

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2007

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HOUSE BILL 1360
Committee Substitute Favorable 5/16/07

Short Title: Small & Hist. Underutilized Bus. Contr. Act.

(Public)

Sponsors:

Referred to:

April 10, 2007

A BILL TO BE ENTITLED

1 AN ACT TO ESTABLISH THE SMALL AND HISTORICALLY UNDERUTILIZED
2 BUSINESS CONTRACTOR ACT, TO PROVIDE FOR CONTRACT FINANCING
3 AND SURETY BONDS FOR SMALL AND HISTORICALLY UNDERUTILIZED
4 BUSINESSES THAT CONTRACT WITH GOVERNMENTAL AGENCIES.
5

6 The General Assembly of North Carolina enacts:

7 **SECTION 1.** Article 10 of Chapter 143B of the General Statutes is amended
8 by adding a new Part to read:

9 "Part 20. Small and Historically Underutilized Business Contractor Act.

10 **"§ 143B-472.105. Purpose and intent.**

11 The purpose and intent of this Part is to foster economic development and the
12 creation of jobs by providing financial assistance to financially responsible small and
13 historically underutilized businesses that are unable to obtain adequate financing and
14 bonding assistance in connection with contracts.

15 **"§ 143B-472.106. Definitions.**

16 The following definitions apply in this Part:

- 17 (1) Authority. – The North Carolina Small and Historically Underutilized
18 Business Contractor Authority created in this Part.
19 (2) Internal Revenue Code. – The Code as defined in G.S. 105-228.90.
20 (3) Contract term. – The term of a contract, including the maintenance or
21 warranty period required by the contract and the period during which
22 the surety may be liable for latent defects.
23 (4) Government agency. – The federal government, the State, an agency,
24 or a political subdivision of the federal government or the State, or a
25 utility regulated by the North Carolina Utilities Commission.
26 (5) Historically Underutilized Business. – As defined in G.S. 143-128.4.
27 (6) Related party. – A party related to the applicant in a manner that would
28 require an attribution of stock to or from the party under section 318 of
29 the Internal Revenue Code.

1 (7) Secretary. – The Secretary of Commerce.

2 (8) Small business. – A small business concern must meet the applicable
3 size standards established by the United States Small Business
4 Administration for business loans based on the industry in which the
5 concern, including its affiliates, is primarily engaged and based on the
6 industry in which the concern, not including its affiliates, is primarily
7 engaged. In addition, in the case of an application for bonding
8 assistance, the applicant, including its affiliates, may not have receipts
9 for construction and service contracts in excess of the maximum
10 amount established by the United States Small Business
11 Administration for surety bond guarantee assistance.

12 **"§ 143B-472.107. Authority creation; powers.**

13 (a) Creation. – The North Carolina Small and Historically Underutilized
14 Business Contractor Authority is created within the Department of Commerce.

15 (b) Membership. – The Authority consists of 11 members appointed as follows:

16 (1) Four members appointed by the General Assembly upon the
17 recommendation of the Speaker of the House of Representatives, one
18 of whom has experience in underwriting surety bonds.

19 (2) Four members appointed by the General Assembly upon the
20 recommendation of the President Pro Tempore of the Senate, one of
21 whom is a present or former governmental employee with experience
22 in administering public contracts.

23 (3) Three members appointed by the Governor, one of whom is a licensed
24 general contractor and one of whom is experienced in working for
25 private, nonprofit, small, or underutilized businesses.

26 (c) Terms. – Members serve four-year terms, except initial appointments. There
27 is no prohibition against reappointment for subsequent terms. Initial appointments shall
28 begin on January 1, 2008. Each appointing authority shall designate two of its initial
29 appointments to serve four-year terms and the remainder of its initial appointments to
30 serve three-year terms.

31 (d) Chair. – The chair shall be elected annually by the members of the Authority
32 from the membership of the Authority and shall be a voting member.

33 (e) Compensation. – The Authority members shall receive no salary as a result of
34 serving on the Authority but are entitled to per diem and allowances in accordance with
35 G.S. 138-5.

36 (f) Meetings. – The Secretary shall convene the first meeting of the Authority
37 within 60 days after January 1, 2008. Meetings shall be held as necessary as determined
38 by the Authority.

39 (g) Quorum. – A majority of the members of the Authority constitutes a quorum
40 for the transaction of business. A vacancy in the membership of the Authority does not
41 impair the right of the quorum to exercise all rights and to perform all duties of the
42 Authority.

