

1 **State of Arkansas**
2 **78th General Assembly**
3 **Regular Session, 1991**

A Bill

SENATE BILL

4 **By: Senators Jewell, Lewellen and Edwards**

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7

For An Act To Be Entitled

8 "AN ACT TO ESTABLISH THE SMALL AND DISADVANTAGED BUSINESS
9 ECONOMIC DEVELOPMENT PROGRAM; TO ESTABLISH GOALS FOR STATE
10 AGENCIES TO AID SMALL AND DISADVANTAGED BUSINESSES; TO
11 REQUIRE STATE AGENCIES TO MEET THE ANNUAL PURCHASING AND
12 CONTRACTING GOALS; TO AID SMALL AND DISADVANTAGED
13 BUSINESSES IN OBTAINING STATE AGENCY CONTRACTS; TO
14 PRESCRIBE PENALTIES FOR VIOLATIONS OF THE ACT; AND FOR
15 OTHER PURPOSES."

16

17 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

18

19 SECTION 1. This Act shall be known and may be cited as the "Small and
20 Disadvantaged Business Economic Development Act".

21

22 SECTION 2. The Arkansas General Assembly finds that small and
23 disadvantaged business owners have suffered a social disadvantage and a
24 resulting economic disadvantage evident by denied access to capital markets
25 and procurement opportunities which have benefitted non-disadvantaged firms.
26 It is the policy of the State of Arkansas to support equal opportunity, as
27 well as economic development in every sector. Therefore, the Arkansas General
28 Assembly recognizes as the purpose of this measure the policy of supporting
29 the fullest possible participation of the firms owned and controlled by small
30 and disadvantaged persons in state funded and directed public construction
31 programs and in projects involving state purchase of goods and services. This
32 Act will establish annual procurement goals for state agencies with small and
33 disadvantaged businesses each year. For fiscal year 1991-92 each state agency
34 shall award a minimum of five percent (5%) of covered contracts to small and
35 disadvantaged businesses; for fiscal year 1992-93 each state agency shall

1 award a minimum of seven percent (7%) of covered contracts to small and
2 disadvantaged firms; and for fiscal year 1993-94 and thereafter each state
3 agency shall award ten percent (10%) of covered contracts to small and
4 disadvantaged businesses.

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6 SECTION 3. As used in this Act, unless the context otherwise requires:

7 (1) "Certification" means the determination by the Minority Business
8 Development Division of the Arkansas Industrial Development Commission,
9 through a standard procedure, that a firm is a small and/or disadvantaged
10 business for the purposes of this Act;

11 (2) "Council" means the Economic Development Council created under
12 Arkansas Code 15-4-303;

13 (3) "Covered contract" means a contract of the type listed in this Act
14 and including all contracts which shall be included in measuring achievement
15 of the State's goal and upon which certain procurement measures shall be
16 invoked only if the state agency does not achieve its goal;

17 (4) "Division" means the Minority Business Development Division of the
18 Arkansas Industrial Development Commission;

19 (5) "Director" means Director of the Minority Business Development
20 Division of the Arkansas Industrial Development Commission;

21 (6) "Exempt" and "non-exempt" means goods and services classified as
22 either exempt or non-exempt for the purpose of administering this Act as shall
23 be determined by the Director of the Department of Finance and Administration
24 and the Director of the Division of Minority Business Development submitted to
25 the Economic Development Council for their review and consideration for the
26 purposes of this Act;

27 (7) "Joint venture" means an association of two (2) or more businesses
28 formed to carry out a single business goal for profit, for which purpose they
29 combine their property, capital, efforts, skills and knowledge;

30 (8) "Disadvantaged person" means a person who is a citizen or lawful
31 permanent resident of the State of Arkansas, and who is:

32 (A) Black: a person having origins in any of the black racial groups
33 of Africa;

34 (B) Hispanic: a person of Spanish or Portuguese culture with origins
35 in Mexico, South or Central America, or the Caribbean Islands, regardless of

1 race;

2 (C) Asian American: a person having his/her origin in any of the
3 original peoples of the Far East, Southeast Asia, the Indian subcontinent, or
4 the Pacific Islands;

5 (D) American Indian or Alaska Native: a person having origins in any
6 of the original people of North America;

7 (E) Female: a person of the female gender; or

8 (F) White male: who because of uncontrollable social and/or economic
9 conditions is unable to effectively access capital and procurement
10 opportunities.

