

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 687 Service-Disabled Veteran Business Enterprises
SPONSOR(S): Proctor and others
TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 108

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Committee on Military & Veterans' Affairs</u>	_____	<u>Shaffer</u>	<u>Camechis</u>
2) <u>Government Efficiency & Accountability Council</u>	_____	_____	_____
3) <u>Policy & Budget Council</u>	_____	_____	_____
4) _____	_____	_____	_____
5) _____	_____	_____	_____

SUMMARY ANALYSIS

Current Florida law does not contain state contracting set-asides, goals, or preferences to specifically benefit small businesses owned and operated by service-disabled veterans.

This bill creates a certification process within the Department of Management Services (DMS) for small business enterprises owned and operated by service-disabled veterans. The certification process is substantially similar to the certification process implemented by DMS for minority business enterprises (MBEs). Potential benefits of certification include business promotion through the MyFloridaMarketPlace online purchasing system, first tier referrals to state agencies, special email notices about purchasing opportunities, networking activities, and technical assistance training.

The bill also creates a "tie-breaker" contracting preference for certified Service-Disabled Veteran Business Enterprises (SDVBEs) by requiring a state agency to award a procurement or contract to the certified SDVBE when considering two or more bids, proposals, or replies for the procurement of commodities or contractual services, at least one of which is from a certified SDVBE, that are equal with respect to all relevant considerations. However, if a certified SDVBE and one or more certified SDVBEs or businesses eligible for another statutory vendor preference, such as a MBE, submit bids or proposals that are equal with respect to all relevant considerations, the state agency must award the contract or proposal to the business having the smallest net worth or average annual income.

This bill does not:

- impose any type of fee for certification of SDVBEs;
- require a certain number of state contracts to be set-aside for SDVBEs;
- establish state goals for contracting with SDVBEs; or
- require local governments to offer any special contracting consideration for certified SDVBEs, although the bill does encourage local governments to do so.

This bill has a minimal negative fiscal impact on state government. The Department of Management Services and the Department of Veterans' Affairs have represented that existing resources will be used to administer the program. This bill does not have a fiscal impact on local governments.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

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FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Empower families - The bill may assist self-employed service-disabled veterans in obtaining state contracts.

Provide limited government - The bill creates a program within the Department of Management Services to certify service-disabled veteran business enterprises. The bill also grants joint rulemaking authority to the Department of Management Services and the Department of Veterans Affairs to implement the program.

Ensure lower taxes - The bill does not impose any new taxes or fees.

B. EFFECT OF PROPOSED CHANGES:

I. BACKGROUND

A. Self-Employment in the Service-Disabled Veteran Population

In January 2007, a report entitled *Self-Employment in the Veteran and Service-Disabled Veteran Population* was published pursuant to a contract with the Small Business Administration, Office of Advocacy.¹ The report concluded that veterans with service-connected disabilities are self-employed at lower rates than veterans without such disabilities, and that the disparity results primarily from the service-connected disabilities themselves and not to differences in demographic or other characteristics. The report provided the following veteran employment data for years 1988-2005:

- Unemployed: An average of 63.9% of service-disabled veterans and 45.3% of non-service-disabled veterans were unemployed.
- Self-Employed: An average of 4.2% of service-disabled veterans and 7.8% of non-service-disabled veterans were self-employed.
- Employed by Others: An average of 32% of service-disabled veterans and 46.8% of non-service-disabled veterans were employed by others.

B. Federal Contracting Provisions Related to Service-Disabled Veterans

It is the policy of the United States that small business concerns owned and controlled by veterans, as well as small business concerns owned and controlled by service-disabled veterans, have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency, including contracts and subcontracts for subsystems, assemblies, components, and related services for major systems.² Federal law requires the President to annually establish Government-wide goals of not less than 3 percent of the total value of all prime contract and subcontract awards for each fiscal year for procurement contracts awarded to small business concerns owned and controlled by service-disabled veterans.³ A federal contract may not be awarded unless the procurement authority determines that the plan to be negotiated provides the maximum practicable opportunity for small business concerns owned and controlled by service-disabled veterans.⁴

¹ *Self-Employment in the Veteran and Service-Disabled Veteran Population*, U.S. Small Business Administration, Office of Advocacy (Jan. 2007).

