

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1989

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HOUSE BILL 476

Short Title: Minority/Small Business Contracts.

(Public)

Sponsors: Representatives Hardaway; Barnhill, Barnes, Bowman, Burke, Cunningham, Easterling, Fitch, Gist, Holt, H. Hunter, Jeralds, Michaux, and S. Thompson.

Referred to: Government.

March 7, 1989

1 A BILL TO BE ENTITLED
2 AN ACT TO FURTHER THE DEVELOPMENT OF MINORITY-OWNED
3 BUSINESSES AND SMALL BUSINESSES BY CREATING THE MINORITY
4 AND SMALL BUSINESS DEVELOPMENT COUNCIL AND BY
5 ESTABLISHING GOALS FOR STATE CONTRACTS.

6 The General Assembly of North Carolina enacts:

7 Section 1. Article 9 of Chapter 143B is amended by adding a Part to read:

8 **"PART 29.**

9 **"MINORITY AND SMALL BUSINESS**
10 **DEVELOPMENT ACT.**

11 **"§ 143B-426.45. Policy; purpose.**

12 (a) The State of North Carolina declares that it is the public policy of the State to
13 promote and encourage the economic development of minority-owned businesses and
14 small businesses and that minority-owned businesses and small businesses participate in
15 the State's procurement process as both prime contractors and subcontractors.

16 (b) The purposes of this Part are:

17 (1) To increase the State's knowledge of minority-owned businesses and
18 small businesses and to become familiar with their products and
19 services.

20 (2) To stimulate those businesses whose ability to compete in the free
21 enterprise system has been impaired due to diminished capital and
22 credit opportunities.

- 1 (3) To provide documentation of the number of minority-owned
2 businesses and small businesses that are qualified to undertake State
3 prime contracts and subcontracts and the level of participation in State
4 contracts by minority-owned businesses and small businesses.
5 (4) To serve the public interest in the efficient performance of its public
6 contracts by making information regarding minority-owned businesses
7 and small businesses readily available.
8 (5) To encourage minority-owned businesses and small businesses by
9 establishing flexible goals for these businesses regarding State
10 contracts.

11 **"§ 143B-426.46. Definitions.**

12 As used in this Part, unless the context requires otherwise:

- 13 (1) 'Certification' means a determination made by a State agency or the
14 Minority and Small Business Development Council that a business
15 entity is a minority-owned business or a small business.
16 (2) 'Contract package' means related contracts that are bid or awarded
17 simultaneously for the same project.
18 (3) 'Control' means the exclusive or ultimate and sole control of the
19 business, including capital investment and all other financial matters,
20 property, acquisitions, contract negotiations, legal matters, officer-
21 director-employee selection and comprehensive hiring, operating
22 responsibilities, cost-control matters, income and dividend matters,
23 financial transactions and rights of other shareholders or joint partners.
24 Control shall be real, substantial, and continuing, not **pro forma**.
25 Control shall include the power to direct or cause the direction of the
26 management and policies of the business and to make the day-to-day
27 as well as major decisions in matters of policy, management, and
28 operations. Control shall be exemplified by possessing the requisite
29 knowledge and expertise to run the particular business. Control does
30 not mean simple majority or absentee ownership.
31 (4) 'Female' shall mean a person who is a citizen or lawful permanent
32 resident of the United States and who is of the female gender.
33 (5) 'Female-owned business' means a business concern:
34 a. In which at least fifty-one percent (51%) is owned by one or
35 more females, or, in the case of a corporation, in which at least
36 fifty-one percent (51%) of the stock is owned by one or more
37 females; and
38 b. Of which the management and daily business operations are
39 controlled by one or more of the females who own it.
40 (6) 'Goal' means a voluntary percentage or quantitative objective.
41 (7) 'Minority person' means a person who is a citizen or lawful permanent
42 resident of the United States and who is:
43 a. Black, that is, a person having origins in any of the black racial
44 groups in Africa;

