

SUBJECT: State employment and contracting practices

COMMITTEE: Appropriations — committee substitute recommended

VOTE: 26 ayes — Junell, Delisi, Averitt, Coleman, Cuellar, Davis, Eiland, Finnell, Gallego, Glaze, Greenberg, Haggerty, Heflin, Hernandez, Hinojosa, Hochberg, Kubiak, Moreno, Mowery, Pitts, Price, Swinford, Tillery, S. Turner, Walker, West

0 nays

1 absent — Raymond

SENATE VOTE: On final passage, April 4 — 25-3 (Ellis, Gallegos, Nelson)

WITNESSES: None

BACKGROUND : In 1991, the Legislature enacted HB 799 by Dutton, setting up the historically underutilized business (HUB) program to encourage state agencies to contract with female- and minority-owned firms. Article 9 of the the general appropriations act directs state agencies and institutions of higher education on executing affirmative action, equal employment opportunity (EEO) and historically underutilized business (HUB) programs. Scattered throughout state statutes are requirements that various state agencies pursue goals for hiring and contracting with women and minorities.

For the history and current status of state affirmative action and HUB programs, see *Texas after Hopwood: Revisiting Affirmative Action*, House Research Organization Session Focus Report Number 75-14, April 22, 1997.

DIGEST: CSSB 31 would codify provisions of Article 9 of the General Appropriations Act addressing equal employment opportunity, workforce diversity, affirmative action, historically underutilized businesses, and board member diversity.

Legislative findings. CSSB 31 would make several legislative findings:

- State agencies and institutions of higher education for which money is appropriated in the general appropriations act employ available blacks, Hispanics, and females in numbers fewer than they are employed in the civilian work force.
- State agencies and institutions of higher education have historically underutilized or excluded blacks, Hispanics, and females in proportion to their available numbers in the civilian labor force.
- The number of complaints filed with the state Commission on Human Rights (CHR) in 1992 totalled 315, at a cost of \$787,500 plus \$1,890,155 for litigation costs.

The bill also specifies the percentages of blacks, Hispanics, and females holding positions in various job categories in the civilian labor force.

Equal employment opportunity. CSSB 31 would provide that no funds appropriated by the general appropriations act may be expended by agencies that discriminate based on race, creed, sex, or national origin. The attorney general would enforce this provision at the request of the governor. The bill would establish that any qualified applicant have access to compete for employment with the state and require that each agency and institution annually report equal employment opportunity information to CHR. The information would include the total number of employees and total hired each month broken down by racial and ethnic group and gender, and the percentage of the total number of agency employees for each racial and ethnic group and gender both for the agency as a whole and for each job category.

CHR would assess any state agency or institution that did not meet equal opportunity reporting requirements an administrative penalty of up to \$2,000, payable from money appropriated by the general appropriations act.

An agency or institution charged with three or more complaints of employment discrimination, except for complaints determined to be without

merit, would receive comprehensive equal employment opportunity training, to be paid for by the offending agency or institution.

The bill would encourage agencies and institutions appropriated funds under the general appropriations act to purchase products and services from Texans with disabilities as defined by the Human Resources Code.

Minority hiring and affirmative action. Each state agency and institution could spend appropriated money to examine whether its workforce excluded or underutilized minorities or women in various job categories. Based on these analyses, court-ordered remedies, or other agreements to remedy discrimination, agencies and institutions would develop and implement plans to recruit capable and qualified applicants for employment. These provisions would not affect a court-ordered remedy, affirmative action program, conciliation agreement, or settlement made in accordance with applicable law.

Each agency and institution would report to CHR the number of minorities and women hired annually, and CHR would submit the information biennially to the Legislative Budget Board (LBB) and the budget division of the Governor's Office.

Every six years, each agency and institution would, with the assistance of CHR, review its affirmative action plans. One-third of agencies would conduct their reviews each biennium, according to functional categories defined by the LBB. Each year, they would file a report detailing compliance with their affirmative action plan to the governor, the lieutenant governor, the speaker of the House, and the LBB.

Workforce diversity. Each state agency and institution would develop and implement personnel selection procedures that incorporated a workforce diversity program. CHR would review these policies; agencies would pay up to \$5,000 for travel or other expenses related to the review. If CHR determined an agency was not complying, it would inform the governor, the comptroller, and the LBB. Agencies not complying would pay a fine of up to \$5,000.

