

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Governmental Operations Committee

BILL: CS/CS/SB 108

INTRODUCER: Governmental Operations Committee, Military Affairs and Domestic Security Committee, and Senator Fasano

SUBJECT: State Contracts/Disabled Veterans Business Enterprises

DATE: March 27, 2008

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Pardue	McElroy	MS	Fav/CS
2.	McKay	Wilson	GO	Fav/CS
3.			GA	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

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|------------------------------|--|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="checked" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

This bill creates a certification process for small businesses owned and operated by service-disabled veterans, and creates a tie-breaker contracting preference for certified service-disabled veteran business enterprises. The bill defines a service-disabled veteran and a service-disabled veteran business enterprise and assigns duties to the Departments of Management Services and Veterans' Affairs in order to administer the program.

This bill creates an undesignated section, and amends sections 288.705 and 288.7015 of the Florida Statutes.

II. Present Situation:

Employment of Service-Disabled Veterans

In January 2007, a report entitled *Self-Employment in the Veteran and Service-Disabled Veteran*

Population was published pursuant to a contract with the Small Business Administration, Office of Advocacy.¹ The report concluded that veterans with service-connected disabilities are self-employed at lower rates than veterans without such disabilities, and that the disparity results primarily from the service-connected disabilities themselves and not to differences in demographic or other characteristics. The report provided the following veteran employment data for years 1988-2005:

- Unemployed: An average of 63.9 percent of service-disabled veterans and 45.3 percent of non-service-disabled veterans were unemployed.
- Self-Employed: An average of 4.2 percent of service-disabled veterans and 7.8 percent of non-service-disabled veterans were self-employed.
- Employed by Others: An average of 32 percent of service-disabled veterans and 46.8 percent of non-service-disabled veterans were employed by others.

Federal Policies

The federal government has established policies to encourage small business development. These include a requirement that a portion of federal government contracts be awarded to small businesses. Awarding such contracts is considered to be in the best interest of maintaining and mobilizing the nation's full productive capacity.² Federal statute further establishes a federal government-wide goal for participation of small business concerns owned and controlled by service-disabled veterans. This goal is established at not less than three percent of the total value of all prime contract and subcontract awards for each fiscal year.³

State Policies

Florida also has undertaken a number of actions to encourage the development of small businesses. These include the establishment of:

- The Florida Small Business Development Center Network to assist in the growth of micro, small, and medium size business enterprises in Florida.⁴
- Programs to assist small and minority businesses in obtaining financing through private equity capital including the Florida Minority Business Loan Mobilization Program and the Florida Black Business Investment Board.⁵

Section 287.0943, F.S., requires the Department of Management Services (DMS) to implement a minority business enterprise (MBE) certification program and provides minimum eligibility criteria for certification as a MBE. The DMS currently certifies women and minority owned business enterprises. Benefits of state certification include business promotion through the MyFloridaMarketPlace online purchasing system, and email notices about purchasing opportunities.

Section 287.09451, F.S., "encourages" each state agency to spend a specified percentage of state

¹ *Self-Employment in the Veteran and Service-Disabled Veteran Population*, U.S. Small Business Administration, Office of Advocacy (Jan. 2007).

² 15 United States Code (USC) Section 644 (a).

³ 15 USC Section 644 (g) (1).

⁴ Source: Florida Small Business Development Center Network website, <http://www.floridasbdc.com>.

⁵ Chapter 288, Part IV, Florida Statutes.

funds, ranging from 21 percent to 51 percent of funds expended for certain goods and services, on contracts with certified MBEs. The statute also establishes an “overall spending goal for each industry category”, with the goals ranging between 4 percent and 36 percent depending on the industry and specific minority group. However, in 2004, a federal court declared the statute unconstitutional, finding it to be an impermissible violation of the Equal Protection Clause of the Fourteenth Amendment.⁶

III. Effect of Proposed Changes:

This bill provides legislative intent relating to rectifying the economic disadvantage of service-disabled veterans.

The bill defines “service-disabled veteran” as a veteran who has a service-connected disability of 10 percent or greater as determined by the U. S. Department of Veterans Affairs or who has been terminated from military service by reason of disability by the U. S. Department of Defense.

The bill defines a “service-disabled veteran business enterprise” as a business that:

- Is certified by the Department of Management Services according to stated criteria;
- Employs 200 or fewer permanent full-time employees;
- Has a total net worth of \$5 million or less;
- Is organized to engage in commercial transactions;
- Is domiciled in Florida;
- Is at least 51 percent owned by one or more service-disabled veterans; and
- Is controlled and managed on a daily basis by one or more service-disabled veterans or in the case of a service-disabled veteran with a permanent and total disability, by the spouse or permanent caregiver of the veteran.

The bill requires state agencies to award a competitive contract for the procurement of commodities or contractual services to a certified service-disabled veteran business enterprise if the bid, proposal, or reply of the business is equal to other competitors with respect to all relevant considerations including price, quality, and service.

The bill further requires that in the case of competing service-disabled veteran business enterprises or businesses that are entitled to another vendor preference, if the bids or proposals are equal with respect to all relevant considerations including price, quality, or service then the business having the smallest net worth shall receive the award.

