

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

The bill does not appear to implicate any of the House Principles.

B. EFFECT OF PROPOSED CHANGES:

Present Situation

Small Businesses

Part IV of chapter 288, F.S., relates to small and minority businesses. Section 288.703(1), F.S., defines a small business as an independently owned and operated business that employs 200 or fewer permanent full-time employees and has a net worth of no more than \$5 million. Section 288.703(2), F.S., defines a minority business enterprise as any small business which is at least 51-percent-owned by minority persons who are members of an insular group that is of a particular racial, ethnic, or gender group of people. Section 788.703(3), F.S., defines a minority person as a person who is African-American, an Hispanic-American, an Asian-American, a Native American, or an American woman.

Section 288.706, F.S. provides for the creation of the Florida Minority Business Loan Mobilization Program. Subsection (1) states that it is the intent of the Legislature to promote diversity in state contracting by eliminating barriers to minority business enterprises providing goods and services to the state. The goal of the FMBLM Program is to assist minority businesses by facilitating working capital to minority businesses that are vendors of state agency contract.

Section 287.09451, F.S., establishes the Office of Supplier Diversity (OSD) within the Department of Management Services to assist minority business enterprises in becoming suppliers of commodities, services, and construction to state government. In establishing the office, the Legislature found evidence of past and continuing racial discrimination against minority business enterprises and a disparity in the availability and use of minority businesses in the state procurement system. As part of the Governor's One Florida Initiative, the principal focus of the OSD is to aggressively recruit minority businesses and to facilitate relationships between the businesses and state agencies. The OSD also manages a program for certifying minority businesses. Based upon its FY 2002-2003 Annual Report, OSD reports that as of June 30, 2003, about 36% of all vendors registered by the OSD were minority and women business enterprises, of which about half were certified.

OSD is also responsible for monitoring state agencies' compliance with statutory requirements related to minority business enterprises. For example, OSD is responsible for reviewing and approving state agencies' minority business enterprise utilization plans requires under s. 287.09451(6), F.S., and for ensuring compliance with the plans. OSA also does outreach and advocacy on behalf of minority and women businesses. OSD participates and meets with a wide number of organizations and agencies throughout the state, including meeting with water management districts.

According to the U.S. Small Business Administration, Florida had a total of about 426,000 employer small businesses of which 98.9 percent were small firms. Nearly 26 percent of all small businesses in Florida are women-owned businesses. Nearly 21 percent of all small businesses in Florida were minority-owned businesses.

Water Management Districts

As part of the Comprehensive Everglades Restoration Program (CERP), emphasis has been placed upon community and minority outreach activities both in terms of education the public on restoration

projects and goals, but also on implementing programs designed to educate, engage and empower minority and women business enterprises in the South Florida Water Management District (SFWMD) and in U.S. Army Corps of Engineers' contracting opportunities and procurement opportunities.

In addition, water management districts have also implemented programs which attempt to provide equal access for all businesses, including include minority and women business enterprises, for contracting and procurement opportunities.

For example, according to a quarterly publication by the St. Johns Water Management District (Stream Lines, Summer 2003), the district proactively seeks out minority and women-owned businesses for contracting and procurement opportunities.

Another example is the South Florida Water Management District (SFWMD) which according to a March 2005 Fact Sheet, has increased opportunities for and spending with small and minority businesses. According to the fact sheet, since 2000, the district has more than tripled its expenditures to small and minority business firms from about \$12.5 million in 2000 about \$41 million in 2004. Of the \$41 million, \$4.3 million was expended to Asian-American businesses, \$9.7 to African-American businesses, and \$13.2 million to women-owned businesses. In 2004, of the 35 different firms contracted for engineering services in the district, ten of the primary contractors are minority owned firms and the remaining 25 firms include 30 percent or more minority participation as part of the contract.

According to staff from the SFWMD, the district recently ended its minority business enterprises program as a result of litigation in Miami-Dade County. Like Miami-Dade County, SFWMD had a minority and women business enterprise program. The county's program was challenged in terms of whether the establishment of "participation goals" for minority and women business enterprises in awarding architecture and engineering contracts violated the Equal Protection Clause of the Fourteenth Amendment, 42 U.S.C. Sec. 1983 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. sec. 2000d.

