

SENATE BILL No. 268

By Committee on Commerce

1-11

1 AN ACT concerning small, minority and woman-owned businesses;
2 enacting the Kansas small, minority and woman-owned business
3 development act.
4

5 *Be it enacted by the Legislature of the State of Kansas:*

6 Section 1. Sections 1 through 14, and amendments thereto, shall be
7 known and may be cited as the Kansas small, minority and woman-owned
8 business development act.

9 Sec. 2. As used in sections 2 through 14, and amendments thereto,
10 unless the context requires otherwise, the following terms shall have the
11 meanings ascribed to them in this section:

12 (a) "Affiliate or division of a larger business" means a business which
13 is a subsidiary of or owned in part by a larger business which is dominant
14 in its field of operation, or which is owned in excess of 20% by the
15 partners, officers, directors, majority shareholders or the equivalent, of a
16 larger business which is dominant in its field of operation. The calculation
17 of a firm's size includes the employees or receipts of all affiliates.

18 (b) "Broker" means a person that provides a bona fide service, such
19 as professional, technical, consultant, brokerage or managerial services
20 and assistance in the procurement of essential personnel, facilities,
21 equipment, materials or supplies required for performance of a contract.

22 (c) "Commercially useful function" means real and actual services
23 that are a distinct and verifiable element of the contracted work based
24 upon private sector trade or industry standards. There shall be a rebuttable
25 presumption that when the MBE or WBE subcontracts a great portion of
26 the contract work than normal industry practice, the MBE or WBE is not
27 performing a commercially useful function.

28 (d) "Committee" means the advisory committee on small,
29 minority and woman-owned business enterprises.

30 (e) "Contractor utilization plan" means a statement, in a form
31 prescribed by the director, that must be submitted by a bidder or proposer
32 that states its plan to utilize qualified minority-owned business enterprises
33 (MBE's) or woman-owned business enterprises (WBE's) in the
34 performance contract.

35 (f) "Control" means having the day-to-day decision-making
36 authority as measured by: (1) Voting power; (2) officer and director votes;

1 (3) ability to bind the business entity; (4) financial authority; (5) shared
2 officers and directors; or (6) more than 20% of the small business contracts
3 directly or indirectly attributable to the affiliate or any combination
4 thereof.

5 (g) "Director" means the assistant director for the office of
6 minority and women business development established pursuant to K.S.A.
7 74-5010a, and amendments thereto.

8 (h) "Dominant in its field of operation" means exercising a
9 controlling or major influence in a kind of business activity in which a
10 number of businesses are engaged. In determining if a business is
11 dominant, the following criteria, among others, shall be considered:
12 Number of employees; volume of business; financial resources;
13 competitive status or position; ownership or control of materials,
14 processes, patents, license agreements and facilities; sales territory; and
15 nature of business activity. Furthermore, notwithstanding the above
16 criteria, the following businesses shall be deemed dominant in their field
17 of operation: (1) Manufacturing businesses which employ more than 100
18 persons and have in the preceding three fiscal years exceeded \$3,000,000
19 gross income annually; (2) general construction businesses which in the
20 preceding three fiscal years exceeded \$4,000,000 gross income annually;
21 (3) all other nonmanufacturing businesses which employ more than 100
22 persons and have in the preceding three fiscal years exceeded \$1,500,000
23 gross income annually.

24 (i) "Goals" means annual overall agency goals, expressed as a
25 percentage of dollar volume, for participation by small, minority-owned
26 and woman-owned and controlled businesses and shall not be construed as
27 a minimum goal for any particular contract or for any particular
28 geographical area. It is the intent of this act that such overall agency goals
29 shall be achievable and shall be met on a contract-by-contract or class-of-
30 contract basis.

31 (j) "Goods or services" includes professional services and all
32 other goods and services.

33 (k) "Minority" means person who is a citizen or lawful
34 permanent resident of the United States and who is an:

35 (1) African American, meaning a person whose origins are in
36 any of the black racial groups of Africa, and who has historically and
37 consistently identified such self as being such a person;

38 (2) Hispanic or Latino American, meaning a person whose
39 origins are in Mexico, Central or South America, or any of the Spanish-
40 speaking islands of the Caribbean, (for example: Cuba and Puerto Rico),
41 regardless of race, and who has historically and consistently identified
42 such self as being such a person;

43 (3) Asian or Pacific Islander American, meaning a person

1 whose origins are in any of the original peoples of the Far East, Southeast
2 Asia, the islands of the Pacific or the Northern Marianas, or the Indian
3 subcontinent, and who has historically and consistently identified such self
4 as being such a person; or

5 (4) Native American, meaning a person having origins in any of
6 the original peoples of North America, who maintains tribal affiliation or
7 demonstrates at least one-quarter descent from such groups, and who has
8 historically and consistently identified such self as being such a person.

