

Senate Bill 908

Sponsored by COMMITTEE ON RULES (at the request of Governor John A. Kitzhaber)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Changes title of Director of Affirmative Action to Director of Diversity and Inclusion. Changes title of Advocate for Minority, Women and Emerging Small Business to Director of Economic and Business Equity and name of Office for Minority, Women and Emerging Small Business to Office of Economic and Business Equity.

Declares emergency, effective on passage.

A BILL FOR AN ACT

1
2 Relating to executive branch nomenclature; amending ORS 182.100, 200.005, 200.025, 200.035, 200.045,
3 200.055, 200.065, 200.090, 200.100 and 243.315; and declaring an emergency.

4 **Be It Enacted by the People of the State of Oregon:**

5 **SECTION 1.** ORS 243.315 is amended to read:

6 243.315. (1) There is hereby created in the office of the Governor the position of Director of
7 [*Affirmative Action*] **Diversity and Inclusion**. The primary duty of the occupant of this position
8 shall be to direct and monitor affirmative action programs in all state agencies to implement the
9 public policy stated in ORS 243.305. The director shall be appointed by the Governor, subject to
10 confirmation by the Senate pursuant to section 4, Article III of the Oregon Constitution.

11 (2) The legislative and judicial branches shall each select a person to monitor the effectiveness
12 of the branches' affirmative action programs.

13 **SECTION 2.** ORS 182.100 is amended to read:

14 182.100. (1) It is declared to be the policy of Oregon that this state shall be a leader in affir-
15 mative action. All appointive authorities for state boards, commissions and advisory bodies shall
16 implement this policy of affirmative action in their appointments, subject to the legal requirements
17 for each appointment.

18 (2) The Director of [*Affirmative Action*] **Diversity and Inclusion** shall assist all persons who
19 have appointing authority at the state level for boards, commissions or advisory bodies in carrying
20 out the state policy stated in subsection (1) of this section and ORS 236.115.

21 (3) As used in this section, "affirmative action" means a method of eliminating the effects of past
22 and present discrimination, intended or unintended, on the basis of race, religion, national origin,
23 age, sex, marital status or physical or mental disabilities, that are evident or indicated by analysis
24 of present appointment patterns, practices and policies.

25 **SECTION 3.** ORS 200.005 is amended to read:

26 200.005. As used in ORS 200.005 to 200.075, 200.160 to 200.200 and 279A.105:

27 (1) "Disadvantaged business enterprise" means a small business concern:

28 (a) That is at least 51 percent owned by one or more socially and economically disadvantaged
29 individuals; or

30 (b) For which, in the case of a corporation, at least 51 percent of the stock is owned by one or

NOTE: Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted.
New sections are in **boldfaced** type.

1 more socially and economically disadvantaged individuals, and of which the management and daily
 2 business operations are controlled by one or more of the socially and economically disadvantaged
 3 individuals who own it.

4 (2) “Economically disadvantaged individual” means a socially disadvantaged individual whose
 5 ability to compete in the free enterprise system has been impaired due to diminished capital and
 6 credit opportunities as compared to other individuals in the same business area who are not socially
 7 disadvantaged individuals.

8 (3) “Emerging small business” means an independent business:

9 (a) With its principal place of business located in this state;

10 (b) That qualifies as a tier one firm or a tier two firm;

11 (c) That is properly licensed and legally registered in this state; and

12 (d) That is not a subsidiary or parent company belonging to a group of firms that are owned or
 13 controlled by the same individuals if, in the aggregate, the group of firms does not qualify as a tier
 14 one firm or a tier two firm.

15 (4) “Minority individual” means a person who is a citizen or lawful permanent resident of the
 16 United States[,] **and** who is:

17 (a) Black, having origins in any of the black racial groups of Africa;

18 (b) Hispanic, having Mexican, Puerto Rican, Cuban, Central or South American or other Spanish
 19 culture or origin, regardless of race;

20 (c) Asian American, having origins in any of the original peoples of the Far East, Southeast
 21 Asia, the Indian subcontinent or the Pacific Islands;

22 (d) Portuguese, having Portuguese, Brazilian or other Portuguese culture or origin, regardless
 23 of race;

24 (e) American Indian or Alaskan Native, having origins in any of the original peoples of North
 25 America; or

26 (f) A member of another group, or another individual who is socially and economically disad-
 27 vantaged as determined by the [*Advocate for Minority, Women and Emerging Small Business*] **Di-**
 28 **rector of Economic and Business Equity.**

29 (5) “Minority or women business enterprise” means a small business concern:

30 (a) That is at least 51 percent owned by one or more minority individuals or women; or

31 (b) For which, in the case of a corporation, at least 51 percent of the stock is owned by one or
 32 more individuals who are minority individuals or women, and of which the management and daily
 33 business operations are controlled by one or more of the minority individuals or women who own
 34 it.

