

OPINION NO. 83-101**Syllabus:**

The set-aside provisions for minority business enterprises do not apply to contracts to be let by a board of county commissioners.

To: Anthony G. Pizza, Lucas County Prosecuting Attorney, Toledo, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, December 21, 1983

I have before me your request for an opinion as to whether the set-aside provisions for minority business enterprises apply to contracts to be let by a board of county commissioners. A proper determination of this question requires an examination of R.C. 122.71(E), R.C. 123.151, and R.C. 125.081.

R.C. 122.71(E) defines a minority business enterprise as follows:

(1) "Minority business enterprise" means an individual, partnership, corporation, or joint venture of any kind that is owned

and controlled by United States citizens, residents of Ohio, who are members of one of the following economically disadvantaged groups: Blacks, American Indians, Hispanics, and Orientals.

(2) "Owned and controlled" means that at least fifty-one per cent of the business, including corporate stock if a corporation, is owned by persons who belong to one or more of the groups set forth in division (E)(1) of this section, and that such owners have control over the management and day-to-day operations of the business and an interest in the capital, assets, and profits and losses of the business proportionate to their percentage of ownership. In order to qualify as a minority business enterprise, a business shall have been owned and controlled by such persons at least one year prior to being awarded a contract pursuant to this section.

R.C. 123.151 sets forth the percentages of construction contracts that are to be set aside to be bid on only by minority business enterprises, and specifies the construction contracts to which the set-aside provisions apply. R.C. 123.151 states in pertinent part:

(C)(1) From the contracts to be awarded under section 123.15 and Chapter 153. of the Revised Code, the director of administrative services shall select a number of contracts whose aggregate value is approximately five per cent of the total estimated value of contracts to be awarded in the current fiscal year. The director shall set aside the contracts so selected for bidding by minority business enterprises only. . . .

(2)(a) Any contractor awarded a contract authorized by section 123.15 and Chapter 153. of the Revised Code or a contract included under division (D) of this section shall make every effort to ensure that certified minority business subcontractors and materialmen participate in the contract. In the case of contracts specified in division (A), (B), or (C) of section 153.02 of the Revised Code, the total value of subcontracts awarded to and materials and services purchased from minority businesses shall be at least ten per cent of the total value of the contract, wherever possible and whenever the contractor awards subcontracts or purchases materials or services. In the case of all other contracts, the total value of subcontracts awarded to certified minority businesses shall equal at least five per cent of the total value of the contract; and the total value of both the subcontracts awarded to and the purchases of materials made from such businesses shall equal at least ten per cent of the total value of the contract, wherever possible and whenever the contractor awards subcontracts or purchases materials or services.

(D)(1) To the extent that any agency of the state other than the department of administrative services is authorized to enter into contracts for construction, the agency shall set aside a number of contracts the aggregate value of which equals approximately five per cent of the aggregate value of construction contracts for the current fiscal year for bidding by minority business enterprises only. . . .

(2) All contracts for construction entered into by any agency of the state other than the department of administrative services, including contracts set aside under division (D)(1) of this section, shall contain the same provision required by division (C)(2) of this section. . . .

(G) No funds of any state agency shall be expended in any fiscal year for construction until the director of the department of administrative services certifies to the equal employment opportunity coordinator, the clerk of the senate, and the legislative clerk of the house of representatives of the general assembly that approximately

five per cent of the aggregate amount of the projected expenditure for construction in the fiscal year has been set aside as provided for in this section.

(H) The department of administrative services and every other agency of the state authorized to enter into contracts for construction or contracts for purchases of equipment, materials, supplies, contracts of insurance, or services shall file a report every ninety days with the equal employment opportunity coordinator of the department of administrative services. . . .

R.C. 125.081 sets forth the percentages of procurement contracts that are to be set aside to be bid on only by minority business enterprises. In addition, R.C. 125.081 identifies the procurement contracts to which the set-aside provisions apply. R.C. 125.081 states in pertinent part:

(A) From the contracts to be awarded for purchases of equipment, materials, supplies or contracts of insurance under the authority of section 125.07 of the Revised Code and from any service contracts awarded by the department of administrative services requiring either competitive bidding or controlling board approval under division (D) of section 127.16 of the Revised Code, the director of administrative services shall select a number of such contracts whose aggregate value is approximately fifteen per cent of the estimated total value of all such contracts to be awarded in the current fiscal year. The director shall set aside the contracts selected for bidding only by minority business enterprises, as defined in division (E)(1) of section 122.71 of the Revised Code. . . .

(B) To the extent that any agency of the state, other than the department of administrative services, the generally assembly, the supreme court, courts of appeal[s], courts of common pleas, boards of elections, and agricultural experiment stations of the state, is authorized to purchase equipment, materials, supplies, contracts of insurance, or services, the agency shall set aside a number of purchases the aggregate value of which equals approximately fifteen per cent of the aggregate value of such purchases for the current fiscal year for bidding by minority business enterprises only. . . .