9 (l) "Minority business enterprise" or "MBE" means for-profit
10 small business concern that:

11 (1) Is at least 51% owned, managed and independently
12 controlled by one or more persons who belong to a minority group;

13 (2) has a real and substantial presence in Kansas as defined by
14 subsection (o);

15 (3) has fewer than 100 full-time equivalent employees;

16 (4) performs a commercially useful function; and

17 (5) is certified as an MBE by the office or department of
18 transportation, or both.

19 Only persons meeting each of the criteria of subsection (j) shall
20 be deemed an MBE for purposes of this act. Except for instances of
21 misrepresentation or fraud, any person listed as an MBE on the office's
22 online directory concerning minority and woman-owned business
23 enterprises on the date a contractor utilization plan is submitted is eligible
24 to participate as an MBE on a particular contract.

25 (m) "Office" means the office of minority and woman-owned
26 business development established pursuant to K.S.A. 74-5010a, and
27 amendments thereto.

28 (n) "Person" includes one or more individuals, partnerships,
29 associations, organizations, corporations, cooperatives, legal
30 representatives, trustees and receivers or any group of persons.

31 (o) "Postsecondary educational institution" shall have the
32 meaning ascribed to it in K.S.A. 74-3201b, and amendments thereto.

33 (p) "Procurement" means the purchase, lease or rental of any
34 goods or services.

35 (q) "Public works" means all work, construction, highway and
36 ferry construction, alteration, repair or improvement other than ordinary
37 maintenance, which a state agency or postsecondary educational institution
38 is authorized or required by law to undertake.

39 (r) "Real and substantial presence" means:

40 (1) The company's principle office or place of business is in the
41 state of Kansas;

42 (2) the company maintains full-time employees in one or more
43 of the company's offices within the state to conduct or solicit business in

1 the state the majority of their working time;

2 (3) the company has transacted business more than once in the
3 state within the last three years; and

4 (4) the company has been in existence in the state of Kansas at
5 least one year prior to application for participation in the MBE/WBE
6 program.

7 (s) "Small business" means a business which has fewer than
8 100 full-time equivalent employees and which is independently owned and
9 operated and is not an affiliate or division of a larger business.

10 (t) "State agency" shall have the meaning ascribed to it in
11 K.S.A. 75-3701, and amendments thereto.

12 (u) "Woman" means a female person who is a citizen or lawful
13 permanent resident of the United States.

14 (v) "Woman business enterprise" or "WBE" means a for-profit
15 small business concern that:

16 (1) Is at least 51% owned, managed and independently
17 controlled by one or more women;

18 (2) has a real and substantial presence in the state of Kansas as
19 defined by this section;

20 (3) has fewer than 100 full-time equivalent employees;

21 (4) performs a commercially useful function; and

22 (5) is certified by the office or the department of transportation,
23 or both.

24 Only persons meeting the criteria of subsection (t) shall be
25 deemed a WBE for purposes of this act. Except for instances of
26 misrepresentation or fraud, any person listed as a WBE on the office's
27 online directory concerning minority and woman-owned business
28 enterprises on the date a contractor utilization plan is submitted is eligible
29 to participate as a WBE on a particular contract.

30 Sec. 3. There is hereby created within the department of commerce a
31 Kansas small, minority and woman-owned business development program.
32 The director shall administer the provisions of the Kansas small, minority
33 and woman-owned business development program. In administering the
34 provisions of the Kansas small, minority and woman-owned business
35 development program, the director is authorized to:

36 (a) Employ such staff as are necessary to carry out the purposes
37 of this act.

38 (b) Develop, plan and implement, in consultation with the
39 committee, one or more programs to provide an opportunity for
40 participation by qualified small, minority or woman-owned businesses in
41 public works and the process by which goods and services are procured by
42 state agencies and postsecondary educational institutions from the private
43 sector.

1 (c) Develop, in consultation with the committee, a
2 comprehensive plan insuring that small, minority and woman-owned
3 businesses are provided an opportunity to participate in public contracts
4 for public works, goods and services.

5 (d) Identify, in consultation with the advisory committee on
6 small, minority and woman-owned business enterprises, any barrier to
7 equal participation by a qualified small, minority or woman-owned
8 business in all state agency and postsecondary educational institution
9 contracts.

10 (e) Establish annual overall goals for participation by qualified
11 small, minority or woman-owned and controlled businesses for each state
12 agency and postsecondary educational institution to be administered on a
13 contract-by-contract basis or on a class-of-contracts basis.

14 (f) Develop and maintain a central small, minority or woman-
15 owned business certification list for all state agencies and postsecondary
16 educational institutions. No business shall be entitled to certification under
17 this act unless it meets the definition of a small, minority or woman-
18 owned business as established by the office.