11 (9) "Procurement" means buying, purchasing, renting, leasing, otherwise
12 acquiring any goods or services;

13 (10) "Target market" means a procurement procedure whereby certain
14 contracts are specifically selected by the Division of Minority Business
15 Development for competitive bid or negotiation solely with minority
16 businesses;

17 (11) "Small disadvantaged business" means a small business, as defined
18 in the federal Small Business Administration size standards, which is at least
19 fifty-one percent (51%) owned by one or more minority persons, and the
20 management and daily operations of which are controlled by one or more
21 minority individuals who own it;

22 (12) "Small business" means a small business, as defined in the federal
23 Small Business Administration size standards;

24 (13) "State agency" means all departments, offices, boards,
25 commissions, institutions, and bodies politic and corporate of the State,
26 including the state-supported institutions of higher education; and

27 (14) "State contract" means all binding agreements of state agencies
28 for goods or services, the majority of which is not subject to federal
29 reimbursement, whether competitively bid or negotiated.

30

31 SECTION 4. (a) It is hereby established as a goal for all state
32 agencies that not less than a minimum of five percent (5%) of covered
33 contracts shall be awarded to small businesses and small disadvantaged
34 businesses in fiscal year 1991-92 with a minimum of two and one-half percent
35 (2 1/2%) awarded to small disadvantaged businesses; and not less than a

1 minimum of seven percent (7%) of covered contracts shall be awarded to small
2 businesses and small disadvantaged businesses in fiscal year 1992-93 with a
3 minimum of three and one-half percent (3 1/2%) awarded to small disadvantaged
4 businesses; and not less than a minimum of ten percent (10%) of covered
5 contracts shall be awarded to small businesses and small disadvantaged
6 businesses in fiscal year 1993-94 and thereafter with a minimum of five
7 percent (5%) awarded to small disadvantaged businesses.

8 (b) The above percentage goals relate to the total dollar amount of
9 covered contracts which are let by state agencies during the stated fiscal
10 years, calculated by examining independently, the sum of covered contracts let
11 by each agency. If an agency does not meet its goal, it shall implement the
12 enhanced procurement procedures promulgated under this Act, and other programs
13 as determined by the Director to meet the goals.

14 (c) When the award of a contract for the purchase of goods or services
15 involves five thousand dollars (\$5,000) or less, an agency shall, whenever
16 possible, utilize a small business and/or small disadvantaged business
17 to purchase such goods or services.

18

19 SECTION 5. (a) Within ninety (90) days from effective date of this
20 Act, each state agency shall submit to the Division and the Economic
21 Development Council an advanced compliance plan which shall outline the
22 agency's plan to reach its goals for the current fiscal year.

23 (b) The compliance plan shall include, but not be limited to:

24 (1) The name of the state agency;

25 (2) A policy statement signed by the agency head expressing a
26 commitment to use small and disadvantaged businesses in all aspects of
27 contracting to the maximum extent feasible;

28 (3) The name of the coordinator or procurement officer in the agency
29 who is responsible for developing and administering the compliance plan;

30 (4) The time table for the agency to reach its goals under the plan and
31 the manner in which the agency intends to reach its goals; and

32 (5) Any other procedures the agency deems necessary to comply with the
33 goals and the compliance plan.

34 (c) The Economic Development Council shall require each state agency to
35 produce within fifteen (15) days of the close of each six (6) month period,

1 beginning with the six (6) month period ending December 31, 1991, a report
2 summing up total procurement for all covered contracts of the agency, the
3 dollar value and the percentage of the covered contracts of the agency let to
4 small businesses and small disadvantaged businesses.

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6 SECTION 6. Each state agency and each primary contractor with a state
7 agency shall designate an individual as its small business and small
8 disadvantaged business officer. The small business and small disadvantaged
9 business officer shall be the person within the agency and with the primary
10 contractor with whom the Division and the Council shall work in its efforts to
11 accomplish the goals of this Act. Upon the appointment of the small business
12 and small disadvantaged business officer in each state agency and primary
13 contractor, the agency or the primary contractor shall notify the Director.

14

15 SECTION 7. There is hereby established a formal relationship between
16 the provisions of this Act and the Economic Development Council. The small
17 business and small disadvantaged business officer will be the liaison to the
18 Council and will be responsible for submitting to the Council any reports and
19 documents under this Act. Their duties in relation to this Act shall be
20 considered official duty in the conduct of State business. The Council's
21 duties and responsibilities shall be to:

22 (1) review reports and interpret each agency's achievement of its
23 goals;

24 (2) advise the Governor when an agency has not reached its goals;

25 (3) consider and rule on appeals presented by the Division of Minority
26 Business Development in which an agency has denied sheltered market treatment
27 of a contract;

28 (4) make annual reports to the Governor and the General Assembly in
29 regards of performance of this Act;

30 (5) individually, cast votes in support of or against motions before
31 the Council and refrain from voting when a member from the Council has a
32 direct financial interest in the matter before the Council;

33 (6) recommend for corrective action to the state agency and the
34 Division actions to strengthen small business and small disadvantaged business
35 opportunities in the State; and

1 (7) conduct public hearings when necessary to obtain public input and
2 support for the purpose of carrying out this Act.

