The Florida Senate

Interim Project Report 2001-042 *November 2000*

Committee on Governmental Oversight and Productivity Senator Jack Latvala, Chairman

MINORITY BUSINESS ENTERPRISE STATUTES

SUMMARY

Presently, a footnote to s. 287.09451, F.S., provides that Florida's minority business enterprise (MWBE[1]) programs will be repealed on July 1, 2001, if a disparity study is completed by December 31, 2000. To date this study has not been completed. If the study is not completed, the repeal is not invoked.

A review of recent federal case law suggests that Florida's MWBE program may be vulnerable to an equal protection challenge. In order to survive such a challenge, the state would be required to show that its MWBE program is based on evidence of discrimination; however, the last two disparity studies on this issue have not found discrimination sufficient to support the existing MWBE program.

Accordingly, this report recommends that the Legislature review Florida's MWBE statutes during the 2001 Session, notwithstanding whether the contingent repeal of the statutes is invoked. Legislative action appears necessary in order to overcome any future constitutional challenge.

BACKGROUND

History of Florida's Minority Business Enterprise Legislation -- Florida's MWBE program began in 1982 with the enactment of ch. 82-196, L.O.F. This law encouraged each state agency to annually set aside up to 5% of contractual service monies for contracts with qualified, responsive, minority owned firms.

Subsequently in 1985, the Legislature passed ch. 85-104, L.O.F., entitled the Florida Small and Minority Business Act of 1985. Key components of the act were: (a) defining a minority business enterprise as a small business at least 51% owned and controlled by minority persons; (b) creating a certification process for MWBEs; (c) setting a 15% goal for state agency spending with certified MWBEs; and (d) permitting agencies to use set-asides to reach the goal.

In 1989, the U.S. Supreme Court issued its landmark decision in *City of Richmond v. J.A. Croson*, which held that a program creating a race- or ethnicity-based preference is constitutional only if it is narrowly tailored to achieve a compelling governmental interest.[2] *Croson* explained that a compelling interest can be demonstrated with objective proof of, " . . . a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors . . ."[3] This proof is commonly referred to as a disparity study in which disparity indices (DIs) for the utilization of MWBEs in state contracting are calculated.[4]

Due to the *Croson* holding, the Legislature commissioned TEM Associates, Inc. to complete a disparity study in 1989. The study's results, presented to the Legislature in January 1991, documented a significant statistical disparity between the availability of MWBEs and their utilization in prime contracting in four categories: construction, architecture and engineering, commodities, and contractual services.[5] These disparities were illustrated as percentages within particular racial, ethnic, and gender groups across the four categories, and the report recommended that state agencies award contracts to MWBEs in the specified percentage amounts in

[1]This report uses the term "MWBE" to refer to firms owned by minorities or women, the term "MBE" to refer to firms owned by racial minorities only, and "WBE" to refer to firms owned by women.

[2]*City of Richmond v. J.A. Croson Co*., 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 845 (1989).

[3]*Croson*, 109 S.Ct. at 730.

[4]A DI is based on the portion of the MWBE group used in contracting over the portion of the MWBE group available. A DI result greater than one is considered over-utilization, equal to one is parity, and less than .8 is prima facie evidence of discrimination. *Phillips & Jordan v. Watts*, 13 F. Supp.2d 1308 (N.D. Fla. 1998).

[5]*State of Florida Minority/Women Business Study: Final Report*, TEM Associates, Inc., Phase II, Vol. II (1990).

order to rectify the disparities.[6] Additionally, the study presented anecdotal evidence of discriminatory practices in the public and private sectors.

In response to the study, the Legislature enacted ch. 91-162, L.O.F., which amended the MWBE statutes to reflect the spending goals recommended in the disparity study. These spending goals, which have not since been modified by the Legislature in substance, are detailed in the discussion of current law contained in the "Findings" section below.

