

THE GENERAL ASSEMBLY OF PENNSYLVANIA

# HOUSE BILL

## No. 1128

Session of  
1983

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R. C. WRIGHT, WILLIAMS AND ZWIKL, MAY 25, 1983

REFERRED TO COMMITTEE ON STATE GOVERNMENT, MAY 25, 1983

AN ACT

1 Declaring a policy of the Commonwealth with regard to small  
2 business concerns owned by economically disadvantaged  
3 persons; creating the Economically Disadvantaged Owners Small  
4 Business Procurement Committee; providing for the operation  
5 of the committee; establishing a small business set-aside;  
6 establishing a procedure for the solicitation of bids and a  
7 broadening set-aside; and providing for an annual report to  
8 the Governor and General Assembly.

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9 The General Assembly of the Commonwealth of Pennsylvania  
10 hereby enacts as follows:

11 Section 1. Short title.

12 This act shall be known and may be cited as the Economically  
13 Disadvantaged Owners Small Business Procurement Act.

14 Section 2. Legislative intent.

15 It is hereby determined and declared as a matter of  
16 legislative finding that:

17 (1) The promotion of economic development is a  
18 legitimate and necessary governmental function.

19 (2) The existence of a healthy free enterprise system is  
20 directly related to the well-being and strength of small  
21 business concerns and their opportunities for free entry into  
22 business and for growth and expansions.

23 (3) Recent studies have found that small businesses  
24 create over 75% of the new jobs in the Nation and that the  
25 Commonwealth wants to increase the number of jobs available  
26 to residents of the Commonwealth.

27 (4) Experience in administering the equal opportunity  
28 provisions of the law has shown that many discriminatory  
29 practices of the past years have remained so deeply embedded  
30 in basic institutions of society, industry and government

1 that these practices continue to have extremely unequal  
2 effects on individuals and groups, even when those who make  
3 the decisions have no conscious intent to discriminate.

4 (5) There currently exists in the Commonwealth a  
5 situation where an inequitable small share of State contracts  
6 are awarded to small businesses owned by economically  
7 disadvantaged persons and that such conditions are chronic  
8 and longstanding.

9 (6) Without remedial measures there is no prospect for  
10 improvement.

11 (7) The present and prospective health, safety, morals  
12 and general welfare of the Commonwealth require as a public  
13 purpose the development and encouragement of small businesses  
14 owned by economically disadvantaged persons furnishing  
15 property and services to the Commonwealth.

16 Therefore, it is hereby declared to be a policy of the  
17 Commonwealth to insure that a fair proportion of all the  
18 Commonwealth's contracts for property and services be placed  
19 with small business concerns owned by economically disadvantaged  
20 persons. Such policy is hereby declared to be a public purpose.

### 21 Section 3. Definitions.

22 The following words and phrases when used in this act shall  
23 have the meanings given to them in this section unless the  
24 context clearly indicates otherwise:

25 "Affiliate or subsidiary of a business dominant in its field  
26 of operation." A business of which 20% or more is owned or of  
27 which its controlling interest is controlled by a business  
28 dominant in its field of operation, or is owned by partners,  
29 officers, majority shareholders or their equivalent of a  
30 business dominant in its field of operation.

1 "Business set-aside." The percentage of each State contract  
2 or package of contracts, determined by the committee, for which  
3 bids are to be solicited only from small businesses owned by  
4 economically disadvantaged persons.

5 "Committee." Economically Disadvantaged Owners Small  
6 Business Procurement Committee.

7 "Commonwealth contract." Any agreement, purchase order or  
8 arrangement or modification thereof between the Commonwealth or  
9 any State contracting agency, and any person to be paid in whole  
10 or in part, directly or indirectly, by public funds, or in-kind  
11 contributions from the Commonwealth.

12 "Commonwealth contractor." Any contractor, supplier, vendor  
13 or other person who, through a contract or other arrangement,  
14 has received, is to receive or is receiving public funds or in-  
15 kind contributions from the Commonwealth and shall include any  
16 subcontractor who performs under a State contract.

17 "Department." Any department, agency, commission, authority,  
18 establishment or other instrumentality of the Commonwealth and  
19 any wholly or partially owned government corporation which  
20 enters into contracts.

21 "Dominate in its field of operation." Exercising a  
22 controlling or a major influence in a business activity in which  
23 small businesses are competing.

