

STORAGE NAME: h0319s1z.bdt

****FINAL ACTION****

DATE: July 6, 1998

****SEE FINAL ACTION STATUS SECTION****

**HOUSE OF REPRESENTATIVES
AS FURTHER REVISED BY THE COMMITTEE ON
BUSINESS DEVELOPMENT AND INTERNATIONAL TRADE
FINAL BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

BILL #: CS/HB 319

RELATING TO: Minority Business Enterprises

SPONSOR(S): Committee on Business Development and International Trade and Representative Andrews

COMPANION BILL(S): SB 940(s)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) BUSINESS DEVELOPMENT AND INTERNATIONAL TRADE YEAS 7 NAYS 0
- (2) GOVERNMENTAL OPERATIONS (W/D)
- (3)
- (4)
- (5)

I. FINAL ACTION STATUS:

CS/HB 319, second engrossed, became Chapter 98 - 295, Laws of Florida.

II. SUMMARY:

In order to receive minority "set-asides" under the state's program for procurement of personal property and services, minority businesses must be certified as eligible to participate. Section 287, F.S., delineates the requirements for such certification, including number of employees, net worth, and lineage.

This bill amends s. 287.0943(1), F.S., to make ineligible for Minority Business Enterprise (MBE) certification, those minority-owned businesses which are the result of a transfer from a nonminority to a minority within a related immediate family group if the combined net asset value of all members of that family group exceeds \$1 million.

The Minority Business Advocacy and Assistance Office (MBAAO) will be required to develop rules and forms to implement the provisions of this bill. The MBAAO has estimated that the additional staff, resources and training required in the first year will cost \$55,000, and \$35,000 in the second and third years.

See separate Committee on Governmental Operations' partial analysis in the "Comments" section, which raises, among other things, constitutional and mandate concerns.

This committee bill was carried over to the 1998 legislative session and placed on the House Consent Calendar pursuant to House Rule 96.

III. SUBSTANTIVE RESEARCHS:

A. PRESENT SITUATION:

In order to receive minority "set-asides" under the state's program for procurement of personal property and services, minority businesses must be certified as eligible to participate. Section 287.0943(1)(e), F.S., requires businesses seeking MBE certification to meet the following criteria in order to be eligible for MBE certification:

1. The applicant business must be owned or controlled by a minority person.
2. If present ownership was obtained by transfer, the minority owner must be a 51% owner for at least two years prior to certification when the transferor was a nonminority. This requirement does not apply to minority persons who are otherwise eligible who take a 51% or greater interest in a firm that requires professional licensure to operate and who will be the qualifying license holder for the firm when certified.
3. The prospective certified minority business enterprise must be currently performing a useful business function.

Section 288.703(1), F.S., limits the definition of a small business to one that, together with its affiliates, has a net worth of not more than \$3 million. Additionally, it restricts the eligibility of sole proprietors to those with personal and business investments not exceeding \$3 million.

Section 288.703(2), F.S., limits the definition of "minority business enterprise" to any small business concern which is organized to engage in commercial transactions, which is domiciled in Florida, and which is at least 51% owned by minority persons.

Section 287.09431, F.S., provides for statewide and interlocal agreement on the certification of minority business enterprises. The purpose of this section is to establish a uniform certification process among the various local governmental entities throughout the state. The intent of this section is to avoid burdensome administrative requirements on MBE applicant firms and redundancy.

B. EFFECT OF PROPOSED CHANGES:

This bill amends s. 287.0943(1), F.S., to further limit eligibility for MBE certification by deeming the ownership of the following businesses invalid for the purpose of qualifying for certification: where a transfer of majority ownership was made within an "immediate family group" from a nonminority to a minority person if the combined total net asset value of all members of that family group exceeds \$1 million.

Additionally, this bill amends s. 288.703(2), F.S., to limit the definition of a "Minority business enterprise" to exclude from eligibility for certification those minority owned businesses which are the result of a transfer from non-minority to a minority within a related immediate family group if the combined total net asset value of all members of such family group exceeds \$1 million.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

Yes, this bill will require the Minority Business Advocacy and Assistance Office of the Department of Labor and Employment Security to enact rules to administer the requirements of this bill.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

The MBAAO stated that this bill would require their investigations of applicant businesses to be much more extensive in order to determine the collective net worth of a "family group".

(3) any entitlement to a government service or benefit?

This bill would make ineligible for MBE certification those MBE applicants who acquired ownership of the applicant business through a transfer from a nonminority within the same related immediate family group if the combined total net asset value of all members of that family group exceeds \$1 million dollars.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

- a. Does the bill increase anyone's taxes?

N/A

- b. Does the bill require or authorize an increase in any fees?

N/A

- c. Does the bill reduce total taxes, both rates and revenues?

N/A

- d. Does the bill reduce total fees, both rates and revenues?

N/A

- e. Does the bill authorize any fee or tax increase by any local government?

N/A

3. Personal Responsibility:

- a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

Yes. This bill would reduce the number of businesses entitled to MBE certification. Specifically, it would make ineligible for MBE certification those MBE applicants who acquired ownership of the applicant business through a transfer from a nonminority within the same immediate family group if the combined total net asset value of all members of that family group exceeds \$1 million dollars.

