

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/CS/SB 2338

SPONSOR: Commerce and Economic Opportunities Committee, Governmental Oversight and Productivity Committee, and Senator Villalobos

SUBJECT: Florida Minority Business Loan Mobilization Program

DATE: March 14, 2002                      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	White	Wilson	GO	Favorable/CS
2.	Cibula	Maclure	CM	Favorable/CS
3.	_____	_____	BI	_____
4.	_____	_____	AGG	_____
5.	_____	_____	AP	_____
6.	_____	_____	_____	_____

## I. Summary:

The committee substitute creates section 288.706, F.S., to establish the Florida Minority Business Loan Mobilization Program. The purpose of the program is to assist a minority business enterprise (MBE), as defined in s. 288.703(2), F.S., in competing for a state contract for goods or services by facilitating access to working capital. Under the committee substitute, a state agency that awards a contract to an MBE may: (a) disburse up to 10 percent of the base contract award amount to assist an MBE vendor in obtaining working capital financing; or (b) advance up to 5 percent of the base contract award amount to an MBE vendor that provides professional services. The committee substitute provides that the Department of Management Services shall administer the program.

This committee substitute creates section 288.706, Florida Statutes.

## II. Present Situation:

Part IV of ch. 288, F.S., is titled the “Florida Small and Minority Business Assistance Act of 1985.” Under the act, a minority business enterprise (MBE) is defined as a “small business” that is organized to engage in commercial transactions, is domiciled in Florida, and is at least 51-percent owned by minority persons.<sup>1</sup> The term “small business” means an independently owned and operated business concern that employs 200 or fewer permanent full-time employees, and that, together with its affiliates, has a net worth of \$5 million or less, or any firm that has Small Business Administration 8(a) certification.<sup>2</sup> The term “minority person” means a lawful,

<sup>1</sup> Section 288.703(2), F.S.

<sup>2</sup> Section 288.703(1), F.S.

permanent resident of Florida who is an African American, a Hispanic American, an Asian American, a Native American, or an American woman.<sup>3 4</sup>

The act creates the Florida Black Business Investment Board (BBIB) within the Governor's Office of Tourism, Trade, and Economic Development (OTTED). Pursuant to s. 288.707, F.S., the BBIB is designed to be a catalyst for the development of competitive black business enterprises in Florida by: increasing opportunities for the employment of black Americans, as well as the population in general; providing role models and establishing business networks for the benefit of future generations of aspiring black entrepreneurs; strengthening the economy of the state by increasing the number of qualified black business enterprises; and increasing access to both debt and equity capital for black business enterprises. A "black business enterprise" is defined as "any business concern which is organized to engage in commercial transactions and which is at least 51 percent owned by one or more black Americans as defined in s. 288.703 and whose management and daily operations are controlled by such persons."<sup>5</sup>

Further, the act provides for the creation of Black Business Investment Corporations (BBICs), which are subsidiaries of financial institutions or consortia of financial institutions investing in or lending to black business enterprises.<sup>6</sup> BBICs provide loan guarantees and direct lending products to black business enterprises.<sup>7</sup> The BBIB has a non-voting investment interest in all of the regional BBICs.<sup>8</sup> There are eight regional BBICs.

Currently, there is no program that permits a state agency to advance a portion of a state contract award amount to an MBE in order to allow the MBE to use the advance as collateral to obtain loans. State law generally prohibits agencies from making advance payments for the purchases of goods and services.<sup>9</sup> Although the statutory prohibition against advance payment may be waived by the Comptroller, such waivers have not been made recently, according to the Comptroller's Office.

### **III. Effect of Proposed Changes:**

#### **Florida Minority Business Loan Mobilization Program**

The committee substitute creates s. 288.706, F.S., to establish the Florida Minority Business Loan Mobilization Program (program). The program's purpose is to assist minority business enterprises (MBEs), as defined in s. 288.703(2), F.S., to compete for state contracts for goods or services by facilitating access to working capital financing.

---

<sup>3</sup> Section 288.703(3), F.S.

<sup>4</sup> The definition of an MBE contained in the Act also is utilized by ch. 287, F.S., for purposes of determining businesses that are eligible to be certified as MBEs pursuant to s. 287.0943, F.S. Certified MBEs are eligible for state contracting preferences, such as set-asides and price preferences, that are set forth in chs. 235, 255, and 287, F.S.

