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**\*\*AS PASSED BY THE LEGISLATURE\*\***  
**CHAPTER #:** 2002-303, Laws of Florida

**HOUSE OF REPRESENTATIVES  
COMMITTEE ON  
STATE ADMINISTRATION  
FINAL ANALYSIS**

**BILL #:** CS/HB 1323, 2ND ENG  
**RELATING TO:** Fla. Minority Business Loan Program  
**SPONSOR(S):** Council for Smarter Government, Representative(s) Kallinger, Holloway and others  
**TIED BILL(S):**

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

- (1) STATE ADMINISTRATION YEAS 3 NAYS 0
  - (2) GENERAL GOVERNMENT APPROPRIATIONS YEAS 12 NAYS 0
  - (3) COUNCIL FOR SMARTER GOVERNMENT YEAS 11 NAYS 0
  - (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 MBEs to obtain working capital financing so that these vendors can purchase the materials or hire the personnel necessary to complete a contract. This act 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 to assist that vendor in obtaining working capital financing.

This act does not appear to have a fiscal impact on the state government, as the monies to be advanced in this program are part of the base contract amount awarded to the vendor.

This act takes effect October 1, 2002.

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II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- |                                   |   |  |   |
|-----------------------------------|---|--|---|
| 1. <u>Less Government</u>         | Yes <input type="checkbox"/>            | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/>            |
| 2. <u>Lower Taxes</u>             | Yes <input type="checkbox"/>            | No <input type="checkbox"/>            | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u>      | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/>            | N/A <input type="checkbox"/>            |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/>            | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/>            |
| 5. <u>Family Empowerment</u>      | Yes <input type="checkbox"/>            | No <input type="checkbox"/>            | N/A <input checked="" type="checkbox"/> |

1. This act creates an optional activity within the state procurement process to advance payment to minority business enterprise vendors to obtain capital financing.

4. The act provides state government assistance to entities in order to secure a business loan.

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. Minority Business Enterprises (MBE) are defined in s. 288.703(2), F.S., as:

[a]ny 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.

This definition is 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 reported in its analysis of House Bill 1323 (2002) that there is no mechanism available in state contracting procedures to assist MBEs in obtaining working capital financing towards fulfilling state contracts.

Additionally, the Comptroller is charged by the Florida Constitution to settle and approve accounts against the state. There are also several statutory limitations on advance payment for goods and services by contracting state agencies. Section 215.422(14), F.S., authorizes the Comptroller to adopt rules to authorize advance payments for goods and services. Such rules are to provide objective criteria for determining when it is in the best interest of the state to make payments in advance and must also provide adequate protection to ensure that such goods or services will be provided. Additionally, s. 216.181(16), F.S., provides that "that funds provided in a specific appropriation in the General Appropriations Act may only be advanced if specifically authorized in the General Appropriations Act." Finally, s. 216.351, F.S., requires that "[s]ubsequent inconsistent laws shall supersede this chapter (Ch.

216, F.S., regarding planning and budgeting by the state) only to the extent that they do so by express reference to this section.”

**C. EFFECT OF PROPOSED CHANGES:**

This act creates s. 288.706, F.S., the Florida Loan Mobilization Program (program), to assist minority business enterprise vendors by providing a mechanism to obtain working capital financing after the award of a state contract.

**Legislative Findings and Intent**

The stated Legislative finding is:

that it is the interest of the public welfare to meaningfully assist minority business enterprises that are vital to the overall economy of this state.

The stated intent is:

to promote diversity in state contracting by eliminating barriers to minority business enterprises providing goods and services to the state.

**Program Creation**

The program will assist minority business enterprise vendors in fulfilling state contracts for goods and services. Minority business enterprise vendors may only apply to participate in the program after being awarded a state agency contract.

**Program Operation**

The program provides that the contracting state agency can advance a portion of the base contract award amount to a MBE vendor (prime or subcontract) to be used to obtain working capital financing. This designated loan mobilization payment is made by the agency to the vendor and financial institution as co-signators and under the vendor's tax information number. Upon disbursement, the agency retains no interest the payment.

Alternatively, the contracting agency may 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.

The program is exempted from the provisions of ss. 215.422(14), F.S., (authorizing the Comptroller to adopt rules to advance payment for good and services) and 216.181(16), F.S., (providing that funds provided in a specific appropriation in the General Appropriations Act may only be advanced if specifically authorized in the General Appropriations Act and providing that any agency expressly authorized by law to make advanced payments for program startup or advances for contracted services, in total or periodically, must limit such disbursements to other governmental agencies and not-for-profit corporations). The program is implemented pursuant to s. 216.351, F.S., which provides that “[s]ubsequent inconsistent laws shall supersede this chapter (regarding planning and budgeting by the state) only to the extent that they do so by express reference to this section.”

Advance payment as retainer for basic services portion of a contract.

A contracting agency that has awarded a contract to a MBE vendor for construction, professional services, or the provision of goods and services is authorized to advance up to 10 percent of the 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 applies towards preliminary work that underlies the project, for example, surveying a site, preparing working agreements, and design activities.

Alternatively, 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. 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. This act 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.

#### Disbursement of designated loan mobilization payment as collateral for working capital agreement.

The contracting 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 a participating financial institution to obtain working capital financing. 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 prime contract vendor and the financial institution under the vendor's tax information number (TIN). Upon disbursement, this act provides that the contracting agency no longer maintains an interest in the DLMP payment.

