

By Mr. Nickinello of Natick, petition of the Construction Industries of Massachusetts, Inc., relative to set-aside provisions in certain construction contracts authorized by the Commonwealth and its political subdivision. State Administration.

**The Commonwealth of Massachusetts**

In the Year One Thousand Nine Hundred and Eighty.

AN ACT RELATIVE TO SET-ASIDE PROVISIONS IN CERTAIN CONSTRUCTION CONTRACTS AUTHORIZED BY THE COMMONWEALTH AND ITS POLITICAL SUBDIVISIONS.

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

1 Chapter twenty-nine of the General Laws is hereby amended by  
2 inserting after section eight C the following new section:

3 *Section 8D.* For the purposes of this section, the following  
4 words and phrases shall have the following meanings:—

5 “Minority persons” — Citizens of the United States who are  
6 Black, Hispanic, Oriental, American Indian, Eskimo, Aleut or  
7 Cape Verdean.

8 “Minority Business Enterprise” — A business at least fifty-one  
9 percent of which is owned and controlled by minority persons, or,  
10 in the case of publicly owned business, at least fifty-one percent of  
11 the stock of which is owned and controlled by minority persons,  
12 including joint ventures in which minority persons control no less  
13 than fifty percent of the combines interest in the joint venture. As  
14 used in this section, the acronym “MBE” shall have the same  
15 meaning as Minority Business Enterprise.

16 “Awarding Authority” — Any agency of the commonwealth or  
17 any county, city, town, district or political subdivision authorized  
18 to conduct construction projects under the terms of section thirty-  
19 nine M of chapter 30 of the General Laws.

20 “Minority Business Enterprise Set-Aside Program” — Any reg-  
21 ulation, order, or contract condition by an awarding authority  
22 which reserves, as either a goal, quota or any type of numerical

23 requirement a specific percentage, or range of percentages, or  
24 dollar value of a contract price as work to be performed exclusively  
25 by minority business enterprises. For the purposes of this section,  
26 the term, "MBE set-aside program" shall have the same meaning as  
27 "Minority Business Enterprise Set Aside Program."

28 "SOMBA" — The State Office of Minority Business Assistance  
29 established under section thirty-eight of chapter twenty-three A of  
30 the General Laws.

31 (a) Business enterprises which desire to be considered as MBE's  
32 for the purpose of participation in an MBE set aside program  
33 conducted by any awarding authority, shall present to SOMBA  
34 such evidence and documentation as may be necessary to establish  
35 the identity of the business enterprise as an MBE. SOMBA shall  
36 thereafter, and within thirty days of the business enterprise's sub-  
37 mission of said evidence, make a finding of fact as to whether each  
38 business enterprise submitting evidence is or is not a bona fide  
39 MBE. Not later than 90 days from the effective date of this section,  
40 SOMBA shall cause to be published and circulated to each award-  
41 ing authority a list of those business enterprises certified by  
42 SOMBA to be bona fide MBE's which may be eligible for partici-  
43 pation in any MBE set aside program, and SOMBA may from time  
44 to time amend said list to include minority business enterprises  
45 approved by SOMBA subsequent to publication of the list, or to  
46 remove businesses from the list upon their dissolution or disqualifi-  
47 cations, or upon their specific request.

48 (b) Each awarding authority which operates an MBE set aside  
49 program shall conduct an investigation of each MBE appearing on  
50 the list certified by SOMBA to determine the extent to which each  
51 company has the interest, ability to perform and competence to  
52 participate in the awarding authority's MBE set aside program.  
53 Within 90 days of the receipt of the list of certified MBE's from  
54 SOMBA, each awarding authority operating an MBE set-aside  
55 program shall publish a separate list of those MBE's listed on the  
56 SOMBA list who possess the interest, ability to perform and  
57 competence to adequately participate in its MBE set aside pro-  
58 gram. No name may be added to any awarding authority's list  
59 without prior inclusion on the list compiled by SOMBA, and the  
60 names included on each awarding authority's list shall be the sole  
61 source of MBE's which may be used as subcontractors to, in joint  
62 ventures with, or as suppliers to, any contractor seeking to comply

63 with the provisions of the MBE set aside program.

