

HOUSE BILL 3591

By Miller L

AN ACT to amend Tennessee Code Annotated, Title 12,
Chapter 3, relative to small, minority owned and
women owned businesses.

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

SECTION 1. The Tennessee Code Commission shall transfer Tennessee Code Annotated, Sections 12-3-809, 12-3-810, 12-3-811 and 12-3-812 to be a new Part 14 of Title 12, Chapter 3.

SECTION 2. Tennessee Code Annotated, Title 12, Chapter 3, Part 8, is amended by deleting Sections 12-3-801 through 12-3-808 in their entireties and by substituting instead the following:

Section 12-3-801.

(a) This part and part 13 shall be known and may be cited as the “Tennessee Small Business and Diversity Business Enterprise Procurement and Contracting Opportunity Act.”

(b) The purpose of this part is to create a program to enhance and increase participation of minority businesses, women businesses and other small businesses in this state’s procurements and contracts.

Section 12-3-802. As used in this part and part 13 of this chapter, unless the context otherwise requires:

(1) “Commissioner” means the commissioner of general services;

(2) “Contractor” means an individual or a business enterprise including a sole proprietorship, a partnership, a corporation, limited liability corporation or joint venture and is a for profit business which has contracted with the state of

Tennessee to provide equipment, supplies, personal services, professional services, consulting services, construction services, and architectural and engineering services;

(3) "Department" means the department of general services;

(4) "Diversity business enterprise" means businesses that are minority owned, women owned, and other small businesses;

(5) "Goal setting" means establishing internal utilization goals for Tennessee small businesses and diversity business enterprises participation in state procurement and contracting;

(6) "Good faith efforts" means each state agency's, bidders and proposers efforts to utilize Tennessee small businesses and diversity business enterprises in the state's procurement and contracting opportunities;

(7) "Governor's office of diversity business enterprise" means the office charged with coordinating and directing the state of Tennessee's efforts develop a program to assist Tennessee small businesses and diversity businesses to compete successfully for the state of Tennessee's expenditures for goods and services;

(8) "Minority" means a person who is a citizen or lawful permanent resident of the United States and who is and can demonstrate membership in one (1) or more of the following groups:

(A) African American (a person having origins in any of the black racial groups of Africa);

(B) Hispanic (a person of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race);

(C) Asian American (a person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands); or

(D) Native American (a person having origins in any of the original peoples of North America);

(9) "Minority owned business" means a minority owned business that is a continuing, independent, for profit business which performs a commercially useful function and is at least fifty-one percent (51%) owned and controlled by one (1) or more minority individuals who are impeded from normal entry into the economic mainstream because of past practices of discrimination based on race or ethnic background;

(10) "Other small business" means a business that is a continuing, independent, for profit business which performs a commercially useful function that may not reside in the state of Tennessee and has total gross receipts of no more than ten million dollars (\$10,000,000) averaged over a three-year period and employs no more that thirty (30) persons on a full-time basis and is certified as such;

(11) "Procurement and contracting" means the procurement and contract award of equipment, supplies, personal services, professional services, consulting services, construction services, and architectural and engineering services;

(12) "Small business program representative" means the agency's liaison to the governor's office of diversity business enterprise.

(13) "State agency" means state of Tennessee departments, agencies, commissions, boards, state building commission, higher education, and the

board of regents, cities, counties and local governments who are recipients of state appropriated funds;

(14) "State contracts" means a written signed agreement or purchase order instrument providing by a contracting agency in return for equipment, supplies, personal services, professional services, consulting services, construction services, and architectural and engineering services;

(15) "Subcontractor" means a business under contract with a prime contractor, successful proposer or construction manager for providing goods, materials, supplies, equipment, labor, or materials; and

(16) "Tennessee small business" means a business that is a continuing, independent, for profit business which performs a commercially useful function with residence in Tennessee and has total gross receipts of no more than ten million dollars (\$10,000,000) averaged over a three-year period and employs no more than thirty (30) persons on a full-time basis and is certified as such;

(17) "Utilization commitment" means a contractor's commitment to utilize Tennessee small businesses and diversity business enterprise in contracts awarded by the state of Tennessee;

(18) "Utilization plan" means a commitment to utilize the participation of state of Tennessee small businesses, minority, women businesses and other small businesses on contracts awarded; and

(19) "Woman owned business" means a woman owned business that is a continuing, independent, for profit business which performs a commercially useful function and is at least fifty-one percent (51%) owned and controlled by one (1) or more women; or, in the case of any publicly owned business, at least fifty-one percent (51%) of the stock of which is owned and controlled by one (1)

or more women and whose management and daily business operations are under the control of one (1) or more women.

