

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1993

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SENATE BILL 929

Capital Expenditures and Improvements Committee Substitute Adopted 5/12/93

Short Title: Minority Bus./Highway Construct.

(Public)

Sponsors:

Referred to: Appropriations.

April 20, 1993

A BILL TO BE ENTITLED

AN ACT TO MAKE CHANGES IN STATE LAW CONCERNING PARTICIPATION
BY DISADVANTAGED BUSINESSES IN HIGHWAY CONTRACTS.

Whereas, the Joint Legislative Highway Oversight Committee requested a
"Study of Minority and Women Business Participation in Highway Construction"; and

Whereas, MGT of America, Inc., was commissioned to conduct the study and
has submitted the results in its final report, dated 26 January 1993; and

Whereas, the final report finds and documents the existence of discrimination
against minority and women businesses in the awarding of highway construction
contracts in North Carolina; and

Whereas, recent decisions in federal court have held that, upon such finding
and documentation, a state has a compelling interest to remedy the effect of
discrimination as it affects projects let by that state; Now, therefore,

The General Assembly of North Carolina enacts:

Section 1. G.S. 136-28.4 reads as rewritten:

**"§ 136-28.4. ~~State policy concerning participation~~ Participation by disadvantaged
businesses in highway contracts.**

- (a) (1) For purposes of this section, 'disadvantaged business' means a disadvantaged business as defined in 49 C.F.R. § 23.62 (1 October 1992 Edition) that has been documented by the 'Study of Minority and Women Business Participation in Highway Construction', dated 26 January 1993, and funded by the General Assembly to have

1 suffered from discrimination within the highway construction
2 industry in North Carolina and that is:

- 3 a. Located in North Carolina; or
4 b. Located outside North Carolina, but can demonstrate to the
5 Department of Transportation that it has sought to participate in
6 the letting of highway construction contracts in North Carolina
7 for at least one year, through such activities as registering as a
8 vendor somewhere in North Carolina, making sales calls on an
9 agency or prime contractor in North Carolina, obtaining a local
10 business license in North Carolina, or submitting a bid to any
11 agency or prime contractor in North Carolina.

12 (2) For purposes of this section and as used in 49 C.F.R. § 23.62 (1
13 October 1992 Edition), 'Native Americans' includes those Indians
14 recognized in Chapter 71A of the General Statutes and other American
15 Indians, but does not include Eskimos, Aleuts, or Native Hawaiians.

16 (b) It is the policy of this State to encourage and promote participation by
17 disadvantaged businesses in contracts let by the Department pursuant to this Chapter for
18 the design, construction, alteration, or maintenance of State highways, roads, streets, or
19 bridges and in the procurement of materials for these projects. All State agencies,
20 institutions, and political subdivisions shall cooperate with the Department of
21 Transportation and all other State agencies, institutions, and political subdivisions in
22 efforts to encourage and promote the use of disadvantaged businesses in these contracts.

23 ~~(b) A ten percent (10%) goal is established for participation by minority~~
24 ~~businesses and a five percent (5%) goal for participation by women businesses is~~
25 ~~established in contracts let by the Department of Transportation for the design,~~
26 ~~construction, alteration, or maintenance of State highways, roads, streets, or bridges and~~
27 ~~for the procurement of materials for these projects. The Department of Transportation~~
28 ~~shall endeavor to award to minority businesses at least ten percent (10%), by value, of~~
29 ~~the contracts it lets for these purposes, and shall endeavor to award to women~~
30 ~~businesses at least five percent (5%), by value, of the contracts it lets for these purposes.~~
31 ~~The Department shall adopt written procedures specifying the steps it will take to~~
32 ~~achieve these goals.~~

33 (c) The following definitions apply in this section:

34 (1) ~~'Disadvantaged business' has the same meaning as in 49 C.F.R. §~~
35 ~~23.62.~~

36 (2) ~~'Minority' has the same meaning as in 49 C.F.R. § 23.5.~~

37 The Department of Transportation shall set annual goals for participation by each
38 classification of disadvantaged business in contracts let by the Department using one
39 hundred percent (100%) State funding, for the design, construction, alteration, or
40 maintenance of State highways, roads, streets, or bridges and for the procurement of
41 materials for these projects. The initial annual goals for participation by each
42 classification of disadvantaged business shall be set at fifteen percent (15%) above
43 current availability as documented in the 'Study of Minority and Women Business
44 Participation in Highway Construction', dated 26 January 1993, and funded by the

1 General Assembly. Thereafter, the annual goals for participation by each classification
2 of disadvantaged business during each fiscal year shall be based upon:

3 (1) The type and number of contracting opportunities projected for the
4 next fiscal year; and

5 (2) The level of participation by disadvantaged businesses achieved during
6 the previous fiscal year.