- b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

N/A

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

No.

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

Yes, some MBEs currently eligible for certification would no longer be eligible to participate in the program.

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

N/A

- (1) Who evaluates the family's needs?

N/A

- (2) Who makes the decisions?

N/A

- (3) Are private alternatives permitted?

N/A

- (4) Are families required to participate in a program?

N/A

- (5) Are families penalized for not participating in a program?

N/A

- b. Does the bill directly affect the legal rights and obligations between family members?

No.

- c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

- (1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

Amends ss. 287.0943 and 288.703

E. SECTION-BY-SECTION RESEARCH:

IV. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

The MBAAO will incur minimal costs associated with the development of rules and procedures to implement the provisions of this bill.

2. Recurring Effects:

The MBAAO has estimated that the additional staff, resources and training required to implement this bill is as follows.

<u>FY 97/98</u>	<u>FY 98/99</u>
\$55,000	\$35,000
(1 FTE)	(1 FTE)

3. Long Run Effects Other Than Normal Growth:

None.

4. Total Revenues and Expenditures:

See A.1 and 2 above

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

Local governments that operate MBE programs will incur minimal costs associated with the development of rules and procedures to implement the provisions of this bill.

2. Recurring Effects:

Local governments that operate MBE programs will incur costs associated with administration.

3. Long Run Effects Other Than Normal Growth:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

It is foreseeable that the cost upon an applicant for gathering data and personal records will increase pursuant to this bill as more information will be required of an applicant.

2. Direct Private Sector Benefits:

None.

3. Effects on Competition, Private Enterprise and Employment Markets:

None.

D. FISCAL COMMENTS:

None.

V. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

Those local governments that currently operate a minority business procurement program will be required to expend funds to comply with this act. However, since the expenditure required in this act applies to all persons similarly situated, including the state and local governments, this bill is exempt from the provisions of article VII, Section 18 of the Florida Constitution.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

VI. COMMENTS:

Analysis by the House Committee on Governmental Operations:

Current Situation

CS/HB 319, in part, amends s. 287.0943, F.S. That section establishes the "Minority Business Certification Task Force". The purpose of the task force is to propose uniform criteria and procedures by which participating entities and organizations can qualify businesses to participate in procurement or contracting programs as certified minority business enterprises. Section 287.0943, F.S., sets forth numerous criteria requirements regarding ownership and control of minority businesses.

When these certification criteria are approved by the task force, they must be submitted to the Department of Labor and Employment Security for approval. These criteria are then to be included in a "statewide and interlocal agreement". Section 287.09431, F.S., sets forth the provisions of this "statewide and interlocal agreement" (hereinafter the "agreement"), but does not include the certification criteria because they were not developed at the time this law was passed. However, these certification criteria are incorporated by reference. Section 287.09431, F.S., further provides that if, within 2 years from the date the department adopts the certification criteria, the agreement included in the statutes is not executed by a majority of municipal and county governing bodies that administer a minority business assistance program, then

the Legislature shall review this agreement. It is the intent of the Legislature that if the agreement is not executed by a majority of the requisite governing bodies, then a statewide uniform certification process should be adopted, and that said agreement should be repealed and replaced by a mandatory state government certification process. (emphasis added)

The Minority Business Certification Task Force has already met and developed certification criteria in accordance with the existing provisions of the Florida Statutes. These criteria were approved by the Department of Labor And Employment Security on July 16, 1996. Since that time a number of county and municipal governing bodies have executed this agreement. (telephone conversation, 4/10/97, Veronica Anderson, Minority Business Certification Task Force Chairperson)

Effect of Proposed Legislation

CS/HB 319 amends the criteria requirements that the task force was to consider in establishing certification criteria. If this bill passes, the certification criteria upon which the agreement is based will be unilaterally changed by the Legislature in circumvention of the task force process. Furthermore, those governmental entities which have executed this agreement, or are contemplating same, may consider the legislative change sufficiently material and burdensome and thus choose not to participate.

The new certification criteria requires that a transfer of a business ownership from a nonminority person to a minority person within the "related immediate family group"¹ "in order to establish ownership by a minority person" will be deemed to have been made solely for the purpose of satisfying certification criteria and thus will render such ownership invalid for purposes of qualifying for such certification **if the combined total net asset value of all members of the "related immediate family group" exceeds \$1 million.** (Apparently such a transfer is valid if the total net assets are \$1 million or less.) Accordingly, participating governmental entities will have to gain access to certain family members' financial records in order to determine net assets. Currently, no such requirement exists.

Furthermore, what this amendment actually provides is subject to a divergence of opinion. The Business Development and International Trade Committee analysis interprets the amendment to s. 287.0943(1), F.S., as providing that if a transfer occurs of a nonminority owned business to a minority person who is a member of the "related immediate family group", then the transfer will be deemed (presumed) to have occurred solely for purposes of satisfying MBE certification criteria. Accordingly, the transfer will be considered invalid for purposes of MBE qualification. See p.2, last paragraph. (Presumably the minority owner would have an opportunity to rebut that presumption.)