The bill encourages political subdivisions of the state to offer similar considerations but does not require them to do so.

The bill provides for a certification procedure for service-disabled veteran business enterprises and a requirement for a biennial recertification. Provisions of the Administrative Procedure Act relating to application, denial and revocation procedures apply to the certification process. The bill further provides for a one year revocation of certification if a business fails to report any event as required by the act that significantly affects certification eligibility including but not

⁶ *Florida A.G.C. Council, Inc. v. Florida*, 303 F.Supp.2d 1307, 1314 (N.D.Fla.2004)

limited to change in ownership or management. During the revocation period, a business may still continue to bid on state contracts but is ineligible for any preferences under this act until it is recertified.

The bill assigns duties to the Department of Veterans' Affairs (DVA) including:

- Assisting the Department of Management Services in establishing a certification application procedure which shall be reviewed and updated biennially;
- Identifying eligible service-disabled veteran business enterprises and encouraging them to apply for certification; and
- Providing information to service-disabled veteran business enterprises regarding services that are available from the Office of Veterans' Business Outreach of the Florida Small Business Development Center.

The bill assigns duties to the Department of Management Services (DMS) including:

- Establishing a certification application procedure which shall be reviewed and updated biennially;
- Granting or rejecting certification of service-disabled veteran business enterprise applicants; and
- Maintaining an electronic directory of certified service-disabled veteran business enterprises for use by the state, political subdivisions, and the public.

The bill requires the Florida Small Business Development Center to include in its report under s. 288.705, F.S., the percentage of certified service-disabled veteran business enterprises using the statewide contracts register.

The bill grants rule making authority to the Departments of Management Services and Veterans' Affairs to administer the act.

The bill amends s. 288.705, F.S., to correct a reference to the Agency for Workforce Innovation and to include the reporting requirement given to the Small Business Development Center.

Section 288.7015, F.S., establishes a rules ombudsman in the Executive Office of the Governor to review the impact of state agency rules on businesses, particularly those relating to small and minority businesses. This bill amends the section to include service-disabled veteran business enterprises among the list of businesses that receive rules impact oversight.

The bill provides for an effective date of November 11, 2008.

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:

Under the U.S. Constitution, the Equal Protection Clause of the Fourteenth Amendment prohibits a state from “deny[ing] to any person within its jurisdiction the equal protection of the laws.” If a law is challenged on equal protection grounds, the level of scrutiny applied by a court depends on whether the law affects “fundamental rights” or creates a “suspect classification.” If so, a court would apply strict scrutiny to the law, and the government must show that the law is narrowly tailored to further a compelling governmental interest.⁷ If not, a court would apply a more deferential standard, the rational basis test, in which a law need only be rationally related to a legitimate governmental purpose.⁸ It is unlikely that a court would find that a state contract is a fundamental right, and the bill does not appear to treat people differently on the basis of a suspect classification. The service-disabled veteran preference created by this bill, if challenged, would therefore probably be analyzed under the rational basis test, and any such challenge would be unlikely to succeed.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The provisions of this bill will only impact the award of state contracts in the event that the service-disabled veteran business enterprise’s bid or proposal is equal to a competitor’s bid or proposal with respect to all relevant considerations including price, quality, and service. In that event, the distribution of the contract award is affected.

C. Government Sector Impact:

The Departments of Management Services and Veterans’ Affairs report that they expect minimal additional cost to administer this program. The number of disabled veterans who will seek certification under this program is unknown. However, according to data provided by the Department of Veterans’ Affairs, there are approximately 320 service disabled veterans’ businesses in Florida currently registered under a federal disabled-veterans’ business enterprise program.

VI. Technical Deficiencies:

None.

⁷ *Id.*

⁸ *WCI Communities, Inc. v. City of Coral Springs*, 885 So. 2d 912 (Fla. 4th DCA 2004)

VII. Related Issues:

None.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Governmental Operations on March 27, 2008:

The committee substitute clarifies that DMS will certify service-disabled veteran business enterprises, requires Florida residency for the certification, and clarifies what is included on the application for certification. The CS specifies that the Administrative Procedure Act provisions relating to application, denial and revocation procedures applies to the certification process, and deletes a provision that required the Department of Veterans Affairs to contract with a private entity to carry out its duties.

CS by Military Affairs and Domestic Security on January 8, 2008:

This committee substitute bill deletes provisions in the prior version of the bill including:

- A three percent preference goal in awarding contracts to service-disabled veteran business enterprises;
- A requirement for political subdivisions of the state to participate in the program;
- Authority that allows a service-disabled veteran business enterprise to retain certification in the event the majority owner veteran is deceased, and
- A requirement that state agencies and political subdivisions submit a quarterly report.

This committee substitute expands the authority of a spouse or a permanent caregiver to seek certification on behalf of a permanently and totally disable veteran. The committee substitute also provides for additional criteria in defining a service-disabled veteran business enterprise and adds provisions for:

- A certification application appeals process;
- A revocation of certification for a period of one year for failure to report significant events;
- Duties to be performed by the Departments of Management Services and Veterans' Affairs; and
- Rule making authority.

B. Amendments:

None.