

State of Arkansas

76th General Assembly

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HOUSE BILL 1743

By: Representatives Wilkins, Townsend and I. Brown

"THE MINORITY AND FEMALE SMALL BUSINESS OPPORTUNITIES
ACT."

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

SECTION 1. This Act shall be known and may be cited as the "Minority and Female Small Business Opportunities Act of 1987."

SECTION 2. The General Assembly of the State of Arkansas finds that minorities and females have historically suffered some form of discrimination either due to race, color, ethnicity, creed, or sex where upon they have been deprived of the opportunity to develop and maintain a competitive position in the economy and it is in the best interest of all inhabitants of the State of Arkansas to encourage the economic development of minority and female owned businesses by:

- (a) Increasing the opportunities of minority and female businesses to participate fully in the economic opportunities of the State;
- (b) Ensuring the fair and equitable treatment of minority and female individuals who deal with the procurement system of the State; and
- (c) Providing safeguards for maintenance of a procurement system of quality, equality, and integrity.

SECTION 3. Unless the context clearly requires otherwise, the terms in this section shall have the following definitions throughout this Act:

- (1) "Agency" means any agency, department, division, board, bureau, commission, or institution, including institution of higher education of the state.
- (2) "Certification" or "Certified" shall mean the determination by the Division of Minority and Female Small Business Affairs through a standard pro-

cedure that for the purposes of this Act:

- (a) a business entity is a minority owned business; or
- (b) a business entity is a female owned business; or
- (c) an individual is a minority or female person; and
- (d) said business entity or individual is qualified.

For the purposes of this Act a business shall be certified as a minority business if minorities own and control a greater share than females.

A business shall be certified as a female business if females own and control a greater share than minorities.

For the purposes of this Act, a business shall be certified as a minority business if at least fifty-one (51%) percent of the business is owned by minorities or females.

(3) "Contract" means any type of state agreement for the construction, alteration, or repair of any public building, public highway, or other public work and any state agreement for the procurement of goods, real or personal property, equipment, or services.

(4) "Control" means the exclusive or ultimate and sole control of the business including, but not limited to, capital investment and all other financial matters, property, acquisitions, contract negotiations, legal matters, officer-director-employee selection and comprehensive hiring, operating responsibilities, cost-control matters, income and dividend matters, financial transactions and rights of other shareholders or joint partners. Control shall be real, substantial and continuing, not pro forma. Control shall include the power to direct or cause the direction of the management and policies of the business and to make the day-to-day as well as major decisions in matters of policy, management and operations. Control shall be exemplified by possessing the requisite knowledge and expertise to run the particular business and control shall not include simple majority or absentee ownership.

(5) "Department" means the Department of Industrial Development.

(6) "Division" means the Division of Minority and Female Small Business Affairs.

(7) "Female" shall mean a person who is a citizen or lawful permanent resident of the United States and who is of the female gender.

(8) "Female Business" means a business entity organized for profit with:
One Hundred (100%) percent female ownership of a proprietorship; or
Fifty (50%) percent female ownership of a partnership; or

Fifty-one (51%) percent female ownership of the voting stock and the majority of the members of the board of directors of a corporation are female; and the management and daily business operations is controlled by one or more female persons; and the chief executive of day to day operations is a female.

(9) "Joint venture" means an association of two or more businesses formed to carry out a single business enterprise for profit for which purposes they combine their property, capital efforts, skills, and knowledge. For purposes of this Act, one of the partners in a joint venture must be a certified and qualified minority or female business enterprise.

(10) "Lowest responsible bidder" means any contractor who has bid in compliance with the invitation to bid, has met all the requirements of the plans and specifications, is the low bidder, and has furnished bonds or their equivalent as required by law.

(11) (a) "Minority" means an ethnic minority, including a person of African descent (Black), Spanish surname (Hispanic), Asian-Indian American, Asian-Pacific American, or Native American who is a citizen of the United States. Persons of American Indian and Aleut descent shall be considered as such only if they are certified by the Bureau of Indian Affairs as having a minimum of twenty-five percent American Indian or Aleut ancestry.

