

Department of Legislative Services
Maryland General Assembly
2013 Session

FISCAL AND POLICY NOTE

House Bill 757 (Delegate Holmes)
Health and Government Operations Education, Health, and Environmental Affairs

Procurement - Minority Business Enterprises - Reporting of Architectural Services and Engineering Services Contracts

This bill requires State procurement units to disaggregate data on minority business enterprise (MBE) procurements for architectural services and for engineering services that they report annually to the Governor’s Office of Minority Affairs (GOMA), the Maryland Department of Transportation (MDOT), and the Joint Committee on Fair Practices and Personnel Oversight. It also changes the statutory definitions of “architectural services” and “engineering services.”

The bill takes effect June 1, 2013.

Fiscal Summary

State Effect: None. Although the bill requires reprogramming various State financial management and reporting systems, GOMA, MDOT, and the Department of Information Technology can make any necessary changes with existing budgeted resources. No effect on revenues.

Local Effect: None.

Small Business Effect: None.

Analysis

Bill Summary: “Architectural services” does not include structural, mechanical, plumbing, or electrical engineering. “Engineering services” includes structural, mechanical, plumbing, electrical, geotechnical, and environmental engineering.

Current Law:

Architectural and Engineering Services

“Architectural services” is defined as professional or creative work related to design and supervision of construction or landscaping that requires architectural education, training, and experience. It does not include construction inspection services or services provided in connection with energy performance contracts.

“Engineering services” is defined as professional or creative work that is performed in connection with any utility, structure, building, machine, equipment, or process that requires engineering education, training, and experience in the application of the mathematical, physical, and engineering sciences.

Minority Business Enterprise Program

For a description of the State’s MBE program, please see the **Appendix – Minority Business Enterprise Program**.

Within 90 days of the end of the fiscal year, each procurement unit must report to GOMA, MDOT, and the joint committee on:

- the total number and value of procurement contracts between the unit and MBEs, by MBE category, including whether the MBE participated as a prime contractor or subcontractor;
- the percentage of total contracting, by number and value, represented by MBE contracts;
- the number and names of all MBEs who participated as prime contractors or as subcontractors as well as the procurements awarded to each one; and
- any other information required by GOMA and MDOT.

By December 31 of each year, GOMA must submit a summary report based on the agency reports it receives to the Board of Public Works and the Legislative Policy Committee. As a matter of practice, GOMA reports MBE results by the following procurement categories:

- architectural/engineering (A/E);
- construction;
- construction-related services;
- maintenance;
- services;
- human/cultural/social/and educational services;

- supplies and equipment;
- information technology services;
- information technology supplies and equipment;
- corporate credit card; and
- direct vouchers.

Background: In fiscal 2011, the most recent data available from GOMA, the total value of State A/E contracts was \$562.3 million, of which 28.7% went to MBEs, mostly in the form of subcontracts.

State Expenditures: Despite the bill's June 1, 2013 effective date, it is assumed that the reprogramming necessary to implement the bill's requirements will occur in fiscal 2014 using existing resources, and the bill's reporting requirements may not be implemented until fiscal 2015. The Department of Budget and Management advises that the systems can be reprogrammed with existing resources. MDOT advises that it will require additional expenditures of approximately \$134,000. The Department of Legislative Services (DLS) assumes that, with the additional time described above, MDOT can also use existing resources.

Additional Comments: DLS notes that, as drafted, the bill could be interpreted to only exclude engineering services in connection with energy performance contracts; however, DLS assumes the legislative intent was to exclude the specified engineering services from all "architectural services."

Additional Information

Prior Introductions: HB 1314 of 2012, a similar bill, was withdrawn after receiving a hearing from the House Health and Government Operations Committee.

Cross File: None.

Information Source(s): Board of Public Works, Department of Budget and Management, Department of Information Technology, Governor's Office, Department of General Services, University System of Maryland, Department of Legislative Services

Fiscal Note History: First Reader - February 18, 2013
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Appendix – Minority Business Enterprise Program

The State’s Minority Business Enterprise (MBE) program, which is scheduled to terminate July 1, 2016, requires that a statewide goal for MBE contract participation be established biennially through the regulatory process under the Administrative Procedure Act. The biennial statewide MBE goal is established by the Special Secretary for the Governor’s Office of Minority Affairs (GOMA), in consultation with the Secretary of Transportation and the Attorney General. In a year in which there is a delay in establishing the overall goal, the previous year’s goal applies. The Special Secretary is also required to establish biennial guidelines for State procurement units to consider in deciding whether to establish subgoals for different minority groups recognized in statute. In a year in which there is a delay in issuing the guidelines, the previous year’s guidelines apply.

Prior to the enactment of Chapters 252 and 253 of 2011 (HB 456/SB 120) and Chapter 154 of 2012 (HB 1370), State law established a goal that at least 25% of the total dollar value of each agency’s procurement contracts be awarded to MBEs, including subgoals of 7% for African American-owned businesses and 10% for woman-owned businesses. As of January 2013, a new statewide goal had not been issued by GOMA, so the 25% statewide goal remains in effect. GOMA issued subgoal guidelines in July 2011, summarized in **Exhibit 1**, which are still in effect. The guidelines state that subgoals may be used only when the overall MBE goal for a contract is greater than or equal to the sum of all recommended subgoals for the appropriate industry, plus two percentage points.