<sup>5</sup> Section 288.707(2)(b), F.S.

<sup>6</sup> Section 288.707(2)(b), F.S.

<sup>7</sup> Office of Program Policy Analysis and Government Accountability (OPPAGA), "Profile No. 6126," *Florida Government Accountability Report*, at <http://www.oppaga.state.fl.us/profiles/6126/>, (updated June 27, 2001)

<sup>8</sup> *Id.*

<sup>9</sup> *See* ss. 215.422(14), F.S., and 216.181(16), F.S.

Under the committee substitute, an MBE that has been awarded a state contract may apply to participate in the program or alternatively apply to a contracting agency for an advance of the contract amount. For purposes of the program, MBE means a “small business” that is organized to engage in commercial transactions, is domiciled in Florida, and is at least 51-percent owned by minority persons.<sup>10</sup> The term “small business” means an independently owned and operated business concern that employs 200 or fewer permanent full-time employees, and that, together with its affiliates, has a net worth of \$5 million or less, or any firm that has Small Business Administration 8(a) certification.<sup>11</sup> The term “minority person” means a lawful, permanent resident of Florida who is an African American, a Hispanic American, an Asian American, a Native American, or an American woman.<sup>12</sup> The term “state agency” is not defined by the committee substitute and, therefore, may be broadly construed to apply to the Public Service Commission, the judicial branch, state colleges and universities, and other governmental entities.<sup>13</sup>

### **Designated Loan Mobilization Payments**

To facilitate access to working capital financing, the committee substitute authorizes an MBE that is a prime contractor or subcontractor of a state contract to apply to the contracting agency for a “designated loan mobilization payment” (DLMP). The amount of the DLMP shall not be less than \$5,000 or 5 percent of the base contract or amount, whichever is greater, or in excess of 10 percent of the base contract amount or \$250,000, whichever is less. The MBE prime contractor or subcontractor may apply to the contracting agency for the DLMP after it has entered into a working capital agreement with a financial institution approved by the Department of Management Services (DMS). The working capital agreement must provide for a line of credit in an amount between 125 percent of the DLMP and 200 percent of the DLMP. In the case of a construction contract, a DLMP may be disbursed when it is requested in the first application for payment and the contracting agency has issued a notice to proceed and has approved the first application for payment. The contract documents may provide that the contract commences when the contracting agency disburses the DLMP. In the case of contracts other than construction contracts, a DLMP may be disbursed after a letter requesting the payment but before the commencement of work.

Although the committee substitute does not state how the disbursement of funds under the program will facilitate access to working capital financing, DMS contemplates that these funds will be deposited in the financial institution to be used as collateral for a working capital loan. DMS further contemplates that a participating financial institution will be compensated for its participation in the program with interest generated on the DLMP and with interest on the working capital loan to the MBE. In addition, DMS contemplates that the DLMP will be eventually returned to the MBE from the financial institution as part of the MBE’s payment for performance of the contract. The Legislature may wish to clarify provisions of this committee

---

<sup>10</sup> Section 288.703(2), F.S.

<sup>11</sup> Section 288.703(1), F.S.

<sup>12</sup> Section 288.703(3), F.S.

<sup>13</sup> See e.g., s 20.055, F.S. (defining “state agency” as including each department created pursuant to ch. 20, F.S., and including the Executive Office of the Governor, the Department of Military Affairs, the Board of Regents, the Fish and Wildlife Conservation Commission, the Public Service Commission, and the state courts system).

substitute to specify how the DLMP may be used by a participating financial institution and a contractor to ensure that the program will operate as contemplated by DMS.

### **Professional Services**

Although MBEs under contract with a state agency to provide professional services may apply under the program to the contracting agency for the disbursement of a designated loan mobilization payment (DLMP), the committee substitute provides for an alternate payment. As an alternative to the disbursement of a DLMP under the program, MBEs providing professional services may be advanced up to 5 percent of the base contract award by an agency.