(b) As used in subsection 11(a):

(I) "Black Americans" include persons having origins in any of the Black racial groups of Africa;

(II) "Hispanic Americans" include persons of Mexican, Puerto Rican, Cuban, Central American, or South American descent, or other Spanish cultures or origins, regardless of race;

(III) "Asian-Indian Americans" include persons whose origins are from India, Pakistan, and Bangladesh;

(IV) "Asian-Pacific Americans" include persons whose origins are from Japan, China, Taiwan, Korea, Vietnam, Laos, Cambodia, the Philippines, Samoa, Guam, the United States trust territories of the Pacific, and the Northern Marianas;

(V) "Native Americans" include persons who are American Indians, Eskimos, Aleuts, or native Hawaiians.

(12) "Minority Business" means a business entity organized for profit with:

One Hundred (100%) percent minority ownership of a proprietorship; or
Fifty (50%) percent minority ownership of a partnership; or
Fifty-one (51%) percent minority ownership of the voting stock and the majority of the members of the board of directors of a corporation are minority; and the management; daily business operations, is controlled by one or more minority persons; and the chief executive of day to day operations is a minority person.

(13) "Person" shall mean an individual, association, sole proprietorship, corporation or other legal entity.

(14) "Procurement" means buying, purchasing, renting, leasing, or otherwise acquiring or disposing of any goods, supplies, equipment, services or construction.

(15) "Professional services" means services of accountants, architects, analysts, construction managers, consultants, lawyers, pharmacists, physicians, planners, and artists, and such other services as may be procured through agents of those services, and any other services that the Department of Industrial development may by rule designate as professional services.

(16) "Qualified" shall mean a certified minority and/or female or a business entity owned by said certified minority and/or female having the financial ability, skills, experience, and access to the necessary staff, facilities, and equipment to complete a project.

(17) "Small business" means an independently owned and operated, business which is not dominant in its field, and meets certain standards of size in terms of employment or annual receipts or net margin or net worth as is now and may from time to time be set by and published by and made available through the nearest office of the United States Small Business Administration.

SECTION 4. (1) Not less than ten (10%) percent of the total amount of state contracts shall be established as a goal to be awarded to minority and female owned businesses; provided, however, that contracts representing at least eighty (80%) percent of the total amount of all state contracts awarded to minority and female owned businesses pursuant to this section shall be awarded to minority owned businesses . This percentage shall be obtained within three (3) years from the effective date of this ACT.

(2) The above percentage relates to the total dollar amount of state contracts during each state fiscal year, calculated by examining independently

each type of contract for each agency which lets such contracts. Only that percentage of arrangements which represents the minority or female owned business' participation on such contracts shall be included.

SECTION 5. (1) (a) There is hereby created in the Department of Industrial Development, the Division of Minority and Female Business Affairs, referred to in this Act as the "Division". The Division is created from and shall replace the Division of Minority Business Enterprise existing in the Department of Industrial Development prior to the effective date of this Act which performed functions relating to minority businesses.

(b) The head of the Division shall be titled the Director and shall be appointed by the Governor.

(2) The Division and the Director shall exercise their powers and perform their duties and functions under the Department of Industrial Development and the Director thereof as if the same were transferred to the Department by Type 2 transfer.

SECTION 6. (1) The Division shall certify businesses as minority or female businesses pursuant to a standard procedure and shall be responsible for monitoring the goals set and plans developed by each agency and the procurement and the purchase of professional services, goods, supplies, equipment, real or personal property, construction or other services for the amounts to be awarded in such procurement or purchase of minority and female businesses.

(2) The Division shall have the following duties and functions:

(a) provide technical, managerial and consulting services to minority and female businesses;

(b) establish regular performance monitoring and reporting systems to assure that the goals are being achieved;

(c) evaluate the impact of federal and state support in achieving the objectives established by the Division;

(d) implement state policy in regard to minority and female businesses;

(e) coordinate the plans, programs and operations of state government which affect or may contribute to the establishment, preservation and strengthening of such businesses;

(f) promote the mobilization of activities and resources of state agencies and local government, business and trade association, institution of higher education, foundation, professional organizations, volunteers and other groups toward the growth of minority and female businesses and facilitate the coordination of the efforts of these groups with those of other state agencies;

(g) establish a center for the development, collection, and dissemination of information that will be useful to persons and organizations throughout the state and undertaking or promoting the establishment and successful operation of minority and female businesses;

