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HOUSE OF REPRESENTATIVES
COUNCIL FOR SMARTER GOVERNMENT
ANALYSIS

BILL #: CS/HB 1323
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
 - (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 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 to assist that vendor in obtaining working capital financing.

The bill 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.

The bill 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 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.

4. The bill 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. 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 MBEs towards 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. 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.

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.”

Program Creation

The Florida Loan Mobilization Program will 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:

[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.

Program Operation

The program provides that the contracting state agency can disburse a portion of the base contract award amount to a MBE vendor (prime or subcontract) to be used as collateral towards obtaining working capital financing. This designated loan mobilization payment would be made by the agency directly to the financial institution on behalf of the vendor and will be pledged as collateral by the vendor. Upon disbursement, the agency retains no interest the designated loan mobilization 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.

Advance payment of 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. 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).

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 will 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 an 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 vendor and the financial institution under the tax information number (TIN). Upon disbursement, the bill provides that the contracting agency no longer maintains an interest in the DLMP payment.

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. In both cases, the DLMP is disbursed to the vendor and the financial institution using the TIN. The bill authorizes to 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 which indicates that the prime contractor has been notified of the request and that there is a valid working capital agreement with an approved 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.

The bill 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. 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 financial institution. The bill reiterates that the contracting agency is to disburse the DLMP to the financial institution. The financial institution is to notify the agency (although it is not clear if it is the contracting vendor who is to be notified) of the receipt of an application for a working capital agreement by a participating vendor.

The bill 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.

The bill takes effect October 1, 2002.

D. SECTION-BY-SECTION ANALYSIS:

Section 1. Creates s. 288.706, F.S., creating the Florida Minority Business Loan Mobilization Program. (1) Provides legislative findings and intent; (2) Creates the Florida Minority Business Loan Mobilization Program; (3) Authorizes state agencies to disburse payment as retainer; (4) Authorizes a direct retainer from the agency or participation in the Florida Minority Business Loan Program; (5) Provides application and award procedures, including disbursement of loan by state agencies to financial institutions; (6) Requires all prime contractors to incorporate the designated loan mobilization payment procedures in subcontract agreements or purchase orders with vendors participating in the program; (7) Requires agency to encourage prime contractors to make weekly or biweekly payment to participating subcontract vendors; (8) Requires agency to monitor compliance with and effectiveness of the procedures set forth in this section; (9) Prohibits the agency from being a party to the working capital agreement between the participating financial institution and the vendor; Requires agency to disburse the loan payment directly to the financial institution; (10) Provides that the loan program is exclusive to any line of credit or other credit facility based upon a prime contract or subcontract for an agency project; (11) Authorizes the Department of Management Services to adopt rules to implement the provision of the section [288.706, F.S.]; and (12) 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 be able to obtain working capital using an advance from the contract awarded as collateral for a working capital agreement 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 would be required to provide a retainer directly to the vendor or to disburse a loan payment to the vendor and the financial institution using the vendor's TIN. The bill provides that the agency retain no interest in the DLMP.

Section 215.422(14), F.S., states "the Comptroller may adopt rules to authorize advance payments for goods and services, including, but not limited to, maintenance agreements and subscriptions. Such rules shall provide objective criteria for determining when it is in the best interest of the state to make payments in advance and shall also provide for adequate protection to ensure that such goods or services will be provided." The bill provides an exception for the program from the provisions of this section.

The bill provides payment of funds prior to delivery of contracted services. This appears to conflict with s. 287.057(14), F.S., which requires services to be rendered in accordance to contract terms prior to invoice payment.

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.*, 488 U.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 is authorized to adopt rules to implement the provisions of the bill.

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. The amendment is traveling with the bill.

On February 27, 2002, the Committee on General Government Appropriations adopted a substitute amendment to the strike-everything amendment adopted on by the Committee on State Administration. The substitute amendment makes editorial changes so that MBE vendors and elements of the program are referred to consistently in the bill. The substitute amendment includes language notwithstanding sections 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 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-everything amendment adopted on by the Committee on State Administration that 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

Staff Director:

Lynn Dixon

AS FURTHER REVISED BY THE COUNCIL FOR SMARTER GOVERNMENT:

Prepared by:

David M. Greenbaum

Council Director:

Don Rubottom