3

4 SECTION 8. (a) The Director shall serve as the principal coordinator
5 of the initiative to insure the successful implementation of this Act.

6 (b) The Director shall review and make consistent agency procedures for
7 certifying small and disadvantaged businesses accessing this program. The
8 Division shall have the sole authority to certify businesses in the bid
9 exemption program. Certification shall occur by one of the following methods:
10 a letter of prior certification from another agency or from one of the
11 private sector projects currently in force; or through an agency implemented
12 program.

13 (c) The Division shall provide assistance to small businesses and small
14 disadvantaged businesses seeking contract opportunities with various state
15 agencies and its prime contractors.

16 (d) The Division shall maintain a directory of all designated small
17 business and small disadvantaged business officers for each state agency.
18 These officers are to be supplied by the agencies and any contractor of a
19 state agency.

20 (e) The Division shall provide management and technical assistance to
21 any state agency or prime contractor who is experiencing difficulties in
22 complying with this Act.

23 (f) In the event a state agency fails to meet the goal established by
24 this Act, the Director shall effectively charge and assist that agency in
25 selecting contract specific projects to be accessed by small businesses and
26 small disadvantaged businesses only. Once a project is selected the Director
27 shall proceed to negotiate a contract between the agency and the small
28 business and/or small disadvantaged business.

29 (g) The Division shall maintain a current directory of certified small
30 businesses and small disadvantaged businesses and shall make the directory
31 available to each state agency, small business and small disadvantaged
32 business officer and its prime contractors. The Division shall serve as a
33 central clearinghouse for information on state contracts, including a record
34 of all pending state contracts upon which all small businesses and small
35 disadvantaged businesses may participate.

1 (h) The Director shall, in conjunction with the Director of the
2 Department of Finance and Administration, compile an annual report of all
3 contracts entered into by each state agency with a small business or small
4 disadvantaged business.

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6 SECTION 9. (a) Each state agency that is unable to meet the
7 procurement goals of this Act shall be subject to the implementation of one or
8 more of the four (4) following enhanced procurement compliance measures. The
9 employment of the enhanced procurement compliance measures are to be
10 instituted under the direction of the Director.

11 (b) Each agency which has not met the goals under this shall:

12 (1) Direct Contract Negotiation: On contracts of less than one hundred
13 thousand dollars (\$100,000) an agency under the direction of the Director
14 shall select solicitations to be matched with appropriate small businesses and
15 small disadvantaged businesses for contractual negotiations;

16 (2) Solicit small business and/or small disadvantaged business bids:
17 On contracts of less than fifty thousand dollars (\$50,000), the agency,
18 through procedures developed by the Minority Business Development Division,
19 shall secure two-thirds (2/3) of its bids from small businesses and/or small
20 disadvantaged businesses. This compliance measure shall be used in
21 combination with the five percent (5%) preference compliance measure;

22 (3) Agencies who are unable to meet their procurement goals established
23 by this Act shall have as an additional option of compliance enhancement the
24 providing of a five percent (5%) price preference. Under this compliance
25 measure the agency awards designated contracts to a small business and/or
26 small disadvantaged business should the bid of the small business and/or small
27 disadvantaged business be within five percent (5%) of the low bidders price;
28 and

29 (4) Division of the job or project: When feasible, jobs or projects
30 shall be divided into smaller projects or tasks in order to permit
31 participation by small businesses and small disadvantaged businesses. The
32 application of this enhanced procurement compliance measure shall be at the
33 direction of the Director and shall be employed only when the sheltered
34 approach is not being employed.

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1 SECTION 10. (a) The Division shall have the authority in concurrence
2 with the office of State Purchasing and/or State Building Services to issue
3 bonding waivers for small businesses and/or small disadvantaged businesses
4 that are otherwise qualified to perform work for the State but are unable to
5 meet the qualifications for traditional bonding requirements for the
6 performance of state contracts. This program shall be implemented as a pilot
7 program for a two (2) year period and the Division shall be responsible for
8 the administration and operation of the program and for the issuance of the
9 bonding waivers. Businesses approved for the program shall be allowed to
10 perform work on designated contracts for up to one hundred thousand dollars
11 (\$100,000) through a bonding waiver.