43 (h) Vacancies. – A vacancy on the Authority resulting from the resignation of a
44 member or otherwise is filled in the same manner in which the original appointment was

1 made, for the balance of the unexpired term. Vacancies in appointments made by the
2 General Assembly shall be filled in accordance with G.S. 120-122.

3 (i) Removal. – Members may be removed in accordance with G.S. 143B-13. A
4 member who misses three consecutive meetings of the Authority may be removed for
5 nonfeasance.

6 (j) Powers and Duties. – The Authority has the following powers and duties:

7 (1) To accept grants, loans, contributions, and services.

8 (2) To employ staff, procure supplies, services, and property, and enter
9 into contracts, leases, or other legal agreements, including the
10 procurement of reinsurance, to carry out the purposes of the Authority.

11 (3) To acquire, manage, operate, dispose of, or otherwise deal with
12 property, take assignments of rentals and leases, and enter into
13 contracts, leases, agreements, and arrangements that are necessary or
14 incidental to the performance of the duties of the Authority, upon
15 terms and conditions that it considers appropriate.

16 (4) To specify the form and content of applications, guaranty agreements,
17 or agreements necessary to fulfill the purposes of this Part.

18 (5) To acquire or take assignments of documents executed, obtained, or
19 delivered in connection with assistance provided by the Authority
20 under this Part.

21 (6) To fix, determine, charge, and collect any premiums, fees, charges,
22 costs, and expenses in connection with any assistance provided by the
23 Authority under this Part.

24 (7) To adopt rules, in accordance with Chapter 150B of the General
25 Statutes, to implement this Part.

26 (8) To take any other action necessary to carry out its purposes.

27 (9) To report quarterly to the Joint Legislative Commission on
28 Governmental Operations on the activities of the Authority, including
29 the amount of rates, sureties, and bonds.

30 (k) Limitations. – Notwithstanding any other provision of this Part, the Authority
31 may not provide financial assistance that constitutes raising money on the credit of the
32 State or pledging the faith and credit or the taxing power of the State directly or
33 indirectly for the payment of any debt. Before providing financial assistance to an
34 applicant under this Part, the Authority must obtain the written certification of the
35 Attorney General that the proposed financial assistance does not constitute raising
36 money on the credit of the State or pledging the faith of the State directly or indirectly
37 for the payment of any debt as provided in Section 3(2) of Article V of the North
38 Carolina Constitution.

39 **§ 143B-472.108. Eligibility.**

40 To qualify for assistance under this Part, an applicant must meet all of the following
41 requirements:

42 (1) The applicant must be a small business as defined in this Part or a
43 historically underutilized business.

- 1 (2) The applicant must be an individual, or be controlled by one or more
2 individuals, with a reputation for financial responsibility, as
3 determined from creditors, employers, and other individuals with
4 personal knowledge. If the applicant is other than a sole proprietorship,
5 at least seventy percent (70%) of the business must be owned by
6 individuals with a reputation for financial responsibility.
- 7 (3) The applicant must be a resident of this State or be incorporated in this
8 State and must have its principal place of business in this State.
- 9 (4) The applicant must demonstrate to the satisfaction of the Authority
10 that it has been unable to obtain adequate financing or bonding on
11 reasonable terms through an authorized company. If the applicant is
12 applying for a guarantee of a loan, the applicant must have applied for
13 and been denied a loan by a financial institution.

14 **"§ 143B-472.109. Small and Historically Underutilized Business Contract**
15 **Financing Fund.**

16 (a) Creation and Use. – The Small and Historically Underutilized Business
17 Contract Financing Fund is created as a special revenue fund. Revenue in the Fund does
18 not revert at the end of a fiscal year, and interest and other investment income earned by
19 the Fund accrues to the Fund. The Authority shall use the Fund to make direct loans and
20 guaranty payments required by defaults and to pay the portion of the administrative
21 expenses of the Authority related to making these loans and payments.

22 (b) Content. – The Small and Historically Underutilized Business Contract
23 Financing Fund consists of all of the following revenue:

- 24 (1) Funds appropriated to the Fund by the State.
25 (2) Repayments of principal of and interest on direct loans.
26 (3) Premiums, fees, and any other amounts received by the Authority with
27 respect to financial assistance provided by the Authority.
28 (4) Proceeds designated by the Authority from the sale, lease, or other
29 disposition of property or contracts held or acquired by the Authority.
30 (5) Investment income of the Fund.
31 (6) Any other moneys made available to the Fund.

32 **"§ 143B-472.110. Contract performance assistance authorized.**

33 (a) Type. – The Authority is authorized to provide the following contract
34 performance assistance:

- 35 (1) A guarantee of a loan made to the applicant.
36 (2) If the applicant demonstrates to the satisfaction of the Authority that it
37 is unable to obtain money from any other source, a loan to the
38 applicant.