Section 12-4-803.

(a) The commissioner is authorized to adopt rules and regulations establishing criteria and standards for Tennessee small businesses and diversity business enterprises that are eligible to be included under this part. Such rules and regulations shall include methods by which eligibility can be verified and the business deemed certified.

(b) Such criteria and standards for eligibility shall include, but not be limited to, the number of employees, the total receipts and annual sales, including ownership and control.

(c) The governor's office of diversity business enterprise shall develop a certification program and publish a directory of certified Tennessee small businesses, minority and women business and other small owned firms.

(d) Any business desiring to be certified as a Tennessee small business or diversity business shall make application to the governor's office of diversity business enterprise on a form prescribed by such office.

Section 12-3-804.

(a) The commissioner of general services is charge with responsibility for this part and part 13.

(b) The commissioner is authorized to adopt rules and regulations establishing criteria and standards for a program that complies with the regulations of this part and part 13.

(c) As directed by the commissioner, the governor's office of diversity business enterprise attached to the department of general services shall develop and administer a program to comply with the regulations of this part and part 13.

(d) The office shall develop policies and procedures to coordinate and direct efforts to assist Tennessee small businesses and diversity business enterprises.

(e) The office shall facilitate these businesses access to state procurements and contracting opportunities.

Section 12-3-805.

(a) All state agencies shall fully cooperate and comply with this part and part 13 to ensure the participation of these businesses in the state's procurement and contracting opportunity program and adhere to the policies, procedures and reporting guidelines prescribed by the governor's office of diversity business enterprise.

(b) Each state agency shall designate a staff person as a small business liaison representative to the governor's office of diversity business enterprise to coordinate the agency's efforts to utilize Tennessee small businesses and diversity businesses enterprises in their procurement and contracting opportunities.

(c) Each state agency's small business liaison shall provide monthly to the governor's office of diversity business enterprise a report of solicitations issued, contract dollars awarded and payments made toward those contracts to Tennessee small businesses and diversity business enterprise.

Section 12-3-806.

(a) The commissioner is authorized to adopt rules and regulations establishing criteria and standards to establish contracting goals that are set in accordance with availability of Tennessee small businesses and diversity business enterprises. In establishing these goals for the participation of Tennessee small businesses and diversity business enterprises, the governor's office of diversity business enterprise shall work closely with each state agency to ensure that goals are reasonable and obtainable.

(b) Individual goals shall be established for Tennessee small business, minority business by each ethnic group, women business and other small business.

(c) Nothing in this part shall be construed as establishing any mandatory goal or quota with respect to Tennessee small businesses and diversity business enterprises.

(d) Each state agency shall provide to the governor's office of diversity business enterprise a monthly report that tracks its attainment of goals through award data and payment data.

Section 12-3-807.

(a) Through the process of certification, the ownership and control of businesses participating in the program shall be verified. In fulfilling its charge, the governor's office of diversity business enterprise is directed to work with all state agencies with procurement policy responsibilities to ensure compliance with the program requirements.

(b) All state agencies with authority to solicit bids or proposals for equipment, supplies, professional services, consulting services, construction contracts, and architectural and engineering services are required to actively

solicit bids from Tennessee small businesses and diversity business enterprises in order to obtain their established goals for procurements and contracting.

(c) The commissioner of general services shall develop and adopt rules and regulations to establish a process for state agencies to actively solicit bids and requests for proposals that assist agencies in achieving their established goals for participation of Tennessee small businesses and diversity business enterprises.

Section 12-3-808.

(a) In accordance with this part and part 13, efforts shall be made to facilitate and maximize the participation of affected businesses in state procurement and contracting opportunities.

(b) The commissioner shall develop and adopt rules and regulations to establish a process for bidders and proposers to demonstrate their efforts to achieve Tennessee small business and diversity business enterprise participation on contracts awarded by this state.