² 15 U.S.C.A. § 637(d)(1).

³ 15 USCA § 644(g)(1).

⁴ 15 U.S.C.A § 637(d)(4)(D).

Under the federal law, a “service-disabled veteran” is a veteran with a disability that is service-connected.⁵ A “service-connected disability” is a disability that was incurred or aggravated in the line of duty in the active military, naval, or air service.⁶ The term “small business concern owned and controlled by service-disabled veterans” means a small business concern:

- not less than 51 percent of which is owned by one or more service-disabled veterans or, in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one or more service-disabled veterans; and
- the management and daily business operations of which are controlled by one or more service-disabled veterans or, in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran.⁷

C. State Contracting Provisions

1. Service-Disabled Veterans and Veterans

Current Florida law does not contain state contracting set-asides, goals, or preferences to specifically benefit small businesses owned and operated by service-disabled veterans.

2. Minority Business Enterprises

Section 287.0943, F.S., requires the Department of Management Services (DMS) to implement a minority business enterprise (MBE) certification program and provides minimum eligibility criteria for certification as a MBE⁸. The DMS currently certifies women and minority owned business enterprises, lists them in an on-line directory, and provides an annual report of these expenditures by state agencies to various state leaders.⁹ Benefits of state certification include business promotion through the MyFloridaMarketPlace online purchasing system, first tier referrals to state agencies, special email notices about purchasing opportunities, networking activities, and technical assistance training.¹⁰

Section 287.09451, F.S., “encourages” each state agency to spend a specified percentage of state funds, ranging from 21% to 51% of funds expended for certain goods and services, on contracts with

⁵ 15 U.S.C.A. § 632(q)(1).

⁶ 38 U.S.C.A. § 101(16).

⁷ 15 U.S.C.A. § 632(q)(2).

⁸ Section 288.703, F.S., defines these terms as follows: "**Minority business enterprise**" means any small business concern as defined in subsection (1) which is organized to engage in commercial transactions, which is domiciled in Florida, and 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 makeup or national origin, which has been subjected historically to disparate treatment due to identification in and with that group resulting in an underrepresentation of commercial enterprises under the group's control, and whose management and daily operations are controlled by such persons. A minority business enterprise may primarily involve the practice of a profession. Ownership by a minority person does not include ownership which is the result of a transfer from a nonminority person to a minority person within a related immediate family group if the combined total net asset value of all members of such family group exceeds \$1 million. For purposes of this subsection, the term "related immediate family group" means 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; "**Small business**" means an independently owned and operated business concern that employs 200 or fewer permanent full-time employees and that, together with its affiliates, has a net worth of not more than \$5 million or any firm based in this state which has a Small Business Administration 8(a) certification. As applicable to sole proprietorships, the \$5 million net worth requirement shall include both personal and business investments; "**Minority person**" means a lawful, permanent resident of Florida who is: (a) An African American, a person having origins in any of the black racial groups of the African Diaspora, regardless of cultural origin. (b) A Hispanic American, a person of Spanish or Portuguese culture with origins in Spain, Portugal, Mexico, South America, Central America, or the Caribbean, regardless of race. (c) An Asian American, a person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent, or the Pacific Islands, including the Hawaiian Islands prior to 1778. (d) A Native American, a person who has origins in any of the Indian Tribes of North America prior to 1835, upon presentation of proper documentation thereof as established by rule of the Department of Management Services. (e) An American woman.

⁹ Dep't. of Mgmt Services Analysis of HB 687, Jan. 31, 2008.

