

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Communications, Energy, and Public Utilities

BILL: SB 636

INTRODUCER: Senator Braynon

SUBJECT: Public Utility Suppliers

DATE: February 6, 2014

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Wiehle</u>	<u>Caldwell</u>	<u>CU</u>	<u>Favorable</u>
2.	_____	_____	<u>CM</u>	_____
3.	_____	_____	<u>CA</u>	_____
4.	_____	_____	<u>RU</u>	_____

I. Summary:

SB 636 requires each regulated company (specified regulated utilities) to annually submit a plan for increasing the procurement of contracts from woman, minority, and disabled-veteran business enterprises; provides measures that each regulated company may use to promote the inclusion and participation of these companies in these contracts; requires the Public Service Commission (PSC) to develop an outreach program to be implemented by each regulated company to inform and encourage these businesses to participate; and requires annual reports by each regulated company and the PSC.

II. Present Situation:

There is no similar requirement for a public utility and all existing similar requirements appear to apply only to governmental entities.

III. Effect of Proposed Changes:

The bill creates s. 350.118, F.S., for the purpose of expanding diversity among public utility suppliers. Speaking generally, the bill accomplishes this by:

- requiring each regulated company¹ to annually submit a plan for increasing the procurement of contracts from woman,² minority,³ and disabled-veteran business enterprises;⁴
- providing measures which each regulated company may use to promote the inclusion and participation of these companies;
- requiring the commission⁵ (PSC) to develop an outreach program to be implemented by each regulated company to inform and encourage these businesses to participate; and
- requiring annual reports by each regulated company and the PSC.

More specifically, the bill contains seven Whereas clauses and three statements of legislative intent to establish its purposes, including intent to:

- encourage greater economic opportunity for businesses controlled and operated by women, minorities, and service-disabled veterans;
- promote competition among suppliers of public utilities in order to enhance efficiency in the procurement of contracts from regulated companies; and
- expand programs for the procurement of contracts for technology, equipment, supplies, services, materials, and construction work between regulated companies and businesses controlled and operated by women, minorities, and service-disabled veterans.

Each regulated company must annually submit (presumably to the PSC, although this is not specified) a detailed and verifiable plan for increasing the procurement of contracts from woman, minority, and disabled-veteran business enterprises. Each plan must include both short-term and

¹ The bill defines the term “regulated company” to mean a public utility, as defined in s. 366.02 (electricity or natural gas selling to the public, but not a municipal or cooperative electric utility), or any person holding a valid and current certificate from the commission under chapter 351 (railroads – PSC does not issue certificate), chapter 364 (telecommunications – PSC does not issue certificate after July 1, 2011, but certificates issued prior to that date remain valid), chapter 365 (also telecommunications), or chapter 367 (water or wastewater, but not all subject to PSC jurisdiction) which has gross annual revenues exceeding \$25 million.

² The bill defines the term “woman business enterprise” to mean a business enterprise that is at least 51 percent owned by a woman or women. In the case of a publicly owned business, at least 51 percent of the stock must be owned by one or more women. The management and daily business operations of the woman business enterprise must be controlled by one or more women.

³ The bill defines the term “minority business enterprise” to mean a business enterprise that is at least 51 percent owned by a minority group or groups. In the case of a publicly owned business, at least 51 percent of the stock must be owned by one or more minority groups. The management and daily business operations of the minority business enterprise must be controlled by one or more minority individuals. The term “minority” includes black Americans, Hispanic Americans, Native Americans, and Asian-Pacific Americans.

⁴ The bill defines the term “disabled-veteran business enterprise” to mean 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, or, if a sole proprietorship, has a net worth of \$5 million or less, including 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 permanent state residents who have a service-connected disability as determined by the United States Department of Veterans Affairs or who have been terminated from military service by reason of disability by the United States Department of Defense; and
- is controlled and operated by one or more service-disabled veterans or, for a service-disabled veteran having a permanent or total disability, by the spouse or permanent caregiver of the veteran.

⁵ The bill defines the term “commission” to mean the Florida Public Service Commission.

long-term goals, timetables, and methods for encouraging both prime contractors and grantees⁶ to engage woman, minority, and disabled-veteran business enterprises in subcontracts, including, but not limited to, renewable energy and smart grid projects. A plan may not include quotas. The PSC must establish guidelines that a regulated company shall use in establishing a plan.

An electrical, gas, water and wastewater, wireless, telephone, cable television, and direct broadcast satellite corporation that is not subject to PSC regulation, and therefore not subject to the bill's requirements, is encouraged to voluntarily adopt a plan for increasing procurement from woman, minority, and disabled-veteran business enterprises.