35 (6) “Responsible bidder” means a bidder who, as determined by the [*Advocate for Minority,*
 36 *Women and Emerging Small Business*] **Director of Economic and Business Equity**, has undertaken
 37 both a policy and practice of actively pursuing participation by minority or women business enter-
 38 prises in all bids, both public and private, submitted by the bidder.

39 (7) “Small business concern” means a small business as defined by the United States Small
 40 Business Administration in 13 C.F.R. part 121 and in effect on January 1, 2006.

41 (8) “Socially disadvantaged individual” means an individual who has been subjected to racial or
 42 ethnic prejudice or cultural bias, without regard to individual qualities, because of the individual’s
 43 identity as a member of a group.

44 (9) “Tier one firm” means a business that employs fewer than 20 full-time equivalent employees
 45 and has average annual gross receipts for the last three years that do not exceed \$1.5 million for

1 a business performing construction, as defined in ORS 446.310, or \$600,000 for a business not per-
 2 forming construction.

3 (10) “Tier two firm” means a business that employs fewer than 30 full-time equivalent employees
 4 and has average annual gross receipts for the last three years that do not exceed \$3 million for a
 5 business performing construction, as defined in ORS 446.310, or \$1 million for a business not per-
 6 forming construction.

7 (11) “Woman” means a person of the female sex who is a citizen or lawful permanent resident
 8 of the United States.

9 **SECTION 4.** ORS 200.025 is amended to read:

10 200.025. (1) There is created, in the Office of the Governor, the [*Advocate for Minority, Women*
 11 *and Emerging Small Business*] **Director of Economic and Business Equity** who shall be appointed
 12 by the Governor.

13 (2) There is created in the Oregon Business Development Department the [*Office for Minority,*
 14 *Women and Emerging Small Business*] **Office of Economic and Business Equity**, the employees
 15 of which shall be appointed by the Director of the Oregon Business Development Department.

16 (3)(a) The **Director of the Oregon Business Development Department** may prescribe the du-
 17 ties and assignments of all officers and employees of the [*Office for Minority, Women and Emerging*
 18 *Small Business*] **Office of Economic and Business Equity**. The director shall establish the com-
 19 pensation of all officers and employees of the office.

20 (b) The officers and employees of the office shall be allowed reimbursement for reasonable and
 21 necessary travel and other expenses incurred in the performance of their duties.

22 (4) The [*Advocate for Minority, Women and Emerging Small Business*] **Director of Economic**
 23 **and Business Equity** shall:

24 (a) Advise the Governor and the **Director of the Oregon Business Development Department**
 25 on activities and initiatives that may promote the economic integration of minorities, women and
 26 emerging small businesses into the business sector;

27 (b) Prepare an annual report to the Governor, **Director of the Oregon Business Development**
 28 **Department** and Legislative Assembly on the status of minorities and women in the marketplace,
 29 accomplishments and resolutions of issues of concern to minority and women’s enterprises and rec-
 30 ommendations for executive and legislative actions; and

31 (c) Carry out other duties that may be assigned by the Governor.

32 (5) The [*Office for Minority, Women and Emerging Small Business*] **Office of Economic and**
 33 **Business Equity** shall:

34 (a) Provide information to minority, women and emerging small businesses;

35 (b) Assist in the development and implementation of an aggressive strategy for this state, based
 36 on research and monitoring, that encourages participation of minorities, women and emerging small
 37 businesses in the state’s economy;

38 (c) Make recommendations to the **Director of the Oregon Business Development Department**
 39 on the research, development and implementation of the plan for the involvement of disadvantaged
 40 and minority groups and emerging small businesses in all state programs;

41 (d) Maintain an Oregon Opportunity Register and Clearinghouse for information on public
 42 agency and other contract solicitations for professional services, supplies and services and other bid
 43 opportunities, in consultation with the State Board of Higher Education, the Department of Trans-
 44 portation and other entities;

45 (e) Monitor the certification and compliance program for disadvantaged, minority, women and

1 emerging small businesses under ORS 200.055;

2 (f) Investigate complaints and possible abuses of the certification program; and

3 (g) Assist in the promotion and coordination of plans, programs and operations of state govern-
4 ment that strengthen minority and women participation in the economic life of this state.