¹⁰ Id.

certified MBEs. The statute also establishes an “overall spending goal for each industry category”, with the goals ranging between 4% and 36% depending on the industry and specific minority group. However, in 2004, a federal court struck the statute as unconstitutional, finding it to be an impermissible violation of the Equal Protection Clause of the Fourteenth Amendment¹¹ The court said that:

- The statute was not narrowly tailored to remedy a systemic pattern of past and present racial discrimination against minority business enterprises and did not withstand strict scrutiny under the Equal Protection Clause;
- For purposes of determining whether a minority preference is constitutional, there is no distinction between a statute that is optional versus one that is compulsory when the challenged statute “induces an employer...with an eye toward meeting ... [a] numerical target;” and
- There must be “some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination.”

While the statutory set-aside program and state goals for MBEs were found unconstitutional, the courts have not invalidated all statutes related to the MBE certification program. One statute that was not specifically invalidated is s. 287.057(12), F.S., which provides that if two equal responses to a solicitation or a request for quote are received and one response is from a certified MBE, the agency must enter into a contract with the certified MBE.

3. Local Government Contracting with Minority Business Enterprises

Section 287.093, F.S., allows, but does not require, a county, municipality, community college, or district school board to set-aside up to 10 percent or more of the total amount of funds allocated for the procurement of personal property and services for the purpose of entering into contracts with minority business enterprises. These contracts must be competitively solicited only among minority business enterprises. The set-aside must be used to redress present effects of past discriminatory practices and are subject to periodic reassessment to account for changing needs and circumstances.

Although the courts have not specifically found this statute unconstitutional, local government set-aside programs for MBEs may be subject to challenge as a violation of the Equal Protection Clause of the Fourteenth Amendment if the program is not based upon “particularized” findings of earlier discrimination in the affected industry and is not narrowly tailored.¹²

EFFECT OF PROPOSED CHANGES

The stated intent of the bill is to “rectify the economic disadvantage of service-disabled veterans, who are statistically the least likely to be self-employed when compared to the veteran population as a whole and who have made extraordinary sacrifices on behalf of the nation, the state, and the public, by providing opportunities for service-disabled veteran business enterprises as set forth in this section.”

This bill creates a certification process within the Department of Management Services (DMS) for small service-disabled veteran business enterprises (SDVBE). The certification process is similar to that currently administered by DMS for minority business enterprises (MBEs). The bill also creates a “tie-breaker” preference for SDVBEs by requiring a state agency, when considering two or more bids, proposals, or replies for the procurement of commodities or contractual services, at least one of which is from a certified SDVBE, that are equal with respect to all relevant considerations including price, quality, and service, to award such procurement or contract to the certified SDVBE. However, if a certified SDVBE and one or more SDVBE or businesses eligible for another statutory vendor

¹¹ Florida A.G.C. Council, Inc. v. State of Florida, 303 F.Supp.2d 1307 (N.D.Fla.2004).

¹² Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County, 333 F.Supp.2d 1305 (S.D.Fla.2004); H.K. Porter Co., Inc. v. Metropolitan Dade County, 975 F.2d 762 (11th Cir. 1992); Cone Corp. v. Hillsborough County, 908 F.2d 908 (11th Cir. 1990).

preference, such as an MBE, submit bids or proposals that are equal with respect to all relevant considerations including price, quality, and service, the state agency must award the contract or proposal to the business having the smallest net worth or average annual income.

In order to become certified as a SDVBE, the owners and the business must satisfy statutory eligibility requirements. In order to be considered a "service-disabled veteran" eligible for certification, the veteran must have a service-connected disability of 10% or greater as determined by the U.S. Department of Veterans Affairs or who was terminated from military service by reason of disability by the U.S. Department of Defense. In order to be certified as a SDVBE, a business enterprise must be an independently owned and operated business that:

- Employs 200 or fewer permanent full-time employees;
- Together with its affiliates has a net worth of \$5 million or less and, if a sole proprietorship, the net worth includes both personal and business investments;
- Is organized to engage in commercial transactions;
- Is domiciled in this state;
- Is at least 51 percent owned by one or more service-disabled veterans; and
- Is managed and controlled by one or more service-disabled veterans or, for a service-disabled veteran with a permanent and total disability, by the spouse or permanent caregiver of the veteran.

