

[OFFICIAL COPY REPRINT]

SENATE, No. 886

STATE OF NEW JERSEY

INTRODUCED JANUARY 19, 1982

By Senator LIPMAN

Referred to Committee on State Government, Federal and
Interstate Relations and Veterans Affairs

AN ACT concerning the designation of certain State purchases and
construction contracts as small business set-asides and supple-
menting Title 52 of the Revised Statutes.

1 BE IT ENACTED *by the Senate and General Assembly of the State*
2 *of New Jersey:*

1 1. This act shall be known and may be cited as the "Small
2 Business Set-Aside Act."

1 2. The Legislature declares that the existence of a strong and
2 healthy free enterprise system is directly related to the well-being
3 and competitive strength of small business concerns and to the
4 opportunity for small business to have free entry into business, to
5 grow and to expand; and finds that the State must ensure that a
6 fair proportion of the State's total purchases and contracts for
7 construction, property and services is placed with small business
8 concerns.

1 3. As used in this act:

2 a. "Contracting agency" means the State or any board, com-
3 mission, committee, authority or agency of the State.

4 b. "Chief" means the Chief of the Office of Small Business
5 Assistance.

6 c. "Department" means the Department of Commerce and Eco-
7 nomic Development.

8 d. "Office" means the Office of Small Business Assistance in the
9 ***[Division of Economic Development in the]*** Department of Com-
10 merce and Economic Development.

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in the above bill
is not enacted and is intended to be omitted in the law.

Matter printed in italics *thus* is new matter.

Matter enclosed in asterisks or stars has been adopted as follows:

*—Assembly amendments adopted September 30, 1982.

**—Senate amendments adopted December 20, 1982.

***—Senate amendments adopted in accordance with Governor's recommenda-
tions December 8, 1983.

11 e. "Small business" means a business which has its principal
12 place of business in the State, is independently owned and operated
13 and meets all other qualifications as may be established in accord-
14 ance with P. L. 1981, c. 283 (C. 52:27H-21.1 et seq.).

15 f. "Small business set-aside contract" means (1) a contract for
16 goods, equipment, construction or services which is designated as
17 a contract with respect to which bids are invited and accepted only
18 from small businesses, or (2) a portion of a contract when that
19 portion has been so designated.

1 4. Notwithstanding the provisions of any State bidding or public
2 contracts laws to the contrary, contracting agencies, in consultation
3 with the office, shall designate a contract, or a portion thereof,
4 of goods, equipment, construction or services to be awarded by a
5 contracting agency as a small business set-aside contract, whenever
6 there is a reasonable expectation that bids may be obtained from at
7 least three qualified small businesses capable of furnishing the
8 desired goods, equipment, construction or services at a fair and
9 reasonable price. The designation shall be made prior to the
10 advertisement for bids.

1 5. There is established the goal that contracting agencies set
2 aside at least 15% of their contracts for small businesses. This goal
3 may be attained by the direct designation of prime contracts for
4 small business or, in the case of a prime contract not directly desig-
5 nated for small business, by requiring that a portion of such a
6 prime contract be subcontracted to a small business. Each contract-
7 ing agency shall make a good faith effort to attain the goal estab-
8 lished in this section.

1 6. If the chief and the contracting agency disagree as to whether
2 the small business set-aside is appropriate for a contract or a
3 portion of a contract, the dispute shall, within 7 days, be submitted
4 to the State Treasurer for final determination.

1 7. The advertisement for small business bids shall indicate the
2 invitation to bid as a small business set-aside. The advertisement
3 shall be in such newspaper or newspapers as will best give notice
4 thereof to small business bidders and shall be sufficiently in advance
5 of the purchase or contract to promote competitive bidding among
6 small businesses. The newspaper or newspapers in which the
7 advertisement shall appear shall be selected by the contracting
8 agency in consultation with the office. The advertisement shall
9 designate the time and place at which sealed proposals shall be
10 received and publicly opened and read, the amount of the cash or
11 certified check, if any, which shall accompany each bid and such
12 other items as the office may deem proper. The advertisement shall

13 be made pursuant to the procedure set forth in the law governing
14 State contracts, where this act is inconsistent with that law.

