

MINUTES OF THE SENATE COMMITTEE ON TRANSPORTATION AND UTILITIES

The meeting was called to order by SENATOR ROBERT V. TALKINGTON at  
Chairperson

9:00 a.m. a.m./p.m. on Friday, March 2, 1984 in room 254-E of the Capitol.

All members were present except:

all present

Committee staff present:

Fred Carman, Ray Hauke, Rosalie Black

Conferees appearing before the committee:

SB 694 - Senator Billy McCray; David Tittsworth, DOT; Robert Morrissey, Federal Highway Administration; Alonzo Harrison, HDB Construction, Inc.; Theodus Lockhart, NAACP

The meeting was called to order by Senator Talkington, Chairman, for hearing of SB 694 and to take action on bills previously heard.

SENATE BILL 694 - HEARING

Senator Billy McCray explained that his interest in SB 694 is a result of his wish to increase participation of disadvantaged business persons in state highway contracts made possible by the passage of the federal surface transportation assistance act of 1982. (See Attachment 1.)

Robert Morrissey said the federal highway administration exceeded its goal of 8.3% last year by participation of socially and economically disadvantaged businesses involvement in highway contracts. He added that this year's goal of 10% is being met so far.

Alonzo Harrison and Theodus Lockhart supported the bill because of the creation of employment opportunities; competitiveness among disadvantaged business enterprises; and the allowance of these businesses to become bondable. Mr. Lockhart indicated he wanted to be certain that beneficiaries of the program reaped the full benefits. (See Attachment 2.)

David Tittsworth stated that Governor Carlin and DOT urge favorable consideration of SB 694. (See Attachment 3.)

SENATE BILL 772 - ACTION

Senator Morris moved to place SB 772 on the consent calendar; seconded by

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON TRANSPORTATION AND UTILITIES,  
room 254-E, Statehouse, at 9:00 a.m. on March 2, 1984.

SENATE BILL 772 - (con't)

Senator Thiessen. The motion carried.

SENATE BILL 778 - ACTION

Senator Meyers moved that SB 778 be reported favorable for passage; seconded by Senator Hayden. The motion failed.

Senator Morris moved that SB 778 be reported adversely; seconded by Senator Hein. The motion carried.

SENATE BILL 693 - Action

Senator Thiessen moved to adopt an amendment that DOT would maintain the access road to Pawnee Rock historical state park, however, the access road will not become part of the highway system; seconded by Senator Norvell. The motion carried.

Senator Norvell moved that SB 693 be reported favorable for passage as amended; seconded by Senator Thiessen and passed.

SENATE BILL 636 - ACTION

Senator Johnston moved that SB 636 be reported favorable for passage; seconded by Senator Hayden. The motion failed.

SENATE BILL 542 - ACTION

Senator Morris moved that SB 542 be reported adversely; seconded by Senator Hein. The motion carried. Senator Johnston, Senator Rehorn, Senator Norvell and Senator Hayden asked that they be recorded as voting no.

SENATE BILL 543 - ACTION

Senator Burke moved that SB 543 be reported adversely; seconded by Senator Hein. The motion carried. Senator Norvell asked that he be recorded as voting no.

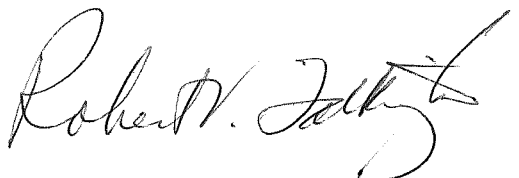
SENATE BILL 544

Senator Norvell moved that SB 544 be reported favorable for passage. The motion lost for lack of a second.

SENATE BILL 545

Senator Morris moved that SB 545 be reported adversely. The motion lost. No second.

The meeting adjourned at 10:00 a.m.



Please PRINT Name, Address, the organization you represent, and the Number of the Bill in which you are interested. Thank you.

