

## Set Aside Law

**SECTION 12-28-2930.** Allocation of state source highway funds for construction and renovation projects to firms owned and controlled by disadvantaged ethnic minorities or women.

(A)(1) Of total state source highway funds, including revenues generated by Section 12-28-2740, expended in a fiscal year on highway, bridge, and building construction, and building renovation contracts, the Department of Transportation and counties shall ensure that not less than:

(a) five percent are expended through direct contracts with estimated values of two hundred fifty thousand dollars or less with small business concerns owned and controlled by socially and economically disadvantaged ethnic minorities (MBEs);

(b) five percent are expended through direct contracts with estimated values of two hundred fifty thousand dollars or less with firms owned and controlled by disadvantaged females (WBEs).

(2) The two hundred fifty thousand dollars value limits may be raised in the discretion of the department as MBEs/WBEs are able to provide bondability.

(B) The department shall certify eligible firms under this section and shall give at least thirty days' notice to certified firms of contracts to be let. The department shall take into consideration the location and availability of MBE or WBE firms in the State when designating projects to be set aside. No certified MBE or WBE may participate after June 30, 1999, or nine years from the date of the firm's first contract, whichever is later, if that firm performed at least three million dollars in highway contracts for four consecutive years while certified as a WBE or MBE. Firms performing less than three million dollars in highway contracts for four consecutive years may be recertified for additional five-year periods based upon recertification reviews by the department.

(C) To achieve the set-asides set forth in subsection (A), the department shall advertise a number of highway construction projects at each regularly scheduled highway letting to be bid exclusively by MBEs and WBEs. The total annual value of those projects awarded must equal at least ten percent of total state source highway funds expended in each fiscal year, or otherwise documented as described in subsection (D). Projects must be awarded when the lowest responsive and responsible bidder submits a bid within ten percent of the official engineer's estimate. If the lowest responsive bid exceeds the engineer's estimate by more than ten percent, the department may enter into negotiation with the low bidder making reasonable changes in the plans and specifications as necessary to bring the contract price within the ten percent range. If the low bidder agrees to the changes and the revised contract price, the contract must be awarded to the low bidder at the revised price. If the low bidder can show just cause for his bid exceeding the ten percent range, the department may award the contract without making any changes in the plans and specifications or the contract price. If the department fails to award any advertised project, that project may be readvertised through the normal bid process and must not be readvertised for the purpose of achieving the set-asides.

(D) If no MBE or WBE firms certified pursuant to this section are available to perform a contract, the department shall verify and record this fact, and the verification must be preserved in department records.

(E) To facilitate implementation of this section, the department may waive bonding requirements for contracts let pursuant to this section with estimated construction costs not exceeding two hundred fifty thousand dollars a contract, and any contract set aside and awarded to any MBE or WBE contractor without bonding shall provide expressly that termination of the contract for default of the contractor renders the contractor ineligible for any further department nonbonded contracts for a minimum period of two years from the date of the notice. The department shall act as bonding company when bonding requirements have been waived. Any claims brought by subcontractors or suppliers in connection with nonbonded projects must be heard by the Department Claims Committee and all legitimate claims must be paid by the department. The committee shall take into account circumstances such as unsettled payments and disputes with the department or other circumstances that are beyond the MBE/WBEs control. Claims resulting in monetary settlements shall render the MBE/WBEs ineligible for any further department nonbonded projects until the MBE/WBE has reimbursed or has made acceptable arrangements to reimburse the department for the amount due as a result of the settlement.

(F) In awarding any contract pursuant to this section, preference must be given to an otherwise eligible South Carolina contractor submitting a responsible bid not exceeding an otherwise eligible out-of-state contractor's low bid by two and one-half percent.

(G) The department shall establish written guidelines to be used in the selection and design of projects awarded under this section. Those guidelines shall outline the types of projects best suited for this program and other related criteria.

(H) When a MBE or WBE receives a contract, the department shall furnish a letter, upon request, stating the dollar value and duration of, and other information about the contract, which may be used by the MBE or WBE in negotiating lines of credit with lending institutions.

(I) The department shall issue an annual report listing all contracts awarded pursuant to this section. That report must also include a listing of all contracts and subcontracts awarded pursuant to Section 106(C) of the Federal Surface Transportation Act of 1987 (STAA-1987; P.L. 100-17, Section 106(c)). The listings must be both chronological and by name of participating firms. Entries must include file numbers, locations, and dollar amounts. The report must also contain information relating to canceled contracts and subcontracts, subcontractor substitutions, and final payments to MBE/WBEs.

(J) Any MBE or WBE acting as a prime contractor shall perform at least thirty percent of the work with his own forces. If thirty percent of the work is performed with his own forces, the total amount of the contract is counted toward the MBE/WBE set-asides. If less than thirty percent is performed by the MBE/WBE, then only that portion performed by the MBE/WBE is counted toward the set-asides.

(K) The department shall make available technical assistance for MBEs and WBEs for not less than three hundred thousand dollars. Any of these funds awarded to small consulting firms owned and controlled by MBEs or WBEs may count toward the set-asides established in subsection (A) of this section. The selected firms must be South Carolina based and experienced in assisting with the development of minority firms.

(L) Technical assistance provided under subsection (K) must include written and verbal instruction on competitive bidding, management techniques, and general business operations. Firms certified under this section must be represented by a company officer in at least twenty hours of continuing education a year in order to remain certified. The department shall implement a system that will designate a lead engineer to work with MBE/WBEs. This engineer shall work with the office of compliance, the supportive services contractor, and with the department's engineers to provide early technical assistance to MBE/WBEs with contracts in each highway district. The support must include professional and technical assistance aimed toward meeting the standards, the specifications, the timing, quality, and other requirements of their contracts. The department also shall endeavor to utilize the expertise of established highway, bridge, and building contractors when providing technical and support services.

(M) Any contracts awarded through the normal bid process to certified MBEs or WBEs may count toward the set-asides. Subcontracts entered into between prime contractors and certified MBE/WBEs without regard to these provisions may be counted toward the set-asides outlined in subsection (A) of this section if these subcontracts are verified through the department records.

(N) If any part or provision of this section is declared to be unconstitutional or unenforceable by a court of competent jurisdiction of this State, the court's decision, nevertheless, has no effect on the constitutionality, validity, and enforceability of the other parts and provisions of this section which are considered severable.

(O) Within one hundred twenty days of the effective date of this section the department shall promulgate and implement regulations to administer the provisions of this section.