24 "Economically disadvantaged business." A business that is  
25 owned and positively controlled by one or more persons who are  
26 economically disadvantaged in this Commonwealth.

27 "Economically disadvantaged person."

28 (1) A person who is a United States citizen, resides in  
29 the Commonwealth and is a member of an economically  
30 disadvantaged group including, but not limited to, the

1 following groups: Blacks, American Indians, Hispanics, Asian-  
2 Americans, Orientals and Females.

3 (2) Other residents of the Commonwealth whose  
4 participation in the free enterprise system is hampered due  
5 to social or economic considerations beyond their personal  
6 control, such as formal education, financial capacity,  
7 geographic or regional economic distresses, social handicaps  
8 such as physical or mental difficulties, all of which  
9 restrict the individual from the opportunity to fully  
10 participate in our economic system.

11 "Owned." A business which is:

12 (1) A sole proprietorship legitimately owned by an  
13 individual who is an economically disadvantaged person.

14 (2) A partnership or joint venture positively controlled  
15 by economically disadvantaged persons and in which at least  
16 51% of the beneficial ownership interest legitimately is held  
17 by a person who is a member of an economically disadvantaged  
18 group.

19 (3) A corporation or other entity controlled by  
20 economically disadvantaged persons in which at least 51% of  
21 the voting interest and 51% of the beneficial interest  
22 legitimately are held by economically disadvantaged persons.

23 "Partial set-aside." Bids for a portion of the contract are  
24 to be solicited only from small businesses owned by economically  
25 disadvantaged persons.

26 "Person." Includes any natural person, corporation,  
27 partnership, unincorporated association, State or local  
28 government and any agency, commission, authority, board or other  
29 instrumentality or political subdivision of a government.

30 "Positive control." The exclusive or ultimate and sole

1 control of the business including, but not limited to, capital  
2 investment and all other financial matters, property  
3 acquisition, contract negotiation, legal matters, officer-  
4 director-employee selection and comprehensive hiring, operating  
5 responsibility, cost-control matters, income and dividend  
6 matters, financial transactions and rights of other shareholders  
7 or joint partners.

8 "Procurement." The system and practice of soliciting bids on  
9 State contracts.

10 "Small businesses." A business entity including a sole  
11 proprietorship, partnership, corporation, joint venture,  
12 association or cooperative which has its principal place of  
13 business in this State and which is not dominant in its field of  
14 operation and is not an affiliate or subsidiary of a business  
15 dominant in its field of operation. In determining whether a  
16 business qualifies under this definition the Economically  
17 Disadvantaged Owners Small Business Procurement Committee,  
18 created by this act, shall ensure that departments promulgate  
19 rules according to guidelines established by the committee for  
20 the determination of business size limitations. When computing  
21 size status, annual sales and receipts of a business and all of  
22 its affiliates, the maximum number of employees and the maximum  
23 dollar volume which a small or female-owned minority business  
24 may have under the rules promulgated by the committee may vary  
25 from industry to industry to the extent necessary to reflect  
26 differing characteristics of such industry, subject to the  
27 following presumptions:

28 (1) No wholesale business is a small business if it  
29 employs more than 50 persons and its annual sales when  
30 averaged over a two-year period exceeds \$10,000,000.

1           (2) No retail business or business selling services is a  
2       small business if it employs more than 100 persons and its  
3       annual sales when averaged over a two-year period exceeds  
4       \$10,000,000.

5           (3) No manufacturing business is a small business if it  
6       employs more than 100 persons and its annual sales when  
7       averaged over a two-year period exceeds \$10,000,000.

8           (4) No construction business is a small business if its  
9       annual receipts when averaged over a two-year period exceeds  
10      \$10,000,000.

11 The above limitations shall exclude the amount of any pending  
12 bids in the determination of size. This definition shall not  
13 prohibit the committee from developing guidelines which permit a  
14 department to promulgate rules and regulations, in compliance  
15 with this act, which define small business using criteria  
16 different from those contained in these definitions.

17       "Surety company." A company that is authorized by the  
18 Insurance Commissioner of the Commonwealth to issue construction  
19 contract bonds as security.

20       "Total set-aside." Bids for the entire contract are to be  
21 solicited only from small businesses owned by economically  
22 disadvantaged persons.

23 Section 4. Creation of Economically Disadvantaged Owners Small  
24                               Business Procurement Committee.