1 8. The department may establish reasonable regulations appro-
2 priate for controlling the qualifications of prospective small busi-
3 ness bidders according to the financial ability and experience of the
4 bidders and the capital and equipment available to them pursuant
5 to and reasonably related to the class or category of work to be
6 performed or materials and supplies to be furnished or hired in
7 the performance of any subcontract, and may require each bidder
8 to furnish a statement thereof. No qualification rating of any
9 bidder shall be influenced by his race, creed, color, national origin,
10 ancestry, age, marital status or sex, nor shall undue preferences
11 be created.

12 ***[In lieu of adopting any qualification regulations under this
13 section, the department may delegate by regulation to the Depart-
14 ment of the Treasury or other appropriate State agency with its
15 consent, the authority to qualify bidders subject to this act. Regu-
16 lations shall be proposed and adopted pursuant to the "Adminis-
17 trative Procedure Act," P. L. 1968, c. 410 (C. 52:14B-1 et seq.).]***

1 9. When a contract or portion thereof has been designated as
2 a small business set-aside, invitations for bids shall be confined
3 to small businesses and bids from other bidders shall be rejected.
4 The purchase, contract or expenditure of funds shall be awarded
5 ***[to the lowest responsible bidder]*** *pursuant to section 7*
6 *of P. L. 1954, c. 48 (C. 52:34-12)**** among the small businesses,
6A considering formality with specifications and terms, in accordance
7 with regulations published by the department. The award shall
8 be made with reasonable promptness by the contracting agency
9 with written notice to the office.

1 10. If the contracting agency determines that the acceptance of
2 the lowest responsible bid will result in the payment of an un-
3 reasonable price, the contracting agency shall reject all bids and
4 withdraw the designation of small business set-aside contracts.
5 Small businesses shall be notified in writing of the small business
6 set-aside cancellation, the reasons for the rejection and the State's
7 intent to resolicit bids on an unrestricted basis. The canceled
8 solicitation shall not be counted as a set-aside for the purpose of
9 attaining established set-aside goals.

1 11. Each contracting agency shall submit an annual report to the
2 office **according to the schedule announced by the office**. This
2A report shall include the following information:

3 a. The total dollar value and number of set-aside contracts
4 awarded to small businesses and the percentage of the total State

5 procurements by the contracting agency the figure of total dollar
6 value and the number of set-asides reflects;

7 b. The types and sizes of businesses receiving set-aside awards
8 and the nature of the purchases and contracts; and

9 c. The efforts made to publicize and promote the program.

10 The office shall receive and analyze the reports submitted by the
11 contracting agencies and, utilizing this data, submit an annual
12 report to the Commissioner of the Department of Commerce and
13 Economic Development and the Governor showing the progress
14 being made toward the objectives and goals of this act during the
15 preceding fiscal year.

1 12. ***[**The office shall maintain a list of businesses which meet the
2 qualifications as small businesses as established in accordance with
3 the provisions of P. L. 1981, c. 283 (C. 52:27H-21.1 et seq.) and
4 shall review the list annually to determine which of those businesses
5 continue to qualify as small businesses. The office shall notify the
6 department of those businesses which no longer qualify as small
7 businesses.]* **The office shall monitor the development of bidders
8 lists in each contracting department or agency within State govern-
9 ment and shall provide guidance and expertise in the compilation
10 and qualification of bidders for the bidders lists. All bidders shall
11 meet the qualifications as "small business" as established in
12 accordance with the Small Business Size Standards for Procure-
13 ment of the New Jersey Office of Small Business Assistance in the
14 Department of Commerce and Economic Development. The office
15 shall review the lists annually with each contracting department
16 to determine which of those businesses continue to qualify as small
17 businesses.** The department shall establish a procedure whereby
18 the designation of a business as a small business may be challenged
19 by a third party. The procedure shall include proper notice and a
20 hearing for all parties concerned **before the bid is awarded**.