(h) assist in experimental and demonstration projects designed to overcome the special problems of minority and female businesses;

(i) conduct coordinated reviews of proposed state training and technical assistant activities and direct support of minority and female businesses to insure consistency with program goals and to preclude duplication of the efforts of other state agencies with overlapping jurisdiction;

(j) recommend appropriate legislative or executive action to promote and strengthen minority and female business opportunities in the state;

(k) assist minority and female businesses in obtaining governmental or commercial financing for expansion, establishment of new businesses or industrial development;

(l) provide services to promote the new organization of local development corporations to develop and assist minority and female businesses in agrarian endeavors;

(m) assist minority and female businesses in promoting reciprocal foreign trade and investment and assist minority and female businesses in obtaining procurement contracts from governmental and private commercial sources;

(n) maintain a list of all bona fide minority and female owned businesses to provide to all state agencies under the jurisdiction of this Act;

(o) review rules and regulations for the implementation of the provisions of this Act;

(p) review compliance plans submitted by each agency pursuant to this Act;

(q) make reports to the Department on the status of the minority and female business program;

(r) serve as a central clearinghouse for information on state contracts, including the maintenance of all pending state contracts upon which minority and female businesses may bid.

SECTION 7. (1) In order to insure the stated goals of this Act each agency under the jurisdiction of this Act shall file with the Department an annual compliance plan which shall outline the agency's minority and female contracting goals for the then current fiscal year, the manner in which the agency intends to reach these goals and a time table for reaching these goals.

(2) The compliance plan shall also include, but not be limited to:

(a) the name of the agency;

(b) a policy statement, signed by the agency head, expressing a commitment to use minority and female businesses in all aspects of contracting to the maximum extent feasible;

(c) the name of the coordinator or procurement officer in said agency who will be responsible for developing and administering the compliance plan;

(d) procedures to distribute to potential contractors and vendors a list of all bona fide minority and female owned businesses certified under this Act;

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

(f) goals that include at least ten (10%) percent of the agency's total procurements which are established for minority and female businesses. The following shall be counted toward said goals;

(I) dollar amounts for the portion of work performed by minority and female businesses as primary contractor;

(II) dollar amount for the portion of work performed by minority and female businesses on a joint venture arrangement, if the minority or female business partner in the joint venture is responsible for a clearly defined portion of the work to be performed and shares in the ownership, control, management responsibilities, risks and profits of the joint venture;

(g) procedures to be used when it is necessary to divide total project requirements to smaller units which will permit increased minority and female business participation;

(h) procedures to assure that contractors and vendors make good

faith efforts to meet contract goals; and

(i) procedures for contract goal exemption, modification and waiver.

(3) A current list of all qualified minority and female businesses in each commodity category for which such businesses qualified shall be supplied to each agency by the Department in a timely manner.

(4) Agency compliance plan shall be submitted to the Department no later than forty-five (45) days prior to the beginning of each fiscal year.

(5) Each agency shall make a report to the Department no later than forty-five (45) days after the end of each quarter of the fiscal year specifying the actual percentage of the agency's total procurement that went to minority or female businesses, compared with the percentage goal specified in the agency's compliance plan. Such reports shall also include the number of minority and female businesses which have been awarded contracts, separated into business categories. The form of the report shall be determined by the Department.

(6) Approval of the compliance plans shall include such delegation of responsibilities to the requesting agency as the Department deems necessary and appropriate to fulfill the purpose of this Act.

SECTION 8. The Department shall designate a reasonable percentage of state contracts which may be administered by the Small Business Administration (SBA) in accordance with Public Law 95-507. Said designation of contracts shall be counted toward the attainment of the percentage goal under this Act.

SECTION 9. (1) The Department shall promulgate rules and regulations concerning contracting for professional services which are estimated to cost fifty thousand (\$50,000.00) dollars or less. Said rules and regulations shall include, but not be limited to, procedures to be followed by agency purchasing officials for negotiating such contracts with minority and female businesses. The procedures shall be based on, but not be limited to, the following criteria:

- (a) the estimated total cost of the professional services;
- (b) whether the minority and female business is based in Arkansas;
- (c) whether the award of such contract will enable the state to maintain a system of quality services and goals;
- (d) whether the price is fair, reasonable, and competitive to both

the state and to the contractor and will not result in a loss to the state.

