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THE SMALL AND MINORITY BUSINESS ASSISTANCE ACT OF 1985: A UNIFIED APPROACH TO FLORIDA BUSINESS

COMMENT BY
VIRLINDIA ALBRITTON SAMPLE*

The Florida Small and Minority Business Assistance Act of 1985¹ is a comprehensive and far-reaching piece of legislation addressing all aspects of the relationship between state procurement and small and minority providers. The Act was the end result of a two-pronged assault on the issues and problems confronting Florida's small businesses. In the House of Representatives, the Small Business Subcommittee of the Committee on Commerce was established by Speaker James Harold Thompson² to look into the problems faced by small businesses. In the executive branch, the Governor's Advisory Council on Minority Enterprise Development was created to investigate the concerns of minority businesses.³ These two fronts came together in the Florida Legislature during the 1985 Regular Session to improve the environment in which minority business enterprises can become established and prosper.

The purpose of this Comment is to acquaint the reader with the provisions of the Act, its purposes as expressed through legislative intent, and its long term effects on Florida's small and minority businesses. The Comment begins with a summary of the various provisions of the Act, moves to a discussion of the previously existing law, traces the movement of the bill through the legislature, and concludes with a projection of the effects of the bill as passed.

I. SUMMARY OF THE LEGISLATION

To describe the Florida Small and Minority Business Assistance Act of 1985 as lengthy is a gross understatement. In its thirty-four sections, the Act covers aspects of small and minority business ranging from advocacy to warrant procedures and from bonding to severability. For this reason, it is convenient to separate the Act for purposes of discussion into its three major components: small business rights, minority business encouragement, and black venture capital.

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1. Ch. 85-104, 1985 Fla. Laws 627.

2. Dem., Gretna.

3. Fla. Exec. Order No. 84-58 (Mar. 8, 1984).

A. *Small Business Rights*

Representative Beverly Burnsed⁴ said of this law when, as House Bill 1266, it was being debated on the House floor, "I want you to think of this bill as a circle with two smaller circles inside of it."⁵ The large circle to which she referred is comprised of the sections of the Act which deal with all small businesses without regard to the minority status of the owners or management. The Act defines a small business as one having twenty-five or fewer permanent employees and a net worth of \$1 million dollars or less.⁶ It sets up a council and an advocate in the Department of Commerce⁷ and charges the council with serving as a resource for and liaison between the government and Florida's small businesses. The fifteen-member body, to be known as the Small and Minority Business Advisory Council, is required to report annually to the Governor, both houses of the legislature, and the Secretary of Commerce, on the Council's activities, findings, assistance provided, and recommendations.⁸

A second aspect of the provisions relating to all small businesses is the establishment of a statewide contracts register⁹ to operate through the Florida Small Business Development Center Procurement System.¹⁰ This provision requires all state agencies to forward their solicitations for goods and services to the Small Business Development Centers' automated system. The Centers, located at fifteen colleges and universities throughout the state,¹¹ will then disseminate the information to their clients. The provision also sets out reporting requirements for the Centers in track-

4. Dem., Lakeland (Chairperson, Fla. H.R. Comm. on Com.).

5. Fla. H.R., tape recording of proceedings (May 8, 1985) (on file with Clerk).

6. Ch. 85-104, § 2, 1985 Fla. Laws 627, 629. Note that "[a]s applicable to sole proprietorships, the \$1 million net worth requirement shall include both personal and business investments." *Id.*

7. *Id.* § 3, 1985 Fla. Laws at 630.

8. *Id.*

9. *Id.* § 4, 1985 Fla. Laws at 632.

10. *Id.*

11. These Centers are funded through the Florida State University System and the United States Small Business Administration. They are located at the Florida State University and Florida Agricultural and Mechanical University in Tallahassee, the University of South Florida in Tampa, Florida Atlantic University in Boca Raton, the University of North Florida in Jacksonville, the University of West Florida in Pensacola, the University of Florida in Gainesville, the University of Central Florida in Orlando, Florida International University in Miami, and Florida Keys Community College in Key West. STAFF OF FLA. S. COMM. ON GOV'T. OPS., REVIEW OF MINORITY SET-ASIDES, 49-50 (Nov. 1984) (on file with committee) [hereinafter cited as STAFF REVIEW].

ing the solicitations.¹² The Act further requires that the Comptroller, in his annual report, show disbursements made to small businesses, with a further breakdown for minority businesses.¹³

As a third aid to small businesses, the Act requires that each state agency consider the impact of proposed rule changes on small businesses and minimize any adverse impact to the extent possible.¹⁴ Agencies are given flexibility to accomplish this objective, including authority to define "small business" as those businesses with more than twenty-five permanent employees; to establish less stringent compliance, reporting, or time requirements for small businesses; or to exempt businesses from the rule altogether.¹⁵ There is also a requirement that agencies include an analysis of the rule's impact on small businesses in its economic impact statement.¹⁶ Further, the law gives extensive opportunity for participation by small and minority businesses in rulemaking procedures if the agency determines that a proposed action would affect those businesses.¹⁷

Finally, the Act requires that agencies pay small business providers promptly.¹⁸ Under existing law, vouchers authorizing payment of invoices must be filed with the Comptroller within fifteen days and warrants mailed within fifteen days of the filing. The Act adds provisions that the agency must pay one percent per month interest on any invoice not paid within forty-five days after receipt.¹⁹ The interest is to be added to the invoice at the time of submission to the Comptroller, if possible, or, if not, mailed no less than fifteen days after the warrant in payment of the invoice is mailed. The Department of Banking and Finance is charged with

12. Ch. 85-104, § 4, 1985 Fla. Laws 627, 632 requires that the report include the total number of solicitations, a breakdown by agency, the methods of dissemination, and the number of businesses using the service, with a percentage breakdown of minorities.

13. Ch. 85-104, § 6, 1985 Fla. Laws 627, 633 (amending FLA. STAT. § 17.11 (Supp. 1984)).

14. *Id.* § 7, 1985 Fla. Laws at 633-34 (amending FLA. STAT. § 120.54(2), (11)(a) (1983)).

15. *Id.*

16. An economic impact statement, including estimates of cost to the agency, cost to persons directly affected, impact on competition and employment, and methods of data preparation, is already required for proposed agency rule changes under FLA. STAT. § 120.54(2)(b) (Supp. 1984).

17. Ch. 85-104, § 7, 1985 Fla. Laws 627, 635 (amending FLA. STAT. § 120.54(2)(b) (Supp. 1984)) adds, in addition to the requirement of notice to affected persons, a requirement of notice to the Small and Minority Business Advocate, the Minority Business Enterprise Assistance Office, and the Division of Economic Development of the Department of Commerce.

