



S.B. 122
123rd General Assembly
(As Introduced)

Sen. Watts

BILL SUMMARY

- Changes the term "minority business enterprise" to "challenged business enterprise" for purposes of the laws governing public contract set asides, minority business development loans, and minority business bonds.
- Revises the definition of and criteria for becoming certified as a challenged business enterprise.
- Limits the permissible period of certification as a challenged business enterprise to five years.
- Renames the Minority Development Financing Advisory Board the Challenged Business Development Financing Advisory Board and renames the Minority Business Development Division of the Department of Development the Challenged Business Development Division of the Department.
- Eliminates the programs for public contract set asides, challenged business development loans, and challenged business bonds for challenged business enterprises ten years after the effective date of this act.

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CONTENT AND OPERATION

Background

Under current law, a "minority business enterprise" (MBE) is defined as "an individual, partnership, corporation, or joint venture of any kind that is owned and controlled by United States citizens, residents of Ohio, who are members of one of the following economically disadvantaged groups: Blacks, American Indians, Hispanics, and Orientals." "Owned and controlled" means that at least 51% of the business, including corporate stock of a corporation, is owned by persons who belong to one or more of the economically disadvantaged groups listed above. The owners of the business must "have control over the management and day-to-day operations of the business and an interest in the capital, assets, and profits and losses of the business proportionate to their percentage of ownership." To qualify as an MBE, a business must have been owned and controlled as described above for a minimum of one year prior to being awarded specified contracts. (R.C. 122.71(E).)

Businesses that have been designated as an MBE may receive certain entitlements under the law. For example, the Minority Business Development Division within the Department of Development provides technical, managerial, and counseling services and assistance, procurement and bid packaging assistance, and bonding technical assistance to MBEs, implement state law and policy supporting MBEs and assists in coordinating plans, programs, and operations of state government that affect or may contribute to the establishment, preservation, and strengthening of MBEs, establish a center for the development, collection, and dissemination of information helpful to establishing MBEs, recommend appropriate legislative or executive actions to support MBEs, coordinate reviews of state training and technical assistance for MBEs, and assists MBEs in obtaining governmental or commercial financing for business expansion, establishment of new businesses, or industrial development projects. (R.C. 122.92.)

Another entitlement is in the form of contract set-asides (see **COMMENT** 2). "Contract set-asides" refers to the practice of selecting a number of contracts with an aggregate value of a certain per cent of the total estimated value of contracts to be awarded in a fiscal year, and setting aside those selected contracts for bidding by MBEs. Current law requires various state agencies and a number of entities at the local government level to establish contract set-asides for MBEs.

Some statutes stipulate the percentage of the aggregate value of contracts which must be set aside for MBEs. Other statutes merely require that a set-aside program be established and no percentage is stipulated. No one type of contract is the single focus of set-aside programs. Instead, the types of contracts that may require set-aside programs include contracts for construction, maintenance, equipment, materials, supplies, repairs, and services.

A special bonding program for MBEs also is established under the law. Under the Minority Business Bonding Program, the Director of Development may execute bonds as surety for minority businesses as principals, on contracts with the state, any political subdivision or instrumentality thereof, or any person as the obligee. The Director of Development, with the advice of the Minority Development Financing Advisory Board (see **COMMENT 1**) adopts rules establishing procedures for application for such bonds and for review and approval of those applications. The Board reviews the applications and refers qualified applicants to the Director. The Director, based on those recommendations, must determine whether each applicant will receive bonding. The rules must require a minority business to have been denied a bond by two surety companies or to have applied to two surety companies and not received a bond or been denied a bond within 60 days in order to make application for a bond. The rules also must require the business to pay a premium for the bond to be established by the Director. (R.C. 122.89.)

A Minority Business Development Loan Program, similar to the Bonding Program, is also established under the law. The Director, with Controlling Board approval, may make loans to MBEs and to specified types of corporations that meet specified criteria. (R.C. 122.76.)

Operation of the bill

Definitions

Under existing law, "minority business enterprise" means an individual, partnership, corporation, or joint venture of any kind that is owned and controlled by United States citizens, residents of Ohio, who are members of one of the following economically disadvantaged groups: Blacks, American Indians, Hispanics, and Orientals. Under the bill, "minority business enterprise" would be renamed "challenged business enterprise." The bill defines a challenged business enterprise as a business that is owned and controlled by an individual who is a United States citizen, a resident of this state, and an economically disadvantaged individual, or a partnership, corporation, association, limited liability company, or joint venture of any kind that is owned and controlled by individuals who are United States citizens, residents of this state, and are economically disadvantaged

individuals. The bill removes provisions that state that a business enterprise member must be a member of one of the following groups: Blacks, American Indians, Hispanics, and Orientals. Therefore, to qualify for any of the challenged business enterprise assistance programs, an individual must be economically disadvantaged but not necessarily a member of a specified minority group. (R.C. 122.71(E)(1).) The bill amends numerous R.C. provisions solely to replace the term "minority business enterprise" with the term "challenged business enterprise."