The next significant change to the MWBE statutes occurred in 1994 with the passage of ch. 94-322, L.O.F. The reforms included: (a) establishing a statewide, unified certification process; (b) creating the Minority Business Advocacy and Assistance Office (MBAAO); and (c) requiring the MBAAO to make recommendations to the Legislature concerning the MWBE spending goals on the basis of an updated disparity analysis to be completed at least once every five years with the first study due by December 1, 1995. The legislation also provided that any provisions related to MWBE programs, " . . . shall be repealed on July 1, 2001, contingent upon the completion of the statistical disparity analysis required pursuant to s. 287.0945(6)(p) to be completed in the year 2000 . . ."[7]

As required, Florida State University (FSU) completed a disparity study in 1995. The study found no disparity in MWBE utilization during FYs 1991-1994, and consequently recommended that the MWBE program be changed to race/gender neutral small business procurement assistance. The report also stated that the 1991 MWBE spending goals had been set too high because the prior disparity study erroneously based its results on the *potential* availability of MWBEs, rather than the *actual* availability of qualified, willing, and able MWBEs as required by *Croson*.[8]

The House Committee on Commerce questioned the FSU study.[9] According to the staff analysis, FSU researchers improperly restricted its *actual* availability count to only certified MWBEs. The analysis points out that any business, including non-certified MWBEs, is permitted to bid on a state contract, and concludes therefore that a MWBE may be available, i.e., qualified, willing, and able as required by *Croson*, notwithstanding its certification status.

Subsequently, the Speaker of the House of Representatives requested that FSU conduct an updated analysis using the pool of minority businesses in the state that are *potentially* available to contract with the state. The updated report, submitted by FSU on April 6, 1996, presented DIs based on two different calculations of MWBE availability.[10] The results of the calculations are presented in the table below.[11] The first number in each range reflects a DI based on census estimates of the number of MWBE firms less an adjustment for firm capacity. The second number in each range reflects a DI based on census estimates of the number of MWBEs, less adjustments for firm capacity and certifiability.[12]

Minority Group	DIs for FYs 1989--1994	DIs for FYs 1991--1994
African American	2.56 – 4.21	5.95 – 9.70
Asian American	.35 -- .55	.83 – 1.32
Hispanic American	.59 – 1.00	1.42 – 2.39
Native American	6.92 – 13.28	14.41 – 27.91
American Women	.43 -- .60	.96 – 1.77
All MWBEs	.60 – 1.07	1.38 – 2.44

As the table illustrates, FSU researchers found that MWBEs were for the most part over-utilized, i.e., a DI over 1.00, by the state notwithstanding which availability calculation or time period was used. The only indications of disparity, i.e., a DI less than .8, occurred during the aggregated time period of 1989-1994. The updated FSU study noted, however, that the statistics for FYs 1991-1994 provided the most accurate analysis for several reasons, including that the data reflects those years in which the 1991 MWBE spending goals were effective. The updated study concluded by stating that the three-year statistics proved that the MWBE program had been a success whether a pool of *potentially* available MWBEs or *actually* available certified MWBEs was utilized; thus, the recommendation in the original study that Florida

[6]A 1991 Senate staff review concurred in the study's recommendation. See: *A Review of the State of Florida Minority/Women Business Study Conducted by TEM Associates, Inc.*, Florida Senate, Committee on Governmental Operations, March 1991.

[7]Section 26 of ch. 94-322, L.O.F.

[8]*Women and Minority Business Enterprise Disparity Study*, Florida State University, December 1, 1995.

[9]*Initial Analysis of the State of Florida Women and Minority Business Enterprise Disparity Study*, House of Representatives, Committee on Commerce, January 1996.

[10]*Women and Minority Business Enterprise Disparity Study Addendum*, Florida State University, April 12, 1996.

[11]This table was constructed from data contained in the FSU addendum at page 31.

[12]An adjustment for firm capacity reflects the proportional availability of business resources available from each MWBE and non-MWBE group, and avoids requiring small vendors to receive the same number of contracts as large vendors. An adjustment for certifiability means that only MWBEs who could qualify for certification were counted.

adopt a race/gender neutral plan still prevailed. This recommendation was not enacted by the Legislature.