12 (b) To qualify for the program, a small business and/or small
13 disadvantaged business shall:

14 (1) Be an Arkansas contractor licensed by the Contractor's Licensing
15 Board, under Arkansas Code 17-22-101 et seq., and certified by the Minority
16 Business Development Division;

17 (2) Have been in business for a minimum of two (2) years or more and
18 able to demonstrate a pattern of growth through guidelines promulgated by the
19 Minority Business Development Division; and

20 (3) Be able to provide the Minority Business Development Division with
21 a letter of denial from a surety company and the reason for denial of the
22 surety should be consistent with the acceptable reasons as defined by the
23 Division.

24

25 SECTION 11. To insure that small businesses and small disadvantaged
26 businesses are not financially harmed due to slow pay by state agencies
27 entering into contracts with small businesses and small disadvantaged
28 businesses under the provisions of this Act state agencies are required to
29 conform to all directives issued by the Director to offset incidents of
30 accounts receivable problems of small businesses and/or small disadvantaged
31 businesses caused by the State of Arkansas.

32

33 SECTION 12. The Minority Business Development Division, subject to the
34 approval of the Council, may at the request of an affected agency permit an
35 individual contract or special classification of contracts to be exempted from

1 the goals established by this Act. This may occur whenever there has been a
2 document determination, based on factual information, that there is an
3 insufficient number of small businesses and small disadvantaged businesses to
4 insure adequate competition. No class exemption shall be permitted for more
5 than one (1) year at a time.

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7 SECTION 13. (a) Every small business and/or small disadvantaged
8 business performing as primary contractor, subcontractor or member of a joint
9 venture shall actually perform, manage or supervise work awarded to it.

10 (b) Consistent with industrial practices and any other laws of this
11 State, small businesses and/or small disadvantaged businesses may enter into
12 subcontracts, including subcontracts with non-disadvantaged businesses, except
13 that in no instance shall a small business and/or small disadvantaged business
14 act as a conduit or broker for the purpose of passing on business to non-
15 disadvantaged businesses. Further, in those instances where subcontracting
16 does occur, the small business and/or small disadvantaged business must
17 perform a minimum of twenty-five percent (25%) of the work associated with the
18 contract.

19

20 SECTION 14. (a) A person who has been denied certification or
21 recertification as a small business and/or small disadvantaged business by the
22 Division may request a review of the decision by the Council.

23 (b) All persons having any ownership interest in a business that has
24 been denied certification pursuant to this Act shall be precluded from
25 reapplying for certification under the same business entity or under a newly
26 organized business entity for a period of one (1) year from the date
27 certification was denied by the Council.

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29 SECTION 15. (a) Any small business and/or small disadvantaged business
30 found to be acting as a conduit for the purposes of brokerage shall not be
31 awarded the contract under the provisions of this Act and at the discretion of
32 the Minority Business Development Division the following may occur:

33 (1) The business shall be disqualified from contracting under this Act
34 for two (2) years and any bid from such business during said period shall not
35 be considered responsible; or

1 (2) Action shall be taken terminating the businesses' contracts and the
2 State may keep any retainage, if applicable.

3 (b) If the primary contractor knowingly receives business as a result
4 of:

5 (1) Fraudulently obtaining, retaining, attempting to obtain or retain,
6 or aiding another in fraudulently obtaining or retaining or attempting to
7 obtain or retain, certification as a small business and/or small disadvantaged
8 business enterprise for the purposes of this Act;

9 (2) Willfully making a false statement, whether by affidavit, report,
10 or other representation, to an official or employee for the purpose violation
11 of this Act;

12 (3) Willfully obstructing, impeding, or attempting to obstruct or
13 impede any official or employee who is investigating the qualifications of a
14 business entity which has requested recertification of any entity as a small
15 business and/or small disadvantaged business; and

16 (4) Fraudulently obtaining, attempting to obtain, or aiding another
17 person in fraudulently obtaining or attempting to obtain public monies to
18 which the person is not entitled under this Act.

19 (c) Any person who violates the provisions of this section is guilty of
20 a class D felony.

21

22 SECTION 16. All provisions of this Act of a general and permanent
23 nature are amendatory to the Arkansas Code of 1987 Annotated and the Arkansas
24 Code Revision Commission shall incorporate the same in the Code.

25

26 SECTION 17. If any provision of this Act or the application thereof to
27 any person or circumstance is held invalid, such invalidity shall not affect
28 other provisions or applications of the Act which can be given effect without
29 the invalid provision or application, and to this end the provisions of this
30 Act are declared to be severable.

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32 SECTION 18. All laws and parts of laws in conflict with this Act are
33 hereby repealed.

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