64 (c) Each awarding authority that wishes to establish an MBE  
65 set-aside program shall submit its list of eligible MBE's, together  
66 with a list of projects it intends to include in its MBE set-aside  
67 program for the next twelve months, to SOMBA, which will have  
68 the power to approve or deny such list and such plan. SOMBA may  
69 also approve any such plan with conditions or limitations, which  
70 may include a reduction of the size of a set aside program where the  
71 amounts to be set aside exceed the ability to perform of the eligible  
72 MBE's; annulment or reduction of a MBE set-aside program  
73 where a non-competitive situation in one or more sub-trades is  
74 likely to result from the MBE set-aside program; and annulment or  
75 reduction of a set-aside program where excessive costs of all or  
76 portions of a construction project are likely to accrue from the  
77 operation of the MBE set-aside program. Nothing in this section  
78 shall be construed to mean that SOMBA may impose upon any  
79 awarding authority the obligation to prepare any MBE set-aside  
80 program, nor may it be construed that SOMBA's obligation to  
81 approve or deny MBE set-aside programs extends to the right to  
82 deny any program by reason of its lack of magnitude or scope. No  
83 awarding authority, after its MBE set aside program has been  
84 submitted to SOMBA for approval, may operate the MBE set-  
85 aside program prior to receiving said approval.

86 (d) Each awarding authority shall, each year on the anniversary  
87 date of the initial approval of its MBE set aside program by  
88 SOMBA, file a report with SOMBA describing the progress of the  
89 MBE set aside program during the previous twelve months, listing  
90 the projects to be included in any continuation of the minority  
91 business set-aside program during the following twelve months,  
92 and recommending any changes or amendments to the set-aside  
93 program proposed for the following twelve months. SOMBA shall  
94 review such reports, request additional information as necessary,  
95 conduct hearings and investigations, and if SOMBA deems it to be  
96 in the public interest to do so, suspend the approval of any award-  
97 ing authority's list of eligible MBE's or its MBE set aside program.

98 (e) Each awarding authority operating an MBE set-aside pro-  
99 gram shall, upon formulation of its own list of eligible MBE's and  
100 the approval of said list by SOMBA, cause it to be published and  
101 made available to all contractors, by way of attachment to all bid  
102 documents for construction contracts on which MBE set-aside

103 provisions are to be in force. Said lists shall contain a detailed  
104 summary of each MBE's interest, ability to perform and compe-  
105 tence, including where appropriate, a record of recent construction  
106 activity where said MBE has been involved. No MBE may be  
107 utilized by any contractor for the purposes of meeting any require-  
108 ment under any MBE set-aside program, unless said MBE was  
109 entered onto the awarding authority's list of MBE's at least seven  
110 days prior to the advertisement of the contract affected by the  
111 MBE set-aside program; provided, that the prohibition so stated in  
112 this sentence shall not become effective until one year after the  
113 effective date of this section.

114 (f) The powers and duties accorded SOMBA by this section  
115 shall be inoperative whenever inconsistent with an appropriate law  
116 or regulation of the United States government.

117 (g) Any contractor who employs an MBE listed on an awarding  
118 authority's list that has been approved by SOMBA, may rely on  
119 SOMBA's certification of the MBE as bona fide, and upon the  
120 awarding authority's certification of the interest, ability to perform  
121 and competence of the MBE. In the event that subsequent to such  
122 employment in fulfillment of an MBE set aside program require-  
123 ment, said MBE is found by SOMBA to be not bona fide, or by the  
124 awarding authority to be not interested, not able to perform or not  
125 competent, the contractor shall not be liable for the effects of such  
126 discoveries, and shall be held in compliance with the requirements  
127 of the MBE set-aside program, if his compliance would be jeopard-  
128 ized solely by the decertification of said MBE.