NAME	ADDRESS	ORGANIZATION	BILL NO.
RICK ENEWOLD	TOPEKA	AT&T	
ED SCHAUB	TOPEKA	SWBT	
M. C. GERMANN	"	Ks Railroad Assn.	
Robert G. Anderson		Met. Control Bd.	
William G. Leonard		Ks. Tel. Assn.	
Lon Stanton	TOPEKA	NORTHERN NATURAL GAS	
BILL PERDUE	"	KPL / GAS SERVICE	
Alonso Hansen	"	H.D.B. Const. Inc.	694
How Miller	TOPEKA	Associated Credit Bureau of Kansas	
Tom Whitaker	TOPEKA	Ks Motor Carriers Assn.	
James Clouse	TOPEKA	Federal Navy	
Bob Morrissey	TOPEKA	"	
D. WAYNE ZIMMERMAN	TOPEKA	THE ELECTRIC CO. ASSOC. OF KS.	
Jerry Conrad	TOPEKA	KGE	
Ron Calbert	NEWTON	UNITED TRANSPORTATION UNION	
Leroy Jones	Overland Park	B. L. E.	
DAVID G. TITTSWORTH	CHIEF COUNSEL	KDOT	SB 694

Mr. Chairman Senate Transportation Committee Members:

Ref: SB 694

I appreciate this opportunity to appear before you committee on behalf of S B 694.

This bill was introduced because of a desire on my part to increase participation of disadvantaged business persons in State Highway contracts; contracts that are being let as a result of the passage of the Federal Surface Transportation Assistance Act of 1982

It is the work product of KDOT and is designed to allow the department more flexibility in meeting their goals as they work toward complying with federal statutes and regulations which govern the Act. The bill also reflects input by several small disadvantaged business persons who are regular bidders on small highway construction contracts here in the State of Kansas.

Senate Bill 694 does not mandate anything but it does allow permissive discretionary authority for the Secretary of KDOT to comply with section 105 (f) of the 1982 Surface Transportation Assistant Act.

The bill is not a panacea for either KDOT or small disadvantaged business persons but it does offer the appropriate tools to accomplish the job.

Conferees will be Robert Morrisey, Regional Administrator of Federal Highway Administration; Theodis Lockhart, NAACP; Alonzo Harrison, President HDB Construction and David Tittsworth, Chief Counsel KDOT.

*Billy Q. McCray*

*Atch. 1*

STATEMENT OF MR. ALONZO HARRISON  
ON SENATE BILL 694 PRESENTED TO  
THE SENATE TRANSPORTATION COMMITTEE

First and foremost I want to thank you all for affording me this time.

I, along with my business associates, would like very much to urge passage of Senate Bill 694. It is our belief that in so doing you will at one and the same time disrobe and dethrone many myths while opening the doors of cooperation.

Specifically, with the passage of Senate Bill 694 disadvantaged business enterprises (DBE's) will be afforded an arena wherein they may show to all who would observe their ability to perform in the area of construction. Such a bill will relieve majority contractors of some of their "burden" of finding quality DBE's. At the same time, the majority contractor will have an opportunity to observe the performance of DBE's without the "preconceived liability" of working with them. Further, the majority contractor will thereby be able to select from that pool a number of quality DBE's to work with in the future.

Moreover, benefits would result in two other ways as well. One, the State would be able to increase its DBE participation percentage thereby ensuring a continuous flow of federal highway funds while developing opportunity and employment for its citizens. It is equally true that there would be no loss in quality of service or

product due mostly to the fact that quality control specifications would be as they currently are, that is, determined and supervised by state inspectors.

Secondly, DBE's will be afforded an opportunity to:

- 1) Showcase their skills and talents.
- 2) Develop a track record of performance.
- 3) Create employment opportunities for themselves and others.
- 4) Become more competitive.
- 5) Develop goodwill with suppliers and lending institutions.
- 6) Become bondable.

These are, of course, only a few of the benefits that would be a direct result of passing Senate Bill 694.

This creative, responsible and legitimate mandate will serve not only DBE's but the State and majority contractors as well. To disrobe and dethrone misunderstanding and distrust will be a byproduct of your passing this bill. A negative vote simply serves to prolong age old adages of divisiveness and disdain held by some who have had questionable DBE experiences.

MEMORANDUM TO: Senate Transportation Committee  
FROM: David G. Tittsworth  
Chief Counsel  
REGARDING: Senate Bill 694

Section 105(f) of the 1982 Surface Transportation Assistance Act (Pub. L. 97-424) requires that "not less than ten per centum of the amounts authorized to be appropriated under this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals." This section was modeled after provisions of the Public Works Employment Act of 1977 (Pub. L. 95-28). Like its predecessor, Section 105(f) was implemented in part to address the difficulties facing disadvantaged business owners in competing for economic benefits in federal programs.