18. Ch. 85-104, § 8, 1985 Fla. Laws 627, 636 (amending FLA. STAT. § 215.422 (1983)).

19. *Id.*

monitoring the process.²⁰ That these provisions are mandatory must be noted by each agency in the position description of the person responsible for processing vendors' invoices and warrants.²¹ Each person must sign a statement confirming his or her understanding of the interest requirements.²² Additionally, unless otherwise provided for contractually, contractors must pay their subcontractors within seven working days of receipt of payment or face a penalty of one-half of one percent per day of the amount owed the subcontractor.²³

B. *Minority Business Encouragement*

One controversial feature of the Act, the first of the "smaller circles" referred to by Representative Burnsed, is the encouragement of agencies to spend fifteen percent of the monies expended in the previous fiscal year for "commodities, contractual services, and construction" on contracts with certified minority business enterprises.²⁴ The Act defines "minority business enterprise" as a small business organized to engage in commercial transactions, domiciled in Florida, at least fifty-one percent owned by minority persons, and managed and controlled in daily operations by minority persons.²⁵ The Department of General Services is charged with certifying and recertifying each year businesses which comply with the definition of the Act,²⁶ and which perform a "useful business function," defined as a function resulting in provision of goods and services to customers other than the state government.²⁷ In addition to certifying minority businesses, the Department must maintain a vendors list,²⁸ and its Division of Purchasing is encouraged to develop procedures for agencies to use in identifying contracts, goods,

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* § 5, 1985 Fla. Laws at 633. If the contractor receives less than full payment, the subcontractors must be paid their pro-rata shares within the specified time limits. *Id.*

24. *Id.* § 21, 1985 Fla. Laws at 646 (amending FLA. STAT. § 287.042(4)(f) (Supp. 1984)). FLA. STAT. § 287.042(4)(f) (Supp. 1984) presently reads: "[E]ach agency is encouraged to annually set aside a sum of money not to exceed 5 percent."

25. "Minority persons" include: black Americans, Hispanic Americans, Asian Americans, Native Americans, Native Hawaiians, American women, and the physically disabled. Ch. 85-104, § 2, 1985 Fla. Laws 627, 630.

26. *Id.* § 22, 1985 Fla. Laws at 647.

27. *Id.* Acting as a conduit to transfer funds to a nonminority does not fit the definition unless it is done as a normal industry practice. *Id.*

28. *Id.*

and services that can be provided by minority businesses.²⁹ The Department is further directed to identify businesses eligible for certification in all areas of state purchasing,³⁰ and certified businesses must report transfers of ownership affecting certification (i.e., transfers to nonminority owners) to the Department within fourteen days.³¹ The Act includes certification as a factor to be considered in agency procedures for evaluating professional architectural, landscaping, land surveying, or engineering services³² and in competitive selection evaluations for other services.³³ To facilitate agencies in reaching the fifteen percent minority participation goal, the Act permits agencies to "reserve any contract for competitive bidding only among certified minority business enterprises."³⁴ This may be done only when the agency determines in advance that sufficient qualified minority businesses exist to provide effective competition.³⁵ If all bids exceed the agency's estimate of what the cost of the contract should be, it may request new bids, with or without the reservation for minority providers.³⁶ The Act provides penalties for false representation as to being or using a minority business enterprise.³⁷

To increase minority participation in state procurement, the Act establishes the Minority Business Enterprise Assistance Office (MBEAO) in the Department of General Services.³⁸ The Office is charged with adopting rules to determine what constitutes a good faith effort by both an agency in meeting its fifteen percent goal,³⁹ and a contractor in using minority subcontractors in fulfillment of its representation to the agency.⁴⁰ The MBEAO is given other

29. *Id.* § 21, 1985 Fla. Laws at 646 (amending FLA. STAT. § 287.042(4)(f) (Supp. 1984)).

30. *Id.* § 22, 1985 Fla. Laws at 647. The Department of General Services may contract with outside firms to accomplish this.

31. *Id.* § 22, 1985 Fla. Laws at 647.

32. *Id.* § 23, 1985 Fla. Laws at 648 (amending FLA. STAT. § 287.055(3)(d) (Supp. 1984)).

33. *Id.*

34. *Id.* § 24, 1985 Fla. Laws at 648 (amending FLA. STAT. § 287.062 (1983)).

35. *Id.* Agencies may also reserve contracts for bidding among contractors who agree to use minority subcontractors. *Id.*

36. *Id.*

37. *Id.* § 25, 1985 Fla. Laws at 649-50 (amending FLA. STAT. § 287.094 (1983)).

38. *Id.* § 26, 1985 Fla. Laws at 650.

39. *Id.* at 650-51. Questions to be considered in determining good faith include: whether presolicitation meetings were held to encourage minority participation; dissemination of information to minority businesses; use of available resources to recruit minorities; and whether timely, written notice of solicitation was provided to minority businesses. *Id.* at 651.

40. *Id.* § 26, 1985 Fla. Laws at 651-52. Presolicitation meetings, use of advertising to solicit minorities, timely, written notice of solicitation, follow-up on initial solicitations,

broad powers and responsibilities to enable it to assist the agencies in meeting their fifteen percent goal, such as the ability to adopt rules,⁴¹ to review agency rules,⁴² to receive and disseminate information,⁴³ to provide independent verification of certified status of minority businesses,⁴⁴ to maintain a minority business directory,⁴⁵ to encourage minority business development plans for firms doing business with the state,⁴⁶ to communicate with the Small and Minority Business Advisory Council,⁴⁷ and to monitor agencies.⁴⁸

As something of a bridge between these provisions and those pertaining to small business in general, the Division of Economic Development of the Department of Commerce is required to establish and administer educational programs and to coordinate with existing programs in educating small and minority businesses about the availability of assistance, statutory requirements, agency goals and policies, and hearing rights.⁴⁹

C. *Black Venture Capital*

As controversial as the minority business encouragements, the sections providing for availability of capital to black-owned businesses establish comprehensive measures for making funding accessible only to concerns that are at least fifty-one percent owned and managed by blacks.

The Act establishes the Florida Black Business Investment Board,⁵⁰ made up of seven members,⁵¹ six of whom shall be experienced in investment finance and business development.⁵² The essential task of the Board is the administration of the funds of the Florida Investment Incentive Trust Fund.⁵³ From these funds, the

breaking down of contracts into units capable of performance by minority subcontractors, availability of information about the job, good faith negotiations, and use of available resources in recruiting minorities are included as factors for consideration. *Id.*

41. *Id.* § 26, 1985 Fla. Laws at 652.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* This provision applies solely to firms doing more than \$1 million in business per year with the state.

47. *Id.*

48. *Id.*

49. *Id.* § 28, 1985 Fla. Laws at 653 (amending FLA. STAT. § 288.39 (3), (4) (Supp. 1984)).