The bill establishes a certification process to be administered by DMS, in coordination with the Florida Department of Veterans' Affairs (DVA). The certification process requires applicants to submit documentation demonstrating that the business meets the above-listed requirements. Certification is renewed biennially and may be revoked for one year if the SDVBE fails to inform DMS within 30 days of a change in circumstances that renders the business ineligible for certification.

The bill provides rule-making authority to DVA, and requires the DVA to:

- Assist DMS in establishing a certification application procedure, which must be reviewed and updated biennially.
- Identify eligible service-disabled veteran business enterprises by any electronic means, including electronic mail, Internet website, or, subject to an appropriation, by any other reasonable means.
- Encourage and assist eligible service-disabled veteran business enterprises to apply for certification.
- Provide information regarding services that are available from the Office of Veterans' Business Outreach of the Florida Small Business Development Center to service-disabled veteran business enterprises.

The bill also provides rule-making authority to DMS, and requires DMS to:

- With assistance from the DVA, establish a certification application procedure, which shall be reviewed and updated biennially.
- Grant or deny certification of a service-disabled veteran business enterprise.
- Maintain an electronic directory of certified service-disabled veteran business enterprises for use by the state, political subdivisions of the state, and the public.

The bill also encourages political subdivisions of the state to offer a similar consideration to certified SDVBEs.

Lastly, the bill requires the Florida Small Business Development Center to include in the report required by s. 288.705, F.S., the percentage of businesses using the statewide contracts register which are certified service-disabled veteran business enterprises.

C. SECTION DIRECTORY:

- Section 1. Creates the Florida Service-Disabled Veteran Business Enterprise Opportunity Act in an undesignated section of law.
- Section 2. Amends s. 288.705, F.S., correcting a reference to the Agency for Workforce Innovation.
- Section 3. Amends s. 288.7015, F.S., relating to duties of the rules ombudsman appointed by the Governor.
- Section 4. Provides an effective date of November 11, 2008.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

- 1. Revenues: None.
- 2. Expenditures: This bill has a minimal negative fiscal impact on state government. The Department of Management Services and the Department of Veterans' Affairs have represented that existing resources will be used to administer the program. This bill does not have a fiscal impact on local governments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

- 1. Revenues: None.
- 2. Expenditures: None.

DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR: This bill may assist service-disabled veterans in competing for state contracts and procurements by creating a certification program for qualified business enterprises owned by service-disabled veterans. The bill also creates a "tie-breaker" preference so that if a certified SDVBE and any other type of business enterprise bid on a state contract or procurement, and the bids are equal in all significant respects, the state agency must award the contract or procurement to the SDVBE. However, if the SDVBE and a MBE or other business entitled to a statutory preference submit equal bids, the state agency must award the contract or proposal to the business having the smallest net worth or average annual income.

C. FISCAL COMMENTS: None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

- 1. Applicability of Municipality/County Mandates Provision: Not applicable. This bill does not appear to affect municipal or county government.
- 2. Other: None.

B. RULE-MAKING AUTHORITY: The bill authorizes the Florida Department of Veterans' Affairs and the Department of Management Services to jointly adopt rules as necessary to administer the certification program.

- C. DRAFTING ISSUES OR OTHER COMMENTS: The bill sponsor, Representative Proctor, is expected to offer a strike-all amendment in the Committee on Military & Veterans' Affairs to address multiple drafting issues.
- D. STATEMENT OF THE SPONSOR: The bill sponsor did not wish to submit a sponsor statement.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

N/A