The new provisions in the federal act represent a significant change from prior policies regarding equal opportunities for disadvantaged businesses in highway construction. In the past few years, states were required by federal regulation to use a "best efforts approach" in achieving minority participation goals. For example, in Kansas, disadvantaged business enterprise participation levels approximated 3% or less of all federal aid projects since 1980. No sanctions were imposed for failure to meet the goals established by each state.

Regulations promulgated under the 1982 STAA have dramatically changed such an approach. Under the new law, waivers or reductions from the 10% requirement will not be approved merely because a state has a small minority population nor will requests be granted if goals were unobtainable because of state statutes or local ordinances. The governor must also approve any request for any waiver and the state must demonstrate that all feasible means were undertaken to satisfy the 10% requirement. Finally, federal law mandates that federal funding from a particular project or further projects may be withheld if a state is in noncompliance because it failed to submit an acceptable goal or failed to remedy an insufficient disadvantaged business enterprise (DBE) level.

The necessity of compliance with the federal law is clearly established when considered in the context of the necessity of continued federal highway financing. Federal apportionments in FFY 1983 approximated \$150 million for Kansas (an increase of nearly \$50 million from the previous fiscal year).

Following the enactment of the 1982 STAA, the Kansas Department of Transportation took immediate steps to insure compliance with the federal act and to protect the federal financing which is crucial to our operations. A goal of 8.3% for DBE participation was designated by the Federal Highway Administration (FHWA) for KDOT for FFY 1983.<sup>1</sup> A

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<sup>1</sup> The 8.3% level was implemented for FFY 1983 because the 1982 STAA did not become effective until January 6, 1983.



10% goal for DBE participation for the current federal fiscal year has been submitted by KDOT and approved by FHWA.

For FFY 1983, the State of Kansas achieved a level of 8.8% DBE participation. For the present federal fiscal year, a cumulative level of 10.8% DBE participation has occurred through February, 1984.

These increases are the result of the following actions taken by the Department, which include the following:

1. The Department analyzes all construction contracts on a project-by-project basis to ascertain the appropriate level of participation by disadvantaged businesses for each project. These determinations are based on the availability of disadvantaged businesses, geographic considerations, expertise required for a particular project or portion thereof, and other considerations.

2. The Department seeks out qualified disadvantaged firms on a statewide basis. The Department has met and will continue to meet with such firms on a regular basis to ascertain concerns and problems. Seminars are offered for disadvantaged businesses to instruct

such firms on various construction contract issues and general business training and to ascertain problems which may arise in the construction area.

3. The Department certifies firms which meet the criteria established by federal regulations for disadvantaged businesses. KDOT will attempt to certify only such firms that are "truly" disadvantaged.

4. The Department monitors construction contracts to insure that disadvantaged business requirements are met and to avoid problems which may arise. The Compliance Section of the Bureau of Construction and Maintenance is responsible for following up on disadvantaged business requirements after contracts are awarded to insure that all requirements are met.

5. The Department has revised its special contractual provisions relating to disadvantaged business participation. The primary change is to require contractors to supply dis-

advantaged business information (name of disadvantaged firm, description of work to be done, value of such work, and percentage of total contract) at the time a bid is submitted. Such information is not subject to revision after bids are opened. Low bidders who do not meet the prescribed disadvantaged business goals are required to submit evidence of their good faith efforts, within two working days after notification, to demonstrate their attempts to meet the contractual DBE goal.

6. The Department has received approval of a Department regulation change which has the effect of making public the bidders list of contractors who have requested plans from the Department to other contractors, suppliers and DBEs. This policy change helps to enable DBEs, among others, to acquire useful information in determining which contractors may require their services. In addition, it should assist prime contractors in meeting necessary levels of DBE participation.

Senate Bill 694 would add another means of assuring compliance with Section 105(f) of the 1982 STAA. The heart of the bill is contained in Section 2(b) which states that:

"...the secretary of transportation is empowered, but is not limited, to:

...

(b) designate certain highway construction contracts or portions thereof to be set aside for bid by disadvantaged business enterprises solely..."

Under current Kansas law, the Department has no authority to set aside projects, or portions thereof, to DBEs. K.S.A. 68-410 provides in relevant part that:

"All contracts for the construction, improvement, reconstruction, and maintenance of the highway system, the cost of which exceeds one thousand dollars (\$1,000), except contracts between the secretary of transportation and the various counties, shall be awarded at a public letting to the lowest responsible bidder: **Provided, however,** That no contract for a single project or structure shall be divided into two or more contracts and awarded without public letting and to other than the lowest responsible bidder..."