In 1996, the Legislature passed ch. 96-320, L.O.F. In relevant part, this legislation repealed s. 287.0945, F.S.,[13] and moved its contents to s. 287.09451, F.S. The primary substantive modifications of this shift were: (a) repealing the Commission on Minority Economic and Business Development; (b) transferring the MBAAO to the Department of Labor and Employment Security; and (c) modifying the disparity study due dates by requiring the next study to be completed by December 1, 1996, and at least once every five years thereafter.

The consulting firm of D.J. Miller and Associates (DJMA) was hired to complete the 1996 study. The study's results were presented in December 1997. In the DJMA report, MWBE availability was calculated based upon vendor lists maintained by various state agencies.[14] Unlike the FSU study, the DJMA study did not adjust MWBE availability for firm capacity nor certifiability. The results of the study, which covered FYs 1992-1996, were displayed in two groups: (a) the "MWBE" group which includes all certified MWBEs, non-certified MWBEs, and Department of Transportation disadvantaged business enterprises; and (b) the "certified MWBE" group which includes only certified MWBEs. The following table summarizes the results:[15]

Procurement Type	DIs for MWBEs	DIs for Certified MWBEs
Construction	1.13	1.12
Architecture/ Engineering	.86	.39
Commodities	.69	.66
Contractual Services	4.64	2.21
Total	.78	.85

As shown by the table, the only evidence of disparity is in architecture and engineering, and commodities. The results for construction and contractual services show an over-utilization of MWBEs. The DJMA report concluded that Florida's MWBE spending goals should be lowered and set over a broader range of state procurement activities. The report also suggested that the state begin its merging with race-neutral small business and geographically based procurement preferences. These recommendations were not enacted by the Legislature.

On November 9, 1999, the Governor announced the One Florida Initiative, the stated mission of which was to increase opportunity and diversity in state college enrollment, contracting, and employment in a constitutional manner. To implement this Initiative, the Governor issued Executive Order 99-281. Concerning state contracting, the order forbade the Office of the Governor and all executive agencies from using racial or gender preferences when making contracting decisions, and directed the MBAAO to develop an implementation strategy for an "Equity in Contracting" plan.[16] The office's progress with this plan will be detailed in its annual report that is due to the Legislature by December 31, 2000.

In a separate document, the Governor announced the following objectives for the plan:

1. Modify state purchasing databases to enable tracking of state spending with all minority vendors, not only certified MWBEs;
2. Require all procurement agents to report directly to the Governor on the amount of minority spending;
3. Simplify the certification process and create less rigid requirements so more businesses may be certified;[17]
4. Move the MBAAO to the DMS, and reprioritize the office's duties to focus on matchmaking between minority business owners and procurement agents;
5. Create a system for investigating complaints of discrimination by state procurement agents, and support legislation banning those found guilty of discrimination from state contracting;
6. End set-asides and price preferences, and substitute a race-neutral program of assistance to firms in economically disadvantaged areas; and
7. Promote minority business development by enhancing assistance programs such as the Bond Guarantee Program and the minority-franchising program of the Black Business Investment Board.

[13]The contingent repeal for the MWBE statutes enacted by ch. 94-322, L.O.F., which references s. 287.0945, F.S., however, was not amended to delete reference to that now repealed section of the statutes.

[14]The DJMA report also calculated MWBE availability based upon census counts of MWBEs without adjusting for factors such as firm availability. Such a calculation is unacceptable under *Croson;* thus, these results are not discussed in this report. Furthermore, the report also presents DIs for MWBEs broken down by race and gender; however, the report indicates that the results are unreliable because available data was incomplete. Thus, these results are likewise not discussed. See: *Disparity Study for the State of Florida*, D.J. Miller and Associates, Inc., December 1997, at pages IV-6 -- IV-8, and VI-1 -- VI-3.

[15]This table was constructed from data presented in the DJMA study at pages VI-6 -- VI-11.

[16]The implementation plan was released by the MBAAO, now OSD, on January 31, 2000.

[17]The certification process will be retained only until racial and gender preferences are ended in all state agencies.

Objectives numbered 3, 4, and 5 above were effected through passage of HB 2127 during the 2000 Session.