A decision by a federal court in *Hershell Gill Consulting Engineers, Inc. v. Miami Dade County, Florida* (Case No. 98-2300-CIV-JORDON), found that the county's program was unconstitutional as it applied to contracts for architecture and engineering services. The court permanently enjoined the county from using, or requiring the use of gender, racial, or ethnic criteria in determining responsiveness to a request for proposal or award of a contract under such a request for proposal. The court further ruled that county commissioners were immune from damages with respect to votes cast to adopt the program, but were not immune for votes cast with respect to architecture and engineering contracts presented to the commission, since they were acting in their administrative capacities.

Since the SFWMD had a similar minority business enterprise program, its board in January 2005 decided to end the program based upon the Miami-Dade County court case decision. However, according to district staff, emphasis is continually placed upon providing equal access for all businesses for contracting and procurement purposes.

Effect of Proposed Changes

Small Business Program

HB 1445 authorizes each water management district to implement a small business program designed to assist small businesses, including businesses owned by women and minorities, in their participation in district procurement and contract activities. The bill states that the purpose of the program is to enhance economic development and support small businesses, including women and minority-owned businesses, to successfully expand in the marketplace.

Governing Board Terms

The term of the governing board members of the water management districts is four years. Currently, upon the termination of a board member's four-year term there are often vacancies on the board during the time that is needed for the Governor to appoint a successor.

The bill will allow the outgoing board member to continue to serve until the Governor has appointed the member's successor.

Wetlands Jurisdiction

Under current law, in order to be entitled to the exemption from the wetlands determination criteria in s. 373.4211, a petition for the determination must have been filed **before** June 1, 1994.

The bill would allow the exemption to apply to those activities included in a petition filed **on** June 1, 1994 as well as those activities included in a petition filed **before** June 1, 1994

The bill takes effect upon becoming law.

C. SECTION DIRECTORY:

Section 1. Creates s. 373.1135, F.S., to provide that water management districts are authorized to implement a small business program designed to assist small businesses, including businesses owned by women and minorities, in their participation in district procurement and contract activities.

Section 2. Amends s. 373.073, F.S., to provide that outgoing water management district board members may continue to serve until the Governor has appointed the member's successor.

Section 3. Amends s. 373.414(13), to provide that activities proposed within the boundaries of a valid declaratory statement issued pursuant to a petition submitted to the Department of Environmental Protection "on or before" June 1, 1994 are exempt from the wetlands determination methodology in s. 373.4211, F.S.

Section 4. The act will take effect upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill provides for no expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because the bill does not appear to: require cities or counties to spend funds or take actions requiring the expenditure of funds; reduce the authority that cities and counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

If a water management district chooses to implement a small business program that classifies business on the basis of race, ethnicity or gender, the district should be prepared to justify any such classification under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

As noted in the body of the analysis, the United States District Court for the Southern District of Florida has found similar programs unconstitutional in violation of Equal Protection. *Hershell Gill Consulting Engineers, Inc., v. Miami-Dade County*, 333 F.Supp.2d 1305 (S.D. Fla. 2004).

To defend a classification based on race or ethnicity, a water management district will have the burden of proving that the classification meets strict scrutiny by showing a compelling government interest supporting the classification and by showing that the classification is narrowly tailored to achieve that interest. *Id.* at 1316.

To defend a classification based on gender, the water management district will have the burden of proving that the classification meets intermediate scrutiny by showing an important governmental objective and by showing that the classification was substantially related to that objective. *Id.* at 1317.

B. RULE-MAKING AUTHORITY:

The bill requires water management districts to promulgate rules for the small business assistance program.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On March 30, 2005 the Water and Natural Resources Committee adopted a single strike-all amendment to HB 1445. Specifically, the amendment:

- Deletes Section 1 of the bill relating to the addition of "Biscayne Bay Coastal Wetlands-Phase 1 Project-C-1 Cutler Wetlands Component" and the "C-111 Spreader Canal Project" to the list of projects for which the South Florida Water Management District may use eminent domain in land acquisition for CERP.

- Retains the section of the bill relating to authorization for a small business program.
- Adds a new section to amend s. 373.073(1)(a), F.S., to allow governing board members of a water management district to serve beyond their four-year term until a successor is appointed.
- Adds a new section to amend s. 373.414(13) to provide that activities proposed within the boundaries of a valid declaratory statement issued pursuant to a petition submitted to the Department of Environmental Protection “on or before” June 1, 1994 are exempt from the wetlands determination methodology in s. 373.4211, F.S.

This analysis has been revised to reflect the amendment to the bill.