The bill also provides measures that each regulated company *may* use in order to promote the inclusion and participation of businesses controlled and operated by women, minorities, and service-disabled veterans in the procurement of contracts. These measures include:

- Progressive payments to woman, minority, or disabled-veteran business enterprises.
- An amendment of performance bond requirements to ensure that such requirements do not prohibit such businesses from participating, however, the bill does not restrict a regulated company's ability to require a bond.
- Providing assistance to such businesses by securing contract payments with letters of credit, negotiable securities, or other financing arrangements or measures.

To inform and encourage woman, minority, and disabled-veteran business enterprises to apply for procurement contracts, the PSC must develop an outreach program to be implemented by each regulated company.

Each regulated company is required to annually report to the PSC regarding the implementation of its plan, using a form and on a date determined by the PSC. The PSC must provide a summary report to the Legislature detailing the progress of activities undertaken by each regulated company on September 1 of each year. The summary report must include comparative information on procurement contracts made between regulated companies and the targeted businesses and those made with at least a majority of other enterprises in the state, to the extent that such information is readily available. The PSC must make recommendations regarding the implementation of the reporting requirement and any proposed legislative recommendations it deems necessary or desirable to further this policy. With regard to disabled-veteran business enterprises, the PSC must ensure that its recommended programs and legislation are consistent with those of a veteran business enterprise certified under s. 295.187, F.S. Finally, the PSC must make the summary report available on its website.

The bill creates penalties for any person, including a corporation through its directors, officers, or agents, which falsely represents a business as a woman, minority, or disabled-veteran business enterprise in the procurement of, or in the attempt to procure, contracts from a regulated company. Such a falsification is a first degree misdemeanor. In the case of a corporation, the fine or imprisonment, or both, is to be imposed on each director, officer, or agent responsible for the false representation.

⁶ The bill does not define this term and it is unclear what it means.

The bill authorizes the PSC to adopt rules for determining and verifying the eligibility of woman, minority, and disabled-veteran business enterprises for procurement contracts.

The bill takes effect July 1, 2014.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

As is discussed in Related Issues, the language relating to the standards for who is eligible as a minority, and perhaps even a woman, are ambiguous. Given that falsifying one's eligibility will be a first degree misdemeanor (lines 194-202), the standard has to be precise enough to avoid a constitutional challenge of being void for vagueness for failing to place a person on notice as to what is illegal.

Lines 203-205 direct the PSC to adopt rules for determining and verifying eligibility. Given the ambiguity in defining the standards to be used by the PSC in rulemaking, the bill may be subject to constitutional challenge as an unlawful delegation of legislative authority.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill's requirements for each regulated company to: annually develop and submit a detailed and verifiable plan for increasing the procurement of contracts from woman, minority, and disabled-veteran business enterprises; implement the plan; comply with the outreach program requirements; and file the annual report will cause uncertain amounts of expenses for each company. These expenses will be recoverable from its customers or its ratepayers.

C. Government Sector Impact:

The bill will result in an uncertain fiscal impact on the PSC due to its requirements for developing an outreach program, preparing an annual report, and rulemaking.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Lines 116-118 define “minority” but don’t speak to the percentage of a race that is necessary to qualify as such. For example, must a person seeking to establish eligibility as a Native American be pure Native American or will some lesser standard suffice? This also raises issues with Line 124 and “woman business enterprise.” What if a person is transgender or transsexual and is undergoing sex reassignment therapy; at what point does he become eligible or does she cease to be eligible? Also, line 117 includes “Hispanic Americans,” but Hispanic does not refer to race but is a term referring to a cultural relationship to Spain, regardless of race.

Lines 140-142 require the PSC to establish guidelines that a regulated company is to use in establishing a plan for increasing the procurement of relevant contracts. Lines 149-153 require the PSC to develop an outreach program. The only way for the PSC to fulfill these tasks is through adoption of rules, but the bill’s only grant of rulemaking authority relates to the eligibility of a business enterprise.

Lines 194-202 create penalties for falsely representing eligibility as a woman, minority, or disabled-veteran business enterprise. These penalties are applicable against “a person, including a corporation...” If the term person is defined as in s. 1.01, F.S., for general use in construing the statutes, it includes “individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations.” If the term is not given this interpretation, the bill includes only an individual and a corporation, and excludes all these other types of entities.

As discussed above, lines 203-205 direct the PSC to adopt rules for determining and verifying eligibility and lines 194-202 create penalties for falsely representing eligibility as a woman, minority, or disabled-veteran business enterprise. This appears to create an unusual situation in which a criminal court will interpret and implement a PSC rule in adjudicating whether a crime has been committed.

VIII. Statutes Affected:

This bill creates section 350.118 of the Florida Statutes.

IX. Additional Information:

- A. **Committee Substitute – Statement of Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

- B. **Amendments:**

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