METHODOLOGY

The methodology for this report included reviewing Florida statutes, federal case law, law review articles, and disparity studies, and discussing the subject matter with national experts on contract preference programs, legislative staff, and representatives from the Department of Management Services (DMS), Office of Economic and Demographic Research, Office of Supplier Diversity (OSD), and DJMA.

FINDINGS

Overview of current Florida statutes concerning minority business enterprises – Chs. 287 and 288, F.S., set forth Florida=s statutory scheme for small and minority business assistance. A Asmall business@ is defined as an independently owned and operated business concern that employs 200 or fewer permanent full-time employees, has a net worth of $5 million or less, and an average net income of $2 million or less.[18] A MWBE is defined as a Asmall business@ that is domiciled in Florida and at least 51% owned by minority persons. A Aminority person@ means an African American, Hispanic American, Asian American, Native American, and an American woman.

The OSD within the DMS oversees the state=s MWBE program.[19] One of the OSD's duties is to certify MWBEs. Certification ensures that the business meets all statutory requirements for MWBE status.[20] A MWBE certified by a local government is also considered state certified if the state's criterion are used in the local certification process.[21] Currently, there are 4,104 certified MWBEs in Florida.[22]

Once certified, the MBE is eligible for the following advantages in state contracting:

- *Set-asides*: State agencies, community colleges, local governments, and district school boards may set aside commodities and services contracts for competitive sealed bidding only among certified MWBEs or only among bidders who agree to use certified MWBEs as subcontractors.[23] Local governments, community colleges, or school boards may set aside up to 10% of funds allocated to construction capital projects or to personal property and services for contracts which are competitively bid only among certified MWBEs.[24]

- *Price preferences*: State agencies may use price preferences up to 10% and weighted preference formulas for commodities and service contracts.[25]

Furthermore, the statutes encourage state agencies to spend the following percentages of contract moneys with certified MWBEs in the following four industries:[26]

- 21% of moneys expended for construction contracts (4% percent with African Americans, 6% with Hispanic Americans, and 11% with American women);

- 25% of moneys expended for architectural and engineering contracts (9% with Hispanic Americans, 1% with Asian Americans, and 15% for American women);

- 24% of moneys expended for commodities (2% with African Americans, 4% with Hispanic Americans, 1% with Asian Americans and Native Americans, and 17% with American women); and

- 50.5% of moneys expended for contractual services (6% for African Americans, 7% for Hispanic Americans, 1% for Asian Americans, .5% with Native Americans, and 36% for American women).

The actual dollar amounts for the MWBE goals are determined by multiplying the percentage goal by the industry dollar base.[27] The industry dollar base for the commodities and contractual services industries is the prior fiscal year's expenditures, and for the construction, and architecture and engineering industries is the current year's

[18]Section 288.703, F.S.

[19]The MBAAO, established by ch. 94-322, L.O.F., was renamed by ch. 2000-286 L.O.F., as the OSD.

[20]If an entity is certified based upon false representation, its certification will be permanently revoked and it will be barred from state business for 36 months. Additionally, the person making the false representation is guilty of a second degree felony. Section 287.094(1), F.S. (2000).

[21]Section 287.0943(1), F.S. (2000).

[22]Of this number, 1091 are African American firms, 933 are Hispanic firms, 183 are Asian firms, 34 are Native American firms, and 1863 are female firms.

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

[24]Sections 235.31, 255.101, and 287.093 F.S.

[25]Sections 255.102 and 287.057(7), F.S.

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

[27]Section 287.09451(4)(n), F.S.; Rule 38A-20.0021, F.A.C.

appropriation. Exclusions from the industry dollar base are determined by the OSD.[28]

None of the aforementioned statutory advantages are mandatory. The spending percentages are goals only, and set-asides and price preferences are two tools that may be used in the agency's discretion when striving to achieve the goals. The only mandatory advantages for MWBEs are: (a) a state agency must award a contract for commodities or services to a certified MWBE if two or more equal bids are received and one of the bids is from a certified MWBE; and (b) 15% of lottery retailers must be MWBEs.[29]

