

SENATE No. 1104

By Mr. Bertonazzi, a petition (accompanied by bill, Senate, No. 1104) of Louis P. Bertonazzi, Sharon M. Pollard, Philip L. Shea and Timothy A. Bassett for legislation to establish the small contractors' resource program of Massachusetts and a fund to administer said program. State Administration.

The Commonwealth of Massachusetts

In the Year One Thousand Nine Hundred and Eighty-two.

AN ACT ESTABLISHING THE SMALL CONTRACTORS' RESOURCE PROGRAM
OF MASSACHUSETTS, AND FUND.

PREAMBLE

Whereas, state and local government contracts, whether for construction and public works, or for the procurement of goods and services, should be awarded so as to acquire quality goods and services at a minimum cost, and this result is best obtained through fair and open competition among bidders who have full opportunity to compete on an equal basis, and

Whereas, it is generally acknowledged that socially and economically disadvantaged entrepreneurs face a multitude of problems as they attempt to obtain working capital and bonding so that they may compete in contracting activities of the state and its localities, and these problems in effect act as a bar and do not allow them to compete for governmental contracts; and, consequently, it is only through assisting the socially and economically disadvantaged entrepreneur with his or her problems in obtaining working capital and bonding that we can increase the level of competition for government contracts and thus protect the interests of the taxpayers of the Commonwealth;

Therefore, it is the intention of this act to address these problems and to assist the socially and economically disadvantaged entrepreneur in securing both adequate working capital and the requisite bonding to bid, start, continue, and complete the project awarded by the governmental unit.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. Definitions.

2 As used in this set the following words and terms have the
3 following meanings: —

4 (1) "Bid Guarantee": A firm commitment such as a bid
5 bond, certified check, or other negotiable instrument accom-
6 panying a bid as assurance that the bidder will, upon accept-
7 ance of his bid, execute such contractual documents as may
8 be required within the time specified.

9 (2) "Performance Bond": A guarantee executed in con-
10 nection with a contract to secure the fulfillment of all the
11 contractors' obligations under the contract.

12 (3) "Payment Bond": A guarantee in connection with a
13 contract to assume payment as required by law of all per-
14 sons supplying labor and material in the execution of the
15 work provided for in the contract.

16 (4) "Surety": The person or business entity who: —

17 (a) Under the terms of a bid bond, undertakes to pay a
18 sum of money to the obligee in the event the principal
19 breaches the condition of the bond;

20 (b) Under the terms of a performance bond, undertakes to
21 incur the cost of fulfilling the terms of the contract in the
22 event the principal breaches the conditions of the contract; or

23 (c) Under the terms of the payment bond, undertakes to
24 make payment to all persons supplying labor and material in
25 the prosecution of the work provided for in the contract if
26 the principal fails to make prompt payment.

27 (5) "Obligee": —

28 (a) In the case of a bid bond, the person requesting the
29 bids for the performance of the contract; or

30 (b) In the case of a payment or performance bond, the
31 person who has contracted with the principal for the comple-
32 tion of the contract and to whom the obligation of the surety
33 runs in the event of a breach by the principal of the condi-
34 tions of a payment or performance bond.

35 (6) "Principal": —

36 (a) In the case of a bid bond, a person or business entity

37 bidding for the award of a contract; or

38 (b) The person or business entity primarily liable to com-
39 plete a contract for the obligee or to make payments to other
40 persons in respect of such contracts, and for whose perform-
41 ance of his obligation the surety is bound under the terms of
42 the payment or performance bond. A principal may be a
43 prime contractor or a subcontractor.

44 (7) "Prime Contractor": The person or business entity
45 with whom the obligee has contracted to perform the con-
46 tract.

47 (8) "Subcontractor": A person or business entity who has
48 contracted with a prime contractor or with another subcon-
49 tractor to perform the contract.

50 (9) "Socially and Economically Disadvantaged": —

51 (a) Socially disadvantaged individuals are those who have
52 been subjected to racial or ethnic prejudice as a member of
53 a group without regard to their individual qualities. Such
54 groups, include but are not limited to Black Americans, His-
55 panic Americans, Native Americans, and other minorities.

56 (b) Economically disadvantaged individuals are those so-
57 cially disadvantaged individuals whose ability to compete in
58 the free enterprise system has been impaired due to dimin-
59 ished capital and credit opportunities as compared to others
60 in the same business area who are not socially disadvantaged.
61 In determining the degree of diminished credit and capital
62 opportunities the Authority shall consider, but not be lim-
63 ited to the assets and net worth of such socially disadvan-
64 tagged individual.

65 (10) "Authority": The Massachusetts Small Business Au-
66 thority.