For the purposes of the challenged business enterprise programs, "economically disadvantaged individual" means an individual whose ability to compete in the free enterprise system has been impaired because of diminished capital and credit opportunities as compared to others in the same or similar field of business and whose personal net worth does not exceed \$250,000 (R.C. 122.71(E)(3)).

Under existing law, "owned and controlled" means that at least 51% of the business, including corporate stock if a corporation, is owned by persons who belong to one or more of the minority groups listed above and that the owners have control over the management and day-to-day operations of the business and an interest in the capital, assets, and profits and losses of the business proportionate to their percentage of ownership. In order to qualify as a minority business enterprise, a business must have been owned and controlled by the above outlined persons at least one year prior to being awarded a contract pursuant to this section. The bill alters this definition by removing the requirement that at least 51% of the business be owned by persons who are members of a minority group, substituting a requirement that at least 51% of the business be owned by "economically disadvantaged individuals." Under the bill, in order to qualify as a challenged business enterprise, a business must have been owned and controlled by the 51% or more economically disadvantaged individuals, and must have been operating in that field of business, for two years prior to being awarded a contract under the Challenged Business Enterprise Law. (R.C. 122.71(E)(2).)

The bill broadens the definition of "mortgagor" to mean the principal user of a project or individual (added by the bill), corporation, partnership (existing law), limited liability company, joint venture (added by the bill), or association (existing law) unconditionally guaranteeing performance by the principal user of its obligations under the mortgage (R.C. 122.71(D)).

The bill changes several defined terms in the sections dealing with surety bonds for "minority businesses" by changing "minority" to "challenged" in the name of the term (R.C. 122.87).

Name changes

Under existing law, the Minority Development Financing Advisory Board (see **COMMENT 1**) assists in carrying out the minority business development programs created pursuant to R.C. sections 122.71 through 122.89. The bill retitles the Board the Challenged Business Development Financing Advisory Board. (R.C. 122.72(A).)

Six months after the effective date of the bill, whenever the Minority Development Financing Advisory Board is referred to or designated in any statute, rule, contract, or other document, the reference or designation is deemed to refer to the Challenged Business Development Financing Advisory Board (Section 4).

Six months after the effective date of the bill, whenever the Minority Business Development Division of the Department of Development is referred to or designated in any statute, rule, contract, or other document, the reference or designation shall be deemed to refer to the Challenged Business Development Division, which is the name given under the bill to the division formerly known as the Minority Business Development Division. (Section 3.)

The bill changes the term "minority business enterprise" to "challenged business enterprise" throughout the Revised Code and "minority business" to "challenged business." It also changes the name of many terms that contain the word "minority" by replacing that word with the word "challenged."

Under existing law, the Director of Development uses the "Minority Business Enterprise Loan Fund" to pay the operating costs of the Minority Development Financing Advisory Board, make loans to minority business enterprises, and make loan guarantees to small businesses. The bill renames the Fund the "Challenged Business Enterprise Loan Fund." (R.C. 122.80.) The bill similarly changes the name of the "Minority Business Bonding Fund" to the "Challenged Business Bonding Fund" and of the "Minority Business Bonding Program Administrative and Loss Reserve Fund" to the "Challenged Business Bonding Administrative and Loss Reserve Fund." (R.C. 122.88.)

Challenged business assistance programs

The renamed Challenged Business Development Financing Advisory Board continues to be required to assist in carrying out the challenged business development programs created in R.C. sections 122.71 through 122.89. The Board, in conjunction with the Director of Development, continues to be invested with the powers and duties provided in those sections in order to promote the welfare of the people of the state. (R.C. 122.72(A) and 122.73(A).)

Under existing law, the Director of Development is required to do all of the following: (1) receive applications for assistance under R.C. sections 122.71 through 122.89 and, after processing, forward them to the Minority Development Financing Advisory Board together with necessary supporting information, (2) receive the recommendations of the Board and make a final determination whether to approve the application for assistance, and (3) transmit the Director's determinations to approve assistance to the Controlling Board together with any information the Controlling Board requires for its review and decision as to whether to approve the assistance. The bill, in addition to making conforming name changes, additionally requires the Director of Development to adopt rules in accordance with the Administrative Code establishing procedures for determining whether a business enterprise qualifies as a challenged business enterprise. (R.C. 122.74(A)(4) and (A)(1), (2), and (3).)