Both the executive and legislative branches monitor agency compliance with the MWBE program. The OSD is responsible for ensuring that each agency adopts a MWBE utilization plan that explains how it will attain the legislative intent to assist MWBEs.[30] If the OSD finds that an agency has deviated significantly from its utilization plan for two consecutive FYs, or for three out of five total FYs, the OSD may review any of the agency=s bid solicitations and contract awards until the agency meets its utilization plan. Moreover, agency spending with certified MWBEs is continually monitored with quarterly reports issued by the Comptroller to the OSD, Legislature, and Governor.[31]

In addition to encouraging agencies to contract with certified MWBEs, the statutes also prohibit discrimination by agencies based on race, ethnicity, gender, religion, or physical disability.[32] A complaint that an agency has discriminated may be filed with the OSD, which must refer it to the Inspector General (IG) of the relevant agency. If discrimination is found to have occurred, the responsible state employee must be referred for disciplinary action.

The statutes also create a discriminatory vendor list for entities found in court to have discriminated on the basis of race, gender, ethnicity, disability, or religion.[33] Any listed entity and its affiliates are prohibited from doing business with any public entity for three years.

Legal standards of review for race-, ethnicity-, and gender-based preference programs -- Florida's programs create a preference based on race and ethnicity, and as such, these programs, pursuant to *Croson*, are subject to strict scrutiny review; i.e., the programs must be based upon a compelling governmental interest and narrowly tailored to achieve that interest.

The federal courts have explained that remedying the effects of past discrimination constitutes a compelling interest sufficient to justify a race- or ethnicity-based preference program; however, to show discrimination an entity cannot rely on mere speculation or legislative declarations. Instead, it must show a "strong basis in the evidence" for its decision that remedial action is required.[34] A strong basis in the contracting context may be shown with, "a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors . . ."[35]

Additionally, Florida's programs create a preference based on gender, and as such, these programs are subject to intermediate scrutiny; i.e., the program must be substantially related to an important governmental interest. Under this standard, the government need only show sufficient probative evidence of societal discrimination based on gender in the relevant economic sector, rather than active or passive discrimination by the government itself as is required for strict scrutiny review.[36]

Since the enunciation of these standards for MWBE preference programs, challenges to such programming have been prevalent throughout the United States with many proving successful. In Florida, the federal courts have recently struck two public contracting preference programs. In *Engineering Contractors*, the Eleventh Circuit affirmed the district court's decision declaring Dade County's programs, which set contract participation goals for black, Hispanic, and female persons, unconstitutional.[37] These programs, like Florida's, permitted the use of set-asides and price preferences to achieve minority participation goals.

To justify its programs, Dade County presented extensive evidence in the district court that included DIs for its award of MWBE construction contracts in three standard industry classification (SIC) categories during years 1989-1991 and 1993. Initially, the Eleventh Circuit noted that the DIs indicated significant under-utilization of black firms, lesser

[28]Rule 38A-20.0021, F.A.C.

[29]Sections 24.113(1) and 287.057(10), F.S.

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

[31]Section 17.11, F.S.

[32]Section 287.094(4), F.S.

[33]Section 287.134, F.S.

[34]*Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 905 (11th Cir. 1997).

[35]*Croson*, 109 S.Ct. at 730.

[36]*Engineering Contractors*, 122 F.3d at 910.

[37]*Id*. at 929.

under-utilization of Hispanic firms, and mixed results as to WBEs.[38] The plaintiffs, however, had argued that any under-utilization was due to the fact that MWBEs tend to be smaller and thus, tend to win fewer and smaller contracts.

Dade County attempted to counter plaintiff's claim by using regression analyses on its DI statistics to control for firm size.[39] The regression analyses, however, explained most of the unfavorable disparities. After the analyses were conducted, the only remaining disparities were for: (a) black firms in one SIC category during 1989-1991; (b) Hispanic firms in two SIC categories during 1989-1991; and (c) WBEs in one SIC category during 1993.

Reviewing this evidence, the court found that the remaining disparities for the MBEs in years 1989 – 1991 did not constitute a strong basis in the evidence to justify a racial preference, particularly where the disparities were explained by firm size in 1993. Moreover, the court found that the one remaining disparity for the WBEs in 1993 was not sufficiently probative of discrimination to justify a WBE program, even though the evidentiary burden for gender preferences is lower than that for racial preferences.