- 1 b. Hispanic, that is, a person of Spanish or Portugese culture with
2 origins in Mexico, South or Central America, or the Caribbean
3 Islands, regardless of race;
- 4 c. Asian American, that is, a person having origins in any of the
5 original peoples of the Far East, South and Asia, the Indian
6 subcontinent, or the Pacific Islands; or
- 7 d. American Indian or Alaskan Native, that is, a person having
8 origins in any of the original peoples of North America.
- 9 (8) 'Minority-owned business' means a business concern:
- 10 a. In which at least fifty-one percent (51%) is owned by one or
11 more minority persons, or in the case of a corporation, in which
12 at least fifty-one percent (51%) of the stock is owned by one or
13 more minority persons; and
- 14 b. Of which the management and daily business operations are
15 controlled by one or more of the minority individuals who own
16 it.
- 17 (9) 'Physically handicapped-owned business' means a business concern:
- 18 a. In which at least fifty-one percent (51%) is owned by one or
19 more physically handicapped persons, or in the case of a
20 corporation, in which at least fifty-one percent (51%) of the
21 stock is owned by one or more physically handicapped persons;
22 and
- 23 b. Of which the management and daily business operations are
24 controlled by one or more of the physically handicapped
25 persons who own it.
- 26 (10) 'Small business' means a business concern:
- 27 a. Which is a female-owned business, a physically handicapped-
28 owned business, or a minority-owned business;
- 29 b. In which gross annual sales total less than one million dollars
30 (\$1,000,000); and
- 31 c. Which employs less than 20 full-time employees.
- 32 (11) 'State contracts' means all State contracts, funded exclusively with
33 State funds which are not subject to federal reimbursement, whether
34 competitively bid or negotiated.
- 35 (12) 'State agencies' means all departments, officers, boards, commissions,
36 institutions and bodies politic and corporate of the State.

37 **"§ 143B-426.47. Minority and Small Business Development Council; membership.**

38 (a) To help implement, monitor, and enforce the goals of this Part, the Minority
39 and Small Business Development Council of the Department of Administration is
40 created.

41 The Council shall be comprised of 14 members. The members shall include: the
42 chief executive officer of the Rural Economic Development Center, Inc., or his
43 designee; the Chief of the Minority Business Section, the Small Business Development
44 Division, Department of Commerce, or his designee; the Director of the Small Business

1 Development Division, Department of Commerce, or his designee; the chief executive
2 officer of the North Carolina Biotechnology Center, or his designee; the chief executive
3 officer of the North Carolina Science and Technology Research Center established in
4 Part 6 of Chapter 143B of the General Statutes, or his designee; the Director of the
5 North Carolina Technological Development Authority established in Part 12 of Chapter
6 143B of the General Statutes, or his designee; the Secretary of State, or his designee; the
7 Chairman of the Council on the Status of Women, or his designee; the Chairman of the
8 Governor's Advocacy Council for Persons with Disabilities, or his designee; three
9 members appointed by the Speaker of the House, two of whom shall:

10 (1) Be members of a minority as defined in G.S. 143B-426.46;

11 (2) Have an interest and knowledge of the problems confronting
12 minorities who seek to be in business; and

13 (3) Represent the interests of minorities seeking to establish businesses,
14 and one of whom shall:

15 (1) Be a female;

16 (2) Have an interest and knowledge of the problems confronting females
17 who seek to be in business; and

18 (3) Represent the interests of females seeking to establish businesses,

19 and three members appointed by the President Pro Tempore of the Senate, who satisfy
20 the same criteria as the Speaker's three appointments.

21 (b) Members serving by virtue of their office shall serve so long as they hold that
22 office, except that the members appointed by the Speaker of the House and the
23 President Pro Tempore of the Senate shall serve two-year terms and shall be eligible for
24 reappointment. Any member who is appointed by the Speaker of the House or the
25 President Pro Tempore of the Senate to fill a vacancy occurring prior to the expiration
26 of a term shall be appointed for the remainder of the term.

27 (c) The Council shall appoint one member to serve as chairman and one member
28 to serve as vice-chairman at the pleasure of the Council. The Director of each State
29 agency shall appoint a liaison to the Council. The liaison shall be responsible for
30 submitting to the Council any reports and documents necessary under this Part.

31 (d) Members of the Council shall serve without compensation, but shall be
32 reimbursed for any expenses pursuant to the provisions of G.S. 138-5 or G.S. 138-6.
33 Any Council member who has direct financial or personal interest in any measure
34 pending before the Council shall disclose this fact to the Council and refrain from
35 participating in the determination of the measure.