50. *Id.* § 9, 1985 Fla. Laws at 638.

51. *Id.*

52. *Id.*

53. *Id.* § 11, 1985 Fla. Laws at 640. The Board may acquire property, make investments

Board may invest in black business investment corporations,⁵⁴ which are defined as subsidiaries of financial institutions investing in, or lending to, black business enterprises.⁵⁵ The Board may establish guarantor funds through the mechanisms of the Black Contractors Bond Trust Fund, the Black Business Loan Guaranty Trust Fund, and the Black Business Loan Guaranty Program Administrative and Loss Reserve Fund.⁵⁶

In the area of bonding, the Board can pledge the assets of the Black Contractors Bond Trust Fund as collateral⁵⁷ to assist black contractors in obtaining bid and construction contract bonds. The Board may also contract with private insurers to provide bond monies.⁵⁸

As to loan guaranties, the Board can use the Black Business Loan Guaranty Trust Fund to guarantee up to twenty percent of the principal of a loan to a black business enterprise.⁵⁹ Defaults and administrative costs are to be paid primarily from the Black Business Loan Guaranty Program Administrative and Loss Reserve Fund and, secondarily, from the Black Business Loan Guaranty Trust Fund.⁶⁰

For both the loan and the bonding programs, the Board may establish premiums⁶¹ and is directed to follow sound actuarial principles.⁶² Additionally, the Act states that there is to be no grant or pledge to any obligee of any state monies other than those in the funds.⁶³ Banks, credit unions, and associations may invest to a limited extent in the capital participation instruments or evidences of indebtedness issued by the Board.⁶⁴

authorized by trust funds under FLA. STAT. § 215.47 (Supp. 1984), procure insurance or bond against loss, receive loans and contributions, create and issue, buy, or sell stocks or bonds, and procure advisory or technical assistance. *Id.* at 639-41.

54. *Id.* § 13, 1985 Fla. Laws at 641.

55. *Id.* § 9, 1985 Fla. Laws at 638.

56. *Id.* § 14, 1985 Fla. Laws at 642.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* The funds are all a part of the Florida Investment Incentive Trust Fund and are separated for accounting purposes. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* § 17, 1985 Fla. Laws at 645 (amending FLA. STAT. § 657.042 (1983)); *id.* § 18, 1985 Fla. Laws at 645 (amending FLA. STAT. § 658.67 (Supp. 1984)); *id.* § 19, 1985 Fla. Laws at 645 (amending FLA. STAT. § 665.0701(4) (Supp. 1984)) (permitting investment by banks of up to 10% of capital, associations of up to 10% of net worth, and credit unions of up to 1% of capital).

In order to participate in the use of these funds, the black business enterprise must demonstrate that the investment is sound and will benefit the state, that upon receipt of the funds it will be able to compete successfully in the private sector, and that it will obtain any necessary technical or managerial support through a mentor, business assistance center, or other credible source.⁶⁵

The Board is subject to extensive reporting requirements. The Act mandates a detailed yearly review of its operations and accomplishments, numbers and status of black business enterprises receiving assistance (broken down into the number participating in programs established or administered by the Board and number of jobs represented by participating businesses), and a report of receipts, expenditures, assets and liabilities, and bonds outstanding.⁶⁶

These three aspects of the Florida Small and Minority Business Assistance Act of 1985 unify, in one piece of legislation, the piecemeal treatment small and minority businesses had previously received through various enactments scattered throughout the Florida Statutes.

II. THE EXISTING STATE OF THE LAW

A "small business" is defined by statute as either:

[a] sole proprietor of an unincorporated business, including a professional practice, whose principal office is in this state, who is domiciled in this state, and whose business or professional practice has, at the time the action is initiated by a state agency, not more than 25 full-time employees or a net worth of not more than \$2 million, including both personal and business investments; or [a] partnership or corporation, including a professional practice, which has its principal office in this state and has at the time the action is initiated by a state agency not more than 25 full-time employees or a net worth of not more than \$2 million.⁶⁷

65. *Id.* § 12, 1985 Fla. Laws at 641. Benefit to the state may be in the form of increased employment opportunities, a strengthened economy, or expansion of black business enterprises. Factors in determining whether the enterprise will be able to compete successfully include: completion by the owner of pertinent courses of study, the owner's prior track record, the amount of local or other financial assistance available to the enterprise, and the availability of technical and managerial assistance. *Id.*

66. *Id.* § 20, 1985 Fla. Laws at 645.

67. FLA. STAT. § 57.111(3)(d) (Supp. 1984). Note that this statute defines small business in the context of qualifying as a "small business party" in litigation seeking review of, or defending against, governmental action. *Id.*

“Minority owned firm” is defined as “any legal entity, other than a joint venture, which is organized to engage in commercial transactions and which is at least 51-percent owned and controlled by minority persons.”⁶⁸ “Minority person” is defined as “a member of a socially or economically disadvantaged group which, for the purposes of this section, include blacks not of Hispanic origin, Hispanics, American Indians, Alaska Natives, Pacific Islanders, women, and physically or mentally disabled persons.”⁶⁹

Current legislation oriented toward small businesses is fragmented. The Division of Economic Development has the power to make expenditures for and to “[p]romote the establishment, preservation, and expansion of small businesses by providing assistance and information through programs designed to achieve these objectives.”⁷⁰ The Division currently has the duty to provide a system for the collection and dissemination of information helpful in establishing or operating a small business.⁷¹ In addition to assistance from the Department of General Services, small businesses may seek assistance from the the Small Business Development Centers.⁷² These Centers provide management counseling, workshops and seminars, financial services, and an automated system to collect and disseminate information about government contracts and proposals.⁷³

Certain programs have been established to aid small and minority businesses. The Division of Purchasing is charged with the “[d]evelopment of procedures to be used by an agency in identifying contractual services that could be provided by minority-owned firms or companies or minority persons.”⁷⁴ Further, the subsection encourages

“[e]ach agency . . . to annually set aside a sum of money not to exceed 5 percent of the moneys actually expended for contractual services during the previous fiscal year and reported to the Legis-

68. *Id.* § 287.012(8) (Supp. 1984).

69. *Id.*

70. *Id.* § 288.03(25) (Supp. 1984).