67 (11) "Bank": The Massachusetts Small Business Develop-
68 ment Bank.

69 (12) "Managerial Assistance": Assistance in developing
70 the basic managerial skills needed in operating the activities
71 of most business entities. Such skills may include, but are not
72 limited to basic bookkeeping and accounting; basic record
73 keeping; personnel management and general office proce-
74 dures.

75 (13) "Technical Assistance": Assistance in understanding

76 the basic technicalities of the construction industry, such as,
77 but not limited to, estimating; bid preparation; preparation
78 of bonding application; scheduling; reading plans and speci-
79 fications; purchasing supplies and interpreting construction
80 contract agreements.

1 SECTION 2. The Small Contractors Resource Program of
2 Massachusetts and Fund.

3 (A) There is hereby created the Massachusetts Small Con-
4 tractors Resource Program within the Massachusetts Small
5 Business Authority which shall manage the Small Contrac-
6 tors Resource Fund. This fund is to be held in trust by the
7 Massachusetts Small Business Development Bank and shall be
8 available to the Authority without fiscal year limitations as
9 a revolving fund for the purposes of this act. All amounts,
10 including all monies, property or assets derived by the Au-
11 thority from its operations under this act shall be deposited
12 in the fund. All expenses and payments, pursuant to opera-
13 tion of the Program under this act shall be paid for by the
14 fund.

15 (B) The Authority may borrow money and incur indebted-
16 ness on behalf of the state of Massachusetts in the aggregate
17 principal amount of \$5,000,000. This indebtedness shall be
18 evidenced by the issuance and sale of state general obligation
19 bonds authorized by resolution of the Massachusetts General
20 Court and issued, sold and delivered in accordance with the
21 laws of the Commonwealth. The bonds may be sold as a
22 single issue, or may be consolidated and sold as part of a
23 single issue, or maybe consolidated and sold as part of a single
24 issue of bonds.

25 (C) Monies in the fund not needed currently to meet the
26 expenses and obligations of the Program shall be deposited
27 with the Bank to the credit of the fund and invested in such
28 a manner as is provided by statute.

29 (D) The Bank shall render monthly reports to the Author-
30 ity and the Joint Standing Committee on Small Business of
31 the Massachusetts General Court advising as to the status of
32 the funds invested, the market value of the assets in the fund
33 as of the date such statement is rendered, and the interest

34 received from the investments during the period covered by
35 the report.

36 (E) The Authority shall fix a uniform fee which it deems
37 as reasonable and necessary for any guarantee issued under
38 this act, to be payable at such times and under such condi-
39 tions as may be determined by the Authority. Such fee shall
40 be periodically reviewed in order to insure that the lowest fee
41 that experience under the program shows to be justified will
42 be placed into effect.

43 (F) Any contract of guarantee under this act shall obli-
44 gate the state to pay to the surety or financial institution a
45 sum not to exceed 90% of the loss incurred as a result of the
46 breach by the principal of its contract.

47 (G) Any contract of guarantee under this section shall
48 obligate the surety to pay the Authority such portions of the
49 bond fee as the Authority determines to be reasonable in
50 light of the relative risks and costs involved.

51 (H) Where the Program has provided a loan to any per-
52 son who is the principal on any bond guarantee under this
53 act, the loan shall be subordinated to any claims, related to
54 such guaranteed transaction, which the surety may have
55 against the principal.

56 (I) The Program shall provide loans or loan guarantees for
57 funds to be used as working capital.

58 (J) The Program may extend a loan or a loan guarantee
59 for projects financed by federal, state or local government,
60 where the individual has applied for such financing but has
61 been rejected by two or more financial institutions.

1 SECTION 3. Program Administration.

2 (A) The Director of the Office of Minority Small Business
3 Affairs of the Massachusetts Small Business Authority shall
4 be appointed manager of the Program by the Authority, and
5 his or her tenure of office shall be at the pleasure of the
6 Authority.

7 (B) The Director-General of the Massachusetts Small Busi-
8 ness Authority shall be the chief administrative officer for
9 the Program and as such shall direct and supervise the ad-
10 ministrative affairs and technical activities of the Program

11 in accordance with the rules, regulations and policies as set
12 forth by the Authority. It is the duty of the manager among
13 other things: —

14 (1) To attend all meetings of the Program, and to act as
15 its secretary and keep minutes of all its proceedings;

16 (2) To approve all accounts for salaries, per diem pay-
17 ments, and allowable expenses incidental to the operation of
18 the Program; and

19 (3) To perform such other duties as may be directed by
20 the Authority.