Existing law permits the Director of Development, with Controlling Board approval and subject to specific requirements, to lend funds to minority business enterprises and to community improvement corporations and Ohio development corporations for the purpose of loaning funds to minority business enterprises and for the purpose of procuring or improving real or personal property, or both, for the establishment, location, or expansion of industrial, distribution, commercial, or research facilities in the state. The Director cannot lend the funds unless the Director determines, in the Director's sole discretion, that all of the following apply: (1) the project is economically sound and will benefit the people of the state by increasing opportunities for employment, by strengthening the economy of the state, or expanding minority business enterprises, (2) the proposed minority business enterprise borrower is unable to finance the proposed project through ordinary financial channels at comparable terms, (3) the value of the project is, or upon completion will be, at least equal to the total amount of the money expended in the procurement or improvement of the project and of which amount one or more financial institutions or other governmental entities have loaned not less than 30%, (4) the amount to be loaned by the Director will not exceed 60% of the total amount expended in the procurement or improvement of the project, and (5) the amount to be loaned by the Director will be adequately secured by a first or second mortgage upon the project, or by mortgages, leases, liens, assignments, or pledges on or of other property or contracts as the Director requires and that such mortgage will not be subordinate to any other liens or mortgages except the liens securing loans or investments made by financial institutions referred to in (3) above, and the liens securing loans previously made by any financial institution in connection with the procurement or expansion of all or part of a project (R.C. 122.76(A)(1) to (5)).

The bill adds a sixth requirement that must be met before the Director may lend funds to challenged business enterprises. The bill requires that the net worth

of a challenged business enterprise not exceed \$500,000. The Director must determine the net worth of a business enterprise by utilizing the procedures for making that determination that the Equal Employment Opportunity Coordinator must follow according to rules adopted under the bill. (R.C. 122.76(A).)

DAS and challenged business certification procedures

Under existing law, the Director of Administrative Services must make rules in accordance with the Administrative Code establishing procedures by which minority businesses may apply to the Equal Employment Opportunity Coordinator for certification as minority business enterprises. Any minority business enterprise that desires to bid on a contract or to be a minority business subcontractor or materialman must first apply to the Coordinator for certification. The Coordinator must approve the application of any minority business enterprise that complies with the rules. Any person adversely affected by an order of the Coordinator denying certification as a minority business enterprise may appeal under the Administrative Code. The Coordinator is required to prepare and maintain a list of certified minority business enterprises. (R.C. 123.151.)

The bill makes the following changes in the certification procedures:

(1) The Director of Administrative Services must adopt additional rules in accordance with the Administrative Code that do the following (R.C. 123.151(B)(1)):

(a) Establish procedures by which a challenged business enterprise may apply to the Equal Employment Opportunity Coordinator for *the renewal of its certification* as a challenged business enterprise;

(b) Require the Coordinator to find, as a condition of certification, that a business enterprise has experienced diminished access to capital and credit opportunities and markets as compared to other businesses in the same or similar field;

(c) Require the Coordinator to find, as a condition of certification, that the individual or individuals who own and control at least 51% of the business enterprise are economically disadvantaged individuals;

(d) Require the Coordinator to determine the net worth and financial condition of a business enterprise seeking certification;

(e) Require the Coordinator to determine the net worth and financial condition of the individual or individuals who own and control at least 51% of the

business enterprise seeking certification for purposes of determining whether an applicant may be certified as a challenged business enterprise;

(f) Establish procedures that the Coordinator must follow in determining the net worth and financial condition of a business enterprise seeking certification and of the individual or individuals who own and control at least 51% of that business enterprise.

(2) The Director must adopt additional rules in accordance with the Administrative Code that the Director finds necessary to carry out the above stated provisions (R.C. 123.151(B)(1)).

(3) Under the bill, a business enterprise whose net worth exceeds \$750,000 is ineligible to obtain certification as a challenged business enterprise. The bill also provides that a certified challenged business enterprise is deemed to have graduated or withdrawn from the status of a certified challenged business enterprise at the earliest of the following dates: (a) the earliest date for renewal of the certification of a challenged business enterprise whose net worth exceeds \$750,000, or (b) the earliest date for renewal of the certification of a challenged business enterprise that has maintained the status of a certified challenged business enterprise for a total of five years, whether or not the years are consecutive. The Coordinator may not certify or renew the certification of a challenged business enterprise that has graduated or withdrawn from the status of a challenged business enterprise.