5 **SECTION 5.** ORS 200.035 is amended to read:

6 200.035. (1) For a public contract with a value of \$5,000 or more, a state agency shall provide
7 timely notice and information to the [*Advocate for Minority, Women and Emerging Small Business*]
8 **Director of Economic and Business Equity** regarding:

9 (a) Bid or proposal solicitations; and

10 (b) Contract awards.

11 (2) Each state agency shall, in consultation with the [*advocate*] **director**, establish a process and
12 timeline for providing the notice and information required by subsection (1) of this section to the
13 [*advocate*] **director**.

14 **SECTION 6.** ORS 200.045 is amended to read:

15 200.045. (1) To determine whether a bidder that has failed to meet emerging small business en-
16 terprise contract requirements may be awarded the contract, the public contracting agency must
17 decide whether the bidder's efforts to obtain participation by emerging small business enterprises
18 were good faith efforts to meet the requirements.

19 (2) Performing all of the following actions by a bidder constitutes a rebuttable presumption that
20 the bidder has made a good faith effort to satisfy the subcontracting requirement for emerging small
21 businesses. It shall be a rebuttable presumption that the bidder has not made a good faith effort if
22 the bidder has not acted consistently with such actions. Efforts that are merely superficial are not
23 good faith efforts:

24 (a) The bidder attended any presolicitation or prebid meetings that were scheduled by the con-
25 tracting agency to inform emerging small business enterprises of contracting and subcontracting or
26 material supply opportunities available on the project;

27 (b) The bidder identified and selected specific economically feasible units of the project to be
28 performed by emerging small business enterprises in order to increase the likelihood of participation
29 by such enterprises;

30 (c) The bidder advertised in general circulation, trade association, minority and trade oriented,
31 women-focus publications, if any, concerning the subcontracting or material supply opportunities;

32 (d) The bidder provided written notice to a reasonable number of specific emerging small busi-
33 ness enterprises, identified from a list of certified emerging small business enterprises provided or
34 maintained by the Oregon Business Development Department for the selected subcontracting or
35 material supply work, in sufficient time to allow the enterprises to participate effectively;

36 (e) The bidder followed up initial solicitations of interest by contacting the enterprises to de-
37 termine with certainty whether the enterprises were interested;

38 (f) The bidder provided interested emerging small business enterprises with adequate information
39 about the plans, specifications and requirements for the selected subcontracting or material supply
40 work;

41 (g) The bidder negotiated in good faith with the enterprises, and did not without justifiable
42 reason reject as unsatisfactory bids prepared by any emerging small business enterprises;

43 (h) Where applicable, the bidder advised and made efforts to assist interested emerging small
44 business enterprises in obtaining bonding, lines of credit or insurance required by the contracting
45 agency or contractor;

1 (i) The bidder’s efforts to obtain emerging small business enterprise participation were reason-
 2 ably expected to produce a level of participation sufficient to meet the goals or requirement of the
 3 public contracting agency; and

4 (j) The bidder used the services of minority community organizations, minority contractor
 5 groups, local, state and federal minority business assistance offices and other organizations identi-
 6 fied by the [*Advocate for Minority, Women and Emerging Small Business*] **Director of Economic**
 7 **and Business Equity** that provide assistance in the recruitment and placement of emerging small
 8 business enterprises.

9 (3) To determine whether a bidder is a responsible bidder, the performance of all the following
 10 actions constitutes a rebuttable presumption that the bidder is responsible. It shall be a rebuttable
 11 presumption that the bidder is not responsible if the bidder has not acted consistently with the
 12 actions described in this subsection. Efforts that are merely superficial are not good faith efforts.