Every six years, each agency and institution would, with the assistance of CHR, review its workforce diversity plan. One-third of the group would conduct their reviews each biennium, according to functional categories defined by the LBB.

Historically underutilized businesses. CSSB 31 would require that each agency and institution make a good-faith effort to increase purchases and contracts with historically underutilized businesses (HUBs), based on the results of the General Services Commission (GSC) disparity study conducted in 1994 and GSC rules.

Every six years, each agency and institution would make progress reports to the GSC on the total dollar amount of purchases and payments to HUBs; the number of businesses participating in state bond issuances; the number of businesses used in acquiring, constructing, or equipping state facilities or operating state programs with funds appropriated by the general appropriations act; the number of HUBs submitting bids or proposals for such contracts; and the amount of any non-treasury funds spent with HUBs.

When determining whether a public need exists for continuing a state agency or its advisory committees, the Sunset Advisory Commission would consider the agency's compliance with purchasing goals and HUB provisions.

The bill would allow a political subdivision to develop and implement a HUB program based on any evidence of need for the program, including an independent study.

The state auditor would monitor agencies' good-faith compliance with HUB provisions and would consider whether they had adopted appropriate rules, identified available HUBs, and made marketing and outreach efforts to reach the HUBs. If an agency was found not to be in compliance, GSC would assist in efforts to comply. If the agency did not achieve compliance within a year, the LBB could revoke its purchasing authority. The comptroller could transfer funds to the GSC for performing the spending functions formerly delegated to the agency.

Board member diversity. An executive or judicial branch agency authorized by the Texas Constitution or statute to appoint members of a board, commission, or advisory body would have to make appointments in a manner representing the gender composition, minority populations, and geographic regions of the state. For these purposes, minority populations would include African Americans, Hispanic Americans, Native Americans, and Asian Americans.

CSSB 31 would take effect September 1, 1997.

**SUPPORTERS
SAY:**

CSSB 31 would move vital state policy priorities from Article 9 of the general appropriations act to statute, adding supporting documentation and statements of legislative intent. The general appropriations act is meant to apportion the financial resources of the state and provide instructions for their distribution. More and more, policy objectives unrelated to the appropriations process have been included in appropriations bills. For several sessions, the general appropriations act has been the primary vehicle for state policy on affirmative action, equal employment opportunity, and HUBs. This convention buries such policies within the appropriations bill, instead of allowing them to pass independently through the legislative process and into statute. Moving these provisions into statute would give them more legal weight and provide more security for long-standing equal opportunity provisions.

It is imperative to ensure the continuation of affirmative action and the HUB program in Texas. Women, blacks, and Hispanics make up 70 percent of the state's population but receive only 16 percent of state contracts. Blacks and Hispanics make up 45 percent of the population, but hold only 20 percent of the top jobs in state agencies. Without HUB and affirmative action programs, these numbers would be even lower.

CSSB 31 would not give these individuals a handout but rather an opportunity to compete on an equal footing. They still have to be competitive, be the low bidder, and meet all the specifications of the contract. The bill's provisions would just allow these businesses to show what they could do.

The role of affirmative action and HUB policies has come under scrutiny since the Fifth U.S. Circuit Court of Appeals in *Hopwood v. Texas* (78 F.3d 932) declared the affirmative action program at the University of Texas School of Law unconstitutional. The court cited among its justifications the Supreme Court's decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), which said that minority hiring goals must be supported by evidence of past discrimination with present effects. A follow-up attorney general opinion warned that the current HUB programs in Texas might not survive a legal challenge on *Croson* grounds.

In response, some have advocated the shift to a race-neutral state contracting program. Such a program would not address the problems the HUB program was created to solve. The facts confirm that racial and gender prejudice exists and has worked to exclude women and minorities from state employment and contract awards.

While some businesses may be economically disadvantaged due to discrimination or other factors beyond their control, some are economically disadvantaged because they are unqualified or otherwise unfit to compete in a free market. Affirmative action and HUB policies were initiated to combat discrimination, not poverty, and would be ineffective if they turn their focus to economic development. For women and minorities in business, no rational appeal to preparedness, quality, or excellence can overcome an irrational prejudice based on race or gender. CSSB 31 would ensure that the good old boy network is not perpetuated to the exclusion of women and minorities.