### **Prime Contractor-Subcontractor Relationship**

The committee substitute provides several regulations for the relationship between contractors and subcontractors. First, prime contractors will be required to incorporate the designated loan mobilization payment procedures in subcontract agreements or purchase orders with MBE vendors participating in the program. Second, a prime contractor may not retain more than 5 percent of the amount earned by an MBE subcontractor who participates in the program. If the prime contractor also participates in the program, the committee substitute suggests that the amount that may be retained by the prime contractor is different than 5 percent. However, that amount is unspecified. The Legislature may wish to clarify the amount of funds earned by an MBE subcontractor participating in the program that may be retained by a prime contractor also participating in the program. Second, all prime contract vendors will be required to incorporate designated loan mobilization payment procedures in subcontract agreements or purchase orders with MBEs participating in the program and must pay DLMPs to subcontractors within 10 days of receipt.

### **Contracting Agency-Contractor Relationship**

The committee substitute provides state contracting agencies with additional responsibilities under the program. Agencies are directed to encourage prime contractors to make weekly or bi-weekly payments to participating subcontract MBE vendors. Additionally, the contracting agency must monitor compliance with the procedures set forth in the committee substitute. The committee substitute also provides that the program does not supersede the contracting agency's right to "insist upon strict compliance with the requirements of the contract documents."

### **Contracting Agency-Financial Institution Relationship**

The committee substitute states that the agency cannot be a party to any working capital agreements between a participating MBE vendor and a financial institution. Further, participating financial institutions are required to notify agency heads when applications for working capital agreements are received.

### **Advance Payment**

Florida law generally prohibits state agencies from making advance payments for goods and services.<sup>14</sup> Although the Comptroller's Office may waive the prohibition against advance payments, according to the Comptroller's Office, it has not made such waivers recently. This committee substitute expressly waives provisions of law generally prohibiting advance payments by agencies for goods and services.

### **Administration and Rulemaking**

The committee substitute provides that Department of Management Services shall administer the program, adopt rules to implement the committee substitute, and maintain a listing of financial institutions that are willing to participate in the program.

### **Effective Date**

The committee substitute takes effect October 1, 2002.

## **IV. Constitutional Issues:**

### **A. Municipality/County Mandates Restrictions:**

None.

### **B. Public Records/Open Meetings Issues:**

None.

### **C. Trust Funds Restrictions:**

None.

### **D. Other Constitutional Issues:**

The committee substitute treats MBE vendors differently than non-minority business vendors. Given these race- and ethnicity-based classifications, the program created by the committee substitute will be subject to strict scrutiny review if challenged on Equal Protection grounds. Strict scrutiny review requires that a program be based on a compelling governmental interest and be narrowly tailored to achieve that interest. In recent years, numerous state programs creating race- and ethnicity-based classifications have been struck by the federal courts for failure to satisfy strict scrutiny review.<sup>15</sup> This issue was recently discussed at length in Interim Project Report 2001-042, titled *Minority Business Enterprise Statutes* by the Senate Committee on Governmental Oversight and Productivity (November 2000).

<sup>14</sup> See ss. 215.422(14), F.S., and 216.181(16), F.S.

<sup>15</sup> In *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706, (1989), the United States Supreme Court struck a city set aside program for minority contractors, and held that programs which create a race- or ethnicity-based classification are constitutional only if narrowly tailored to achieve a compelling governmental interest.

**V. Economic Impact and Fiscal Note:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

The committee substitute should provide MBEs that receive state contracts or that are subcontractors to state contracts with easier access to working capital financing. Also, the committee substitute should provide MBE vendors awarded a state contract for professional services with the ability to obtain 5-percent advances of the contract award amount in order to facilitate performance of the contract.

All prime contractors of state contracts will be required to incorporate designated loan mobilization payment procedures in their subcontract agreements and purchase orders with MBEs.

**C. Government Sector Impact:**

The funds required to be provided to an MBE vendor by a state agency under this committee substitute are part of the total contract award, and as such, this money is already encumbered by the agency for the contract's purpose. Thus, there does not appear to be a fiscal impact on state agencies generally, except that there may be an insignificant amount of interest revenue lost due to the earlier payment of contract monies permitted by this committee substitute. Additionally, the Department of Management Services may incur some insignificant costs in association with its responsibilities under this committee substitute.

The committee substitute may encourage businesses that do not have the financial strength to perform a state contract to bid on such contracts in expectation of a designated loan mobilization payment (DLMP). Disbursement of DLMP is up to the discretion of an agency after a contract award.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.