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HOUSE OF REPRESENTATIVES
COMMITTEE ON
STATE ADMINISTRATION
ANALYSIS

BILL #: HB 1323

RELATING TO: Fla. Minority Business Loan Program

SPONSOR(S): Representative(s) Kallinger and Holloway

TIED BILL(S):

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

(1) STATE ADMINISTRATION
(2) GENERAL GOVERNMENT APPROPRIATIONS
(3) COUNCIL FOR SMARTER GOVERNMENT
(4)
(5)

I. SUMMARY:

Current law provides for certification of Minority Business Enterprises (MBE) to participate in bidding on contracts of state agencies for goods and services. The Department of Management Services reports that there are no programs that provide assistance to MBE's to obtain working capital financing so that these vendors can purchase the materials or hire the personnel necessary to complete a contract.

This bill creates the Florida Minority Business Loan Mobilization Program to provide a mechanism to advance a portion of the base contract award amount to a MBE vendor to be used as collateral in obtaining working capital financing.

The bill does not appear to have a fiscal impact on the state or local governments, as the monies to be used in this program are part of the base contract amount awarded to the vendor.

The bill takes effect upon becoming law.

There are numerous editorial problems with the bill including inconsistent references to program participants and program elements. The sponsor is filing a strike-everything amendment to refine the language of the bill.

The bill may conflict with certain other provisions of law relating to procurement of personal property and services. Please see section V., "Comments" of this analysis.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

1.	Less Government	Yes []	No [X]	N/A []
2.	Lower Taxes	Yes []	No []	N/A [X]
3.	Individual Freedom	Yes [X]	No []	N/A []
4.	Personal Responsibility	Yes []	No []	N/A [X]
5.	Family Empowerment	Yes []	No []	N/A [X]

This bill creates an optional activity within the state procurement process to advance payment to minority business enterprise vendors for collateral to back capital financing agreements.

B. PRESENT SITUATION:

Part IV, ch. 288, F.S., provides definitions, applicable to all government agencies in the state, concerning small and minority business enterprises in the state. These definitions are used in determining whether to certify a minority business enterprise as vendors for purposes of bidding on state contracts for goods and services. This certification process is found in s. 287.0943, F.S. The Department of Management Services reports in its analysis of this bill that there is no mechanism available to assist MBE's towards obtaining working capital financing towards fulfilling state contracts.

C. EFFECT OF PROPOSED CHANGES:

The bill creates s. 288.706, F.S., the Florida Loan Mobilization Program (Program), to assist minority business enterprises in competing for a state contract for goods and services by providing a mechanism to obtain working capital financing.

Legislative Intent

The stated intent is:

> "to promote diversity in state contracting by eliminating barriers that prevent minority business enterprises from providing goods and services to the state. It is also the intent to encourage prime contractors to participate in agency contracts by providing a mechanism to minimize any risk to with the contractor might be exposed as a result of a reduction in the amount of allowable subcontract retainage[1] withheld by the prime contractor for vendors participating in the [Florida Loan Mobilization Program]."

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[1] "Retainage is a common construction contracting practice whereby a certain percentage of compensation is withheld by the project owner from the general contractor and, in turn, by the general contractor from subcontractors until the project is completed satisfactorily. Retainage is also used as leverage to assure timely completion." *See* OPPAGA Special Review, Inflexibility in Contracting and Retainage Practices Could Hurt Construction Industry, Report No. 00-26 (December 2000).

Program Creation

The Florida Loan Mobilization Program is established to assist minority business enterprises in fulfilling a state contract for goods and services. A minority business enterprise vendor may only apply to participate in the Program after it has been awarded a state agency contract. Minority Business Enterprises (MBE) are defined in s. 288.703(2), F.S., as:

> any small business concern as defined in subsection (1) [a small business] 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 under representation 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.

Program Operation

The Program provides that the contracting agency can disburse a portion of the base contract award amount to a MBE vendor to be used as collateral towards obtain working capital financing. Alternatively, the contracting agency can advance directly a portion of the contract amount to a MBE vendor for use as a retainer to fund the basic service portion of a contract.

<u>Advance payment of retainer for basic services portion of a contract.</u>

A contacting agency that has awarded a contract to a MBE vendor for construction, professional services, or the provision of goods and services is authorizes to advance up to 10 percent of he base contract award amount to that vendor as a retainer to fund the basic services portion of a contract. The basic services portion of a contract is that portion which goes towards preliminary work that underlies the project, for example, surveying a site, preparing working agreements, and design activities.

The contracting agency may advance to a MBE vendor providing professional services up to 5 percent of the base contract amount as a direct retainer. Alternatively, if the MBE vendor is a participant in the Program, the contracting agency may advance up to 10 percent of the base contract award amount as a direct retainer. The bill does not provide any limitation on the use of this retainer. Ideally, the vendor would be limited to obtaining the material and personnel necessary to fulfill the contract.

<u>Disbursement of designated loan mobilization payment as collateral for working capital agreement.</u>

The contacting agency may disburse to a MBE vendor a portion of the base contract award amount, termed the "designated loan mobilization payment" (DLMP), for use as collateral to obtain working capital financing.

Once a MBE vendor is awarded a contract, that vendor may apply to an participating lending institution to obtain working capital financing. The lending institution must be one approved by the department. However, as the bill is written, the department does not have the authority to approve the lending institutions for participation in the program. The line of credit obtained under the working capital agreement is based on the amount in the DLMP and can be between 125 and 200 percent of that amount. The actual amount of the DLMP disbursed by the contracting agency can be between $5,000 and $250,000.

