SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

BILL: SB 2618

SPONSOR: Senator Diaz-Balart

SUBJECT: State Procurement/Minority Business

DATE: April 26, 2000 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	White	Wilson	GO	Favorable
2.			CM	
3.				
4.				
5.				

I. Summary:

The bill revises provisions relating to the state procurement process and minority business enterprise (MBE) programs by:

- enhancing penalties for obtaining MBE certification by false representation;
- providing that agency discrimination in contracting is prohibited and creating a complaint and discipline process for violations;
- permitting MBEs certified at the local level to be accepted as state certified if the local government applies the state's MBE certification criteria;
- renaming the Minority Business Advocacy and Assistance Office as the Office of Supplier Diversity, and transferring this office to the Department of Management Services;
- directing the Auditor General to conduct random reviews/audits of certified MBEs to deter fraud;
- expanding the definition of "small business" by allowing businesses with up to 200 employees (current law provides 100) and with $5 million in net worth (current law provides $3 million), or businesses which are federally certified by the Small Business Administration, to qualify; and
- creating a discriminatory vendor list which prevents the vendor from doing business with the state for three years.

The bill leaves existing statutory MBE spending goals and MBE contracting advantages, such as set asides and price preferences, in place.

This bill substantially amends sections 287.094, 287.0943, 287.09451, 288.703, 17.11, 255.102, 287.012, 287.042, 287.057, and 287.9431, Florida Statutes. The bill creates section 287.134, Florida Statutes.

II. Present Situation:

A. Florida statutory law concerning small and minority business assistance

Chapters 287 and 288, F.S., set forth Florida's statutory scheme for small and minority business assistance. A "small business" is defined as an independently owned and operated business concern that employs 100 or fewer permanent full-time employees, has a net worth of not more than $3 million, and an average net income of not more than $2 million.[1] A "minority business enterprise" (MBE) is defined as a "small business" which is domiciled in Florida and is at least 51 percent-owned by minority persons. A "minority person" means an African American, a Hispanic American, an Asian American, a Native American, and an American woman.

The Minority Business Advocacy and Assistance Office (MBAAO) within the Department of Labor and Employment Security, which was created by the Legislature in 1994, oversees the state's MBE program.[2] One of the MBAAO's most significant responsibilities is to certify Florida MBEs so that the MBE may qualify for the following advantages in state contracting:

- **Set-asides:** State agencies, local governments, community colleges, and district school boards are permitted to set aside commodities and services contracts for competitive sealed bidding only among certified MBEs or only among bidders who agree to use certified MBEs as subcontractors.[3] Moreover, local governments, community colleges, or district school boards are permitted to set aside up to 10 percent of funds allocated for construction capital projects to be spent on contracts which are competitively bid only among certified MBEs.[4]

- **Price preferences:** State agencies are permitted to use price preferences up to 10 percent and weighted preference formulas for commodities and services contracts.[5]

Neither set-asides, nor price preferences are required to be used. The only mandatory statutory advantage that state agencies must implement is the following: contracts for commodities or services must be awarded to a certified MBE in the event the MBE's bid is equal to the lowest non-minority bid.[6]

The statutes also encourage, but do not require, state agencies to spend the following percentages of contract moneys with certified MBEs:

- 21 percent of moneys expended for construction contracts (four percent with African Americans, six percent with Hispanic Americans, and 11 percent with American women);

[1]Section 288.703, F.S.

[2]Chapter 94-322, L.O.F.; Section 287.0943, F.S.

[3]Sections 255.102, 287.057(6) and 287.093, F.S.

[4]Sections 235.31 and 255.101, F.S.

[5]Sections 255. 102 and 287.057(7), F.S.

[6]Section 287.057(10), F.S.

