

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/SB 2338

SPONSOR: Governmental Oversight and Productivity Committee and Senator Villalobos

SUBJECT: Florida Minority Business Loan Mobilization Program

DATE: March 5, 2002 REVISED: _____

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

I. Summary:

The bill creates section 288.706, F.S., to establish the Florida 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 providing a mechanism to obtain financing necessary to perform the contract. Under the bill, a state agency that executes a contract for goods or services 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 five percent of the base contract award amount to an MBE vendor that provides professional services. The bill provides that the Department of Management Services shall administer the program.

This bill creates section 288.706 of the Florida Statutes.

II. Present Situation:

Part IV of ch. 288, F.S., is entitled the “Florida Small and Minority Business Assistance Act of 1985.” Under the Act, an 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.¹ 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.² The term “minority person” means a lawful, permanent

¹ Section 288.703(2), F.S.

² Section 288.703(1), F.S.

resident of Florida who is an African American, a Hispanic American, an Asian American, a Native American, or an American woman.^{3 4}

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."⁵

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

III. Effect of Proposed Changes:

Florida Loan Mobilization Program: The bill creates s. 288.706, F.S., to establish the Florida Loan Mobilization Program (hereinafter referred to as the "Program"). The Program's purpose is to assist an MBE, as defined in s. 288.703(2), F.S., in competing for a state contract for goods or services by providing a mechanism to obtain financing necessary to perform the contract.

Under the bill, an MBE may only apply to participate in the Program after it has been awarded a state contract. 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.⁹ 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

³ Section 288.703(3), F.S.

⁴ 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.

⁵ Section 288.707(2)(b), F.S.

⁶ Section 288.707(2)(b), F.S.

⁷ 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)

⁸ *Id.*

⁹ Section 288.703(2), F.S.

Administration 8(a) certification.¹⁰ 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.¹¹

The Program provides that a state agency 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 five percent of the base contract award amount to an MBE vendor that provides professional services. The term “state agency” is not defined by the bill, and therefore, may be broadly construed to apply to the Public Service Commission, the judicial branch, state colleges and universities, and other governmental entities.¹²

Procedures for the Florida Loan Mobilization Program: The bill sets forth procedures that apply to contracts performed by MBEs in the areas of construction, procurement of goods and services, and professional services. Under these procedures, an MBE vendor, upon receipt of a prime contract or subcontract, may apply to obtain working capital financing from any participating financial institution approved by the Department of Management Services. The contracting agency may disburse to an 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.

The line of credit that may be obtained under the working capital agreement is based on the amount in the DLMP and may be between 125 and 200 percent of that amount. The amount of the DLMP is to be between five and 10 percent of the amount of the base contract between an MBE prime contract vendor and the contracting agency, or of the subcontract amount between an MBE subcontractor and prime contract vendor. The actual amount of the DLMP disbursed by the contracting agency is to be between \$5,000 and \$250,000.

The DLMP is to be disbursed by the contracting state agency pursuant to the working capital agreement and is to be made payable to the MBE prime contract vendor and participating financial institution. The tax identification number of the MBE vendor that is the debtor under the working capital agreement.

The bill provides procedures that are to be followed when the participating MBE is the prime contract vendor. The DLMP is to be disbursed to such vendors for construction contracts when the MBE prime contract vendor requests disbursement in the first application for payment, and when the contracting state agency has issued a notice to proceed and has approved the first application for payment. The DLMP is to be disbursed to such vendors for other contracts when the MBE prime contract vendor has requested disbursement by letter prior to the commencement of work, but after the execution of the contract, and when the contracting state agency has approved the letter of request. Further, the bill provides that the DLMP may be paid prior to the

¹⁰ Section 288.703(1), F.S.

¹¹ Section 288.703(3), F.S.

¹² See e.g., Section 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).

commencement of work, and that the contract documents may provide that the contract commences when the DLMP is disbursed pursuant to the working capital agreement.

The bill provides procedures that are to be followed when the participating MBE is the subcontract vendor. The DLMP is to be disbursed for such vendors to the prime contract vendor when the contracting state agency approves a letter of request from the subcontract MBE vendor and the prime contract vendor. The prime contract vendor is required to pay the funds to the subcontract MBE vendor within 10 days after receipt of the funds. Further, the bill specifies that a prime contract vendor may not retain more than 5 percent of the amount earned by a subcontract MBE vendor that is participating in the Program. However, if the prime contract vendor is also an MBE vendor that is participating in the Program, the prime contract vendor is subject to the Program's provisions pertaining to retainage.

The bill also provides that prime contractors are required to incorporate the DLMP procedures into subcontract agreements or purchase orders with MBE vendors that are participants in the Program.

Contracting agency rights and responsibilities: The bill 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 section. The bill also 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 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.

Finally, the bill provides authority to the Department of Management Services to adopt rules to implement the section, and requires the Department to maintain a listing of financial institutions that are willing to participate in the Program.

The bill 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 bill treats MBE vendors differently than non-minority business vendors. Given these race- and ethnicity-based classifications, the program created by the bill 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.¹³ This issue was recently discussed at length in Interim Project Report 2001-042, entitled “Minority Business Enterprise Statutes” by the Senate Committee on Governmental Oversight and Productivity Committee.

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

None.

B. Private Sector Impact:

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

C. Government Sector Impact:

The funds required to be provided to an MBE vendor by a state agency under this bill 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 bill. Additionally, the Department of Management Services may incur some insignificant costs in association with its responsibilities under this bill.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

¹³ In *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 845 (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.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