Under R.C. 123.151, the contracts to be set aside include a certain percentage of construction contracts awarded by the Department of Administrative Services or any agency of the state authorized to enter into such contracts. The specific contracts that can be set aside are contracts covered by R.C. 123.15 and R.C. Chapter 153. Procurement contracts to be set aside under R.C. 125.081 include a certain percentage of contracts awarded by the Department of Administrative Services if competitive bidding or controlling board approval is required, and contracts awarded by state agencies other than the Department of Administrative Services which are not excluded by R.C. 125.081(B). The specific contracts that can be set aside are contracts covered by R.C. 125.07, contracts awarded by the Department of Administrative Services requiring competitive bidding or controlling board approval, and purchases made by those state agencies authorized to do so and not excluded by R.C. 125.081(B). If contracts awarded by a board of county commissioners are included within any of these provisions, then an appropriate percentage of such contracts would have to be set aside for bidding by minority business enterprises only. The following examination of these provisions shows that only R.C. Chapter 153 might encompass contracts awarded by the board of county commissioners. R.C. 123.15 grants to the Director of the Department of Administrative Services the authority to contract for labor, materials and construction "of the public works of the state, or any part thereof." Pursuant to this provision, the Director of the Department of Administrative Services has jurisdiction over state contracts, but not contracts of a county, a municipal corporation, or another political subdivision of the state. Whereas a certain percentage of other state agencies' contracts for construction or the procurement

of goods and services are also required to be set aside, the definition of a state agency as found in R.C. 131.31(C)¹ does not include county government. R.C. 125.07, which subjects procurement contracts to the set aside provisions, deals only with purchases made by the Department of Administrative Services. Finally, contracts awarded by the Department of Administrative Services based upon competitive bidding or controlling board approval include only those contracts for goods and services purchased by the Department for the use of state agencies. 1 Ohio Admin. Code 123:5-1-04. Thus, it appears that only those contracts awarded pursuant to R.C. Chapter 153 could possibly include contracts of a board of county commissioners.

While it might be argued that the language of R.C. 123.151(C) and specifically R.C. 123.151(C)(2)(a) which references contracts to be awarded under R.C. Chapter 153 is broad enough to include all contracts referenced in that chapter, including county contracts governed by R.C. 153.21 through R.C. 153.49, I find it evident from case law, and the intent of the legislature in enacting these provisions of the law, that the scope of the set-aside program is not that broad.

This conclusion is supported by a recent Sixth Circuit Court of Appeals case, brought to challenge the constitutionality of the set-aside program, which referred to the program as affecting state contracts only. Ohio Contractors Association v. Keip, 713 F.2d 167 (6th Cir. 1983). In upholding the constitutionality of this program, the court repeatedly referred to it as affecting state contracts, and made no mention of any possibility that contracts of counties or local governments might be affected. The first sentence of the court's decision states that the case concerned "the validity of an Ohio law which requires state officials to set aside designated percentages of state contracts for bidding by minority business enterprises only." (Emphasis added.) 713 F.2d at 168. The contracts authorized by R.C. 153.21 through R.C. 153.49 are county contracts awarded by a county building commission pursuant to R.C. 153.29. This building commission is created by R.C. 153.21 and is at all times independent of the state Department of Administrative Services and other state agencies.

The conclusion that the set-aside provisions do not apply to county contracts is further supported by the history of these provisions. The title of the bill establishing the set-aside program refers to the setting aside of state contracts, not county contracts. Am. Sub. H.B. 584, 113th Gen. A. (1980) (eff. Dec. 17, 1980). The title of the bill states:

To amend sections 121.04, 122.02, 125.07, 125.08, and 169.05 and to enact sections 122.71 to 122.85, 122.87 to 122.89, 122.92 to 122.94, 123.151, 125.081, 125.111, and 4115.032 of the Revised Code to establish a minority business development loan program, to provide construction contract bonds for minority businesses unable to obtain them from private sources, to set aside five percent of state construction contracts and fifteen percent of procurement contracts for minority businesses, to require a portion of every state construction contract to be reserved for minority subcontractors and materialmen, to require all state and local procurement contracts to contain anti-discrimination clauses, and to make an appropriation. (Emphasis added.)

Although the bill's title mentions local contracts, such reference is in regard to the anti-discrimination clauses found in R.C. 125.111, a section of the code that includes, but is not limited to, the set-aside contract provisions. The intent of the provisions of the bill dealing specifically with set-aside contracts refer to state contracts only, not contracts of a county or other local government.

¹ R.C. 131.31(O) defines "state agency" for the purposes of Title 1 of the Revised Code, as "every organized body, office, and agency established by the laws of the state for the exercise of any function of state government."

Therefore, it is my opinion, and you are hereby advised, that the set-aside provisions for minority business enterprises do not apply to contracts to be let by a board of county commissioners.