However, the amendment to s. 287.0943(1), F.S., provides that "a transfer made within a related immediate family group from a nonminority person to a minority person **in order to establish ownership by a minority person** shall be deemed to have been made solely for purposes of satisfying certification criteria". Accordingly, the transfer will be deemed (presumed) to have occurred solely for purposes of satisfying MBE certification -- but only if it can be shown that the transfer was "in order to establish ownership by a minority". This analyst considers this additional consideration a significant difference.

Generally, a presumption is created in order to avoid proof of a matter, and allows one to simply rely on a specified set of facts from which one presumes the matter. Thus the burden of proof shifts to the other party to rebut that presumption with competent evidence. This bill looks like it creates a "presumption", but in fact does not because one has to show that the transfer took place "in order to establish ownership by a minority person" in order to trigger the "presumption" that the transfer occurred solely for the purposes of satisfying MBE certification criteria. This condition precedent necessary to trigger the presumption effectively eviscerates the purpose of the presumption.

Furthermore, the Business Development and International Trade analysis suggests that the amendment to s. 287.0943(1), F.S., restricts the MBE ineligibility provision to transfers occurring within 2 years of seeking certification. See p.1, paragraph 2. Although the existing statutory language found in the first sentence of s. 287.0943(1)(e)2 requires that the minority owner own at least 51 percent of the business for 2 years subsequent to an ownership transfer, nothing in the new language expressly links the transfer (triggering the presumption) to within 2 years of seeking certification; nor could such a 2- year limitation be easily implied.

¹ "Related immediate family group" is defined to mean "one or more children under 16 years of age and a parent of such children or the spouse of such parent residing in the same house or living unit." It is unclear as to whose house is referenced (former nonminority owner or minority transferee?) and who must be residing there; furthermore, "living unit" is not defined. Finally, it is unclear why the child must be under 16 as opposed to, for example, 17, if that child meets the residential requirement.

CS/HB 319 also amends the definition of "Minority business enterprise" found in s. 288.703(2), F.S. It appears that this bill intends to narrow the definition to exclude transfers of ownership as described above with respect to the amendatory language to s. 287.0943(1), F.S. However, the "in order to establish ownership" language discussed above included in s. 287.0943(1), F.S., is omitted in the amendatory language to s. 288.703(2), F.S. Accordingly, there is a substantial conflict between these two provisions regarding essentially the same matter.

Additionally, the Business Development and International Trade analysis indicates in its fiscal analysis (p. 6, III. A. 1.) that there will be costs associated with the development of rules to implement this bill's provisions. This analyst is unaware of any rulemaking requirements.

Mandates

Finally, section 3 of CS/HB 319 makes the definitions of small business, minority business enterprise, and certified minority business enterprise provided in s. 288.703, F.S., applicable to the state and all political subdivisions of the state. Political subdivision is not defined; accordingly, the definition for that term found in Chapter 1, F.S., Construction of Statutes, would apply:

The words "public body," "body politic," or "political subdivision" include counties, cities, towns, villages, special tax school districts, special road and bridge districts, bridge districts, and all other districts in this state.

This provision would require counties and municipalities to spend money in order to investigate the net asset value of all of the members of the "related family group". Article VII, Sec. 18, Florida Constitution, excuses local governments from complying with state mandates which impose negative fiscal consequences. However, certain exemptions and exceptions exist. If similarly situated persons are all required to comply, as it appears in this case, **and** the Legislature formally determines an important state interest, then an exception exists. Nothing in this bill appears to establish an important state interest.

Constitutional concerns

Finally, there may be constitutional concerns regarding any statewide uniform certification process. See *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) ("The city has failed to demonstrate a compelling governmental interest justifying the [Minority Business] Plan, since the factual predicate supporting the Plan does not establish the type of identified past discrimination in the city's construction industry that would authorize race-based relief under the Fourteenth Amendment's Equal Protection Clause.")

VII. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On March 26, 1997, the Committee on Business Development and International Trade passed HB 319 as a committee substitute. The committee substitute defined "immediate related family group" as a child or children under 16 years old, a parent, or spouse residing in the same house or living unit.

On April 17, 1997, CS/HB 319 was passed by the House and subsequently received in House messages and referred to the Senate Committee on Commerce and Economic Opportunities.

CS/HB 319 was carried over to the 1998 Legislative Session and placed on the House Consent Calendar pursuant to rule 96.

On March 17, 1998, CS/HB 319 was amended technically to reflect the change in Legislative year while on the House Consent Calendar, then subsequently passed by the House (HJ 216). The Senate received CS/HB 319 and referred it to the Senate Committee on Commerce and Economic Opportunities.

On April 13, 1998, CS/HB 319 was withdrawn from the Senate Committee on Commerce and Economic Opportunities, substituted for SB 940, amended and passed by the Senate (SJ 00444). The amendment adopted restored original language in s. 288.703(1), F.S., defining a "Small Business" to include a limitation on net worth of not more than \$3 million. CS/HB 319 had changed the limit to a net worth of not more than \$1 million for a "Small Business."

This analysis reflects CS/HB 319, second engrossed.

VIII. SIGNATURES:

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PAGE 12

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