A business enterprise seeking certification as a challenged business enterprise or the renewal of a certification is required to provide to the Coordinator all the information required to facilitate the certification, or the renewal of the certification, of that business enterprise. (R.C. 123.151(B)(3).)

Minority banks

Existing law provides that the governing board of the state or of a subdivision may designate one or more minority banks as public depositories of its inactive, interim, or active deposits of public moneys designated as federal funds. Except for R.C. section 135.18 or 135.181, Chapter 135. of the Revised Code does not apply to the application for, or the award of, those deposits. "Minority bank" means a bank that is owned or controlled by one or more socially or economically disadvantaged persons. Such disadvantage may arise from cultural, ethnic, or racial background, chronic economic circumstances, or other similar cause. Such persons include, but are not limited to, Afro-Americans, Puerto Ricans, Spanish-speaking Americans, and American Indians. (R.C. 135.04(F)(1).)

The bill provides that the governing board of the state or of a subdivision may designate one or more *challenged* banks as public depositories of its inactive, interim, or active deposits of public moneys designated as federal funds. As under existing law, except for R.C. section 135.18 or 135.181, Chapter 135. of the Revised Code does not apply to the application for, or the award of, the deposits. "*Challenged bank*" means a bank that is owned or controlled by one or more economically disadvantaged *individuals*. "*Economically disadvantaged individual*" has the same meaning as in the *Challenged Business Enterprise Law*. (R.C. 135.04(F)(1).)

The bill in division (F)(4) of section 135.04 states that "This division applies only until 10 years after the effective date of this amendment." "This division" probably means division (F); therefore, the above provisions apparently apply for only ten years.

Awarding contracts for capital improvement projects

Under existing law, in awarding contracts for capital improvement projects, the Department of Administrative Services must ensure that equal consideration be given to contractors, subcontractors, or joint venturers who qualify as a minority business enterprise. "Minority business enterprise" means a business enterprise that is owned or controlled by one or more socially or economically disadvantaged persons who are residents of this state. "Socially or economically disadvantaged persons" means persons, regardless of marital status, who are members of groups whose disadvantage may arise from discrimination on the basis of race, religion, sex, handicap, national origin, or ancestry, or other similar cause. Such persons include, but are not limited to Negroes, Puerto Ricans, Spanish-speaking Americans, American Indians, Eskimos, and Aleuts. (R.C. 153.59(B).)

Under the bill, in awarding contracts for capital improvement projects, the Department must ensure that equal consideration be given to contractors, subcontractors, or joint venturers who qualify as a *challenged* business enterprise. "*Challenged business enterprise*" means a business enterprise *that is certified as a challenged business enterprise* pursuant to the bill. These provisions apply for only ten years. (R.C. 153.59(B).)

Miscellaneous changes

Existing law prohibits any person from intentionally misrepresenting themselves as owning, controlling, operating, or participating in a minority business enterprise for the purpose of obtaining funds, contracts, or other benefits. A violation of the prohibition is the offense of "theft by deception." The bill prohibits any person from intentionally "making a false claim of" owning, controlling, operating, or participating in a minority business enterprise for those

purposes. The prohibition continues to be theft by deception. (R.C. 122.86 and 125.081(F).)

Repeal of challenged business programs

Effective ten years after the effective date of the bill, all sections relating to public contract set asides, challenged business development loans, and challenged business bonds will be repealed to eliminate on the date of their repeal the laws requiring those programs. The bill also specifies that all references to these laws contained in other sections of the Revised Code no longer apply on and after that date of repeal. (Section 7 and R.C. 122.71, 122.72, 122.73, 122.74, 122.75, 122.76, 122.77, 122.78, 122.79, 122.80, 122.81, 122.82, 122.83, 122.87, 122.88, 122.89, 122.92, 122.93, 122.94, 123.151, 125.081, 164.07, 307.921, 340.13, 3354.161, 3355.121, 3357.161, and 5126.071.)

COMMENT

1. The Minority Development Financing Advisory Board consists of seven members appointed by the Governor with the advice and consent of the Senate selected because of their knowledge and experience in specified areas of business and their understanding of the problems of minority business enterprises; one member of the Senate appointed by the President of the Senate; and one member of the House of Representatives appointed by the Speaker of the House of Representatives. (R.C. 122.72.)