71. *Id.* § 288.39(3)(a). The information should include identification and development of new business opportunities; feasibility studies; market research; financing; and how to deal with federal, state, and local programs and their regulations. *Id.*

72. STAFF REVIEW, *supra* note 11, at 21.

73. *Id.*

74. FLA. STAT. § 287.042(4)(f) (Supp. 1984). The Department of General Services' Minority Business Assistance Program's activities include: maintenance of a list of registered minority businesses; publication of a handbook for minority businesses; and efforts to increase business' awareness of available assistance. STAFF REVIEW, *supra* note 11, at 17.

lature pursuant to s. 216.023, for the purpose of entering into contracts with qualified, responsive minority-owned firms or companies or minority persons."⁷⁵

Agencies are instructed that, on receipt of two equal responses to an invitation to bid, preference shall be given to the bid coming from a minority owned company.⁷⁶ Furthermore, school boards are permitted to set aside up to ten percent of funds allocated for personal property and services for bids restricted to minority businesses.⁷⁷ Finally, the Department of Transportation is required to expend "not less than 10 percent" of State Transportation Trust Fund monies on "small business concerns owned and controlled by socially and economically disadvantaged individuals as defined by s[ection] 8(d) of the [federal] Small Business Act."⁷⁸ The Department has met this federally mandated goal through the use of a committee which meets monthly to review contracts in order to match minority businesses with potential opportunities.⁷⁹

Various cities and counties have established minority business set-asides for certain projects. In 1984, the United States Court of Appeals for the Eleventh Circuit upheld the constitutionality of such a plan in Dade County, Florida.⁸⁰ The county had required, by ordinance, that "all proposed county contracts be reviewed to determine whether race-conscious measures would foster participation by black contractors and subcontractors."⁸¹ The ordinance was based on findings that past discrimination had impaired the competitive position of black-owned businesses and that there was

75. FLA. STAT. § 287.042(4)(f) (Supp. 1984). Note that this section applies only to contractual services, not commodities.

76. *Id.* § 287.057(10) (1983).

77. *Id.* § 287.093 (Supp. 1984).

78. *Id.* § 339.0805(1) (Supp.1984). The definition provided in the federal Small Business Act, 15 U.S.C. § 637 (5), (6), is a two-step process with "socially disadvantaged" meaning "subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." "Economic disadvantaged" requires the person to show that the social disadvantage he has suffered has been translated into decreased opportunities to compete in the marketplace because of diminished capital and credit opportunities relative to persons in the same area who are not socially disadvantaged. *Id.* The law creates a presumption that blacks, Hispanics, Native Americans and Asian Pacific Islanders are socially and economically disadvantaged.

79. GOV.'S ADVISORY COUNCIL ON MINORITY ENTERPRISE DEVELOPMENT, INITIAL REPORT 17 (Dec. 1984) (on file with Office of Inspector General) [hereinafter cited as GOV.'S COUNCIL REP.].

80. *South Fla. Chapter of Associated Gen. Contractors of Am. v. Metropolitan Dade County*, 723 F.2d 846 (11th Cir. 1984) [hereinafter cited as *South Fla. Chapter*].

81. DADE COUNTY, FLA., ORDINANCE 82-67 (July 20, 1980) (codified in scattered sections of DADE COUNTY, FLA., CODE).

a "statistically significant disparity"⁸² between the black population, the number of black businesses, and the number of county contracts awarded to black-owned enterprises. The county set aside a contract for the Earlington Heights Metrorail Station for competitive bidding exclusively among black contractors. Associated General Contractors brought suit seeking injunctive and declaratory relief, alleging that the plan was discriminatory. The federal district court granted a temporary restraining order and, in a memorandum opinion, declared the set-aside unconstitutional.⁸³

The court of appeals reversed, basing its decision on the 1980 Supreme Court decision in *Fullilove v. Klutznick*.⁸⁴ There, the Court upheld a provision in the Public Works Employment Act of 1977⁸⁵ requiring recipients of public works grants to use ten percent of the monies appropriated to procure services from minority contractors. Although the Court held the provision valid, three distinct analytical views emerged, each applying different standards of review.

Chief Justice Burger announced the Court's judgment in an opinion in which Justices White and Powell joined. Without citing any particular standard of scrutiny, Chief Justice Burger first inquired whether the objectives of the legislation, ending procurement practices which, Congress found, limited minority access to government contracts, were within Congress' power.⁸⁶ Finding that they were, the Chief Justice determined that the legislation was narrowly tailored to achieve Congress' objectives and thus, constitutionally proper.⁸⁷

Justice Powell, in a separate concurrence, asserted the need for strict scrutiny by the Court in reviewing legislation based on racial classifications. Such review was necessary, he said, because "immutable characteristics, which bear no relation to individual merit or need, are irrelevant to almost every governmental decision."⁸⁸ Jus-

82. *South Fla. Chapter*, 732 F.2d at 848. The findings resulted from a county investigation of social and economic opportunities for blacks, which had been prompted by the Liberty City riots of May, 1980.

83. *South Fla. Chapter of Associated Gen. Contractors of Am. v. Metropolitan Dade County*, 552 F. Supp. 909 (S.D. Fla. 1982), *aff'd in part, rev'd in part*, 723 F.2d 846 (11th Cir. 1984).

84. 448 U.S. 448 (1980).

85. Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 116 (1977) (amending 42 U.S.C. § 6701-6710).

86. 448 U.S. at 478.

87. *Id.* at 480-92.

88. *Id.* at 496 (Powell, J., concurring).

tice Powell found that the provision withstood strict scrutiny, however, because the racial classification was "a necessary means of advancing a compelling governmental interest."⁸⁹

Justice Marshall, joined in his concurrence by Justices Brennan and Blackmun, maintained that an intermediate level of review was required. In his opinion, a racial classification designed for remedial purposes must show a substantial relation to an important and articulated governmental interest.⁹⁰

Admitting that any test discerned from the diverse views expressed by the Court would be speculative at best, the *South Florida Chapter* appeals court focused on their "common concerns." These were, first, "that the governmental body have the authority to pass such legislation"; second, "that adequate findings have been made to ensure that the governmental body is *remedying* the present effects of past discrimination rather than advancing one racial or ethnic group's interests over another"; and third, "that the use of such classifications extend no further than the established need of remedying the effects of past discrimination."⁹¹ The court found that Dade County did have the requisite authority, that the Commission had made adequate findings to ensure that the county was taking remedial action,⁹² and that the review provisions of the ordinance protected against the possibility that the program would continue beyond its demonstrated need.⁹³

Although it was successful in the final analysis, Dade County sailed close to dangerous waters with its set-aside requirement. Other counties have established "goals" in minority procurement efforts. This may be the more prudent course.⁹⁴

Finally, other current sources of assistance to minority enterprises are the Minority Business Development Centers funded by the United States Department of Commerce's Minority Business Development Agency.⁹⁵ The Centers assess the needs of the minor-

89. *Id.* at 496. Note that both the Chief Justice's opinion and Justice Powell's concurrence stressed the fact that this statute was passed by Congress and should therefore be reviewed with deference to Congress' broad remedial powers.

90. *Id.* at 519.

91. *South Fla. Chapter*, 723 F.2d at 851 (emphasis in original).

92. The Commission's actions were based on "reliable, substantial information compiled by independent investigations." *South Fla. Chapter*, 552 F. Supp. at 917 (Finding #17).