25       (a) Membership.--An Economically Disadvantaged Owners Small  
26 Business Procurement Committee is hereby established in the  
27 Department of Commerce. The committee shall have 15 members  
28 consisting of: the Secretary of Commerce; Secretary of General  
29 Services; Secretary of Transportation; four members appointed by  
30 the Governor; four members of the House of Representatives, two

1 from each party; and four members from the Senate, two from each  
2 party. Any member may appoint a designee to serve in their  
3 stead.

4 (b) Compensation and expenses.--The committee members shall  
5 receive no compensation for their services as members but shall  
6 be entitled to reimbursement for all necessary expenses incurred  
7 in connection with the performance of their duties as members.

8 Section 5. Committee responsibilities.

9 (a) Committee to designate a portion of purchases and  
10 contracts as a business set-aside.--The committee shall have the  
11 responsibility to designate as a business set-aside, a portion  
12 of all purchases and contracts made by each executive department  
13 including those services rendered and furnished by registered  
14 professionals including, but no limited to, accountants,  
15 attorneys, medical doctors, architects, dentists and engineers.

16 (b) Operation of committee.--The committee shall operate in  
17 accordance with the following:

18 (1) Procurement shall be set-aside for exclusive small  
19 businesses owned by the economically disadvantaged if it can  
20 be determined that there is a reasonable expectation that  
21 bids and offers will be obtained from a sufficient number of  
22 business concerns and that awards will be made at reasonable  
23 prices on a competitive basis. Partial set-asides of total  
24 procurement requirements will be considered and applied where  
25 the criteria for total set-asides is not met, but where the  
26 procurement is economically severable into two or more parts,  
27 and it is anticipated that one or more small firms has the  
28 technical competency and productive capacity to furnish a  
29 severable portion of the procurement at a reasonable price,  
30 there shall be a total set-aside of the severable portion.



1 When three or more qualified economically disadvantaged small  
2 businesses are on the bidder's list and upon their responding  
3 to a solicitation, indicate an intent to quote,  
4 noneconomically disadvantaged small business enterprise need  
5 not be solicited.

6 (2) All set-aside designations, total or partial, shall  
7 be made prior to the solicitation for bids and offers as  
8 required by law. The solicitation shall identify the small  
9 business size standard and require each bidder and offeror to  
10 identify his size, large or small, pursuant to that standard.  
11 If there is a conflict with other policies, this act and  
12 rules promulgated under this act, shall govern. Where Federal  
13 money is used, Federal law shall apply if acceptance of the  
14 money is conditioned upon the utilization of small female-  
15 owned and minority businesses. All procurement purchased by  
16 the State using Federal funding shall be governed by the  
17 percentage of the goal for female-owned and minority  
18 participation designed by the Federal agency granting the  
19 funds. In the case of construction contracts, the total value  
20 of subcontracts awarded to and materials and services  
21 purchased from economically disadvantaged businesses shall be  
22 at least 15% of the total value of the contract, whenever  
23 possible. In the case of all other subcontracts, the total  
24 value of contracts awarded to certified economically  
25 disadvantaged businesses for services shall equal at least  
26 15% of the total value of the contract.

27 (3) The committee, when bonding is required, shall set  
28 the amount of bonds or securities on a business set-aside. No  
29 agency or department of the State involved in purchasing  
30 goods or services may require bid performance and payment

1 bonds to be posted if the contract price is less than  
2 \$25,000, unless such bonds are required by Federal law or  
3 regulation, or as a condition to Federal assistance. The  
4 amount of these bonds shall be:

5 (i) A bid bond shall not be greater than 10% of the  
6 total bid.

7 (ii) A performance bond shall not be greater than  
8 50% of the total bid price of work.

9 (iii) A labor and material bond may be for the full  
10 amount of labor and materials.

11 (4) The committee shall determine and certify  
12 economically disadvantaged small businesses ownership in  
13 accordance with this act.

14 (c) Organized support system may be established.--The  
15 committee may establish an organized support system for  
16 recommendation of legislation, for offering assistance to  
17 economically disadvantaged small businesses to encompass  
18 monitoring, reporting, delegation of responsibilities between  
19 individuals and departments for sensitizing procurement  
20 personnel to the needs of the businesses, for education for  
21 prospective bidders, for legal enlightenment for economically  
22 disadvantaged small businesses regarding the program and for  
23 such other functions to encourage responsible participation in  
24 the programs as the committee shall see fit.