The Eleventh Circuit also found that the MBE programs were not narrowly tailored. In order to determine whether a race- or ethnicity-based preference is narrowly tailored, the court looks at the following four factors: (1) the necessity for relief and the efficacy of alternative remedies; (2) the flexibility and duration of the relief including the availability of waiver provisions; (3) the relationship of numerical goals to the relevant labor market; and (4) the impact of the relief on the rights of innocent third parties.

Concerning Dade County's MBE programs, the court focused on factor one. Dade County argued that studies found that race-neutral programs could not address the county's discrimination problems; however, the court found the studies to be conclusory and gave them little weight. The court stated that even where there is a strong basis in the evidence for discrimination, a race- or ethnicity-based remedy is not automatic. Instead, the entity must first consider the use of race- and ethnicity-neutral measures, such as: (a) simplifying bidding procedures; (b) relaxing bonding requirements; and (c) training and financial aid for disadvantaged entrepreneurs of all races.

Concerning Dade County's WBE program, the court noted that where there is sufficiently probative evidence of discrimination against women that the government need not implement a gender preference program only as a last resort, nor must it closely tie its numerical goals to the proportion of qualified women in the market. Instead the government may implement the program if it can show that the program is substantially related to an important government interest. The court found that Dade County's WBE program satisfied the substantial relationship prong of intermediate scrutiny; however, given that the evidence was insufficient to show discrimination against women, the program was ruled unconstitutional.

Similarly in *Phillips & Jordan*, a Florida Department of Transportation (DOT) contract preference program was struck.[40] In this case, MGT of America conducted a disparity study. The study calculated DIs of 94.31 for FY 1989-1990, and 38.78 for FY 1990-1991 in DOT contracts awarded to black-owned firms, and DIs of 19.33 for FY 1989-1990, and 47.25 for FY 1990-1991 for Hispanic-owned firms. In response to the study, DOT implemented a program authorizing set-aside contracts for competition only among black- and Hispanic-owned firms.

The program was subsequently challenged. The DOT responded that the MGT study showed disparities in its public contracting, and even though the DOT itself was not discriminating, it must have become a passive participant in discrimination emanating from the local construction industry. Thus, according to DOT, its set-aside programs were justified by its compelling interest in remedying industry discrimination. The Court rejected this argument.

The Court initially noted that a governmental entity can satisfy the compelling interest prong of the *Croson* standard if it can show a racial disparity in contracting, and one of the following: (a) it actively discriminates; or (b) it has become a passive participant in a system of racial exclusion practiced by elements in an industry. Concerning this latter aspect, the showing must be particularized. Therefore, where the argument is that the governmental entity is a passive participant, the court stated that it is insufficient to show only that some unknown entity is or has been discriminating because, "[i]t 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.'"[41] The Court explained that in the DOT case, "[t]he record at best establishes nothing more than some ill-defined wrong caused by some unidentified wrongdoers;

[38]The DI ranges, which were provided for three different construction contract SIC categories, are as follows: a) .10 to .70 for black businesses; b) .23 to 1.10 for Hispanic businesses; and c) .06 to 2.58 for WBEs. *Id.* at 916.

[39]The court stated, "The point of a regression analysis is to determine whether the relationship between the two variables is statistically meaningful. Here, the County's regression analyses were directed toward identifying those disparities that were unexplained by firm size...." *Id.* at 917.

[40]*Phillips & Jordan*, 13 F.Supp.2d 1308 (N.D. Fla. 1998).

[41]*Phillips & Jordan*, 13 F.Supp.2d at 1313-1314.

and under *Croson*, that is not enough."[42] Accordingly, the court found the program unconstitutional.