39 (b) Qualification. – The Authority shall not lend money to an applicant or
40 guarantee a loan unless all of the following requirements are met:

- 41 (1) The applicant meets the requirements of G.S. 143B-472.108.
42 (2) The loan is to be used to perform an identified contract, of which the
43 majority of funding is provided by a government agency or a
44 combination of government agencies.

1 (3) The loan is to be used for working capital or equipment needed to
2 perform the contract, the cost of which can be repaid from contract
3 proceeds, if the Authority has entered into an agreement with the
4 applicant necessary to secure the loan or guaranty.

5 (c) Terms and Conditions. – The Authority shall set the terms and conditions for
6 loans and for the guarantee of loans. When the Authority lends money from the Small
7 and Historically Underutilized Business Contract Financing Fund, it shall prepare loan
8 documents that include all of the following:

9 (1) The rate of interest on the loan, which shall not exceed any applicable
10 statutory limit for a loan of the same type.

11 (2) A payment schedule that provides money to the applicant in the
12 amounts and at the times that the applicant needs the money to
13 perform the contract for which the loan is made.

14 (3) A requirement that, before each advance of money is released to the
15 applicant, the applicant and the Authority must cosign the request for
16 the money.

17 (4) Provisions for repayment of the loan.

18 (5) Any other provision the Authority considers necessary to secure the
19 loan, including an assignment of, or a lien on, payment under the
20 contract, if allowable.

21 (d) Maturity. – A loan made by the Authority shall mature not later than the date
22 the applicant is to receive full payment under the identified contract, unless the
23 Authority determines that a later maturity date is required to fulfill the purposes of this
24 Part.

25 (e) Diversity. – In selecting applicants for assistance, the Authority must consider
26 the need to serve all geographic and political areas and subdivisions of the State.

27 (f) Limitation. – The total amount of loan guarantees and loans issued to each
28 recipient during a fiscal year shall not exceed fifteen percent (15%) of the amount of
29 money in the Fund as of the beginning of that fiscal year.

30 "**§ 143B-472.111. Small and Historically Underutilized Business Surety Bond**
31 **Fund.**

32 (a) Creation and Use. – The Small and Historically Underutilized Business
33 Surety Bond Fund is created as a special revenue fund. Revenue in the Fund does not
34 revert at the end of a fiscal year, and interest and other investment income earned by the
35 Fund accrues to the Fund. The Authority shall use the Fund for the purposes of and to
36 pay the expenses of the Authority related to providing bonding assistance.

37 (b) Content. – The Small and Historically Underutilized Business Surety Bond
38 Fund consists of all of the following revenue:

39 (1) Funds appropriated to the Fund by the State.

40 (2) Premiums, fees, and any other amounts received by the Authority with
41 respect to bonding assistance provided by the Authority.

42 (3) Proceeds designated by the Authority from the sale, lease, or other
43 disposition of property or contracts held or acquired by the Authority.

44 (4) Investment income of the Fund.

1 (5) Any other moneys made available to the Fund.

2 **"§ 143B-472.112. Bonding assistance authorized.**

3 (a) Guaranty. – Subject to the restrictions of this Part, the Authority, on
4 application, may guarantee a surety for losses incurred under a bid bond, payment bond,
5 or performance bond on an applicant's contract, of which the majority of the funding is
6 provided by a government agency or a combination of government agencies, up to
7 ninety percent (90%) of the surety's losses, or nine hundred thousand dollars
8 (\$900,000), whichever is less. The term of a guaranty under this section shall not exceed
9 the contract term. The Authority may vary the terms and conditions of the guaranty
10 from surety to surety, based on the Authority's history of experience with the surety and
11 other factors that the Authority considers relevant.

12 (b) Notice. – When the Authority provides a guaranty under this section with
13 respect to a contract, it must give the government agencies that are parties to the
14 contract written notice of the guaranty.

15 (c) Bonds. – The Authority may execute and perform bid bonds, performance
16 bonds, and payment bonds as a surety for the benefit of an applicant in connection with
17 a contract, of which the majority of the funding is provided by a government agency or
18 a combination of government agencies.