1 13. The department and office shall consult regularly with repre-
2 sentatives of the contracting ***[industry]*** ****[*agency*]**** ****in-**
3 **dustry**** for the purpose of implementing the provisions of this
4 act. These consultations shall take place ***[no less than once every**
5 **3 months]*** ****[*annually*]**** ****no less than once every six**
6 **months.****

1 14. A business which has been classified as a small business on
2 the basis of incorrect information supplied by it and which has
3 been awarded a contract to which it would not otherwise have
4 been entitled under this act shall:

5 a. Pay to the State any difference between the contract amount
6 and what the State's cost would have been if the contract had not
7 been awarded in accordance with the provisions of this act;

8 b. In addition to the amount due under subsection a., be assessed
 9 a penalty in an amount of not more than 10% of the amount of the
 10 contract involved; and

11 c. Be ineligible to transact any business with the State for a
 12 period of not less than 3 months and not more than 24 months.

13 All payments to the State pursuant to subsection a. of this section
 14 shall be deposited in the fund out of which the contract involved
 15 was awarded. All payments to the State pursuant to subsection b.
 16 of this section shall be deposited in the General State Fund.

1 ***[15. The department is authorized to promulgate rules and
 2 regulations, pursuant to the "Administrative Procedure Act,"
 3 P. L. 1968, c. 410 (C. 52:14B-1 et seq.), to effectuate the purposes
 4 of this act.]*** **15. *The Department of the Treasury shall*
 5 *develop such other regulations as may be necessary to interpret*
 6 *and implement all provisions of this act, including rules govern-*
 7 *ing the determination of which type or class of contracts is covered*
 8 *by this act.****

1 16. This act shall take effect ***[immediately]*** * *****[120]*****
 2 ***180*** days after enactment*.

STATEMENT

The purpose of this bill is to require contracting agencies of the State, under certain conditions, to allocate a proportion of State contracts to small businesses. The short title of the bill is the "Small Business Set-Aside Act." Its language is designed to facilitate small business set-aside contracts while at the same time maintaining State standards established pursuant to P. L. 1954, c. 48 (C. 52:34-6 et seq.) for open competitive bidding which will give the State the best value for its expenditures.

For the purpose of the bill a "small business" is one which has its principal place of business in the State, is independently owned and operated, and meets the qualifications for a small business established in accordance with P. L. 1981, c. 283 (C. 52:27II-21.1 et seq.).

The bill will require "contracting agencies" to set aside a contract for small businesses "whenever there is a reasonable expectation that bids may be obtained from at least three qualified small businesses capable of furnishing the desired goods, equipment, construction or services at a fair and reasonable price." If, however, the acceptance of the lowest responsible bid from a small business would result in an unreasonable price, then all bids shall be rejected and shall be resolicited. At this point the designation of the contract as a small business set-aside is withdrawn.

The bill provides that a business which has been classified as a small business on the basis of incorrect information which the business itself has provided, and which has been awarded a contract to which it is not entitled, will be subject to certain penalties.

The business which provides incorrect information must pay to the State any difference between the amount of the contract awarded pursuant to the act and what the amount of the contract would have been had it not been awarded pursuant to the act. In addition, the business will be assessed a penalty in the amount of not more than 10% of the contract. Such a business shall be ineligible to transact any business with the State for a period of not less than 3 but not more than 24 months.

ASSEMBLY STATE GOVERNMENT, CIVIL SERVICE,
ELECTIONS, PENSIONS AND VETERANS AFFAIRS
COMMITTEE

STATEMENT TO
SENATE, No. 886

STATE OF NEW JERSEY

DATED: JUNE 24, 1982

The Senate State Government Committee statement adequately explains the provisions of this bill:

This bill is identical to Senate Bill No. 3277 of the 1980-1981 session which was also sponsored by Senator Lipman. The previous bill was extensively amended in committee to reflect suggestions made by State contracting agencies and representatives of the contracting industry. Senate Bill No. 886, in its present form, contains those amendments. The previous bill, Senate Bill No. 3277, passed both Houses but was not signed by Governor Byrne.

The following statement summarizes the provisions of the bill.

The purpose of this bill is to require contracting agencies of the State, under certain conditions, to allocate a proportion of State contracts to small businesses. The short title of the bill is the "Small Business Set-Aside Act." Its language is designed to facilitate small business set-aside contracts while at the same time maintaining State standards established pursuant to P. L. 1954, c. 48 (C. 52:34-6 et seq.) for open competitive bidding which will give the State the best value for its expenditures.

For the purpose of the bill a "small business" is one which has its principal place of business in the State, is independently owned and operated, and meets the qualifications for a small business established in accordance with P. L. 1981, c. 283 (C. 52:27H-21.1 et seq.).