25 (d) Information to be made known to committee.--The  
26 committee shall require that each department or other  
27 instrumentality of the Commonwealth authorized to contract for  
28 buildings, highways, commodities, equipment, supplies or  
29 services make known and report to the committee all information  
30 pertinent to anticipated procurement needs at the beginning of

1 each fiscal year and each fiscal quarter thereafter. Each  
2 department or instrumentality shall submit this information to  
3 the committee not less than 30 days after the beginning of the  
4 fiscal year and not less than 15 days before the beginning of  
5 each fiscal quarter. This procurement shall include, but not be  
6 limited to, the total amount budgeted to contract for securing  
7 goods and services, the nature and anticipated cost of each  
8 contract and the payment account from which the payment funds  
9 will be drawn such as Federal grants, the General Fund, special  
10 appropriations, departmental allocations, etc. During the course  
11 of each operating year, the committee shall designate no less  
12 than 15% of the total dollar amount or number of such contracts  
13 as small economically disadvantaged business set-asides unless  
14 it can be determined that this minimum percentage is  
15 unattainable due to unavailability of competent, responsible  
16 small economically disadvantaged businesses.

17 Section 6. Surety authorization.

18 (a) Committee as surety.--The committee as surety may  
19 exercise all rights and powers authorized by the Insurance  
20 Commissioner to execute construction contract bonds as surety  
21 but shall not be subject to any requirements of the surety  
22 company.

23 (b) Committee to make rules and establish procedures.--The  
24 committee shall make rules, establish procedures for application  
25 for construction contract bonds by minority contractors and  
26 review in accordance with the following:

27 (1) The rules of the committee shall provide that an  
28 economically disadvantaged contractor shall have been denied  
29 a bond by two surety companies in order to make an  
30 application for a bond to the board.

1           (2) The rules established by the committee shall require  
2           a contractor to pay a premium for a bond to be established by  
3           the committee but it shall not exceed 2% of the penal sum of  
4           the bond. All premiums collected shall be paid into the  
5           Economically Disadvantaged Small Business Contract Bonding  
6           Special Account.

7           (3) The Insurance Commissioner shall provide technical  
8           and professional assistance to the committee is appropriate.

9   Section 7. Cash flow difficulties.

10          To alleviate the cash flow difficulties that arise from  
11          present payment practices which penalize those small businesses  
12          owned by economically disadvantaged persons firms whose cash  
13          flow is negatively affected by extended payment or receivables,  
14          the committee shall be empowered to require and enforce the  
15          following payment practices:

16               (1) Once a contract has been let through the provisions  
17               of this act, and the delivery pursuant thereto, of goods and  
18               services made, the purchasing entity shall make or authorize  
19               the immediate payment of 15% of the total dollar value of  
20               such contract.

21               (2) When the delivery of goods and services are to  
22               extend beyond the 30-day period, the purchasing entity shall  
23               devise payment schedules that will allow for immediate  
24               payment of 15% of the total contract price upon completion of  
25               15% of the contracted goods.

26               (3) The above payment practices will take effect only  
27               after it has been determined that such goods and services  
28               have been provided in accordance with the provisions of the  
29               contract and to the satisfaction of the purchasing entity.

30   Section 8. Creation of Economically Disadvantaged Small

1 Business Contract Bonding Special Account.

2 (a) Account established.--An Economically Disadvantaged  
3 Small Business Contract Bonding Special Account is established  
4 in the State Special Revenue Fund, which will consist of moneys  
5 deposited or credited as follows:

6 (1) All premiums charged and collected, all moneys  
7 recovered following defaults and any other moneys obtained  
8 shall be administered by the committee.

9 (2) All moneys in the fund shall be held by the  
10 committee in trust.

11 (b) Special account established.--An Economically  
12 Disadvantaged Small Business Contract Bonding Program  
13 Administrative Special Account is established in the State  
14 Special Revenue Fund, consisting of all moneys appropriated to  
15 the account. All expenses of the committee in carrying out the  
16 purpose of this section shall be paid from this account.