1 SECTION 4. The Program may assist eligible applicants in
2 the following manner: —

3 (A) The Program may directly loan an eligible applicant
4 not more than \$500,000. The duration of the loan may not
5 exceed the term of the contract. The Program shall charge
6 an interest rate that is 1% higher than the interest rate paid
7 on the latest general obligation bonds issued prior to the date
8 of the loan commitment.

9 (B) The Program may guarantee a loan made to an eligi-
10 ble applicant. The terms and conditions of a loan guarantee
11 are within the sole discretion of the Program. The Program
12 may not guaranty more than \$500,000 of a loan. The dura-
13 tion of a loan guarantee may not exceed the term of the con-
14 tract.

15 (C) The Program may guaranty any surety against loss,
16 as herein provided, as the result of the breach of the terms of
17 a bid guarantee, payment or performance bond by the prin-
18 cipal on any contract.

19 (D) Section 4 (A), (B), and (C) above are subject to the
20 following conditions: —

21 (1) The person who would be the principal on a loan, loan
22 guarantee and/or bond guarantee is a contractor or subcon-
23 tractor who has been doing business in the state and has his
24 principal place of business in the state for at least one year
25 prior to the date of application.

26 (2) Such person's gross revenues for the most recently
27 completed fiscal year were not in excess of \$1,000,000.

28 (3) Such person can demonstrate independence and con-

29 trol.

30 (4) Such person is not able to obtain such loan, loan guar-
31 antee, and/or bond on reasonable terms and conditions with-
32 out the assistance provided by this act.

33 (5) The Authority determines that there is a reasonable
34 expectation that such person will perform the covenants and
35 conditions of the contract with respect to which the loan, loan
36 guarantee and/or bond guarantee is required.

37 (6) The contract meets requirements established by the
38 Authority for feasibility of successful completion and reason-
39 ableness of cost.

40 (7) If necessary, applicants' participation in managerial
41 and technical assistance program.

1 SECTION 5. Subject to the authority of the Authority, the
2 Program may: —

3 (A) Adopt by-laws for the regulation of its affairs and the
4 conduct of its business;

5 (B) Maintain offices in the state at places designated by the
6 Authority;

7 (C) Sue or be sued in its own name and plead and be im-
8 pleaded; service of process in any action shall be made by
9 service upon the manager of the Program either in hand or
10 by leaving a copy of the process at the office of the manager
11 with someone having charge thereof;

12 (D) Employ the assistance, agents and other employees as
13 may be necessary and desirable for its purposes; contract for
14 and engage consultants; and utilize the services of other gov-
15 ernmental agencies;

16 (E) Accept from a federal agency loans or grants for use
17 in carrying out its purposes and enter into agreement with
18 the agency respecting any loans and grants; and

19 (F) Do all acts and things necessary or convenient to carry
20 out powers granted in this act.

1 SECTION 6. An applicant shall follow the procedures in this
2 section, in seeking the benefits of this act.

3 (A) An applicant shall submit to the Program a letter of
4 intent. The letter shall contain a brief description of the gov-
5 ernment project, and an estimate of the projected cost.

6 (B) The applicant shall submit to the Program an appli-
7 cation, in writing, on a form supplied by the Program. The
8 application shall include the following information: —

9 (1) A detailed description of the complete scope of the gov-
10 ernment project, including an itemization of the known and
11 estimated costs;

12 (2) Information relating to the applicant's financial status,
13 including a current audited balance sheet, a profit and loss
14 statement and credit references;

15 (3) The total amount of investment required under the gov-
16 ernment contract;

17 (4) The funds available to the applicant without the bene-
18 fits of this act;

19 (5) Financial support sought from the Program under this
20 act; and

21 (6) Information relating to the applicant's inability to ac-
22 quire adequate financing on reasonable terms through nor-
23 mal lending channels.

1 SECTION 7. If the Program determines that it will extend a
2 loan to an eligible applicant, it shall prepare a loan which
3 includes: —

4 (A) The loan repayment schedule, coinciding with the ap-
5 plicant's draw from the contract;

6 (B) A requirement that all payments made to the appli-
7 cant shall be cosigned by the applicant and the Program man-
8 ager before funds may be released; and

9 (C) Provisions for security deemed desirable by the Pro-
10 gram including where appropriate and allowable an assign-
11 ment or lien on payment under the government contract.

1 SECTION 8. If the applicant fails to comply with the terms
2 of the agreement, or the requirements of this act, the Pro-
3 gram after reasonable notice to the contractor, may withhold
4 further payments to the applicant, pending compliance or ex-
5 ercise other remedies as provided by the loan agreement.

1 SECTION 9. The Massachusetts Small Business Authority
2 may promulgate regulations as are necessary to carry out the
3 purposes of this act.