(2) Except as otherwise provided by law, a state agency shall purchase materials, supplies, equipment and contractual services from minority and female businesses which submit qualified, responsible and competitive bids that are no more than two (2%) percent higher than the apparent low responsible bid or which submit proposals that are not more than two (2%) percent higher than the most advantageous proposal.

(3) When the award of a contract for the purchase of goods or services does not exceed five thousand (\$5,000.00) dollars or another lesser amount established by rule or regulation, which is deemed to be a small purchase as defined by the State Purchasing Director, an agency shall utilize minority or female businesses. A minimum of three (3) such businesses, which have been certified in accordance with Section 5 of this Act shall be solicited pursuant to Act 482 of 1979, as amended, and any rule or regulation promulgated pursuant thereto.

(4) When a contract for the construction of public works in the amount of three hundred fifty thousand (\$350,000.00) dollars or more is to be awarded on the basis of competitive bidding pursuant to Act 482 of 1979, as amended, the award shall be made to a minority or female business certified under the provisions of this Act where the price bid by such business is no more than three (3%) higher than the apparent lowest responsible bid. The provisions of this subsection shall apply only when the certified business is the prime contractor.

(5) When a contract in the amount one hundred thousand (\$100,000.00) dollars or less is to be awarded the requirement of a surety bond provided by the contractor business may be waived as to certified and qualified minority or female owned businesses by the agency's purchasing official pursuant to criteria established by the Department. However, exceptions shall be made as to said waiver as follows:

(a) contracts for architecture and engineering work shall not be included; and

(b) contracts in which time is of the essence or which must be completed in an unusual time period or under abnormal conditions which can be verified.

(6) In the event that a minority or female business is awarded the contract pursuant to subsection (2) or (4) of this section, the minority or

female business shall be given the opportunity to adjust its bid to correspond to the bid of the otherwise lowest responsible bidder; but in no case shall the adjustment be by more than three (3%) percent. If the minority or female business does not agree to match the lowest bid price, the award will then be made to the business which is otherwise the lowest responsible bidder. The award shall then be offered to the next certified minority or female business which is qualified and which had been among the top five low bidders among the minority and female businesses and which is willing to match the lowest bid price.

SECTION 10. (1) The Department on its own initiative or at the request of the affected agency may permit an individual contract or contract package (related contracts being bid or awarded simultaneously for the same project or improvements) be made wholly or partially exempt from minority or female owned business state contracting goals prior to the advertisement for bids or solicitation of proposals whenever there has been a determination, reduced to writing and based on the best information available at the time of the determination, that there is an insufficient number of minority or female owned businesses to insure adequate competition and an expectation of reasonable prices on bids or proposals solicited for the individual contract or contract package in question.

(2) The Department on its own initiative or at the request of the affected agency, may permit an entire class of contracts to be made exempt from minority and female owned business state contracting goals whenever there has been a determination, reduced to writing and based on the best information available at the time of the determination, that there is an insufficient number of qualified minority or female owned businesses to insure adequate competition and an expectation of reasonable prices on bids or proposals within that class. Any such class exemption shall not be permitted for a period of more than one year at a time.

(3) Where a particular contract requires a contractor to meet a goal established pursuant to this Act, the contractor shall have the right to request a waiver from such requirements. The Department shall grant the waiver where the contractor demonstrates that there has been made a good faith effort to comply with the goals for minority or female owned business participation.

SECTION 11. (1) Every minority or female business performing as a primary contractor, subcontractor or member of a joint venture shall actually perform, manage or supervise work awarded to it.

(2) (a) Consistent with industrial practices and any other law of this state, minority and female businesses may enter into subcontracts, including subcontracts with non-minority or non-female businesses; except that in no instance shall a minority or female business act as a conduit or broker for the purpose of passing on business to non-minority or non-female businesses.

(b) Any minority or female business found to be acting as a conduit for purposes of brokerage shall not be considered a low responsible bidder, and at the discretion of the Division the following may occur:

(i) the business shall be disqualified from contracting with the state for procurement for two full years, and any bid from such business during said period shall not be considered responsible;

(ii) action may be taken terminating the business' contracts and the state may keep any retainage if applicable.