93. *South Fla. Chapter*, 723 F.2d at 854.

94. Hillsborough County, Jacksonville, St. Petersburg, Tallahassee, and Orlando have all initiated programs. Gov.'s COUNCIL REP., *supra* note 79, at 917.

95. STAFF REVIEW, *supra* note 11, at 20. The Centers are located in Jacksonville, Tampa, Orlando, West Palm Beach, and Miami-Ft. Lauderdale.

ity businesses within communities and provide assistance with financing, business administration, and contract and grant acquisition.⁹⁶

III. THE PATH OF THE LEGISLATION

Almost simultaneously with the Subcommittee on Small Business, the Governor's Advisory Council on Minority Enterprise Development was studying the problems of small and minority businesses, holding work sessions, hearing testimony, and formulating recommendations. By April 4, 1985, their paths had crossed and the Subcommittee had prepared its first draft of what would become House Bill 1266, incorporating into the draft many of the procedures, policies, and recommendations of the Advisory Council. House Bill 1266 went through four revisions before leaving the Subcommittee, with the third revision being sponsored in the Senate as Senate Bill 1150. The extensive subcommittee work in the House, coupled with Speaker Thompson's strong support, smoothed the way for House passage. In the Senate, however, heated and emotional debate occurred repeatedly before the legislation was passed.

In the following sections, the purposes and problems of the three main components of the Act are analyzed.

A. *Small Business Rights*

The problems of small businesses were the initial impetus for the establishment by Speaker Thompson of the Small Business Subcommittee in the House Commerce Committee. The definition of "small," however, proved to be a sticking point at some stages in the process. The existing definition in the Florida Statutes had both an employee limit (twenty-five) or a net worth limit (\$2 million).⁹⁷ The Subcommittee, after review and study, decided to eliminate the net worth requirement.⁹⁸ After discussion in the Senate Governmental Operations Committee of whether the \$2 million level in the current statute was too high, and whether the personal funds of the sole proprietor or major shareholders should be included, no consensus could be reached and staff was directed to

96. *Id.*

97. FLA. STAT. § 57.111(3)(d) (Supp. 1984).

98. Fla. S., Comm. on Gov't. Ops., tape recording of proceedings (May 6, 1985) (on file with committee) [hereinafter cited as Gov't. Ops. Tape].

work further on the matter.⁹⁹ The committee substitute passed by the Senate Governmental Operations Committee and reviewed by the Senate Committee on Appropriations still had no dollar limit.¹⁰⁰ Senator Richard Langley,¹⁰¹ who was one of the most outspoken opponents of the bill, proposed a net worth requirement of \$250 thousand or less.¹⁰² Senator Carrie Meek¹⁰³ pointed out that the award of one road construction contract could put a business over this limit. As a compromise measure, Senator Arnett Girardeau¹⁰⁴ proposed a \$1 million limit. In response to questions, Frank Scruggs, Chairman of the Governor's Advisory Council, admitted that a person with a large personal net worth could qualify under the definition in the bill.¹⁰⁵ The bill was amended in Senate Appropriations to include the \$1 million limit on corporations and partnerships and to apply to personal assets in the case of sole proprietorships.¹⁰⁶ Although the bill was enacted containing that definition,¹⁰⁷ its passage was preceded by intense debate on the Senate floor where Senator Langley again proposed the \$250 thousand limit.¹⁰⁸

Little else in the "small business" circle aroused controversy. The initial draft of the bill provided four options for the placement of the Small and Minority Business Advisory Council. Two were in the Department of Administration (one with, one without an advocate), while the remaining two were in the Department of Commerce.¹⁰⁹ The option placing the Council in the Department of Commerce and providing for an advocate was quickly chosen.¹¹⁰ The choice was a logical one because the department already had some responsibilities relating to small and minority business development.¹¹¹

99. *Id.*

100. Fla. CS for SB 1150, sec. 2 (1985).

101. Repub., Clermont.

102. Fla. S., Comm. on Approp., tape recording of proceedings (May 23, 1985) (on file with committee) [hereinafter cited as S. Approp. Tape].

103. Dem., Miami.

104. Dem., Jacksonville. Sen. Girardeau was the sponsor of SB 1150.

105. S. Approp. Tape, *supra* note 102.

106. Fla. CS for CS for SB 1150, sec. 2 (1985).

107. Ch. 85-104, 1985 Fla. Laws 627, 631.

108. FLA. S. JOUR., 513, 523 (Reg. Sess. May 27, 1985) (Amendment 1B).

109. Fla. H.R. PCB CO 85-3, sec. 3 (draft of Mar. 27, 1985).

110. Fla. H.R. PCB CO 85-3, sec. 3(1) (draft of Apr. 8, 1985).

111. See FLA. STAT. § 288.03(25) (Supp. 1984); see also *supra* note 70 and accompanying text.

B. *Minority Encouragements*

Far more controversial than the general small business provisions, the minority encouragement and regulatory flexibility sections produced heated discussion. Again, definitions posed a problem.

The bill as originally drafted included a definition of "Native American" which comported with federal definitions.¹¹² At the Subcommittee's hearing on the third draft, the definition was broadened after testimony that the Creek Indians, already a recognized minority in Florida, had not yet received federal recognition.¹¹³ An attempt in the House Appropriations Committee to change the language back to the original failed,¹¹⁴ and the amended language passed the House.¹¹⁵ In Senate Bill 1150, however, the definition was the subject of further debate. In the Senate Governmental Operations Committee hearing of May 6, 1985, compromise language proposed by Senator Girardeau was agreed upon. The language reinstated the restrictive definition originally drafted, but with the inclusion of "any tribe that has a pending application for federal recognition on the effective date of this act."¹¹⁶ In addition, it was established that a mere trace of Indian ancestry would be insufficient to qualify under this section. A "solid genealogy" and recognition by the tribe would also be necessary.¹¹⁷

The definitional problems continued with other minorities. A provision included the mentally disabled as a minority in the bill

112.

A Native American, a person who is a member of, or is eligible to be a member of, a federally recognized Indian tribe. A "federally recognized Indian tribe" means an Indian Tribe, Band, Nation, Rancheria, Colony, or other organized group or community, including any Alaska Native Village, which is recognized by the Secretary of the Interior on the effective date of this act as having special rights and is recognized as eligible for the services provided by the United States as to Indians because of their status as Indians.

Fla. H.R. PCB CO 85-3, sec. 2(3)(d) (draft of Apr. 16, 1985).

113. Fla. H.R., Comm. on Com., Subcomm. on Small Business, tape recording of proceedings (Apr. 16, 1985) (on file with committee) (testimony of Barbara Garrett, representing the Northwest Fla. Creek Indians) [hereinafter cited as H.R. Com. Subcomm. Tape Apr. 16, 1985]. The language was changed to, "a person having origins in any of the original peoples of North America." Fla. H.R. PCB CO 85-3, sec. 2(3)(d) (draft of Apr. 17, 1985).