This act 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 contracts other than construction 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 contracts other than construction contracts, the release of the DLMP occurs 10 days after the agency's approval of the letter of request from the vendor. In both cases, the DLMP is disbursed to the vendor and the financial institution using the TIN. This act authorizes a contracting agency to include as a contract provision that the release of the DLMP will start the time clock that determines timely completion of the contract.

MBEs that are a subcontractor or vendor to a prime contractor which have been awarded a state contract may participate in this program. The subcontractor must submit a letter to the contracting agency requesting the DLMP indicating that the prime contractor has been notified of the request, indicating that there is a valid working capital agreement with a participating financial institution. The DLMP is paid to the prime contractor who must pay the funds to the subcontractor vendor within 10 business days of receipt. 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.

#### Contracting agency rights and responsibilities.

This act provides contracting agencies with additional responsibilities under the program. The contracting agency is directed to encourage prime contractors 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 this section. This act provides that the program does not supersede the contracting agency's right to "insist upon strict compliance with the requirements of the contract document."

This act makes clear that the agency cannot be a party to any working capital agreements entered into by a participating MBE vendor and a financial institution. The financial institution is to notify the contracting agency of the receipt of an application for a working capital agreement by a participating MBE vendor.

This act provides authority to the Department of Management Services to adopt rules to implement the "provisions of the section". The department is authorized to maintain a listing of participating financial institutions and vendors are encouraged to recruit financial institutions with which they have a working relationship to participate in the program.

This act takes effect October 1, 2002.

D. SECTION-BY-SECTION ANALYSIS:

**Section 1.** Creates s. 288.706, F.S., the Florida Minority Business Loan Mobilization Program:

- Provides legislative findings and intent;
- Creates the Florida Minority Business Loan Mobilization Program;
- Authorizes state agencies to disburse advance payment to the MBE vendor and the participating financial institution;
- Authorizes the advance payment of a direct retainer from the contracting agency to the MBE vendor;
- Provides application and award procedures, including disbursement of advance payment by the contracting state agency to the MBE vendor and its participating financial institution;
- Requires all prime contractors to incorporate the designated loan mobilization payment procedures in subcontract agreements or purchase orders with vendors participating in the program;
- Requires the contracting agency to encourage prime contractors to make weekly or biweekly payment to participating subcontract vendors;
- Requires the contracting agency to monitor compliance by participating MBE vendors with this section;
- Prohibits the contracting agency from being a party to the working capital agreement between the participating financial institution and the vendor;
- Authorizes the Department of Management Services to adopt rules to implement this act's provisions; and
- Authorizes the department to maintain a listing of participating institutions.

**Section 2.** Provides an effective date of October 1, 2002.

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 have an additional resource available towards obtaining working capital from a participating financial 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 contracting agency is required to disburse the DLMP to the vendor and the participating financial institution under the vendor's TIN. This ensures that the payment is used for the purpose intended by the program and that any taxes due on the payment would accrue to the MBE vendor. This act provides that the contracting agency retains no interest in the DLMP nor have any interest in the capital financing agreement between the its MBE vendor and the participating financial institution.

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:

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

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This act 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:

This act does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

This act 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. Peña*, 515 U.S. 200 (1995) (federal set-aside programs for minority contractors would be subjected to strict scrutiny).

**B. RULE-MAKING AUTHORITY:**

The Department of Management Services is authorized to adopt rules to implement the provisions of this act. This act provides specific activities for which rulemaking may be necessary. It appears that this act provides the necessary specific powers and duties the department needs to adopt rules under the standard for rulemaking found in s. 120.536, F.S.

**C. OTHER COMMENTS:**

None.

**VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:**

At its February 21, 2002, meeting, the Committee on State Administration adopted a strike-all amendment that makes editorial changes so that MBE vendors and elements of the program are referred to consistently in the bill. The amendment also provides specific rulemaking authority to the department to approve financial institutions for participation in the Program.

On February 27, 2002, the Committee on General Government Appropriations adopted a substitute amendment to the strike-all amendment adopted on by the Committee on State Administration. The substitute amendment makes additional editorial changes. The substitute amendment includes language notwithstanding ss. 215.422(14) and 216.181(16), F. S., to allow certain advanced payments for goods and services purchased by the State. It also provides that the vendor and the financial institution are cosignatories. In addition, the substitute amendment eliminates specific rulemaking authority given to the department to approve financial institutions; rather, it requires the department to maintain a listing of financial institutions willing to participate in the program.

At its March 1, 2002, meeting, the Council for Smarter Government adopted a amendment to the substitute amendment adopted by the Committee on General Government Appropriations to the strike-all amendment adopted by the Committee on State Administration. This amendment makes editorial changes so that MBE vendors and elements of the program are referred to consistently in the bill and refines the language of the bill to more clearly describe the operation of the program. The Council reported the bill favorably, as amended, as a council substitute.

**VII. SIGNATURES:**

**COMMITTEE ON STATE ADMINISTRATION:**

Prepared by:

David M. Greenbaum

Staff Director:

J. Marleen Ahearn, Ph.D., J.D.

**AS REVISED BY THE COMMITTEE ON GENERAL GOVERNMENT APPROPRIATIONS:**

Prepared by:

Marsha Belcher

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AS FURTHER REVISED BY THE COUNCIL FOR SMARTER GOVERNMENT:

Prepared by:

David M. Greenbaum

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Council Director:

Don Rubottom

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**FINAL ANALYSIS PREPARED BY THE COMMITTEE ON STATE ADMINISTRATION:**

Prepared by:

David Greenbaum

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Council Director:

J. Marleen Ahearn, Ph.D., J.D.

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