- 25 percent of moneys expended for architectural and engineering contracts (nine percent with Hispanic Americans, one percent with Asian Americans, and 15 percent for American women);

- 24 percent of moneys expended for commodities (two percent with African Americans, four percent with Hispanic Americans, one percent with Asian Americans and Native Americans, and 17 percent with American women); and

- 50.5 percent of moneys expended for contractual services (six percent for African Americans, seven percent for Hispanic Americans, one percent for Asian Americans, one-half of one percent with Native Americans, and 36 percent for American women).[7]

The statutes also encourage, but do not require, state agencies and local governments which issue bonds or other tax exempt obligations to offer not less than 20 percent participation to minority firms.[8]

The amount of business that state agencies engage in with certified MBEs is reported on a quarterly basis by the Auditor General. This report must include disbursements made to small businesses, to certified MBEs in the aggregate, and to certified MBEs broken down into nationality and gender subgroups.[9]

All state agencies are required to adopt MBE utilization plans which must be reviewed and approved by the MBAAO, and which must include methods designed to attain the legislative intent in assisting MBEs.[10] If an agency deviates significantly from its utilization plan for two consecutive years, or for three out of five total fiscal years, the MBAAO may review any of the agency's bid solicitations and contract awards until the agency meets its utilization plan.

B. Florida Disparity Studies

In 1995, a disparity study performed by Florida State University found no disparity in state contracting and suggested a race and gender neutral small and disadvantaged business program. In 1997, a disparity study performed by D.J. Miller and Associates found an over-utilization of women and Hispanic firm, and a small under-utilization of black, Asian and Native American contracting firms. The Miller study suggested that lower spending goals be set over a broader range of state procurement activities. Neither of these studies has been adopted by the Legislature.

C. Case law concerning race/ethnicity conscious programs

[7]Section 287.09451(4)(n), F.S.

[8]Section 287.0931, F.S.

[9]Section 17.11, F.S.

[10]Section 287.09451(6), F.S.

Florida's affirmative action programs create a classification based on race and ethnicity and are subject to strict scrutiny under federal law; i.e., the program must be based upon a compelling governmental interest and must be narrowly tailored to achieve that interest.[11] In order for a race or ethnicity conscious program to be upheld, there must be a "strong basis in the evidence" in support of the program which rests on a particularized showing of the governmental unit's active or passive participation in past or present discrimination.[12]

In recent years, few race-based affirmative action programs have survived the strict scrutiny analysis. In fact, a law review article released in March 2000 indicated that since 1995, only one federal court of appeals has upheld an affirmative action program challenged on equal protection grounds because in that case discrimination on the part of the government was actually proven.[13]

In Florida, two affirmative action programs based on racial and ethnicity classifications have recently been struck by the federal courts. In *Phillips & Jordan v. Watts,* 13 F.Supp.2d (N.D. Fla. 1998) *& Jordan v. Watts,* a Florida Department of Transportation (DOT) affirmative action contract procurement program was challenged. In this case, a study by MGT of America showed a disparity index of 94.32 for FY 1989-90, and 38.78 for FY 1990-91 in DOT maintenance contracts awarded to black-owned businesses, and a disparity index of 19.33 for FY 1989-90 and 47.25 for FY 1990-91 for Hispanic-owned businesses.[14] [15] In response to this study, the DOT implemented a program which authorized set-aside contracts for competition among only black- and Hispanic-owned businesses.[16]

The program was subsequently challenged on equal protection grounds. The DOT argued the program was constitutional because even though it did not discriminate when contracting, the disparity indices in the MGT report demonstrated that the DOT must have been a passive participant in discrimination, which the DOT speculated emanated from the local construction industry.[17] The Court disagreed, finding that the statistical evidence presented by the DOT merely constituted a generalized assertion of racial discrimination, instead of the required particularized showing that it actively or passively participated in discrimination.[18] The DOT could not simply

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[11]*City of Richmond v. J.A. Croson Co.,* 488 U.S. 469 (1989).

[12]*Id., Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County,* 122 F.3d 895 (11th Cir. 1997).

[13]*McNamara v. City of* Chicago, 138 F.3d 1219 (7th Cir. 1998); *Recent Judicial Opinions Regarding the Permissibility of Race-Based Personnel Decisions in the Public Schools*, 141 Ed. Law Rep. 1 (March, 2000).

[14]*Id.* at 1310.

[15]A disparity index is the ration of the percentage of utilization to the percentage of availability times 100 for each group and year. The court explained that an index of 100 is parity, an index under 100 represents under-utilization, and an index below 80 is generally accepted as evidence of adverse impact. *Id.* at 1311.

[16]*Id.* at 1312.

[17]*Id.* at 1313.