17 Section 9. Solicitation of bids.

18 Each department or other instrumentality of the Commonwealth  
19 shall be responsible for carrying out the policies of this act  
20 and to the extent consistent with the best interests of the  
21 Commonwealth:

22 (1) attempt to locate additional qualified small  
23 economically disadvantaged business suppliers by all  
24 appropriate methods, particularly where only a limited number  
25 of small economically disadvantaged business concerns are on  
26 bidder's lists;

27 (2) give wide publicity to Commonwealth purchasing  
28 procedures;

29 (3) publicize proposed procurements by use of advance  
30 notices or other appropriate methods;

(4) include all established and qualified potential business suppliers on the bidder's lists;

(5) send solicitation to all firms on the appropriate list, except that where less than a complete list is to be used, at least a pro rata number of small economically disadvantaged concerns shall be solicited; and

(6) where feasible, divide proposed procurement of supplies and services as to:

(i) permit bidding on quantities relative to the capability and capacity of the qualified business entrepreneur;

(ii) permit the maximum time practicable for preparation and submission of bids, proposals or quotations; and

(iii) permit and establish delivery schedules and payment procedures which will encourage qualified business participation.

Section 10. Small business set-asides; advertisement; cancellation.

(a) Designation to be advertised.--Each department or other instrumentality of the Commonwealth authorized to contract for buildings, highways, commodities, equipment, supplies or services shall, upon designation of a business set-aside, as determined by the committee, include that designation in the advertisement for bids in the Pennsylvania Bulletin and other media used to solicit bids.

(b) Invitations to bid shall be confined to certain businesses.--In the case of contracts designated as a business set-aside, invitations to bid shall be confined to small economically disadvantaged businesses and bids from other

1 businesses shall be rejected. The contract shall be awarded to  
2 the lowest responsible bidder among such businesses in  
3 accordance with the rules and regulations for purchasing  
4 promulgated by the committee. Awarding of contracts to  
5 businesses under this act is subject to the other statutes  
6 governing State procurement and all rules promulgated  
7 thereunder, including 16 Pa. Code Ch. 49 (relating to contract  
8 compliance), except as altered by this act and the regulations  
9 promulgated in its administration.

10 (c) Set-aside may be cancelled.--In the event the department  
11 or other instrumentality of the Commonwealth soliciting a bid  
12 finds, in conjunction with the committee, that responsive  
13 competitive bids at reasonable prices were not obtained as a  
14 result of the business set-aside solicitation, or that bids  
15 thereof were received only from firms demonstrated not to be  
16 responsible or prequalified, the set-aside may be cancelled by  
17 the committee and may be readvertised on an unrestricted basis.  
18 Section 11. Annual report.

19 The committee shall make an annual report of operations to  
20 the General Assembly and the Governor within 90 days after the  
21 end of each fiscal year. It is intended that the report indicate  
22 the progress being done toward achieving the objectives of this  
23 act, particularly an evaluation of the implementation of the  
24 State economically disadvantaged small business procurement  
25 policies during the preceding fiscal year. The committee's  
26 report shall recommend any amendments to this act which, in  
27 their opinion, the committee finds necessary and proper to  
28 fulfill the original legislative intent of this act. The report  
29 shall identify businesses within this State which have done  
30 business, have expressed interest in doing business or are

1 capable of doing business with the State for the preceding  
2 fiscal year according to:

3 (1) the types of goods purchased, services provided and  
4 construction and maintenance contracts awarded;

5 (2) the number of businesses within each category  
6 determined to be a small business and a business dominant in  
7 its field of operation and the criteria used to determine a  
8 business as a small business or a business dominant in its  
9 field within each category;

10 (3) the number of small economically disadvantaged  
11 businesses within each category of which more than 50% of the  
12 voting share or interest is held by individuals, the majority  
13 of whom are economically disadvantaged; and

14 (4) the reporting data shall also include figures  
15 qualifying contract awards to small firms which resulted from  
16 business set-asides, both total and partial, and the number  
17 of defaults or failures experienced by such which were  
18 awarded set-asides under this act.

19 Section 12. Penalties.

20 If any department or individual fails to comply with the  
21 provisions of this act or with the regulations of the committee,  
22 the committee is empowered to petition the Commonwealth Court  
23 for a judicial order to enforce compliance. Intentional  
24 violations of this act or regulations developed hereunder shall  
25 subject the violators to a fine maximum of which is \$5,000  
26 payable to the special accounts created in section 8.

27 Section 13. Sunset provisions.

28 The provisions of this act shall expire five years after the  
29 effective date hereof unless extended by specific reenactment of  
30 the General Assembly. The report shall be used to determine the



1 degree to which the Commonwealth has made progress to correct  
2 the disparages between other businesses and those owned by  
3 economically disadvantaged persons. It should use this report to  
4 determine if the goal has been accomplished or to recommend  
5 termination of this act.

6 Section 14. Effective date.

7 This act shall take effect immediately.