114. Fla. H.R., Comm. on Approp., tape recording of proceedings (May 7, 1985) (on file with committee) [hereinafter cited as H.R. Approp. Tape].

115. FLA. H.R. JOUR. 288, 290 (Reg. Sess. May 6, 1985). See also Fla. HB 1266 (1985) (First Engrossed).

116. Gov't. Ops. Tape, *supra* note 98.

117. *Id.*

passed by the House¹¹⁸ but was stricken from the bill in the Senate Commerce Committee amidst allegations that the mentally disabled would not be good business risks.¹¹⁹

The Senate floor was the scene of the next battle over definitions. Senators Langley and Barron, vociferous opponents of the measure, sought unsuccessfully to dilute the legislation by adding numerous groups to the Act's definition of minority.¹²⁰

The percentage goals, or "encouragements," were a centerpiece of the debate on minority issues addressed in this legislation. The Governor's Advisory Council recommended, and the Small Business subcommittee's first two drafts contained, language mandating a fifteen percent set-aside.¹²¹ The purpose of this provision was to bring black providers up to levels already attained by other minorities.¹²² The fifteen percent figure was developed by the Governor's Council as a "reasonable and achievable" objective¹²³ and was intended to mean fifteen percent of total contracts, not fifteen percent of each contract for services, commodities and construction.¹²⁴ The issue was debated in the first and second Small Business Subcommittee hearings with representatives from the National Federation of Independent Business¹²⁵ and Florida Associated General

118. Fla. HB 1266 (1985) (First Engrossed).

119. Fla. S., Comm. on Com., tape recording of proceedings, (May 10, 1985) (on file with committee) [hereinafter cited as S. Com. Tape].

120. FLA. S. JOUR. 513 (Reg. Sess. May 27, 1985). Sen. Langley suggested the child of a person killed or 100% disabled during a period of wartime service be added to the definitional minority. *Id.* at 523 (Amendment 1C). This amendment passed but was later removed by the House. FLA. H.R. JOUR. 814, 825 (Reg. Sess. May 29, 1985). Sen. Barron, Dem., Panama City, sought to include as minorities: American Veterans, American farmers, Americans over age 65, Jewish Americans, Irish Americans, and Italian Americans. FLA. S. JOUR. 513, 524-526 (Reg. Sess. May 27, 1985) (Amendments 1H, 1J, 1T, 1U, 1V, 1W). Sen. Don C. Childers, Dem., W. Palm Beach, proposed inclusion of any person having net worth of less than \$25 thousand. *Id.* at 526. All the amendments failed.

121. Fla. H.R. PCB CO 85-3, sec. 24(2) (draft of Mar. 27, 1985); Fla. H.R. PCB CO 85-3, sec. 24(2) (draft of Apr. 8, 1985).

122. Gov.'s COUNCIL REP., *supra* note 79, at 11, found "[e]specially alarming . . . the extent to which black Floridians have been excluded from the little progress which has been achieved thus far under generic categories such as 'minorities' or 'socially and economically disadvantaged individuals.' Those agencies which increased minority participation . . . can attribute most of their increases in 'minority' participation to the size and volume of contracts which they have awarded to Hispanics and white women." Of the 10% of Department of Transportation's funds earmarked for "minority business" only 30% went to black business enterprises. The value of the average contract going to black businesses was about two-fifths the value of the average contract going to Hispanic businesses and only three-fifths the value of the average contracts going to Native American-owned businesses. *Id.*

123. H.R. Approp. Tape, *supra* note 114.

124. Gov't Ops. Tape *supra* note 98.

125. Fla. H.R. Comm. on Com., Subcomm. on Small Business, tape recording of proceed-

Contractors¹²⁶ testifying in opposition to the set-asides. Representative James T. Hargrett¹²⁷ argued in favor of them, pointing out that "goals" such as the five percent participation level presently in the statute, without enforcement mechanisms behind them, historically have not been met.¹²⁸ His arguments failed to carry the day, however, and the mandate was stricken, leaving a fifteen percent encouragement without the half-and-half split between blacks and other minorities.¹²⁹

Even as an "encouragement," the provision was strenuously debated. On the House floor, Representative Grover Robinson¹³⁰ moved to amend the definition of minority business enterprise to include only concerns in operation five years or less and with gross revenues of less than \$2 million.¹³¹

In the Senate, the split of the encouragement was preserved through final passage.¹³² In response to questioning, Senator Girardeau pointed to the resolving clauses of the bill to explain why blacks were separated out from other minorities.¹³³ Responding to arguments that these encouragements would raise the cost of construction contracts for the state, he maintained that the provisions for re-letting the bid were adequate protection.¹³⁴ The provision survived a motion by Senator Langley to remove the half-and-half split and to reduce the goal to ten percent.¹³⁵ An amendment,

ings, (Apr. 4, 1985 and Apr. 10, 1985) (on file with committee) (testimony of Bonnie Hamm) [hereinafter cited as H.R. Com. Subcomm. Tape of Apr. 4, 1985, and H.R. Com. Subcomm. Tape of Apr. 10, 1985].

126. *Id.* (testimony of Barry Willis).

127. Dem., Tampa.

128. H.R. Com. Subcomm. Tape of Apr. 10, 1985, *supra* note 125.

129. Fla. H.R. PCB Co. 85-3, sec. 9(1)(j)(2) (draft of Apr. 17, 1985).

130. Dem., Pensacola.

131. FLA. H.R. JOUR. 288 (Reg. Sess. May 6, 1985). Rep. Robinson saw the legislation as a "public dole." Fla. H.R. tape recording of proceedings (May 6, 1985) (on file with Clerk).

132. FLA. S. JOUR. 513, 527 (Reg. Sess. May 27, 1985).

133. Fla. HB 1266 (1985) provides in part:

WHEREAS, there is a great disparity in the economic and social well-being of black Floridians as compared to both the general population and other minority groups, and

WHEREAS, the disparities between blacks and other minorities caused primarily by the vestiges of racial discrimination dictate that the most urgent need for direct financial and other assistance lies in the black business community, and

. . . .