13 (a) The bidder attended any presolicitation or prebid meetings that were scheduled by the con-
 14 tracting agency to inform minority or women business enterprises of contracting and subcontracting
 15 or material supply opportunities available on the project;

16 (b) The bidder identified and selected specific economically feasible units of the project to be
 17 performed by minority or women business enterprises in order to increase the likelihood of partic-
 18 ipation by such enterprises;

19 (c) The bidder advertised in general circulation, trade association, minority and trade oriented,
 20 women-focus publications, if any, concerning the subcontracting or material supply opportunities;

21 (d) The bidder provided written notice to a reasonable number of specific minority or women
 22 business enterprises, identified from a list of certified minority or women business enterprises pro-
 23 vided or maintained by the Oregon Business Development Department for the selected subcontract-
 24 ing or material supply work, in sufficient time to allow the enterprises to participate effectively;

25 (e) The bidder followed up initial solicitations of interest by contacting the enterprises to de-
 26 termine with certainty whether the enterprises were interested;

27 (f) The bidder provided interested minority or women business enterprises with adequate infor-
 28 mation about the plans, specifications and requirements for the selected subcontracting or material
 29 supply work;

30 (g) The bidder negotiated in good faith with interested, capable and competitive minority or
 31 women business enterprises submitting bids;

32 (h) Where applicable, the bidder advised and made efforts to assist interested minority or women
 33 business enterprises in obtaining bonding, lines of credit or insurance required by the contracting
 34 agency or contractor;

35 (i) The bidder’s efforts to obtain minority or women business enterprise participation were rea-
 36 sonably expected to produce a level of participation sufficient to meet the goals of the public con-
 37 tracting agency; and

38 (j) The bidder used the services of minority community organizations, minority contractor
 39 groups, local, state and federal minority business assistance offices and other organizations identi-
 40 fied by the [*Advocate for Minority, Women and Emerging Small Business*] **Director of Economic**
 41 **and Business Equity** that provide assistance in the recruitment and placement of disadvantaged,
 42 minority or women business enterprises.

43 **SECTION 7.** ORS 200.055 is amended to read:

44 200.055. (1) Any disadvantaged, minority, women or emerging small business enterprise is enti-
 45 tled to be certified as such upon application to the Oregon Business Development Department. If the

1 application is approved by the department, the department shall certify the applicant as a disad-
2 vantaged, minority, women or emerging small business enterprise. The enterprise shall be considered
3 so certified by any public contracting agency.

4 (2) In consultation with the State Board of Higher Education and the Department of Transpor-
5 tation, and with the approval of the [*Advocate for Minority, Women and Emerging Small Business*]
6 **Director of Economic and Business Equity**, the Oregon Business Development Department by
7 rule shall adopt a uniform standard form and procedure designed to provide complete documentation
8 that a business enterprise is certified as a disadvantaged, minority, women or emerging small busi-
9 ness enterprise. The department shall compile and make available upon request a list of certified
10 disadvantaged, minority, women or emerging small business enterprises.

11 (3) Any business enterprise that is refused certification as a disadvantaged business enterprise
12 or denied recertification as such or whose certification is revoked may appeal directly to the United
13 States Department of Transportation.

14 (4) Any business enterprise that is refused certification as a minority, women or emerging small
15 business enterprise or has its certification revoked may request a contested case hearing as pro-
16 vided in ORS chapter 183.

17 (5) The Oregon Business Development Department shall be the sole agency authorized to certify
18 enterprises as disadvantaged, minority, women or emerging small business enterprises eligible to
19 perform on public contracts in this state.

20 (6) The Oregon Business Development Department by rule may establish a fee not to exceed
21 \$100 for a copy of the list of certified disadvantaged, minority, women and emerging small business
22 enterprises and may assess state agencies for services under ORS 200.005 to 200.075.

23 (7) The Department of Transportation may collect a fee, not to exceed \$200, from a bidder upon
24 bidder prequalifications to cover the costs of the Oregon Business Development Department in ad-
25 ministering ORS 200.005 to 200.075. The Department of Transportation shall transfer such fees to
26 the credit of the account established under subsection (8) of this section.

27 (8) The Oregon Business Development Department shall establish a special account in which to
28 deposit fees and assessments. The special account is continuously appropriated to the department
29 to meet its expenses in administering ORS 200.005 to 200.075.

30 **SECTION 8.** ORS 200.065 is amended to read:

31 200.065. (1) It shall be unlawful for any person fraudulently to obtain or retain or attempt to
32 obtain or retain or to aid another person fraudulently to obtain or retain or attempt to obtain or
33 retain certification as a disadvantaged, minority, women or emerging small business enterprise.