36 **"§ 143-426.48. Powers and duties of the Council.**

37 The Minority and Small Business Development Council shall:

38 (1) Devise a certification procedure to assure that businesses seeking a
39 preference pursuant to this Part are legitimate minority-owned
40 businesses or small businesses.

41 (2) Maintain a list of all certified minority-owned businesses and small
42 businesses to provide to all State agencies.

43 (3) Review rules and regulations for the implementation of the provisions
44 of this Part.

- 1 (4) Review compliance plans submitted by each agency pursuant to this
2 Part.
- 3 (5) Make annual reports to the Governor and the General Assembly on the
4 status of the program implemented pursuant to this Part.
- 5 (6) Serve as a central clearinghouse for information on State contracts,
6 including the maintenance of a list of all pending State contracts upon
7 which minority-owned businesses and small businesses may bid.
- 8 (7) Serve as a coordinator for the State's minority and small business
9 programs and as the information and referral center for all State
10 minority-owned business and small business initiatives.
- 11 (8) Devise appropriate policies, regulations, and procedures for including
12 minority-owned business and small business participation as prime
13 contractors, to include:
- 14 a. Encouraging the inclusion of qualified minority-owned
15 businesses and small businesses on solicitation lists; and
- 16 b. Investigating the potential of blanket bonding programs for
17 small construction jobs.
- 18 (9) Establish an enforcement procedure whereby the Council may
19 recommend to the appropriate State agency or law enforcement officer
20 that the State exercise its legal remedies to include:
- 21 a. Termination of the contract involved;
- 22 b. Prohibition of participation in public contracts by the business
23 that violated this Part for a period not to exceed one year; or
- 24 c. Imposition of a penalty not to exceed any profit acquired as a
25 result of the violation.
- 26 (10) Make findings, recommendations, and proposals to the Governor and
27 the General Assembly as are necessary and appropriate to implement
28 the provisions of this Part; and
- 29 (11) Devise procedures for the waiver of the participation goals in
30 appropriate circumstances.

31 **"§ 143B-426.49. Adoption of rules.**

32 The Department of Administration shall submit for review by the Administrative
33 Rules Review Commission and for subsequent adoption any rules recommended by the
34 Council.

35 **"§ 143B-426-50. State contracts.**

36 (a) It is a goal to award not less than twenty-five percent (25%) of the total dollar
37 amount of State contracts to minority-owned businesses and small businesses; provided,
38 however:

- 39 (1) At least ten percent (10%) of the total dollar amount of all State
40 contracts shall be awarded to minority-owned businesses;
- 41 (2) At least ten percent (10%) of the total dollar amount of all State
42 procurement contracts shall be awarded to female-owned businesses;
43 and

1 (3) At least two percent (2%) of the total dollar amount of all State
2 construction contracts and State consulting contracts shall be awarded
3 to female-owned businesses.

4 (b) The percentage of the total dollar amount of State contracts is calculated for
5 one fiscal year and is calculated by examining independently each type of contract for
6 each agency which enters into contracts pursuant to Article 3 and Article 8 of Chapter
7 143 of the General Statutes and Article 2 of Chapter 136 of the General Statutes.

8 "**§ 143B-426.51. Annual compliance plans.**

9 (a) Each State agency shall file with the Council an annual compliance plan
10 which outlines the agency's minority-owned business and small business contracting
11 goals for the fiscal year, the manner in which the agency intends to reach these goals,
12 and a timetable for reaching these goals. The Council shall review and approve the plan
13 of each agency or reject any plan that does not comply with the provisions of this Part
14 or any rules adopted pursuant to this Part.

15 (b) The compliance plan shall include:

16 (1) A policy statement signed by the agency head, expressing a
17 commitment to use minority-owned businesses and small businesses in
18 all aspects of contracting to the maximum extent feasible;

19 (2) A designation of the liaison officer as required by G.S. 143B-
20 426.47(c);

21 (3) Procedures to distribute to potential contractors and vendors the list of
22 all the certified minority-owned businesses and small businesses;

23 (4) Procedures to set separate contract goals on specific prime contracts
24 and purchase orders with subcontracting possibilities based upon the
25 type of work or services and subcontractor availability;

26 (5) Procedures to assure that contractors and vendors made a good faith
27 effort to meet contract goals;

28 (6) Procedures for contract goal exemption, modification, and waiver; and

29 (7) The delineation of separate contract goals for minority-owned
30 businesses and small businesses.

