

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: SB 2340

SPONSOR: Senators Hargrett and Holzendorf

SUBJECT: "One-Florida Initiative"

DATE: April 26, 2000 REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>White</u>	<u>Wilson</u>	<u>GO</u>	<u>Favorable</u>
2.	_____	_____	<u>CM</u>	_____
3.	_____	_____	<u>RC</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

## I. Summary:

The bill creates the "Commission on Minority Business Enterprise Contracting," which shall be composed of members appointed by the Governor and Legislature. The purpose of the commission is to study the participation of minority business enterprises (MBEs) in state contracting activities and to issue a report by December 1, 2000, which recommends whether the Legislature should eliminate existing statutory MBE spending goals. Furthermore, in the event the commission recommends the elimination of the spending goals, the commission is required to recommend alternative means for evaluating agency activities and for preventing discrimination against MBEs in state contracting decisions.

This bill creates an unnumbered section of the Florida Statutes.

## II. Present Situation:

### A. Florida statutory law concerning small and minority business assistance

Chapters 287 and 288, F.S., set forth Florida's statutory scheme for small and minority business assistance. A "small business" is defined as an independently owned and operated business concern that employs 100 or fewer permanent full-time employees, has a net worth of not more than \$3 million, and an average net income of not more than \$2 million.<sup>1</sup> A "minority business enterprise" (MBE) is defined as a "small business" which is domiciled in Florida and is at least 51 percent-owned by minority persons. A "minority person" means an African American, a Hispanic American, an Asian American, a Native American, and an American woman.

The Minority Business Advocacy and Assistance Office (MBAAO) within the Department of Labor and Employment Security, which was created by the Legislature in 1994, oversees the

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<sup>1</sup>Section 288.703, F.S.

state's MBE program.<sup>2</sup> One of the MBAAO's most significant responsibilities is to certify Florida MBEs so that the MBE may qualify for the following advantages in state contracting:

- ▶ **Set-asides:** State agencies, local governments, community colleges, and district school boards are permitted to set aside commodities and services contracts for competitive sealed bidding only among certified MBEs or only among bidders who agree to use certified MBEs as subcontractors.<sup>3</sup> Moreover, local governments, community colleges, or district school boards are permitted to set aside up to 10 percent of funds allocated for construction capital projects to be spent on contracts which are competitively bid only among certified MBEs.<sup>4</sup>
- ▶ **Price preferences:** State agencies are permitted to use price preferences up to 10 percent and weighted preference formulas for commodities and services contracts.<sup>5</sup>

Neither set-asides, nor price preferences are required to be used. The only mandatory statutory advantage that state agencies must implement is the following: contracts for commodities or services must be awarded to a certified MBE in the event the MBE's bid is equal to the lowest non-minority bid.<sup>6</sup>

The statutes also encourage, but do not require, state agencies to spend the following percentages of contract moneys with certified MBEs:

- ▶ 21 percent of moneys expended for construction contracts (four percent with African Americans, six percent with Hispanic Americans, and 11 percent with American women);
- ▶ 25 percent of moneys expended for architectural and engineering contracts (nine percent with Hispanic Americans, one percent with Asian Americans, and 15 percent for American women);
- ▶ 24 percent of moneys expended for commodities (two percent with African Americans, four percent with Hispanic Americans, one percent with Asian Americans and Native Americans, and 17 percent with American women); and
- ▶ 50.5 percent of moneys expended for contractual services (six percent for African Americans, seven percent for Hispanic Americans, one percent for Asian Americans, one-half of one percent with Native Americans, and 36 percent for American women).<sup>7</sup>

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<sup>2</sup>Chapter 94-322, L.O.F.; Section 287.0943, F.S.

<sup>3</sup>Sections 255.102, 287.057(6) and 287.093, F.S.

<sup>4</sup>Sections 235.31 and 255.101, F.S.

<sup>5</sup>Sections 255.102 and 287.057(7), F.S.

<sup>6</sup>Section 287.057(10), F.S.

<sup>7</sup>Section 287.09451(4)(n), F.S.

The statutes also encourage, but do not require, state agencies and local governments which issue bonds or other tax exempt obligations to offer not less than 20 percent participation to minority firms.<sup>8</sup>

The amount of business that state agencies engage in with certified MBEs is reported on a quarterly basis by the Auditor General. This report must include disbursements made to small businesses, to certified MBEs in the aggregate, and to certified MBEs broken down into nationality and gender subgroups.<sup>9</sup>

All state agencies are required to adopt MBE utilization plans which must be reviewed and approved by the MBAAO, and which must include methods designed to attain the legislative intent in assisting MBEs.<sup>10</sup> If an agency deviates significantly from its utilization plan for two consecutive years, or for three out of five total fiscal years, the MBAAO may review any of the agency's bid solicitations and contract awards until the agency meets its utilization plan.