19 (g) Develop, implement and operate a system of monitoring
20 compliance with this act.

21 (h) Adopt rules and regulations in accordance with the rules and
22 regulations filing act, governing:

23 (1) Establishment of agency goals;

24 (2) development and maintenance of a central small, minority
25 and woman-owned business certification program, including a definition
26 of "small, minority and woman-owned business," which shall be
27 consistent with the small business requirements defined under 15 U.S.C. §
28 632, and the regulations promulgated thereunder, and Kansas law;

29 (3) procedures for monitoring and enforcing compliance with
30 goals, regulations, contract provisions and this act;

31 (4) utilization of standard clauses by state agencies and
32 postsecondary educational institutions; and

33 (5) determination of an agency's or postsecondary educational
34 institution's goal attainment consistent with the limitations of section 7,
35 and amendments thereto.

36 (i) Submit an annual report to the governor and the legislature
37 outlining the progress in implementing this chapter.

38 (j) Investigate complaints of violations of this chapter with the
39 assistance of the involved agency or postsecondary educational institution.

40 (k) Cooperate and act jointly with the United States or other
41 states, and with political subdivisions of the state of Kansas and their
42 respective small, minority, socially and economically disadvantaged and
43 woman-owned business enterprise programs to carry out the purposes of

1 this act. However, the power which may be exercised by the office under
2 this subsection permits investigation and imposition of sanctions only if
3 the investigation relates to a possible violation of this act, including any
4 rule and regulation adopted thereunder, and not to a violation of any local
5 ordinance, rule, regulation, or resolution, however denominated, adopted
6 by a political subdivision of the state.

7 (l) Establish an advisory committee on small, minority and
8 woman-owned business enterprises and any other ad hoc advisory
9 committees, as necessary, to assist in the development of policies to carry
10 out the purposes of this act.

11 (m) Enter into contracts necessary to carry out the provisions of
12 this act.

13 Sec. 4. The rules adopted under subsection (h) of section 3, and
14 amendments thereto, shall include requirements for standard clauses in
15 requests for proposals, advertisements, bids, or calls for bids, necessary to
16 carry out the purposes of this chapter, which shall include notice of the
17 statutory penalties under sections 8 and 9, and amendments thereto, for
18 noncompliance.

19 Sec. 5. Each state agency and postsecondary educational institution
20 shall comply with the annual goals established for that agency or
21 institution under this chapter for public works and procuring goods or
22 services. This chapter applies to all public works and procurement by state
23 agencies and postsecondary educational institutions, including all contracts
24 and other procurement under chapter 75 of the Kansas Statutes Annotated,
25 and amendments thereto. Each state agency shall adopt a plan, developed
26 in consultation with the director and the advisory committee, to insure that
27 small, minority and woman-owned businesses are afforded the maximum
28 practicable opportunity to directly and meaningfully participate in the
29 execution of public contracts for public works and goods and services. The
30 plan shall include specific measures the agency will undertake to increase
31 the participation of certified small, minority-owned and woman-owned
32 businesses. The office shall annually notify the governor and the state
33 auditor of all agencies and postsecondary educational institutions not in
34 compliance with this chapter and the legislative audit and review
35 committee of each such agency and postsecondary educational institutions.

36 Sec. 6. (a) It is the intent of this act that the goals established under
37 this act for participation by small, minority and woman-owned businesses
38 be achievable. Notwithstanding any other law to the contrary, if necessary
39 to accomplish this intent, any contract may be awarded to the next lowest
40 responsible bidder in turn, or all bids may be rejected and new bids
41 obtained, if the lowest responsible bidder, without justification, does not
42 meet the goals established for a particular contract under this act. The
43 dollar value of the total contract used for the calculation of the specific

1 contract goal may be increased or decreased to reflect executed change
2 orders. An apparent low-bidder must be in compliance with the contract
3 provisions required under this chapter as a condition precedent to the
4 granting of a notice of award by any state agency or postsecondary
5 educational institution, including either goal attainment or submission and
6 approval of an acceptable request for waiver.

7 (b) "Justification" requires the submission, review and acceptance of
8 the bidder's notarized affidavit setting forth the good faith efforts made by
9 the bidder to meet goals, and specifying the specific reasons such goals
10 were not attainable on the project at the time of bid.

