIBUTABLE TO CONTRACTS AWARDED TO QUALIFIED HISTORICALLY UNDERUTILIZED BUSINESSES AND THE PERCENTAGE OF STATE CONTRACTS THAT WERE AWARDED TO HISTORICALLY UNDERUTILIZED BUSINESSES IN THAT FISCAL YEAR; AND

(III) TO DETERMINE WHAT CHANGES, IF ANY, SHOULD BE MADE TO STATE POLICIES AFFECTING HISTORICALLY UNDERUTILIZED BUSINESSES.

(b) THE DISPARITY STUDY MUST SPECIFICALLY INCLUDE THE FOLLOWING ANALYSES, BOTH FOR THE HISTORICALLY UNDERUTILIZED BUSINESSES AS A GROUP AND FOR EACH SUBGROUP, AS SET FORTH IN SECTION 24-103-1002 (3)(a)(II):

(I) A PRIME CONTRACTOR UTILIZATION ANALYSIS THAT PRESENTS THE DISTRIBUTION OF PRIME CONTRACTS BY INDUSTRY;

(II) A SUBCONTRACTOR UTILIZATION ANALYSIS THAT PRESENTS THE DISTRIBUTION OF SUBCONTRACTS BY THE INDUSTRIES DESCRIBED IN SUBSECTION (2)(a)(I) OF THIS SECTION;

(III) A MARKET AREA ANALYSIS THAT PRESENTS THE LEGAL BASIS FOR THE GEOGRAPHICAL MARKET AREA DETERMINATION AND DEFINES THE STATE'S MARKET AREA;

(IV) A PRIME CONTRACTOR AND SUBCONTRACTOR AVAILABILITY ANALYSIS THAT PRESENTS THE DISTRIBUTION OF AVAILABLE BUSINESSES IN THE STATE'S MARKET AREA;

(V) A PRIME CONTRACTOR DISPARITY ANALYSIS THAT PRESENTS PRIME CONTRACTOR UTILIZATION COMPARED TO PRIME CONTRACTOR AVAILABILITY BY INDUSTRY AND DETERMINES WHETHER THE COMPARISON IS STATISTICALLY SIGNIFICANT;

(VI) A SUBCONTRACTOR DISPARITY ANALYSIS THAT PRESENTS SUBCONTRACTOR UTILIZATION COMPARED TO SUBCONTRACTOR AVAILABILITY BY INDUSTRY AND DETERMINES WHETHER THE COMPARISON IS STATISTICALLY SIGNIFICANT;

(VII) A QUALITATIVE ANALYSIS THAT PRESENTS THE BUSINESS COMMUNITY'S EXPERIENCES AND PERCEPTIONS OF BARRIERS ENCOUNTERED IN CONTRACTING OR ATTEMPTING TO CONTRACT WITH THE STATE; AND

(VIII) RECOMMENDATIONS REGARDING BEST MANAGEMENT PRACTICES AND WAYS TO ENHANCE COLORADO'S CONTRACTING AND PROCUREMENT ACTIVITIES WITH HISTORICALLY UNDERUTILIZED BUSINESSES.

(c)(I) ANY CONCLUSION THAT DISCRIMINATION-RELATED DISPARITY EXISTS BETWEEN THE AVAILABILITY AND UTILIZATION OF HISTORICALLY

UNDERUTILIZED BUSINESSES MUST BE SUPPORTED BY STATISTICAL EVIDENCE AND MAY BE SUPPLEMENTED OR SUPPORTED BY ANECDOTAL EVIDENCE.

(II) IF THE ANALYSIS SUPPORTS A FINDING THAT SUCH DISPARITY EXISTS, THE REPORT MUST INCLUDE RECOMMENDATIONS TO ADDRESS THE DISPARITY, INCLUDING ANY STATUTORY CHANGES LIKELY TO CURE, MITIGATE, OR REDRESS SUCH DISPARITY. ANY PROPOSED REMEDIAL MEASURES MUST BE TAILORED TO ADDRESS DOCUMENTED STATISTICAL DISPARITIES IN PROCUREMENT POLICIES.

(3) THE GENERAL ASSEMBLY MAY ANNUALLY APPROPRIATE TO THE DEPARTMENT OF PERSONNEL SUCH AMOUNT AS IT DEEMS APPROPRIATE FOR THE PURPOSES SPECIFIED IN THIS PART 10. ANY UNEXPENDED AND UNENCUMBERED MONEY FROM AN APPROPRIATION MADE FOR THE PURPOSES OF THIS PART 10 REMAINS AVAILABLE FOR EXPENDITURE BY THE DEPARTMENT FOR THE PURPOSES OF THIS PART 10 IN THE NEXT FISCAL YEAR WITHOUT FURTHER APPROPRIATION.

24-103-1004. Requests for information - disparity study. THE EXECUTIVE DIRECTOR OR THE ENTITY THAT THE EXECUTIVE DIRECTOR COMMISSIONS TO CONDUCT A DISPARITY STUDY PURSUANT TO SECTION 24-103-1003 MAY REQUEST INFORMATION IN FURTHERANCE OF THE DISPARITY STUDY FROM EACH ENTITY THAT IS SUBJECT TO THE STUDY, INCLUDING EACH PRINCIPLE DEPARTMENT OF THE EXECUTIVE BRANCH OF STATE GOVERNMENT AS SPECIFIED IN SECTION 24-1-110, INCLUDING ANY DIVISION, OFFICE, AGENCY, OR OTHER UNIT CREATED WITHIN A PRINCIPLE DEPARTMENT, AND INCLUDING INSTITUTIONS OF HIGHER EDUCATION AND THE COLORADO COMMISSION ON HIGHER EDUCATION; EXCEPT THAT SUCH REQUESTS MAY NOT BE MADE OF ENTITIES THAT HAVE ELECTED TO BE EXEMPT FROM THE CODE PURSUANT TO SECTION 24-101-105 (1)(b). EACH ENTITY THAT IS SUBJECT TO THE DISPARITY STUDY SHALL RESPOND TO ANY SUCH REQUEST FOR INFORMATION IN FURTHERANCE OF THE DISPARITY STUDY AS SOON AS PRACTICABLE AFTER RECEIVING THE REQUEST.

SECTION 2. Appropriation. For the 2019-20 state fiscal year, \$650,000 is appropriated to the department of personnel for use by the division of accounts and control. This appropriation is from the general fund. To implement this act, the division may use this appropriation for operating expenses related to procurement and contracts.

SECTION 3. Effective date. This act takes effect July 1, 2019.

SECTION 4. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Leroy M. Garcia
PRESIDENT OF
THE SENATE

KC Becker
SPEAKER OF THE HOUSE
OF REPRESENTATIVES

Cindi L. Markwell
SECRETARY OF
THE SENATE

Marilyn Eddins
CHIEF CLERK OF THE HOUSE
OF REPRESENTATIVES

APPROVED _____
(Date and Time)

Jared S. Polis
GOVERNOR OF THE STATE OF COLORADO