The Department believes that the set aside authority which would be granted by Senate Bill 694 would help to achieve the intent underlying the 1982 STAA and would aid the Department, contractors and DBEs in complying with federal law. The constitutionality of a 10% set aside of federal funds for minority businesses was originally upheld in Fullilove v. Klutznick, 448 U.S. 448, 65 L.ED 2d 902 (1980). Writing for the majority, Chief Justice Burger explained that: "Congress could prefer minority contractors in order to avoid perpetuating the effects of prior discrimination." 448 U.S. at 472-78. Essentially, the Court was persuaded by the fact that the quota was a temporary measure, remedial in purpose, flexible in administration, with a restricted adverse impact on non-minorities. More recently, the United States Sixth Circuit Court of Appeals upheld Ohio's DBE set side statute. Ohio Contractors Ass'n. v. Keip, 713 F.2d 167 (1983).

Other states have found set aside legislation to be a legitimate and desirable mechanism to address the issue of disadvantaged business participation in highway programs. Based on returns of 42 states in a survey conducted by the American Association of State Highway and Transportation Officials (AASHTO) in October, 1983, it was reported that at least ten (10) states have already enacted set aside legislation.

I would like to emphasize three major points with regard to the set aside authority contained in Senate Bill 694:

1. Set asides will help to further the Congressional intent of Section 105(f) of the 1982 STAA by permitting DBEs to establish "track records" as competent highway contractors and subcontractors. This in turn will help the process of encouraging the development of such businesses and should aid in assisting such businesses to receive the opportunity to compete in the mainstream of highway construction work on an equal basis.

2. The bill is drafted to comport with Section 105(f) of the 1982 STAA. Senate Bill 694 clearly states that the legislation is designed to meet the mandate of such federal law and that the provisions of the bill only apply to federally aided highway construction projects. Section 4 of the bill adopts all terms and words as defined in the federal act and all regulations and amendments thereto. Finally, it should be noted that Section 5 provides for the sunset of such legislation on September 30, 1986, concurrent with the length of the 1982 STAA. Thus, the bill is explicitly interwoven with the federal law and does not involve a new appropriation of state funds or use of set asides where only state funds are used.

3. Passage of Senate Bill 694 would help to shift the burden of locating and utilizing DBEs from the prime contractors to the Department. As noted above, the primary tool which the Department currently is compelled to use to

achieve our approved DBE goal is to require contractors to achieve a specified subcontract goal in each project. The set aside legislation would in some ways place the Department in the shoes of a general contractor as to the successful DBE bidder. The legislation would also permit greater flexibility in determining the types of work to be required under a set aside project and in achieving an equitable distribution of such projects throughout the state.

The Department recommends one technical amendment to the bill. The clause which appears at lines 0039-0041 and which reads "...except that no contract shall be awarded to any bidder whose bid exceeds estimates prepared by the department of transportation by 10% or more" should be stricken. Current procedures and specifications of the Department provide for mechanisms to reject bids for any irregularities, including bids which are considered too high. The clause in Senate Bill 694 is thus unnecessary and should be deleted.

Finally, I would like to briefly address the issue of women business enterprises (WBEs). In an interim committee last year, issues were raised regarding the adverse effect of DBE participation upon WBE. The Department believes that federal action is necessary to ultimately respond to such concerns. The Department believes that WBEs should fall within the definition of DBEs and that WBE participation should be counted toward our approved DBE goal. The current federal regulations currently

provide otherwise. The Department is in the process of drafting a letter to Secretary Dole regarding this issue. Similar actions by the legislature may help in this regard.

Attached are several items relevant to Senate Bill 694:

1. Current federal regulations which relate to DBE participation.

2. The Department's current special contract provision relating to DBE participation.

3. Secretary Dole's January 31, 1984 press release which relates to FFY 1983 levels of DBE participation.

4. Information relating to the number of DBEs and WBEs in Kansas and rejections of certification.

Governor Carlin and the Department respectfully urge favorable consideration of this measure. We will continue to keep the legislature and the Governor aware of the status of this matter and will attempt to provide any additional information which may be needed.