31 (b) If the Council concludes that a compliance plan submitted pursuant to
32 subsection (a) of this section is unlikely to produce the minority-owned business or
33 small business participation goals within the current fiscal year, the Council may
34 recommend that the State agency revise its plan to provide additional opportunities for
35 minority-owned business and small business participation. Such recommended
36 revisions may include:

37 (1) Assurances of stronger and better focused solicitation efforts to obtain
38 more minority-owned businesses and small businesses as potential
39 sources of supply;

40 (2) Division of job or project requirements, when economically feasible,
41 into tasks or quantities to permit participation of minority-owned
42 businesses and small businesses;

1 (3) Elimination of extended experience or capitalization requirements,
2 when programmatically feasible, to permit participation of minority-
3 owned businesses and small businesses; or

4 (4) Identification of specific proposed contracts as particularly attractive
5 or appropriate for participation by minority-owned businesses or small
6 businesses.

7 **"§ 143B-426.52. Individual contract exemptions, class exemptions; waivers.**

8 (a) The Council, on its own initiative or at the request of an affected State
9 agency, may permit an individual contract or contract package to be wholly or partially
10 exempt from minority-owned business and small business State contracting goals prior
11 to the advertisement for bids or solicitation of proposals whenever there has been a
12 written determination based on the best information available at the time of the
13 determination, that there is an insufficient number of minority-owned businesses or
14 small businesses to ensure adequate competition and an expectation of reasonable prices
15 on bids or proposals solicited for the individual contract or contract package in question.

16 (b) The Council, on its own initiative or at the request of an affected State
17 agency, may permit an entire class of contracts to be exempt from minority-owned
18 business and small business State contracting goals whenever there has been a written
19 determination based on the best information available at the time of the determination,
20 that there is an insufficient number of qualified minority-owned businesses or small
21 businesses to ensure adequate competition and an expectation of reasonable prices on
22 bids or proposals within that class.

23 (c) Any such class exemption shall not be permitted for a period of more than
24 one year at a time.

25 (d) Where a particular contract requires a contractor to meet a goal established
26 pursuant to this Part, the contractor shall have the right to request a waiver from this
27 requirement. The Council shall grant the waiver where the contractor demonstrates that
28 there has been a good faith effort to comply with the goals for minority-owned business
29 or small business participation.

30 **"§ 143B-426.53. False information supplied by business.**

31 (a) When a State agency determines that a business has knowingly supplied false
32 information in order to be classified as a minority-owned business or a small business
33 and the business has been awarded a State contract to which it would otherwise not be
34 entitled under this Part, the State agency shall exercise any legal remedy available to the
35 agency as set forth in G.S. 143B-426.48(9).

36 (b) Prior to any final determination under subsection (a) of this section, the
37 business charged with supplying false information may commence an action under
38 Chapter 150B of the General Statutes.

39 (c) Any person who, with intent to defraud another, represents himself as a
40 minority-owned business or a small business without having been certified as such
41 pursuant to the procedures established by the Minority and Small Business
42 Development Council, for the purpose of obtaining money, goods, property, services,
43 choses in action, or any item of value from a person within this State is guilty of a Class
44 J felony.

1 **"§ 143B-426.54. Conflict of laws or rules.**

2 (a) To the extent of any conflict with this Part, federal law or rules or regulations
3 shall prevail over this Part, and the contract will be interpreted and enforced
4 accordingly.

5 (b) To the extent of any conflict with this Part, this Part will prevail over all State
6 or local laws which do not meet or exceed the goals set forth in this Part.

7 (c) Any State agency which administers a construction project for which federal
8 law or regulations establish standards and procedures for the utilization of minority-
9 owned businesses or small businesses may use the federal standards and procedures for
10 the establishment of goals and utilization procedures for the State-funded, as well as the
11 federally assisted, portions of the project. In these cases, these goals shall not exceed
12 those established pursuant to the relevant federal statutes or regulations. A compliance
13 plan which is filed by such State agency pursuant to this Part, which incorporates
14 equivalent terms and conditions of its federally-approved compliance plan, shall be
15 deemed approved under this Part."

16 Sec. 2. This act shall become effective January 1, 1990, and applies to all
17 contracts entered into pursuant to Article 3 or Article 8 of Chapter 143 of the General
18 Statutes or Article 2 of Chapter 136 of the General Statutes.