## **B. Florida Disparity Studies**

In 1995, a disparity study performed by Florida State University found no disparity in state contracting and suggested a race and gender neutral small and disadvantaged business program. In 1997, a disparity study performed by D.J. Miller and Associates found an over-utilization of women and Hispanic firm, and a small under-utilization of black, Asian and Native American contracting firms. The Miller study suggested that lower spending goals be set over a broader range of state procurement activities. Neither of these studies has been adopted by the Legislature.

## **C. Case law concerning race/ethnicity conscious programs**

Florida's affirmative action programs create a classification based on race and ethnicity and are subject to strict scrutiny under federal law; i.e., the program must be based upon a compelling governmental interest and must be narrowly tailored to achieve that interest.<sup>11</sup> In order for a race or ethnicity conscious program to be upheld, there must be a "strong basis in the evidence" in support of the program which rests on a particularized showing of the governmental unit's active or passive participation in past or present discrimination.<sup>12</sup>

In recent years, few race-based affirmative action programs have survived the strict scrutiny analysis. In fact, a law review article released in March 2000 indicated that since 1995, only one

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<sup>8</sup>Section 287.0931, F.S.

<sup>9</sup>Section 17.11, F.S.

<sup>10</sup>Section 287.09451(6), F.S.

<sup>11</sup>*City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

<sup>12</sup>*Id.*, *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895 (11th Cir. 1997).

federal court of appeals has upheld an affirmative action program challenged on equal protection grounds because in that case discrimination on the part of the government was actually proven.<sup>13</sup>

In Florida, two affirmative action programs based on racial and ethnicity classifications have recently been struck by the federal courts. In *Phillips & Jordan v. Watts*, 13 F.Supp.2d (N.D. Fla. 1998) & *Jordan v. Watts*, a Florida Department of Transportation (DOT) affirmative action contract procurement program was challenged. In this case, a study by MGT of America showed a disparity index of 94.32 for FY 1989-90, and 38.78 for FY 1990-91 in DOT maintenance contracts awarded to black-owned businesses, and a disparity index of 19.33 for FY 1989-90 and 47.25 for FY 1990-91 for Hispanic-owned businesses.<sup>14</sup> <sup>15</sup> In response to this study, the DOT implemented a program which authorized set-aside contracts for competition among only black- and Hispanic-owned businesses.<sup>16</sup>

The program was subsequently challenged on equal protection grounds. The DOT argued the program was constitutional because even though it did not discriminate when contracting, the disparity indices in the MGT report demonstrated that the DOT must have been a passive participant in discrimination, which the DOT speculated emanated from the local construction industry.<sup>17</sup> The Court disagreed, finding that the statistical evidence presented by the DOT merely constituted a generalized assertion of racial discrimination, instead of the required particularized showing that it actively or passively participated in discrimination.<sup>18</sup> The DOT could not simply show that some unknown entity was discriminating because, "It goes without saying that the identity of 'those who discriminate' must be known before a governmental unit may take appropriate measures against 'those who discriminate.'"<sup>19</sup> Thus, the Court held the set aside program unconstitutional.<sup>20</sup> *See also Engineering Contractors Association of South Florida, Inc.*, 122 F.3d at 895 (holding Dade County's ordinance which created a minority business certification process and set minority participation goals for county contracts, unconstitutional on equal protection grounds due to a lack of strong or sufficiently probative evidence of discrimination).

#### **D. Case law concerning gender conscious programs**

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<sup>13</sup>*McNamara v. City of Chicago*, 138 F.3d 1219 (7th Cir. 1998); *Recent Judicial Opinions Regarding the Permissibility of Race-Based Personnel Decisions in the Public Schools*, 141 Ed. Law Rep. 1 (March, 2000).

<sup>14</sup>*Id.* at 1310.

<sup>15</sup>A disparity index is the ration of the percentage of utilization to the percentage of availability times 100 for each group and year. The court explained that an index of 100 is parity, an index under 100 represents under-utilization, and an index below 80 is generally accepted as evidence of adverse impact. *Id.* at 1311.

<sup>16</sup>*Id.* at 1312.

<sup>17</sup>*Id.* at 1313.

<sup>18</sup>*Id.*

<sup>19</sup>*Id.* at 1313-1314.

