

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1993

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SENATE BILL 929

Short Title: Minority Bus./Highway Construct.

(Public)

Sponsors: Senators Hunt; and Gulley.

Referred to: Capital Expenditures and Improvements.

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 January 26, 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) For purposes of this section, 'disadvantaged business' means a business owned or controlled by women or minorities as defined in 49 C.F.R. § 23.62 that has been documented by the study of minority and women business participation in highway construction funded by the General Assembly to have suffered from discrimination within the highway construction industry in North Carolina and that is:

(1) Located in North Carolina; or

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

9 'Native American', as it is used in 49 C.F.R. § 23.62, includes those Indians recognized
10 in Chapter 71A of the General Statutes and other American Indians, but does not
11 include Eskimos, Aleuts, or Native Hawaiians.

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

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

29 (c) The General Assembly finds, based upon a study of minority and women
30 business participation in highway construction funded by the General Assembly, that
31 gross disparity exists between the percentage of businesses owned or controlled by
32 women or minorities available in the market to participate in the design, construction,
33 alteration, or maintenance of State highways, roads, streets, or bridges and in the
34 procurement of materials for these projects, and the percentage of the total dollars
35 available that are received by businesses owned and controlled by women or minorities
36 that are utilized for such projects. The General Assembly finds that such disparity
37 constitutes **prima facie** evidence of discrimination within the construction industry.
38 The General Assembly also finds that actual discriminatory practices within the
39 construction industry led to this underutilization of businesses owned or controlled by
40 women or minorities. The General Assembly concludes that the State of North Carolina
41 has a compelling interest to remedy this condition as it affects projects let by the
42 Department of Transportation.

43 (d) The Department of Transportation shall set annual goals for participation by
44 each classification of disadvantaged business in contracts let by the Department using

1 one hundred percent (100%) State funding, for the design, construction, alteration, or
2 maintenance of State highways, roads, streets, or bridges and for the procurement of
3 materials for these projects. The initial annual goals for participation by each
4 classification of disadvantaged business shall be set at fifteen percent (15%) above
5 current availability as documented in the study of minority and women business
6 participation in highway construction funded by the General Assembly. Thereafter, the
7 annual goals for participation by each classification of disadvantaged business during
8 each fiscal year shall be based upon:

- 9 (1) The projected availability of disadvantaged businesses eligible to
10 participate in the program during that fiscal year;
- 11 (2) The expected growth in number and capacity of disadvantaged
12 businesses during that fiscal year;
- 13 (3) The type and number of contracting opportunities projected for the
14 next fiscal year; and
- 15 (4) The level of participation by disadvantaged businesses achieved during
16 the previous fiscal year.

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

24 (e) In implementing the provisions of this section, the Department shall institute
25 procedures to encourage the awarding of contracts for the purposes described in
26 subsection (d) of this section to disadvantaged businesses. The Department shall
27 develop and implement activities to encourage the participation of disadvantaged
28 businesses in the contracting process, including:

- 29 (1) Prebid meetings for the purpose of informing disadvantaged
30 businesses of contracting opportunities;
- 31 (2) Written notice to disadvantaged businesses of contract opportunities
32 for the construction services or materials that the disadvantaged
33 businesses provide;
- 34 (3) Provision of adequate information to disadvantaged businesses about
35 the plans, specifications, and requirements of contracts or the
36 availability of jobs;
- 37 (4) Breaking of large contracts into several single purpose contracts of a
38 size that may be obtained by disadvantaged businesses;
- 39 (5) Development of a process for awarding bid-preference points (i) to
40 disadvantaged businesses on contracts for engineering, construction, or
41 materials that total less than three hundred thousand dollars
42 (\$300,000), and (ii) to other businesses that are engaged in joint
43 ventures with disadvantaged businesses, that actively use

1 disadvantaged businesses as subcontractors, or that provide other
2 assistance to disadvantaged businesses; and

3 (6) Establishment of set-asides of purchase order contracts for small
4 businesses, regardless of ownership.

5 (f) Upon a finding by the Department that the activities developed and
6 implemented pursuant to subsection (e) of this section have not provided sufficient
7 encouragement to disadvantaged businesses to meet the goals set by the Department
8 pursuant to subsection (d) of this section, the Department shall make use of set-asides
9 for disadvantaged businesses to assist in achieving those goals.

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

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

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

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

34 (e) ~~The following definitions apply in this section:~~

35 (1) ~~'Disadvantaged business' has the same meaning as in 49 C.F.R. §~~
36 ~~23.62.~~

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

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
15 January 16, 1993, of the study of minority and women business participation in highway
16 construction, conducted by MGT, Inc., of America and funded by the General
17 Assembly.

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