34 (2) It shall be unlawful knowingly to make a false claim that any person is qualified for certif-
35 ication or is certified under ORS 200.055 for the purpose of gaining a contract or subcontract or
36 other benefit.

37 (3) The public contracting agency may withhold payment, suspend or terminate the contract and
38 may impose on any person a civil penalty not to exceed 10 percent of the contract or subcontract
39 price or \$5,000, whichever is less, for each violation of subsection (1) or (2) of this section. The
40 penalty shall be paid to the [*Office for Minority, Women and Emerging Small Business*] **Office of**
41 **Economic and Business Equity**.

42 (4) The Oregon Business Development Department or an affected public contracting agency shall
43 investigate any complaint that a person has violated subsection (1) or (2) of this section. In investi-
44 gating such a complaint, the department or an affected public contracting agency may require any
45 additional information, administer oaths, take depositions and issue subpoenas to compel the at-

1 tendance of witnesses and the production of books, papers, records, memoranda or other information
 2 necessary to carry out its duties. If any person fails to comply with any subpoena issued under this
 3 subsection or refuses to testify on any matter on which a person may lawfully be interrogated, the
 4 procedure provided in ORS 183.440 shall be followed to compel compliance.

5 (5) An affected public contracting agency or the department **may** disqualify any person found
 6 to have violated subsection (1) or (2) of this section or who admits to such violation under oath
 7 during the course of an investigation from bidding or participating in any public contract for a pe-
 8 riod of time specified by the agency or department, not to exceed three years. Any contracting
 9 agency that has notice of the finding of the fraudulent certification may also disqualify the person
 10 from bidding on or participating in any public contract.

11 **SECTION 9.** ORS 200.090 is amended to read:

12 200.090. Public agencies shall aggressively pursue a policy of providing opportunities for avail-
 13 able contracts to emerging small businesses and shall cooperate with the [*Advocate for Minority,*
 14 *Women and Emerging Small Business*] **Director of Economic and Business Equity** to determine
 15 the best means by which to make such opportunities available.

16 **SECTION 10.** ORS 200.100 is amended to read:

17 200.100. As used in ORS 200.100 to 200.120:

18 (1) "Contractor" means a person who contracts on predetermined terms to be responsible for the
 19 performance of all or part of a job of preparation or construction in accordance with established
 20 specifications or plans, retaining control of means, method and manner of accomplishing the desired
 21 result, and who provides:

22 (a) Labor at the site; or

23 (b) Materials, supplies and labor at the site.

24 (2) "Disadvantaged business enterprise" means a small business concern that is at least 51 per-
 25 cent owned by one or more socially and economically disadvantaged individuals, or, in the case of
 26 any corporation, at least 51 percent of the stock of which is owned by one or more socially and
 27 economically disadvantaged individuals and whose management and daily business operations are
 28 controlled by one or more of the socially and economically disadvantaged individuals who own it.

29 (3) "Minority or women business enterprise" means a small business concern which is at least
 30 51 percent owned by one or more minorities or women, or in the case of a corporation, at least 51
 31 percent of the stock of which is owned by one or more minorities or women, and whose management
 32 and daily business operations are controlled by one or more of such individuals.

33 (4) "Minority individual" means a person who is a citizen or lawful permanent resident of the
 34 United States and who is:

35 (a) Black, a person having origins in any of the black racial groups of Africa;

36 (b) Hispanic, a person of Mexican, Puerto Rican, Cuban, Central or South American or other
 37 Spanish culture or origin, regardless of race;

38 (c) Asian American, a person having origins in any of the original peoples of the Far East,
 39 Southeast Asia, the Indian subcontinent or the Pacific Islands;

40 (d) Portuguese, a person of Portuguese, Brazilian or other Portuguese culture or origin, regard-
 41 less of race;

42 (e) American Indian or Alaskan Native, a person having origins in any of the original peoples
 43 of North America; or

44 (f) A member of another group or another individual that is socially and economically disad-
 45 vantaged as determined by the [*Advocate for Minority, Women and Emerging Small Business*] **Di-**

1 **rector of Economic and Business Equity.**

2 (5) "Subcontractor" means a contractor who has no direct contractual relationship with the
3 owner.

4 **SECTION 11. This 2011 Act being necessary for the immediate preservation of the public**
5 **peace, health and safety, an emergency is declared to exist, and this 2011 Act takes effect**
6 **on its passage.**

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