The bill will require "contracting agencies" to set aside a contract for small businesses "whenever there is a reasonable expectation that bids may be obtained from at least three qualified small businesses capable of furnishing the desired goods, equipment, construction or services at a fair and reasonable price." If, however, the acceptance of the lowest responsible bid from a small business would result in an unreasonable price, then all bids shall be rejected and shall be re-solicited. At this point the designation of the contract as a small business set-aside is withdrawn.

The bill provides that a business which has been classified as a small business on the basis of incorrect information which the business itself has provided, and which has been awarded a contract to which it is not entitled, will be subject to certain penalties.

The business which provides incorrect information must pay to the State any difference between the amount of the contract awarded pursuant to the act and what the amount of the contract would have been had it not been awarded pursuant to the act. In addition, the business will be assessed a penalty in the amount of not more than 10% of the contract. Such a business shall be ineligible to transact any business with the State for a period of not less than three but not more than 24 months.

The bill also provides that the Department of Commerce and Economic Development and the Office of Small Business Assistance consult with representatives of the contracting industry at least once every three months for the purpose of implementing the provisions of the act.

SENATE STATE GOVERNMENT, FEDERAL AND
INTERSTATE RELATIONS AND VETERANS
AFFAIRS COMMITTEE

STATEMENT TO
SENATE, No. 886

STATE OF NEW JERSEY

DATED: MARCH 8, 1982

This bill is identical to Senate Bill No. 3277 of the 1980-1981 session which was also sponsored by Senator Lipman. The previous bill was extensively amended in committee to reflect suggestions made by State contracting agencies and representatives of the contracting industry. Senate Bill No. 886, in its present form, contains those amendments. The previous bill, Senate Bill No. 3277, passed both Houses but was not signed by Governor Byrne.

The following statement summarizes the provisions of the bill.

The purpose of this bill is to require contracting agencies of the State, under certain conditions, to allocate a proportion of State contracts to small businesses. The short title of the bill is the "Small Business Set-Aside Act." Its language is designed to facilitate small business set-aside contracts while at the same time maintaining State standards established pursuant to P. L. 1954, c. 48 (C. 52:34-6 et seq.) for open competitive bidding which will give the State the best value for its expenditures.

For the purpose of the bill a "small business" is one which has its principal place of business in the State, is independently owned and operated, and meets the qualifications for a small business established in accordance with P. L. 1981, c. 283 (C. 52:27H-21.1 et seq.).

The bill will require "contracting agencies" to set aside a contract for small businesses "whenever there is a reasonable expectation that bids may be obtained from at least three qualified small businesses capable of furnishing the desired goods, equipment, construction or services at a fair and reasonable price." If, however, the acceptance of the lowest responsible bid from a small business would result in an unreasonable price, then all bids shall be rejected and shall be resolicited. At this point the designation of the contract as a small business set-aside is withdrawn.

The bill provides that a business which has been classified as a small business on the basis of incorrect information which the business itself has provided, and which has been awarded a contract to which it is not entitled, will be subject to certain penalties.

The business which provides incorrect information must pay to the State any difference between the amount of the contract awarded pursuant to the act and what the amount of the contract would have been had it not been awarded pursuant to the act. In addition, the business will be assessed a penalty in the amount of not more than 10% of the contract. Such a business shall be ineligible to transact any business with the State for a period of not less than 3 but not more than 24 months.

The bill also provides that the Department of Commerce and Economic Development and the Office of Small Business Assistance consult with representatives of the contracting industry at least once every 3 months for the purpose of implementing the provisions of the act.

STATE OF NEW JERSEY
EXECUTIVE DEPARTMENT

July 11, 1983

SENATE BILL NO. 886 (Senate Reprint)

To the Senate:

Pursuant to Article V, Section 1, paragraph 14 of the Constitution of New Jersey, I herewith return Senate Bill No. 886 (Senate Reprint) with my recommendations for reconsideration.

The purpose of this bill is to require contracting agencies of the State, under certain conditions, to allocate a proportion of State contracts to small businesses. For the purpose of this bill a "small business" is one which has its principal place of business in the State, is independently owned and operated, and meets the qualifications for a small business established in accordance with N.J.S. 52:27H-21.1 et seq., which establishes employee number and gross receipts limitations. This bill establishes the goal that contracting agencies set aside at least 15% of their contracts for small businesses.