2. The Director of the Department of Development (DAS) is required by current law to set aside, for bidding only by certified MBEs, contracts of a total value of approximately 5% of the total estimated value of the following kinds of contracts to be awarded in the current fiscal year: contracts for labor, materials, or the construction necessary to maintain, control, or manage state public works, and contracts for the construction, reconstruction, improvement, enlargement, alteration, repair, painting, or decoration of any public improvement under the Public Improvements Law (R.C. Chapter 153.). (R.C. 123.151(C)(1).)

Additionally, every contractor awarded a contract for labor, materials, or the construction necessary to maintain, control, or manage state public works, and contracts for the construction, reconstruction, improvement, enlargement, alteration, repair, painting, or decoration of any public improvement under the Public Improvements Law or any contract for construction awarded by any state agency other than DAS or by any port authority is required to make every effort to ensure that certified minority business subcontractors and materialmen participate in the contract. In the case of plumbing and gas fitting, steam and hot-water heating, ventilating apparatus, steam power-plant, and electrical equipment

contracts for state buildings, the total value of subcontracts awarded to and materials and services purchased from minority businesses must be at least 10% of the total value of the contract, wherever possible and whenever a contractor awards subcontracts or purchases materials or services. For all other contracts of the type described above, the total value of subcontracts awarded to certified MBEs must equal a minimum of 5% of the total value of the contract. The total value of both the subcontracts awarded to and the purchases of materials made from certified MBEs must equal a minimum of 10% of the total value of the contract, wherever possible, and whenever the contractor awards subcontracts or purchases materials or services. (R.C. 123.151(C)(2)(a), 4582.10, and 4582.12.)

The Department of Administrative Services is prohibited from entering into contracts for labor, materials, or the construction necessary to maintain, control, or manage state public works, and contracts for the construction, reconstruction, improvement, enlargement, alteration, repair, painting, or decoration of any public improvement under the Public Improvements Law, including any MBE set-aside contract described above, unless the contract contains a provision that the contractor, to the extent that he subcontracts, will award to certified MBEs no less than 5% of the contract's total value, and that the total value of both the materials purchased from certified MBEs and of the subcontract awarded to certified MBEs will equal at least 7% of the contract's total value. However, in the case of plumbing and gas fitting, steam and hot-water heating, ventilating apparatus, steam power-plant, and electrical equipment contracts for state buildings, the contractor must stipulate that the total value of subcontracts awarded to and materials and services purchased from certified MBEs will equal at least 7% of the total value of the contract, the value of services of which must not be more than 5% of the contract's total value. To the extent that the contractor subcontracts work less than the percentages required to be subcontracted to certified MBEs, the total value of the subcontracts awarded to certified MBEs need not exceed the actual amount of the subcontracts awarded. (R.C. 123.151(C)(2)(b).) Contractors may apply to the Coordinator of the Set Aside Review Board (see **COMMENT 3**) for, and the Board may approve, a waiver or modification to the contract set-aside provision described above. (R.C. 123.151(C)(3).)

State agencies other than DAS, and port authorities authorized to contract for construction, are required to set aside, for certified MBE bidding only, construction contracts the total value of which equals approximately 5% of the total value of construction contracts for the current fiscal year. All construction contracts entered into by these state agencies and port authorities must contain the same contract set-aside provision described above, also subject to waiver or modification by the Set Aside Review Board. (R.C. 123.151(D), 4582.10, and 4582.12.)

The Department of Administrative Services, other state agencies and port authorities authorized to contract for construction, from time to time, must set aside additional contracts for bidding only by MBEs as are necessary to replace contracts previously set aside but not bid upon by MBEs (and thus, open for bid to other parties) and to ensure that, in any fiscal year, the total amount of construction contracts awarded to MBEs equals approximately 5% of the total amount of construction contracts awarded by the agency or port authority. (R.C. 123.151(E), 4582.10, and 4582.12.)

State agencies and port authorities are prohibited from expending any money for construction in any fiscal year until the Director of DAS or the chairman of the port authority, as appropriate, certifies to the DAS EEOC, the Clerk of the Senate, and the Legislative Clerk of the House of Representatives that approximately 5% of the total amount of the projected expenditure for construction in the fiscal year has been set aside as required. (R.C. 123.151(G).)

3. The Set Aside Review Board exists in the Department of Administrative Services. It consists of the Director of DAS or his designee, one member of the House of Representatives appointed by the Governor with the recommendation of the Speaker of the House of Representatives and one member of the Senate appointed by the Governor with the recommendation of the President of the Senate. The Board hears all applications of contractors for waivers or modifications of required set-aside contract provisions and is required to render decisions within 30 days of receipt of an application. (R.C. 123.151(C)(4).)

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	04-08-99	p. 268

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