11 Sec. 7. For the purpose of measuring a state agency's or
12 postsecondary educational institution's goal attainment, any regulations
13 adopted under subsection (h) of section 3, and amendments thereto, shall
14 provide that if a certified small, minority or woman-owned business is a
15 broker of goods or materials required under a contract, the contracting
16 agency or postsecondary educational institution may count only the dollar
17 value of the fee or commission charged and not the value of goods or
18 materials provided. The contracting agency or postsecondary educational
19 institution may, at its discretion, fix the dollar value of the fee or
20 commission charged at either the actual dollar value of the fee or
21 commission charged or at a standard percentage of the total value of the
22 brokered goods, which percentage must reflect the fees or commissions
23 generally paid to brokers for providing such services.

24 Sec. 8. (a) No person, firm, corporation, business, union or other
25 organization shall:

26 (1) Prevent or interfere with a contractor's or subcontractor's
27 compliance with this act or any rule and regulation adopted thereunder;

28 (2) submit any false or fraudulent information to the director
29 concerning compliance with this act or chapter or any rule and regulation
30 adopted thereunder;

31 (3) fraudulently obtain, retain, attempt to obtain or retain, or aid
32 another in fraudulently obtaining or retaining or attempting to obtain or
33 retain certification as a small, minority or woman-owned business for the
34 purpose of this act;

35 (4) knowingly make a false statement, whether by affidavit,
36 verified statement, report, or other representation, to any state official or
37 employee for the purpose of influencing the certification or denial of
38 certification of any entity as a small, minority or woman-owned business
39 enterprise;

40 (5) knowingly obstruct, impede, or attempt to obstruct or
41 impede any state official or employee who is investigating the
42 qualification of a business entity that has requested certification as a small,
43 minority or woman-owned business;

1 (6) fraudulently obtain, attempt to obtain, or aid another person
2 in fraudulently obtaining or attempting to obtain public moneys to which
3 the person is not entitled under this act or any rule and regulation adopted
4 thereunder; or

5 (7) knowingly make any false statement or representation that
6 any entity is or is not certified as a small, minority or woman-owned
7 business for purposes of obtaining a contract governed by this act or any
8 rule and regulation adopted thereunder.

9 (b) Any person or entity violating this act or any rule adopted
10 thereunder shall be subject to the penalties in section 9, and amendments
11 thereto. No provision of this section, and amendments thereto, shall
12 prevent the state agency or postsecondary educational institution from
13 pursuing any such procedure or sanction as is otherwise provided by
14 statute, rule and regulation, or contract provision.

15 Sec. 9. (a) If the director determines after notice and an opportunity
16 for a hearing in accordance with the Kansas administrative procedure act
17 that a person, firm, corporation or business has engaged in or is engaging
18 in any act or practice constituting a violation of any provision of this act,
19 any rule and regulation adopted thereunder or with a contract requirement
20 established under this act, the director, in consultation with the appropriate
21 state official, may withhold payment, debar the contractor, suspend, or
22 terminate the contract and subject the contractor to civil or criminal
23 penalties, or both, for fraud. The director shall adopt, by rule and
24 regulation, criteria for the imposition of penalties under this section, and
25 amendments thereto.

26 (b) Any willful repeated violation, exceeding a single violation,
27 may disqualify the contractor from further participation in state contracts
28 for a minimum period of three years to a maximum of permanent
29 disbarment. An apparent low-bidder must be in compliance with the
30 contract provisions required under this chapter as a condition precedent to
31 the granting of a notice of award by any state agency or postsecondary
32 educational institution.

33 (c) The procedures and sanctions provided in this section, and
34 amendments thereto, shall be in addition to all other remedies provided by
35 law. No provision of this section, and amendments thereto, shall prevent
36 any state agency or postsecondary educational institution administering the
37 contract from pursuing such other procedures or sanctions as are otherwise
38 provided by statute, rule and regulation or contract provision.

39 Sec. 10. The attorney general may bring an action in the name of the
40 state against any person to restrain and prevent the doing of any act
41 prohibited or declared to be unlawful in this chapter. The attorney general
42 may, in the discretion of the court, recover the costs of the action including
43 reasonable attorney fees and the costs of investigation.

1 Sec. 11. The office and the department of transportation shall be the
2 only authorities to perform certification of minority business enterprises,
3 women business enterprises and socially and economically disadvantaged
4 business enterprises throughout the state of Kansas. Certification by the
5 state office will allow these firms to participate in programs for these
6 enterprises administered by the state of Kansas, any city, town, county,
7 special purpose district, public corporation created by the state, municipal
8 corporation, or quasi-municipal corporation within the state of Kansas.

9 Sec. 12. Each city, county and unified school district is hereby
10 authorized to adopt a small, minority or woman-owned business
11 procurement program similar to the program established under this act.

12 Sec. 13. If any provision of this act or its application to any person or
13 circumstance is held invalid, the remainder of the act or the application of
14 the provision to other persons or circumstances shall not be affected.

15 Sec. 14. This act shall take effect and be in force from and after its
16 publication in the statute book.