(c) In order for a bid or proposal to be considered responsive, bidders and proposers shall show proof of their good faith efforts to achieve participation and provide a plan for utilizing achieved certified participation at the time of submission of the bid or proposal.

(d) Bidders' and proposers' good faith efforts and utilization plans shall be evaluated to determine if good faith efforts and a reasonable amount of participation have been achieved. The governor's office of diversity business enterprise shall assist in the evaluation.

(e) State agencies are required to review these utilization plans for compliance.

Section 12-3-809. The commissioner shall develop rules and regulations to establish criteria for “good faith efforts points” to evaluate and determine a bidder’s or proposer’s efforts to achieve Tennessee small business, minority, women, and other small business participation. Each state agency with authority to solicit bids or proposals shall require bidders and proposers to undertake good faith efforts to recruit Tennessee, minority, women and small business participation in the project as prescribed by the governor’s office of diversity business enterprise.

Section 12-3-810.

(a) Each state agency is required to report monthly to the governor’s office of diversity business enterprise on the number of purchase orders and contracts awarded to Tennessee small businesses, minority and women and other small businesses on a form prescribed by the office.

(b) The commissioner shall annually report by December 31 each year to the governor and to each member of the general assembly concerning the awarding of state agency purchases and contracts awarded to Tennessee small businesses, minority, women and other small businesses made during the preceding fiscal year under this part.

(c) The commissioner shall also include in such annual report:

(1) The number of solicitations to Tennessee small businesses, minority businesses by ethnic group, woman businesses and other small businesses;

(2) The number of bids received from Tennessee small businesses, minority business by ethnic group, woman businesses and other small businesses; and

(3) The dollar amount of purchases awarded to Tennessee small businesses, minority business by ethnic group, woman businesses and other small businesses.

SECTION 3. Tennessee Code Annotated, Title 12, Chapter 3, is amended by adding the following language as a new part:

Section 12-3-1301. In addition to the other provisions of this chapter concerning Tennessee small business and diversity business enterprise procurement and contracting opportunities, the department shall develop a plan to maximize participation of Tennessee small business in state agency procurement and contracting. In developing such a plan, the department shall establish a minimum participation goal of twenty percent (20%) to achieve the participation of Tennessee small businesses through both prime and second-tier state agency procurement and contracting opportunities.

Section 12-3-1302.

(a) Notwithstanding any law to the contrary, the commissioner of general services shall promulgate regulations authorizing a preference for Tennessee small businesses in the evaluation of proposals for state contracts.

(b) The preference to be given to a Tennessee small business shall not exceed five (5%) of the lowest responsive, responsible bidder meeting specifications and shall be applied on a sliding scale in the following manner:

(1) A preference of up to five percent (5%) shall be allowed for contracts up to five hundred thousand dollars (\$500,000);

(2) A preference of up to three and one-half percent (3.5%) shall be allowed for contracts up to seven hundred fifty thousand dollars (\$750,000);

(3) A preference of two and one-half percent (2.5%) shall be allowed for contracts up to one million dollars (\$1,000,000);

(4) A preference of two percent (2%) shall be allowed for contracts that exceed one million dollars (\$1,000,000); and

(5) For construction contracts over two million dollars (\$2,000,000), a two percent (2%) preference shall be given to the bids of general contractors who, through use of subcontractors, utilize Tennessee small businesses to perform at least fifty percent (50%) of the work subject to the contract. Any general contractor that receives a contract pursuant to this subdivision (b)(5) shall provide periodic assurances that the requirements of the subdivision have been met or exceeded as may be required by the terms of the contract.

Section 12-3-1303. The department is authorized and directed to identify qualified Tennessee small businesses, to undertake training programs and other educational activities to enable Tennessee small businesses to compete for contracts on an equal basis with other businesses, and to provide necessary assistance to state agencies seeking to maximize participation of Tennessee small businesses.

Section 12-3-1304. The commissioner shall include information concerning the effectiveness of this part in the annual report submitted to the governor and to each member of the general assembly pursuant to § 12-3-810.

SECTION 4. This act shall take effect January 1, 2011, the public welfare requiring it, and shall apply to state contracts entered into or renewed on and after such date.