[18]*Id.*

show that some unknown entity was discriminating because, "It goes without saying that the identity of 'those who discriminate' must be known before a governmental unit may take appropriate measures against 'those who discriminate.'"[19] Thus, the Court held the set aside program unconstitutional.[20] *See also Engineering Contractors Association of South Florida, Inc.*, 122 F.3d at 895 (holding Dade County's ordinance which created a minority business certification process and set minority participation goals for county contracts, unconstitutional on equal protection grounds due to a lack of strong or sufficiently probative evidence of discrimination).

D. Case law concerning gender conscious programs

Florida's affirmative action programs create a classification based on gender, and are subject to intermediate scrutiny; i.e., the program must be substantially related to an important governmental interest.[21] In order for a gender conscious program to be upheld, there must be "sufficient probative evidence" in support of the government's rationale for enacting a gender preference.[22] Unlike the strict scrutiny test, the government need only show some past societal discrimination based on gender, rather than discrimination by the government, in support of the program.[23]

Based on recent United States Supreme Court case law, it appears the Court is beginning to move toward what some legal commentators have termed "heightened intermediate scrutiny" of classifications based on gender.[24] For example in *United States v. Virginia*, the United States argued that the Virginia Military Institute's (VMI's) male only admissions policy violated equal protection.[25] Moreover, the United States argued that the Court should adopt a strict scrutiny standard for gender classifications.[26] The Court chose not to apply strict scrutiny in its analysis; however, in discussing the intermediate scrutiny standard, the Court added that the proffered justification for a classification based on gender must be "exceedingly persuasive," and that it is a difficult standard for the government to meet.[27] Ultimately, the Court ruled that VMI's male-only admissions policy violated equal protection finding that both of the following justifications proffered by VMI were insufficient: (1) that single-sex education yields important educational benefits and that providing such an option fosters diversity; and (2) that VMI's aversive method of training provides educational benefits that cannot be made available unless modified to women, and that such modifications would destroy VMI's program.

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[19] *Id.* at 1313-1314.

[20] *Id.*

[21] *Engineering Contractors Association of South Florida, Inc.* at 909.

[22] *Id.*

[23] *Id.*

[24] *Do We Still Need a Federal Equal Rights Amendment?*, 44-Feb B. BJ 10, 27 (2000).

[25] *United States v. Virginia*, 518 U.S. 515 (1996).

[26] *Id.*

[27] *Id*. at 146-147.

III. Effect of Proposed Changes:

Section 1. The bill amends s. 287.094, F.S., to add that the certification of any contractor, firm or individual will be permanently revoked, and that the entity will be barred from doing business with the state for 36 months if:

- the certification was obtained by false representation; or
- the MBAAO determines that the entity has not acted in good faith to fulfill the terms of a contract calling for it to use the services or commodities of a certified MBE.

The bill also provides that if the Department of Legal Affairs, an agency final order, or a court of law determines that a person was involved in a violation of the section, knew about such violation, or collaborated with a contractor or firm in such violation, the person, or any contractor or firm the person is employed by or affiliated with, shall be barred from doing business with the state government for a period of at least 36 months.

The bill adds a subsection to s. 287.094, F.S., which provides that discrimination based on race, national origin, gender, religion, or physical disability by an agency in the context of contracts for commodities and services is prohibited. The bill states that complaints alleging discrimination by an agency may be filed with the Office of Supplier Diversity (OSD). The complaint must be filed within 60 days after the facts giving rise to the complaint are known, or reasonably should have been discovered, and must set forth the specific facts underlying the claim. The OSD is required to refer the complaint to the Inspector General (IG) of the relevant agency, who must investigate the claim. The findings of the IG must be reviewed by the Chief IG. If it is determined that the agency engaged in discrimination, any state employee(s) who participated shall be referred for disciplinary action in accordance with ch. 60K-9, F.A.C., which governs disciplinary action, grievances, and appeals in the Career Service.

Section 2. The bill amends s. 287.0943, F.S., to add that a business certified as a MBE by a local government shall be accepted as a state certified MBE if the local government applies the state's MBE certification criteria in its certification process.

The bill renames the Minority Business Advocacy and Assistance Office as the OSD, and transfers the OSD to the DMS in section three of the bill.

The bill alters the criterion specified in statute for MBE certification in the following ways:

- Under current law, a MBE owner must be licensed in the trade or profession that the MBE will offer to the state; however, under the bill the owner need only comply with any state licensing requirements, and need only have demonstrated expertise in the trade or profession to be offered to the state.