<sup>20</sup>*Id.*

Florida's affirmative action programs create a classification based on gender, and are subject to intermediate scrutiny; i.e., the program must be substantially related to an important governmental interest.<sup>21</sup> In order for a gender conscious program to be upheld, there must be "sufficient probative evidence" in support of the government's rationale for enacting a gender preference.<sup>22</sup> Unlike the strict scrutiny test, the government need only show some past societal discrimination based on gender, rather than discrimination by the government, in support of the program.<sup>23</sup>

Based on recent United States Supreme Court case law, it appears the Court is beginning to move toward what some legal commentators have termed "heightened intermediate scrutiny" of classifications based on gender.<sup>24</sup> For example in *United States v. Virginia*, the United States argued that the Virginia Military Institute's (VMI's) male only admissions policy violated equal protection.<sup>25</sup> Moreover, the United States argued that the Court should adopt a strict scrutiny standard for gender classifications.<sup>26</sup> The Court chose not to apply strict scrutiny in its analysis; however, in discussing the intermediate scrutiny standard, the Court added that the proffered justification for a classification based on gender must be "exceedingly persuasive," and that it is a difficult standard for the government to meet.<sup>27</sup> Ultimately, the Court ruled that VMI's male-only admissions policy violated equal protection finding that both of the following justifications proffered by VMI were insufficient: (1) that single-sex education yields important educational benefits and that providing such an option fosters diversity; and (2) that VMI's adversive method of training provides educational benefits that cannot be made available unless modified to women, and that such modifications would destroy VMI's program.

### III. Effect of Proposed Changes:

The bill provides that it is the Legislature's intent to retain the MBE spending goals contained in s. 287.09451, F.S., for state agencies, and to consider the elimination of these goals in the future only if elimination is warranted based on the findings and recommendations of an objective commission. Furthermore, the bill provides that it is the legislative intent that state agencies continue to observe these goals and to ensure that the goals are used to measure and evaluate the contracting activities of state agencies.

Section 2 of the bill creates the "Commission on Minority Business Enterprise Contracting." The Commission is to be composed of members appointed by the Governor, the President of the Senate, and the Speaker of the House of Representatives. The purpose of the commission is to

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<sup>21</sup>*Engineering Contractors Association of South Florida, Inc.* at 909.

<sup>22</sup>*Id.*

<sup>23</sup>*Id.*

<sup>24</sup>*Do We Still Need a Federal Equal Rights Amendment?*, 44-Feb B. BJ 10, 27 (2000).

<sup>25</sup>*United States v. Virginia*, 518 U.S. 515 (1996).

<sup>26</sup>*Id.*

<sup>27</sup>*Id.* at 146-147.

study the participation of MBEs in state contracting activities and to issue a report to the Governor and Legislature by December 1, 2000, which includes a recommendation as to whether the Legislature should eliminate the spending goals established in s. 287.09451, F.S. Furthermore, the bill provides that in the event the commission recommends the elimination of the statutory spending goals, the commission must recommend alternative means for evaluating agency activities and for preventing discrimination against MBEs in state contracting decisions.

The bill takes effect upon becoming a law.

#### **IV. Constitutional Issues:**

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

None.

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

None.

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

None.

#### **V. Economic Impact and Fiscal Note:**

##### **A. Tax/Fee Issues:**

None.

##### **B. Private Sector Impact:**

None.

##### **C. Government Sector Impact:**

As indicated in the "Technical Deficiencies" section of this analysis, the bill does not specify if the commission will be staffed, if its members will be compensated, nor if its members' expenses will be reimbursed. As a result, the bill as drafted does not have a fiscal impact; however, if the bill is amended to provide for staffing, compensation, and/or expenses, a fiscal impact will be generated, and the bill should indicate a source of funding for these costs. If the bill is amended to designate an agency to provide staffing for the commission, the agency may be able to absorb any costs into the agency's existing financial resources, assuming the costs are insignificant.

**VI. Technical Deficiencies:**

The bill creates a “commission” to conduct a study concerning the participation of MBEs in state contracting activities, and to make recommendations concerning whether the statutory spending goals for MBEs should be continued. A “commission,” is statutorily defined as a body created by specific statutory enactment within a department, the office of the Governor, or the Executive Office of the Governor.<sup>28</sup> A “committee” or “task force,” on the other hand, is statutorily defined as an advisory body appointed to study a specific problem and to recommend a solution with respect to that problem. A committee’s or task force’s existence terminates upon the completion of its assignment.<sup>29</sup> If the bill’s intent is to have the commission be independent of the executive branch and for it to terminate upon the completion of its duties, it may be appropriate to amend the bill so that it creates a committee or task force, rather than a commission.

Furthermore, the bill fails to specify how many members the commission should have, what qualifications the members should have, and whether the members will be compensated or will receive travel and per diem expenses. The bill also fails to state the time frame for the appointment of the committee members; e.g., the bill could specify that the members of the committee shall be appointed within 30 or 60 days after the section takes effect.

Finally, the bill fails to specify if the commission will be staffed. Typically, such advisory bodies are provided with administrative support from a department. For example, s. 239.5144, F.S., which creates the Employment Task Force for Adults with Disabilities provides that, “The Department of Education shall provide staff to assist the task force.”

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.

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

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<sup>28</sup>Section 20.03(10), F.S.

<sup>29</sup>Section 20.03(8), F.S.