The court also questioned in dicta the validity of the MGT statistics. According to the court, the numbers of MWBEs and non-minority firms in the DOT's relevant market area, which consisted of all areas inside and outside of Florida where DOT contracts had been awarded, were based on census counts without adjustments for firm availability. In other words, the MGT statistics failed to consider whether the firms that were counted were qualified, willing and able to contract with DOT as required by *Croson*. Additionally, the court questioned MGT's aggregation of data obtained from individual districts. The court explained that even though DOT lets it contracts at the district level, the DIs were reported on a statewide basis. If the DIs had been reported district-by-district the possibility of the "aggregate fallacy" could have been avoided. This is a statistical phenomenon that can occur when categories of disparate entities are grouped together for statistical purposes. When aggregated, the data may indicate that disparities exist, even though when disaggregated, the disparities disappear.

As the cases discussed above demonstrate, the courts rigorously scrutinize MWBE programs when challenged. It is, however, possible for a MWBE program to survive strict and intermediate scrutiny review. The following sets forth some guiding principles, as provided in the federal case law discussed above, for race-, ethnicity-, and gender-based programs. For MBE programs:

- Disparity studies used to evidence discrimination in public contracting should ensure that: (a) the determination of MBE availability reflects only those who are qualified, willing, and able to contract with the state; (b) regression analysis or other adjustments are applied to eliminate the possibility that factors other than discrimination, such as firm size, are responsible for any disparity; and (c) the data is properly disaggregated to avoid "aggregate fallacy" problems.

- The MBE program should remedy identified discrimination. Anecdotal evidence may be used to establish the source of the discrimination. For example, evidence demonstrating that minority persons have suffered discriminatory experiences in public procurement or that procurement employees have witnessed discriminatory behavior may be introduced.

- The MBE program should be narrowly tailored in that: (a) it is necessary as race-neutral measures cannot rectify the disparity; (b) it is periodically reviewed by the legislature to determine its effectiveness and scheduled to end when the disparity is resolved; (c) the goals are flexible, i.e., no quotas; (d) the goals reflect the percentage of qualified, willing, and able minorities in the relevant labor market; and (e) the impact on third parties is minimized to the extent practicable.

For WBE programs, intermediate scrutiny, rather than strict scrutiny, applies. Thus, unlike MBE programs, the government need not consider the efficacy of race-neutral alternatives to a WBE program, nor must it show that it was an active or passive participant in the gender discrimination. Instead, the government need only show sufficient probative evidence of societal gender discrimination in the relevant economic sector. Precisely what evidence satisfies this standard has not been defined by the courts; however, it is clear that statistics comparing the total percentage of WBEs in the jurisdiction to the percentage of awarded contracts in a particular industry are insufficient.[43] It is suggested that the disparity analysis should be based on the percentage of WBEs qualified in a particular industry as compared to the percentage of WBEs awarded contracts in that industry.

Legal Considerations for Florida's MWBE program -- Currently, there are two issues concerning Florida's MWBE program. First, MWBE statutes may be repealed on July 1, 2001, if a disparity study is completed in the year 2000. As discussed *supra*, ch. 94-322, L.O.F., provided for the repeal of any provisions related to MWBE programs on July 1, 2001, " . . . contingent upon the completion of the statistical disparity analysis required pursuant to s. 287.0945(6)(p) to be completed in the year 2000 . . ."[44] Although, s. 287.0945, F.S., was later repealed by ch. 96-320, L.O.F., the contingent repeal enacted by ch. 94-322, L.O.F., was not. As such, it can be argued that the repeal's specific reference to s. 287.0945(6)(p), F.S. (1994), keeps that subsection of the law in effect, and therefore that a study is still required by the subsection. Moreover, current law contained in s. 287.09451, F.S., permits, but does not require, a disparity study to be completed in the year 2000. Thus, although it is ambiguous, it appears that the repeal remains viable law that will be invoked if a disparity study is completed in the year 2000. To date, however, a study has not been completed.

The second issue that arises is whether the MWBE program remains viable under federal law. Since the program began, three disparity studies have been completed. Neither of the two most recent studies evidences a disparity sufficient to constitute either a compelling or an important state interest.

In the FSU study, the only unfavorable disparities were during FYs 1989-1994 for: Asian, Hispanic, and female firms.

[42] *Id*. at 1314.

[43] *Engineering Contractors*, 122 F.3d at 910.