- Under current law, a prospective MBE must be currently performing a useful business function which means it is a business function that results in the provision of materials or services to customers other than state or local government. The bill adds that the MBE may

also be seeking to perform a useful business function, and deletes the requirement that the customers be other than state or local government.

The bill deletes current law's requirement that certification procedures should include an onsite visit to inspect the prospective MBE, and instead provides that a MBE which receives payments or awards exceeding $100,000 in one fiscal year shall be reviewed/audited within two years. Moreover, the bill provides that random reviews/audits may be conducted as determined appropriate by the OSD.

The bill provides that for one year from the effective date of the act that the executor of the statewide interlocal agreement may elect to accept only MBEs certified pursuant to criteria in place at the time the agreement was signed. After that time, either party may elect to withdraw from the agreement without further notice.

The bill directs the Auditor General to make random reviews/audits of certified MBEs to deter fraud, and provides that a business which has had its certification revoked temporarily may not apply for recertification for at least three years.

The bill corrects cross-references and makes conforming changes by referring to the DMS, rather than the Department of Labor and Employment Security.

Section 3. The bill provides that effective July 1, 2000, the MBAAO is renamed as the OSD, and that the OSD is transferred from the Department of Labor and Employment Security to the DMS.

Section 4. The bill makes conforming changes to s. 287.09451, F.S., for the name and department changes.

Section 5. The bill amends s. 288.703(1), F.S., to redefine the term "small business" to mean a business that employs 200 or fewer, rather than 100 or fewer as in current law, employees, and that has a net worth of less than $5 million, rather than less than $3 million as in current law. Furthermore, the bill adds that a business may qualify as a "small business" if it has Small Business Administration 8(a) certification.

Section 6. The bill creates s. 287.134, F.S., relating to the denial or revocation of the right to transact business with public entities for discrimination. The bill defines terms for purposes of the section. "Discrimination" or "discriminated" are defined to mean a determination of liability by a state circuit court or federal district court for a violation of any state or federal law prohibiting discrimination on the basis of race, gender, national origin, disability, or religion by an entity. An "affiliate" is defined to mean a predecessor or successor of an entity that discriminated, or an entity under the control of any natural person or entity that is active in the management of the entity that discriminated. An "entity" is defined to mean any natural person or entity with the legal power to enter into contracts and which bids or applies to bid on contracts let by a public entity or which otherwise transacts or applies to transact business with a public entity.

The bill provides that an entity or affiliate who has been placed on the discriminatory vendor list may not submit a bid, contract, or transact any business with any public entity for a period of three years, unless the entity or affiliate is removed from the list.

The bill requires an entity to notify the DMS within 30 days after a final determination of discrimination, and any public entity that receives information that an entity has discriminated must transmit that information to the DMS in writing within 10 days. Furthermore, all entities must disclose to the DMS if they have been found liable in any state circuit court or federal court for a violation of any state or federal law prohibiting discrimination based on race, gender, national origin, disability, or religion prior to entering into any contract with the state.

The bill requires the DMS to maintain the discriminatory vendor list and to publish an initial list on January 1, 2001, in the Florida Administrative Weekly. Thereafter, the DMS must publish an updated list quarterly in the Florida Administrative Weekly.

The bill requires the DMS to investigate any reasonable information received from any source that an entity has discriminated. If the DMS determines that good cause exists to place the entity or affiliate on the discriminatory vendor list, the DMS shall advise the entity or affiliate in writing: (a) that it intends to place the entity or affiliate on the list; (b) that the entity or affiliate has a right to a hearing; and (c) of the procedure and time limits. If the entity or affiliate does not request a hearing, the DMS must enter a final order placing the name of the entity or affiliate on the discriminatory vendor list.

The entity or affiliate must file a petition for a formal hearing with the DMS pursuant to ss. 120.569 and 120.57(1), F.S., within 21 days after receiving the DMS's notice of intent to determine if it is in the public interest to place the entity or affiliate on the discriminatory vendor list. The procedures of ch. 120, F.S., apply to this formal hearing, except where these conflict with the bill's provisions. The DMS must notify the Division of Administrative Hearings (DOAH) within five days of the petition being filed. The DOAH must assign an administrative law judge to preside over the proceeding, and the judge must conduct the formal hearing within 30 days after being assigned, unless otherwise stipulated by the parties. Within 30 days after the formal hearing or receipt of the hearing transcript, the administrative law judge shall enter a final order, which consists of findings of fact, conclusions of law, interpretation of agency rules, and any other information required by law. The judge's final order is deemed final agency action for purposes of judicial review.