The DLMP is an amount between 5 and 10 percent of the base contract amount of the contract between the prime vendor and the contracting agency. The DLMP can be between 5 and 10 percent of the subcontract amount of a contract between a subcontract vendor and a prime contract vendor. The DLMP is to be disbursed by the contracting agency to the lending institution. Upon disbursement, the bill provides that the contracting agency no longer maintains an interest in the DLMP amount. Under both instances, it is needs to be made clear who the MBE vendor is in the relationship.

The bill provides for the timing of the release of the DLMP. A prime contractor may request the disbursement of the DLMP in the first application for payment, or for contractors on nonconstruction contracts, by letter delivered to the agency after award of the contract but before the commencement of the contract. In both cases, the request must be accompanied by the working capital agreement. In the case of construction contracts, the DLMP is released following the issuance of the notice to proceed (on the contract) and within 10 days of the agency's approval of the initial application for payment. For nonconstruction contracts, the release of the DLMP occurs 10 days after the agency's approval of the letter of request from the vendor. The bill provides authority to a contracting agency to include as a element of the contract that the release of the DLMP will start the time clock that determines timely completion of the contract.

MBE's that are a subcontractor or vendor to a prime contractor which has been awarded a state contract may participate in this program. The subcontractor must submit a letter to the contracting agency requesting the DLMP which indicates that the prime contractor has been notified of the request and that there is a valid working capital agreement with an approved lending institution. The bill provides a limitation on these working agreements but the limitation is not clearly written. The release of the DLMP appears predicated on the receipt by the lending institution of documentation indicating the subcontractor's contract amount or "other documentation acceptable to the agency evidencing the subcontract amount." The authority provided the agency in this sub-subparagraph does not describe to the agency the types of information or documentation that can be considered in determining the subcontractor's contract amount for determining the DLMP. Prime contractors can retain no more than 5 percent of the amount earned by the participating subcontractor.

Prime contractors are required to incorporate the Program into subcontract agreements or purchase orders when the subcontractors and vendors are participants in the Program.

<u>Contracting agency rights and responsibilities.</u>

The bill provides contracting agencies with additional responsibilities under the program. The contracting agency is directed to encourage prime contactors to make weekly or bi-weekly payments to participating subcontractors. It is not clear how this encouragement would apply to contractual timeliness requirements.

The contracting agency must "monitor compliance with and effectiveness of the procedures set forth in this section." What this probably means is that the contacting agency must monitor contractor compliance with the program and determine the effectiveness of the program in ensuring MBE participation in state contracts.

The bill provides that the program does not supersede the contracting agency's right to "insist upon strict compliance with the requirements of the contract document."

The bill makes clear that the agency cannot be a party to any working capital agreements entered into by a participating MBE vendor and a lending institution. The bill reiterates that the contracting agency is to disburse the DLMP to the lending institution. The lending institution is to notify the agency (although it is not clear that it is the contracting vendor that is to be notified) of the receipt of an application for a working capital agreement by a participating vendor.

The bill allows for other methods to disburse contact awards to MBE vendors when the MBE has agreed to an assignment of the contract proceeds to in order to obtain a line of credit. The bill provides that participation in the Program (and it appears to be assumed) that the payment of a DLMP is exclusive to any other agreements that a participating MBE vendor might be party to.

Finally, the bill provides authority to the Department of Management Services to adopt rules to implement the "provisions of the section". This general grant of rulemaking authority should be tied to specific activities found in the bill, such as the approval of lending institutions to extend working capital financing where the collateral is a portion of the base contract award amount.

The bill takes effect October 1, 2002.

D. SECTION-BY-SECTION ANALYSIS:

Please see "Effect Of Proposed Change," above.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Minority contractors will be able to obtain working capital using an advance from the contract awarded as collateral for a working capital agreement from a participating lending institution.

D. FISCAL COMMENTS:

There appears to be no fiscal impact on the state. The monies provided to a contractor are part of the total contract award. It is money already encumbered by the agency for the contract's purpose. The Department of Management Services may incur some insignificant costs in association with its responsibilities for the program.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

The bill does not require counties or municipalities to spend funds or to take action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The bill does not reduce the authority that counties or municipalities have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

The bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

This bill does not appear to create a "set-aside" program for minority businesses, although it does treat minority business vendors differently than non-minority business vendors. The United States Supreme Court has addressed this issue extensively and recent case law indicates that it has become skeptical of government programs that make use of race-based classifications. *See City of Richmond v. J.A. Croson Co.*, 488U.S. 469 (1989) (city program which set aside a percentage of construction projects for minority contractors must be subjected to strict scrutiny) and *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) (federal set-aside programs for minority contractors would be subjected to strict scrutiny).

B. RULE-MAKING AUTHORITY:

The department is authorized to adopt rules but needs specific authority to approve participating lending institutions and to promulgate the list of those approved lenders. This general grant of rulemaking authority should be tied to specific activities found in the bill, such as the approval of lending institutions to extend working capital financing when the collateral is a portion of the base contract award amount.

C. OTHER COMMENTS:

There are numerous inconsistencies in the use of terms within the bill. Participating vendors should be consistently referred to as MBE vendors. The Program is what MBE vendors apply to; and the Designated Loan Mobilization Payment is what the MBE vendor has disbursed on its behalf to a participating lending institution.

Additionally, the bill appears to conflict with certain provisions of chapter 287, F.S., relating to procurement of personal property and services. The bill appears to conflict with sections that address contingency contracts for professional services. Section 287.087(14) F.S., provides that: "[t]he agency shall establish procedures to ensure that contractual services have been rendered in accordance with the contract terms prior to processing the invoice for payment." The provisions of this bill appear to conflict with this requirement.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON STATE ADMINISTRATION:

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