7 (d) The Department shall also establish goals for participation by each
8 classification of disadvantaged business for each individual project, based upon the
9 overall annual goals. The Department may waive goals for an individual project if (i)
10 no disadvantaged businesses are available to bid on the project; (ii) the prime contractor
11 affirms that it will use its own work force for the entire project, and will not engage
12 subcontractors; or (iii) assignment of a goal would conflict with the Department's
13 overall goals and objectives.

14 (e) A committee established within the Department of Transportation, appointed by
15 the Secretary of Transportation, and chaired by the Secretary or his designee, shall
16 review good faith efforts by contractors to award subcontracts to disadvantaged
17 businesses for the purposes outlined in subsections (c) and (d) of this section. The
18 committee shall establish a list of specific actions required to establish that a contractor
19 has made such a good faith effort and shall provide the Secretary with the list for
20 distribution. The committee shall report its findings to the Joint Legislative Highway
21 Oversight Committee and the Joint Legislative Commission on Governmental
22 Operations on a quarterly basis.

23 (f) The Department of Transportation may waive the performance and payment bond
24 requirement of G.S. 44A-26 or reduce the amount of the bond required pursuant to that
25 section for projects in which the total amount of construction contracts awarded for the
26 project do not exceed two hundred thousand dollars (\$200,000) if the Department finds
27 that such waiver or reduction of the bond amount will enable more disadvantaged
28 businesses and other small businesses to participate in bidding on the project.

29 (g) The Department shall give equal opportunity for contracts it lets without regard
30 to race, religion, color, creed, national origin, sex, age, or handicapping condition, as
31 defined in G.S. 168A-3, to all contractors and businesses otherwise qualified.

32 (h) The provisions of this section shall remain in effect until the General
33 Assembly finds that the State no longer has a compelling interest in remedying
34 discrimination against disadvantaged businesses in the letting of highway construction
35 contracts. The Department shall conduct an annual review of the utilization of
36 disadvantaged businesses and shall report its findings to the General Assembly by 1
37 June of each year."

38 Sec. 2. G.S. 44A-26(a) reads as rewritten:

39 "(a) ~~When~~ Except as provided in G.S. 136-28.4(h), when the total amount of
40 construction contracts awarded for any one project exceeds fifty thousand dollars
41 (\$50,000) a performance and payment bond as set forth in (1) and (2) is required by the
42 contracting body from any contractor with a contract more than fifteen thousand dollars
43 (\$15,000). In the discretion of the contracting body, a performance and payment bond
44 may be required on any construction contract as follows:

1 (1) A performance bond in the amount of one hundred percent (100%) of
2 the construction contract amount, conditioned upon the faithful
3 performance of the contract in accordance with the plans,
4 specifications and conditions of the contract. Such bond shall be solely
5 for the protection of the contracting body which awarded the contract.

6 (2) A payment bond in the amount of one hundred percent (100%) of the
7 construction contract amount, conditioned upon the prompt payment
8 for all labor or materials for which a contractor or subcontractor is
9 liable. The payment bond shall be solely for the protection of the
10 persons furnishing materials or performing labor for which a
11 contractor or subcontractor is liable."

12 Sec. 3. It is the intent of the General Assembly that the Department of
13 Transportation shall endeavor to implement the provisions of this act in a manner
14 consistent with the findings and recommendations contained in the final report, dated 26
15 January 1993, of the study of minority and women business participation in highway
16 construction, conducted by MGT of America, Inc., and funded by the General
17 Assembly.

18 Sec. 4. This act becomes effective 1 July 1993.