While entirely supportive of the concept of promoting awards of contracts to qualified small businesses, I have some reservations about the legislation's allocation of administrative responsibility between the Department of Commerce and Economic Development and the Department of Treasury.

Paragraph 5 of this bill indicates that 15% of State contracts are to be designated for small businesses. There is no indication, however, whether that definition means 15% of the total dollar value of all State contracts, or 15% of all contracts by general subject category. Even if this were defined, it would be impossible to accurately determine the dollar volume spent under small business set asides, since substantial portions of State purchasing dollars are spent under delegated purchasing authority directly by using agencies.

Paragraph 14 of this bill establishes penalties to be levied against those vendors who supply incorrect information about their small business status. The first penalty is that they will have to pay the difference between the contract as awarded under the set-aside and what the State would have paid under a normal competitive situation. It does not appear, however, that this type of comparison can be achieved, since, according to the bill's own terms, we will preclude all but qualified small businesses from bidding.

Paragraph 10 of this bill provides that if a contracting agency determines that the acceptance of the lowest responsible bid will result in payment of an unreasonable price, the contracting agency "shall" reject all bids and withdraw

STATE OF NEW JERSEY
EXECUTIVE DEPARTMENT

the designation of small business set-aside contracts. Similar to the problems existent in the penalty provision of this bill, there will be no method to determine if small businesses bids are unreasonable where there are no other bids to compare them to.

The problems listed above can be clarified through the promulgation of appropriate regulations. Because of the need for close coordination between the Departments of Commerce and Economic Development and the Treasury in implementing S-886, I feel that the responsibilities of each ought to be clarified.

Accordingly, I herewith return Senate Bill No. 886 (Senate Reprint) and recommend that it be amended as follows:

Page 3, Section 8, lines 12 through 17: Delete in entirety.

Page 3, Section 9, line 5: Delete "to the lowest responsible bidder"
insert "pursuant to C.52:34-12"

Page 5, Section 15, lines 1 through 4: Delete in entirety. Insert
new section 15.

"15. The Department of the Treasury shall develop such other regulations as may be necessary to interpret and implement all provisions of this act, including rules governing the determination of which type or class of contracts is covered by this act."

Page 5, Section 16, line 1: Delete "120" insert "180"

Respectfully,

/s/ Thomas H. Kean

GOVERNOR

[seal]

cc: [redacted]

/s/ A. Craig Edwards
Chief Counsel

Tuesday, January 17, 1984

Page Two

The funds come from the settlement in the Federal Government lawsuit against Exxon Corporation for overcharging. The \$4 million appropriated here is part of \$7.5 million already received by New Jersey. The other \$3.5 million was appropriated to the Department of Energy. New Jersey stands to eventually receive a total of \$60 million in overcharge funds.

S-886, sponsored by State Senator Wynona M. Lipman, D-Essex which requires State contracting agencies, under some conditions to allocate a proportion of State contracts to small businesses. The bill was conditionally vetoed by the Governor, who recommended clarification of responsibilities between the Departments of Treasury and Commerce and Economic Development.

S-1674, also sponsored by Senator Lipman which revises the procedures for licensing child care centers. The bill also creates a 15-member Council on Child Care within the Department of Human Services and the Department of Community Affairs.

S-3744, sponsored by State Senator Gerald R. Stockman, D-Mercer, which authorizes a United States Magistrate to solemnize marriages in New Jersey.

S-1965, sponsored by State Senator James R. Hurley, R-Cumberland, which provides for the incorporation of certain township sewerage districts, provides for election of commissioners and establishes their powers.

S-3578, sponsored by State Senator John F. Russo, D-Ocean which permits the governing bodies of fire districts to provide for and authorize advance payments to officers and employees for official travel expenses.

S-3798, sponsored by State Senator Walter R. Foran, R-Hunterdon, which appropriates \$288,743 in federal funds to the Department of Law and Public Safety for Marine Police operations. The bill was merged with A-4121, sponsored by Assemblyman Anthony M. Villane, Jr., R-Monmouth.

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