WHEREAS, the rate of business formation for blacks is much lower than it is for the rest of the population, including minorities other than blacks

134. Fla. S., tape recording of proceedings (May 27, 1985) (on file with Secretary).

135. FLA. S. JOUR. 513, 524 (Reg. Sess. May 27, 1985) (Amendment 1G).

which did pass, exempted the Department of Transportation from this provision, due to its federally mandated set-asides of ten percent of dollars spent on contracts to minority businesses.¹³⁶ The half-and-half split, though passed by the Senate, was deleted when the bill went back to the House.¹³⁷ Senator Girardeau, who had been a member of the Governor's Advisory Council and was very much in favor of the distinct treatment of blacks, concurred in the House amendment.¹³⁸

C. Black Venture Capital

The most innovative and conceptually difficult aspect of the legislation was the creation of investment capital funds strictly available to blacks and a board to administer such funds. The Governor's Council's findings stated that blacks faced "extraordinary difficulty in obtaining money for their business ventures,"¹³⁹ and that Florida's other minorities were not confronted with the same barriers. Based on the Council's findings, language was included in the bill asserting that the public interest would be served by assistance to black business enterprises.¹⁴⁰ An administrative entity, the Black Business Investment Board, was established and funds were allocated to be used to guarantee loans and to aid in the procurement of bonds.¹⁴¹ The estimated dollar figure for the trust fund was \$5 million.¹⁴²

136. *Id.* at 525 (Amendment 1L).

137. Recall that the Subcomm. on Small Business had already removed the split from HB 1266 after the second draft. When it was time to take up SB 1150 (which still contained the split) in the Senate, Sen. Girardeau moved that HB 1266, the companion bill, be substituted. This was done over the objection of Sen. Barron, and immediately thereafter Sen. Girardeau moved to strike everything after HB 1266's enacting clause, and to amend HB 1266 to read exactly the same as SB 1150. FLA. S. JOUR. 513 (Reg. Sess. May 27, 1985). Had he not done this, there probably would not have been sufficient time remaining in the session to pass the legislation.

138. FLA. S. JOUR. 897 (Reg. Sess. May 30, 1985).

139. Gov.'s COUNCIL REP., *supra* note 79, at 31.

140. Ch. 85-104, § 9, 1985 Fla. Laws 627, 638 states the rationale in these words:

(1) The Legislature finds that the public interest of Florida will be served by the creation and growth of black business enterprises by:

(a) Increasing opportunities for employment of blacks, as well as the population in general;

(b) Providing role models and establishing business networks for the benefit of future generations of aspiring black entrepreneurs; and

(c) Strengthening the economy of the state by increasing the number of qualified black business enterprises, which in turn will increase competition in the market place and improve the welfare of economically depressed neighborhoods.

141. Fla. HB 1266, secs. 9-21 (1985).

142. Staff of Fla. H.R. Comm. on Approp., HB 1266 (1985) Fiscal Note (May 6, 1985)

A state constitutional issue exists with respect to the venture capital provisions which was not addressed in the Advisory Council's report, the Small Business Subcommittee of the House, the Senate committee hearings, or the floor debate. The Florida Constitution prohibits the state from becoming a stockholder in "any company, association, or corporation."¹⁴³ In theory, this could prevent the state-created Black Business Investment Board from issuing, buying, or selling stocks and bonds. However, it appears the courts have taken a fairly liberal view of this provision, permitting the issuance of bonds by a port authority for construction of expanded facilities for an airline¹⁴⁴ and for the construction of a pulp and paper mill to be leased to a private corporation.¹⁴⁵ The Florida Supreme Court has held that where the legislature determines that the project is "imbued with qualities of public essentiality," a bond issue will be allowed to proceed.¹⁴⁶ The court will not question the legislative determination "unless it be found the legislature was not just and reasonable or was arbitrary."¹⁴⁷ The bill received review by the attorney general's office to assure the constitutionality of these provisions.¹⁴⁸

The Board, as initially proposed by the Subcommittee in its first and second drafts, could have been either a Minority or a Black Investment Board.¹⁴⁹ In its workshop on April 10, 1985, the Subcommittee unanimously agreed to the option creating the Black Business Investment Board.¹⁵⁰ Initially, the administrative costs were capped at \$100 thousand.¹⁵¹ After receiving information that costs would more likely be close to \$300 thousand, the Subcommittee compromised and set the limit at \$200 thousand. A proviso was included that if costs exceeded that amount permission for a higher limit could be sought from the President of the Senate and the Speaker of the House.¹⁵² The provision was removed on the House floor and replaced with language providing for a lump sum

(on file with committee).

143. FLA. CONST. art. VII, § 10.

144. *State v. County of Dade*, 210 So. 2d 200 (Fla.), *cert. denied sub. nom. Paul v. Dade County*, 393 U.S. 951 (1968).

145. *State v. Ocean Highway & Port Auth.*, 217 So. 2d 103 (Fla. 1968).

146. *Id.* at 104.

147. *Id.* at 105 (citing *State v. Daytona Beach Racing & Recreation Facilities Dist.*, 89 So. 2d 34 (Fla. 1956)).

148. Gov. Ops. Tape, *supra* note 98.

149. Fla. H.R. PCB CO 85-3, sec. 9 (draft of Mar. 27, 1985).

150. H.R. Com. Subcomm. Tape of Apr. 10, 1983, *supra* note 125.

151. Fla. H.R. PCB CO 85-3, sec. 13(1) (draft of Apr. 16, 1985).

152. Fla. H.R. PCB CO 85-3, sec. 13(1) (draft of Apr. 17, 1985).

appropriation from the general appropriations bill.¹⁵³ This language served the purpose of the Subcommittee compromise, which was to preclude unlimited access to trust fund monies for payment of administrative costs.¹⁵⁴

In the third Subcommittee meeting, Representative Hargrett proposed, in an "amendment for discussion,"¹⁵⁵ that one of the powers of the Board be to "develop strategies for equitable state-wide disbursement" of available funds.¹⁵⁶ Although agreeing with Representative Kimmel's¹⁵⁷ suggestion that a responsible board would already be doing this, Representative Burnsed noted that this proposal established for the record the intent that "Dade and Broward don't sneak all the money."¹⁵⁸ Having accomplished that, Representative Hargrett withdrew his amendment. Note that the black business enterprises as defined in section 9 of the Act are not required to be small businesses. In response to questions from Representative Messersmith¹⁵⁹ in the House Appropriations Committee hearing on House Bill 1266, Representative Burnsed said that a successful, established business could be eligible for assistance under the Act.¹⁶⁰

Although the bonding and loan guaranty provisions passed through the Senate Governmental Operations committee hearing without serious amendment, larger changes awaited in the Senate Commerce Committee. Senator Langley questioned the sufficiency of a \$5 million fund for bond assistance,¹⁶¹ expressing the fear that in case of a default monies from the state employee retirement fund could be reached.¹⁶² He was not comforted by the arguments of Senators Meek and Girardeau that the Department of Administration would only invest the funds if the investment seemed sound and that the Board would be comprised of financial experts. Although the provisions survived the Senate Commerce Committee