19 (d) Obligation of State. – The total amount of guarantees issued and bonds
20 executed shall not exceed ninety percent (90%) of the amount of money in the Small
21 and Historically Underutilized Business Surety Bond Fund. The Authority shall not
22 pledge any money other than money in the Fund for payment of a loss or bond. No
23 action by the Authority constitutes the creation of a debt secured by a pledge of the
24 taxing power or the faith and credit of the State or any of its political subdivisions. The
25 face of each guarantee issued or bond executed shall contain a statement that the
26 Authority is obligated to pay the guarantee or bond only from the revenue in the Small
27 Business and Historically Underutilized Surety Bond Fund and that neither the taxing
28 power nor the faith and credit of the State or any of its political subdivisions is pledged
29 in payment of the guarantee or bond. Nothing in this subsection limits the ability of the
30 Authority to obtain reinsurance.

31 (e) Limitation. – The total amount of bonding assistance provided to each
32 recipient during a fiscal year shall not exceed fifteen percent (15%) of the amount of
33 money in the Fund as of the beginning of that fiscal year.

34 (f) Payment. – If the Authority considers it prudent, it may require that payment
35 be made either to the contractor and lending institution or to the bonding authority.

36 **"§ 143B-472.113. Bonding assistance conditions.**

37 (a) Requirements. – To obtain bonding assistance under this Part, an applicant
38 must meet the eligibility requirements of G.S. 143B-472.108 and must demonstrate to
39 the satisfaction of the Authority that all of the following apply:

40 (1) A bond is required in order to bid on a contract or to serve as a prime
41 contractor or subcontractor.

42 (2) A bond is not obtainable on reasonable terms and conditions without
43 assistance under this Part.

1 (3) The applicant will not subcontract more than seventy-five percent
2 (75%) of the face value of the contract.

3 (b) Default. – If an applicant or a person that is a related party with respect to the
4 applicant has ever defaulted on a bond or guaranty provided by the Authority, the
5 Authority may approve a guaranty or bond under this Part only if one of the following
6 applies:

7 (1) Two years have elapsed since the time of the default.

8 (2) Every default by the applicant or related party in any program
9 administered by the Authority has been cured.

10 (c) Economic Effect. – Before issuing a guaranty or bond, the Authority must
11 determine that the contract for which a bond is sought to be guaranteed or issued has a
12 substantial economic effect. To determine the economic effect of a contract, the
13 Authority must consider all of the following:

14 (1) The amount of the guaranty obligation.

15 (2) The terms of the bond to be guaranteed.

16 (3) The number of new jobs that will be created by the contract to be
17 bonded.

18 (4) Any other factor that the Authority considers relevant.

19 **"§ 143B-472.114. Surety bonding line.**

20 The Authority may, on application, establish a surety bonding line in order to issue
21 or guarantee multiple bonds to an applicant within preapproved terms, conditions, and
22 limitations.

23 **"§ 143B-472.115. Application.**

24 To apply for assistance from the Authority under this Part, an applicant and, where
25 applicable, a surety must submit to the Authority an application on a form prescribed by
26 the Authority. The application must include any information and documentation the
27 Authority considers necessary to enable the Authority to evaluate the application in
28 accordance with this Part. The Authority may require an applicant to provide an audited
29 balance sheet unless the Authority determines that such a requirement is not necessary
30 or appropriate to fulfill the purposes of this Part.

31 **"§ 143B-472.116. Premiums and fees.**

32 (a) Amount. – The Authority shall by rule set the premiums and fees to be paid
33 for providing assistance under this Part. The premiums and fees set by the Authority
34 shall be payable in the amounts, at the time, and in the manner that the Authority
35 requires. The premiums and fees may vary in amount among transactions and at
36 different stages during the terms of transactions.

37 (b) Rate Standards. – The rate standards in G.S. 58-40-20 apply to premiums set
38 by the Authority under this section. The Authority may also use the forms and rates of
39 statistical organizations licensed under G.S. 58-40-50. The Authority may vary from
40 these rates in order to broaden participation by small businesses that are unable to obtain
41 adequate financing and bonding assistance in connection with contracts. The premiums
42 set and forms developed by the Authority under this section must be approved by the
43 Commissioner of Insurance before they may be used.

1 (c) Forms. – The Authority shall develop forms to be used for financing and
2 bonding assistance.

3 "**§ 143B-472.117. False statements; penalty.**

4 (a) Documents. – It is unlawful to knowingly make or cause any false statement
5 or report to be made in any application or in any document submitted to the Authority.

6 (b) Statements. – It is unlawful to make or cause any false statement or report to
7 be made to the Authority for the purpose of influencing the action of the Authority on
8 an application for assistance or affecting assistance, whether or not assistance has been
9 previously extended.

10 (c) Penalty. – A violation of this section is a Class 2 misdemeanor."

11 **SECTION 2.** This act becomes effective January 1, 2008, and applies to
12 offenses committed or causes of action arising on or after that date.