[44] Section 26 of ch. 94-322, L.O.F.

These disparities, however, disappeared during FYs 1991-1994, when the 1991 spending goals were in effect. Under the reasoning in *Engineering Contractors*, it is probable that a court would find that the disparities' correction in the more recent three-year period renders any evidentiary value of the prior disparity insufficient.

In the DJMA study, the only unfavorable disparities were during FYs 1992-1996 in commodities for both MWBEs and certified MWBEs, and in architecture and engineering for certified MWBEs; however, as in *Engineering Contractors*, when regression analysis was conducted to control for the variable of firm size in commodities the unfavorable disparity was explained.[45] Regression analysis could not be conducted for the architecture and engineering category due to an insufficient number of firms in the area. The unfavorable disparity in that category, however, was only for certified MWBEs. No disparity existed as to all MWBEs. Federal case law has held that a disparity limited only to certified MWBEs does not constitute a strong basis in the evidence justifying a racial preference program when no disparity exists as to all MWBEs.[46]

Consequently, it is likely that the existing MWBE program would not be upheld if challenged due to the lack of a strong evidentiary basis demonstrating disparity.[47] Moreover, it also appears that the MBE programs would fail the narrowly tailored prong of strict scrutiny. In order to be narrowly tailored, the program must be necessary because race-neutral measures cannot rectify the disparity, must be periodically reviewed by the Legislature, and must be scheduled to end when the disparity is resolved. Here, however, it can be argued that none of these factors has been satisfied given that the recommendations of the past two disparity studies have not been followed. As discussed s*upra*, neither FSU's recommendation that the MWBE program be ended, nor DJMA's recommendation that the spending goals be lowered and that the program be transitioned into race/gender neutral procurement assistance, have been enacted into law. Thus, it does not appear that a good faith argument could be made that the state has made adequate efforts to ensure that its MWBE programs are narrowly tailored.

RECOMMENDATIONS

Federal case law sets rigorous standards for race-, ethnicity-, and/or gender-based preferences. Currently, Florida's MWBE statutes do not appear to satisfy these standards. None of the disparity studies conducted since 1995 supports an inference of discrimination sufficient to justify the state's MWBE program. Spending data from FYs 1997—2000, however, has not yet been analyzed in a disparity study.

Two approaches to the MWBE program appear viable:

1. Maintain MWBE preferences. This option, as relates to race and ethnicity, is subject to strict scrutiny review by the courts; thus, the program would require an analysis of spending data for FYs 1997--2000 that demonstrates a DI of less than .8. Further, the cause of any disparity found must be identified and the program must be narrowly tailored; e.g., it must be shown that race-neutral measures are insufficient, and that the relief is flexible, related to labor market availability, and scheduled to end when the disparity is resolved.

2. Transform the MWBE program into a race-, ethnicity-, and gender-neutral small business assistance program. This option is subject to rationality review; thus, the program would be presumed valid and would be sustained if rationally related to a legitimate state interest. Promoting small business has been held to be a legitimate state interest.[48]

COMMITTEE(S) INVOLVED IN REPORT ***(Contact first committee for more information.)***
Committees on Governmental Oversight and Productivity (Lead), 404 South Monroe Street, Tallahassee, FL 32399-1100, (850) 487-5177 SunCom 277-5177
Commerce and Economic Development Committee

MEMBER OVERSIGHT
Senator Jim Horne

[45]The DJMA study discusses regression analysis for firm capacity at pages VI 13-14. Detailed information on regression analysis for this report was obtained from the DJMA statistician who completed the Florida study.

[46]See: *Associated General Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 737 (6th Cir. 2000)(DIs that reported only the use of certified MWBE firms, rather than the use of all minority firms, were insufficient).

[47]Also, the past two disparity studies might be insufficient even if they demonstrated disparity as the DIs were based on data aggregated at the state level. Under *Phillips & Jordan*, it can be argued that the data should have reflected DIs at the county or some other sub-relevant market level.

[48]See, e.g.,: *J.H. Rutter Rex Manufacturing Co. v. U.S.*, 706 F.2d 702, 705 (5th Cir. 1983).