153. Fla. H.R., tape recording of proceedings (May 8, 1985) (on file with Clerk).

154. H.R. Com. Subcomm. Tape of Apr. 16, 1985, *supra* note 113.

155. *Id.*

156. *Id.*

157. Repub., West Palm Beach.

158. H.R. Com. Subcomm. Tape of Apr. 16, 1985, *supra* note 113.

159. Repub., Lake Worth.

160. H.R. Approp. Tape, *supra* note 114.

161. S. Com. Tape, *supra* note 119.

162. Under sec. 16 of the bill in its early stages (Fla. SB 1150 (1985)), FLA. STAT. § 215.47 (Supp. 1984) would be amended to allow investment of up to 25% of retirement funds in any type of capital participation instrument or evidence of indebtedness issued by the Board. This section was later removed by the Senate Comm. on Approp. See Fla. CS for CS for SB 1150 (1985).

intact, the section allowing investment of retirement fund monies was removed at the Appropriation hearing on the bill,¹⁶³ and one of the funds under the Investment Incentive Trust Fund, the Black Contractors Bonding Program Administrative and Loss Reserve Fund, was deleted on the Senate floor.¹⁶⁴ The theory behind the excision of this fund, which would have been the primary resource in case of defaults on bonds executed by the Board, was to prevent the Board from obligating too great a percentage of its funds to surety bonds.¹⁶⁵ To this end, language allowing the issuance of surety bonds was also deleted and replaced with a provision permitting the Board to pledge monies in the Black Contractors Board Trust Fund as collateral to help a black business obtain a bond.¹⁶⁶ There is still no restriction on the apportionment of monies among the three funds, therefore, the Board could conceivably obligate much of the money to bond collateral, resulting in a situation where a default could substantially deplete the fund. However, as expressed by Senators Girardeau and Meek, and by John Edward Smith, an attorney who worked with the Governor's Advisory Council in drafting these provisions, the purpose of the Investment Incentive Trust Fund is furnished as "seed money" to encourage participation by financial institutions.¹⁶⁷

The bill was passed by the Senate, debate having taken more than five hours, and sent to the House. The House concurred but added four amendments. One amendment was a technical change. A second amendment removed the half-and-half split on minority "encouragements."¹⁶⁸ A third amendment removed children of Americans killed or 100% disabled in combat from the definition of minority groups.¹⁶⁹ The final amendment is inexplicable. In the section dealing with penalties for contractors or subcontractors who misrepresent their minority status, the language was changed to require proof of *involvement* in the violation of the statute in order to avoid the penalty.¹⁷⁰ This absurd result is probably an er-

163. S. Approp. Tape, *supra* note 102.

164. FLA. S. JOUR. 513, 523 (Reg. Sess. May 27, 1985).

165. S. Approp. Tape, *supra* note 102.

166. FLA. S. JOUR. 513, 525 (Reg. Sess. May 27, 1985).

167. S. Com. Tape, *supra* note 119.

168. FLA. H.R. JOUR. 814, 825 (Reg. Sess. May 29, 1985).

169. *Id.* See *supra* note 120.

170. HB 1266, sec. 25 (1985) read before the change:

(3) No contractor or firm, or affiliate of such contractor or firm, shall be qualified for 36 months to bid on contracts or negotiate for the rendering of professional services pursuant to s. 287.055 awarded by an agency after it is determined that

ror resulting from overuse of negatives. Even if the section is found invalid, however, a severability clause insures the continued viability of the other sections.¹⁷¹

D. Other Proposed Legislation

The sponsors of House Bill 1266 and Senate Bill 1150, and those seriously concerned with the passage of legislation assisting small and minority business, took out "insurance" in the form of bills that contained bits and pieces of their ideas. Representative Kutun¹⁷² introduced House Bill 14, requiring a set aside to minority persons of ten percent of the dollars expended on state contracts. Representative Hargrett sponsored House Bill 787, embodying the minority business aspects of House Bill 1266 and the venture capital aspects of House Bill 882. Senator Meek did the same thing with Senate Bill 818 and Senate Bill 823, respectively. The House bills all died in the Small Business Subcommittee of the Commerce Committee.¹⁷³ The same fate awaited Senator Meek's bills in the Senate Governmental Operations Committee.¹⁷⁴ A third measure, Senate Bill 996, sponsored by Senator George Stuart,¹⁷⁵ mirrored the small business provisions of Senate Bill 1150 and, after one hearing, was absorbed into it.¹⁷⁶

IV. CONCLUSION

After accepting as fact the historical exclusion of blacks and other minorities from the marketplace, the crucial question is whether that recognition is sufficient to put an end to the discrimination, or whether affirmative steps must be taken to place those individuals in the societal position they would have occupied but for the discrimination. The Florida Small and Minority Business

he has falsely represented that he is a minority business enterprise.

The amendment is inserted after the word "firm" and reads "who is *unable* to demonstrate that it was involved in, had knowledge of or collaborated with said contractor or firm to violate the provisions of this section." FLA. H.R. JOUR. 814, 826 (Reg. Sess. May 29, 1985) (House Amendment 5 to Senate Amendment 1) (emphasis added).

171. Ch. 85-104, § 33, 1985 Fla. Laws at 656.

172. Dem., Miami.

173. FLA. LEGIS., HISTORY OF LEGISLATION, 1985 REGULAR SESSION, HISTORY OF HOUSE BILLS at 111, HB 787; *id.* at 2, HB 14; *id.* at 123, HB 882.

174. *Id.* HISTORY OF SENATE BILLS at 106, SB 818; *id.* at 107, SB 823.

175. Dem., Orlando.

176. FLA. LEGIS., HISTORY OF LEGISLATION, 1985 REG. SESS., HISTORY OF SENATE BILLS, at 440, SB 996. Compare CS for SB 996, sec. 1 (1985) (amending FLA. STAT. § 120.54(2), (3), (11)) with CS for CS for SB 1150, sec. 7 (1985) (amending FLA. STAT. § 120.54(2)(11)).

Assistance Act of 1985 clearly views the latter as the correct answer.

This legislation is unquestionably the most expansive and innovative statute dealing with small and minority business issues in Florida's history. It attempts to address problems common to all small business people and to redress the historical, systematic exclusion of blacks from entrepreneurial activity. Yet, the Act makes every effort to protect the competitive process. Flexibility for agencies, good faith provisions, and procedures for rebidding help ensure that taxpayer's pockets need not suffer as a result of compliance with the minority participation goals. The minorities, as defined, include not all "needy" or "deserving" individuals, but those who have been traditionally barred from the marketplace. The venture capital program is a model for other states. The appropriated fund is large enough to foster a successful plan, given proper management. It is not so large, however, as to devastate state coffers should the plan fail. Much will depend on the abilities and expertise of the Board members. Like all innovative programs, there is the potential for failure. However, with competent administration, the provisions of this Act will benefit the state by bolstering the opportunity, the ingenuity, and the pride of its people.