(c) If the primary contractor knowingly receives business as a result of a conduit's or broker's action or violates any provision of this Act, the penalties in subparagraphs (i) and (ii) of paragraph (b) of this subsection may be applied by the Division.

SECTION 12. The certification of businesses as minority or female small businesses for purposes of this Act shall be reviewed annually by the Division. Upon review, a business may be recertified as a minority or female business or the certification may be terminated if there has been a change in the business organization ownership and/or structure such that it does not meet current certification standards.

SECTION 13. (1) A person who has been denied certification or recertification as a minority or female business may request a review of said decision by the Department.

(2) All persons having any ownership interest in a business that has been denied certification pursuant to this Act shall be precluded from reapplying for certification under the same business entity or under a newly organized

business entity for a period of one year from the date certification is denied.

SECTION 14. (1) No person shall:

(a) fraudulently obtain, retain attempt to obtain or retain, or aid another in fraudulently obtaining or attempting to obtain or retain certification as a minority or female business enterprise for the purposes of this Act;

(b) willfully make a false statement, whether by affidavit, report, or other representation, to an official or employee for the purpose of influencing the certification or denial of certification of any entity as a minority or female business;

(c) willfully obstruct, impede, or attempt to obstruct or impede any official or employee who is investigating the qualifications of a business entity which has requested certification as a minority or female business; or

(d) fraudulently obtain, attempt to obtain, or aid another person in fraudulently obtaining or attempting to obtain public moneys to which the person is not entitled under this Act.

(2) Any person who violates the provision of this Section is guilty of a class D felony.

SECTION 15. (1) No person shall willfully make false statements that any entity is or is not certified as a minority or female business for purposes of this Act.

(2) Any person who violates the provisions of this Section is guilty of a class A misdemeanor.

SECTION 16. (1) The Division shall prepare a written report four times each year describing the progress which has been made in meeting the annual goals set by agencies in the compliance plans. The Department shall submit a copy of each report to the General Assembly and to the Governor within forty-five (45) days after the end of each quarter during the State's fiscal year.

(2) If after the third quarter an agency has not substantially met the annual goals set forth in its compliance plan and/or it is determined that the agency will not be able to meet its annual goals by the end of the fiscal year, said agency shall submit a report which sets forth in explicit detail the

reasons that the goals were not met and specify measures which will be taken in the future to meet the goals.

SECTION 17. (1) The Division shall make such findings, recommendations and proposals to the Governor as are necessary and appropriate to enforce this Act. If, as a result of its monitoring activities, the Division determines that its goals and policies are not being met by any agency, the Division may recommend any or all of the following actions:

(a) establishing enforcement procedures whereby the Division may recommend to the appropriate State agency or law enforcement officer that legal or administrative remedies be initiated for violations of contracts provisions or rules issued hereunder or by a contracting state agency;

(b) if the Division concludes that a compliance plan is unlikely to produce the minority or female owned business participation goals within the current fiscal year, the Division may recommend that the agency revises its plan to provide additional opportunities for minority or female business participation. Such recommended revisions may include, but shall not be limited to, the following:

(i) assurances of stronger and better focused solicitation efforts to obtain more minority and female owned businesses and potential sources of supply;

(ii) division of job or project requirements, when economically feasible, into tasks or quantities to permit participation of minority and female owned businesses;

(iii) elimination of extended experience or capitalization requirements, when feasible, to permit participation of minority and female owned businesses;

(iv) identification of specific proposed contracts as particularly attractive or appropriate for participation by minority or female owned businesses, such identification to result from and be coupled with the efforts of subparagraph (i) through (iii).

SECTION 18. (1) The purchasing officials may make special provisions for progress payments as deemed reasonable to assist minority or female businesses to carry out the terms of a State contract.

(2) When certified minority or female businesses receive a contract with

the state, the appropriate purchasing official shall furnish a letter upon request stating the dollar value and duration of the contract and other information about the contract which may be used by the business in negotiating lines of credit with lending institutions.

SECTION 19. This Act shall be administered as an integral part of any provision of State law that is concerned with procurement.

SECTION 20. This Act becomes effective on July 1, 1987.