Furthermore, shifting the HUB program's focus to race-neutral measures could have serious legal repercussions. The Houston Metropolitan Transit Authority learned in January 1997 that it would not be eligible for future federal grants because it altered its affirmative action program, steering contracts toward small businesses, but retaining no race-based provisions.

CSSB 31 would address the remaining effects of past discrimination based on race and gender, and provide evidence of that discrimination that justifies its provisions. In the *Hopwood* ruling, the Fifth Circuit Court ruled that a legislative finding citing past discrimination and present effects of that discrimination could serve as the basis for a narrowly tailored remedy.

CSSB 31 would make such findings, supporting them with statistics documenting the underrepresentation of women and minorities in state employment.

With CSSB 31, Texas would take its proper place in the forefront of national affirmative action policy with a program that is both fair and legally defensible. The bill would establish the commitment of the state to equality of opportunity for all Texans, and lay the groundwork for a tightly documented, effective, and equitable state policy.

OPPONENTS
SAY:

CSSB 31 would enact a variety of provisions that would not ensure equal protection under the law for all Texans. The *Hopwood* decision and subsequent attorney general opinion have indicated the untenability of policies that give preferences to individuals or groups on the basis of race. The state should not institutionalize these policies, but rather amend them to ensure that they are constitutional and not unwittingly create a system of reverse discrimination.

The emphasis of the HUB program on women and minority owned businesses encourages dishonesty and tokenism in Texas business practices. Often, male business owners transfer ownership to their wives or hire a “subterfuge” female or minority partner to gain state contracts.

These practices are not only illegal but also undermine the goals the HUB program sets for itself, perpetuating the myth that women and minorities cannot be competitive on their own. Especially at this critical juncture, Texas should demonstrate its complete confidence in the ability of women and minorities to achieve their full potential independent of special privileges or accommodations from the state.

Race-based policies such as those contained in CSSB 31 keep race and gender differences foremost in people's minds when they should be minimized and exacerbate differences rather than similarities and shared goals. Instead of using race as a criteria for HUB eligibility, the state should employ a “place not race” strategy that focuses its efforts on helping small and economically disadvantaged businesses gain better representation in state contracting. An economically disadvantaged business could be defined as one meeting the specifications of the U.S. Small Business Administration

Act, a standard that would be easily understandable and fair to all. Such a plan could provide extra assistance to disadvantaged businesses without granting unfair advantage to any individual or business due to the race or gender of its owners.

OTHER
OPPONENTS
SAY:

CSSB 31 should include stricter enforcement provisions for the HUB program to make it less vulnerable to criticism and litigation. The state's current oversight requirements and sanctions for HUBs are insufficient to prevent the type of abuses that endanger program viability. If the Legislature wishes to support the HUB program, it should provide for enhanced sanctions, including increased monitoring by the GSC, additional training, or corrective plans.

The bill's requirement that individual agencies, instead of CHR, complete their own workforce diversity analyses would be misguided. CHR is much better equipped to perform such work, and would have to review the reports and correct any errors they contained.

NOTES:

The Senate-passed version of the bill codified numerous sections of Article 9 from the General Appropriations Act, including overtime compensation for state and legislative employees, the use of state money to influence elections, and the authorized use of state goods and services, and required CHR to conduct workforce utilization analyses on agencies' compliance with equal employment opportunity provisions. The committee substitute limited the bill's scope to equal opportunity, workforce diversity, affirmative action, and HUB-related issues, and required agencies to do the analyses and CHR to review them.

The substitute also added minority hiring practice, affirmative action, and board member diversity provisions; language authorizing political subdivisions receiving state funds to increase HUB participation and establishing equal opportunity intent; reporting requirements for affirmative action compliance; and deleted a monetary penalty for non-compliance with EEO training requirements.

The Senate-passed version defined a HUB as a business owned by an economically disadvantaged person that met the gross receipt standards and number of employees required by the U.S. Small Business Administration

Act and specified that a married person's spouse could not own a business that did not meet the bill's HUB requirements. The Senate version also directed the GSC's small business administration program to assist HUBs in obtaining state business, and provided GSC with \$1 million assist HUBS that have been previously unsuccessful in obtaining state business.