The bill provides that it is not in the public interest to place an affiliate or entity on the discriminatory vendor list if: (a) the discrimination did not occur; (b) the discrimination was committed by an employee of the entity or affiliate who is not senior management; or (c) the member of senior management who is responsible for the discrimination is no longer an employee. The administrative law judge is required to consider the following factors in determining if it is in the public interest to place an affiliate or entity on the discriminatory vendor list: (a) the nature and details of the discrimination; (b) the degree of culpability of the entity or affiliate; (c) the prompt or voluntary payment of any damages or penalty as the result of the discrimination; (d) prior or future self-policing by the entity or affiliate to prevent discrimination; (e) compliance by the entity or affiliate with the notification provisions of paragraph (b); (f) the needs of public entities for additional competition in the procurement of goods and services in their respective markets; and (g) mitigation based upon any demonstration of good citizenship by the entity or affiliate.

The bill provides that the DMS is required to prove by clear and convincing evidence that it is in the public interest to place the entity or affiliate on the discriminatory vendor list. Proof of discrimination by the entity or affiliate constitutes a prima facie case that it is in the public interest. Once a prima facie case is made, the entity or affiliate may prove by a preponderance of the evidence that it would not be in the public interest.

The bill allows an entity on the discriminatory vendor list to petition for removal from the list no sooner than six months from the date a final order is entered concerning the list. This petition must be filed with the DMS. The entity may be removed from the list subject to such terms and conditions as may be prescribed by an administrative law judge.

Finally, the bill provides that placement on the discriminatory vendor list shall not affect any rights or obligations under any contract, franchise, or other binding agreement which predates such conviction or placement on the discriminatory vendor list. The bill also excepts activities regulated by the Public Service Commission and purchases made by a public entity from the Department of Corrections, a nonprofit corporation organized under ch. 946, F.S., or an accredited nonprofit workshop certified under ss. 413.02-413.037, F.S.

Sections 7 through 12 . The bill makes conforming changes for the office name and department changes.

Section 13. The bill provides that it takes effect July 1, 2000.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill will expand the number of businesses which may qualify as a “small business” pursuant to ch. 288, F.S., and in turn this may increase the number of certified MBEs.

Moreover, the bill will allow locally certified MBEs to receive state certification if the local government applies the state's MBE certification criteria.

C. Government Sector Impact:

The bill should have the effect of increasing the number of certified MBEs in Florida. The bill's creation of the administrative hearing process for the discriminatory vendor list will result in the DMS and the DOAH incurring greater expenses; however, this fiscal impact is indeterminate.

VI. Technical Deficiencies:

On page 2, lines 29 through 30, some existing language was not stricken due to a drafting error. The section should be amended to read, "It is unlawful for any individual to falsely claim to be ~~represent any entity as~~ a minority business enterprise . . . ."

On page 9, lines 14 through 15, the bill provides that a "review/audit" will be conducted within two years of a certified MBE receiving more than $100,000 in one fiscal year. Typically, using a slash between words means the words are interchangeable. While an audit encompasses a review in depth and breadth of a program, a review does not. Chapter 11, F.S., recognizes three distinct audit types: (a) a "financial audit," which examines financial statements in order to express an opinion on the fairness to which they present financial position and operations to assess their conformity with law and generally accepted accounting principles; (b) an "operational audit," which evaluates management performance relative to the achievement of stated goals in conformity with law and the preservation of financial control and the safeguarding of assets; and, (c) a "performance audit," which examines a program of activity to assess its economy, efficiency, or effectiveness and its sufficiency at achieving its stated legal objectives. These above distinctions are significant as an audit necessarily implies the use of internal and external financial experts while a review may involve little more than ordinary oversight attendant to program operations. Clarification of intent is highly desirable.

On page 34, lines 29 through 30, the bill states, "entity of affiliate." This should be amended to state, "entity or affiliate."

VII. Related Issues:

None.

VIII. Amendments:

None.