Exhibit 1 Subgoal Guidelines Issued July 2011

	<u>Construction</u>	<u>Architectural/ Engineering</u>	<u>Maintenance</u>	<u>Information Technology</u>	<u>Services</u>	<u>Supplies/ Equipment</u>
African American	7%	6%	8%	7%	7%	6%
Hispanic	–	2%	3%	2%	–	–
Asian	4%	–	3%	–	4%	5%
Women	–	9%	–	8%	12%	10%
Total	11%	17%	14%	17%	23%	21%
Total +2	13%	19%	16%	19%	25%	23%

Source: Governor’s Office of Minority Affairs

There are no penalties for agencies that fail to reach the statewide target. Instead, agencies are required to use race-neutral strategies to encourage greater MBE participation in State procurements.

History and Rationale of the MBE Program

In 1989, the U.S. Supreme Court held in the *City of Richmond v. J.A. Croson Co.*, that state or local MBE programs using race-based classifications are subject to strict scrutiny under the equal protection clause of the Fourteenth Amendment to the U.S. Constitution. In addition, the ruling held that an MBE program must demonstrate clear evidence that the program is narrowly tailored to address actual disparities in the marketplace for the jurisdiction that operates the program. As a result, prior to each reauthorization of the State's MBE program, the State conducts a disparity study to determine whether there is continued evidence that MBEs are underutilized in State contracting.

The most recent disparity study was completed in February 2011 and serves as the basis for the most recent reauthorization of the MBE program. It found continued and ongoing disparities in the overall annual wages, business earnings, and rates of business formation between nonminority males and minorities and women in Maryland. For instance, average annual wages for African Americans (both men and women) and nonminority women were 33% lower than for comparable nonminority males. It also found continued disparities in the use of MBEs compared to their availability in the marketplace to perform work in designated categories of work. For instance, African American-owned businesses were paid 4.5% of State construction contract dollars, but they make up 9.7% of the construction sector in the State. Woman-owned businesses were paid 8.5% of maintenance contract dollars, despite making up 18.0% of the maintenance contract sector. Similar disparities were found in other contracting sectors and for other MBE categories.

Another disparity study is due by December 31, 2015, prior to the July 1, 2016 termination date for the MBE program. (The program has been reauthorized six times since 1990, most recently by Chapter 154 of 2012.) **Exhibit 2** provides MBE participation rates for major Executive Branch agencies for fiscal 2011, the most recent year for which data is available.

Requirements for MBE Certification

An MBE is a legal entity, other than a joint venture, that is:

- organized to engage in commercial transactions;
- at least 51% owned and controlled by one or more individuals who are socially and economically disadvantaged; and

- managed by, and the daily business operations of which are controlled by, one or more of the socially and economically disadvantaged individuals who own it.

MBEs include not-for-profit entities organized to promote the interests of physically or mentally disabled individuals. There are no restrictions on the size or management structure of not-for-profit entities that can be considered MBEs.

A socially and economically disadvantaged individual is defined as a citizen or legal U.S. resident who is African American, Native American, Asian, Hispanic, physically or mentally disabled, a woman, or otherwise found by the State's MBE certification agency to be socially and economically disadvantaged. An MBE owned by a woman who is also a member of an ethnic or racial minority group is certified as either owned by a woman or owned by a racial or ethnic minority, but not both. The Maryland Department of Transportation is the State's MBE certification agency.

A socially disadvantaged individual is someone who has been subject to racial or ethnic prejudice or cultural bias within American society because of his or her membership in a group and without regard to individual qualities. An economically disadvantaged individual is someone who is socially disadvantaged whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities compared with those who are not socially disadvantaged. An individual with a personal net worth in excess of \$1.5 million, adjusted annually for inflation, is not considered economically disadvantaged. The inflation-adjusted limit for calendar 2013 is \$1,615,663.

Exhibit 2
MBE Participation Rates, by Agency
Fiscal 2011

<u>Agency</u>	<u>% MBE Participation</u>
Aging	30.7%
Agriculture	6.9%
Budget and Management	10.5%
Business and Economic Development	43.9%
Education	20.3%
Environment	25.2%
Executive Department	14.0%
General Services	33.9%
Health and Mental Hygiene	46.1%
Higher Education Commission	14.0%
Housing and Community Development	21.9%
Human Resources	8.4%
Information Technology	13.7%
Juvenile Services	8.9%
Labor, Licensing, and Regulation	36.1%
Morgan State University	22.3%
Natural Resources	10.9%
Planning	8.3%
State Police	8.8%
Public Safety and Correctional Services	33.0%
Transportation – Aviation Administration	26.2%
Transportation – Motor Vehicle Administration	46.7%
Transportation – Office of the Secretary	29.5%
Transportation – Port Administration	7.8%
Transportation – State Highway Administration	26.1%
Transportation – Transit Administration	16.8%
Transportation – Transportation Authority	25.4%
University System of Maryland	19.7%
Veterans Affairs	18.2%
Statewide Total¹	23.8%

¹Includes additional non-Cabinet agencies.

Source: Governor's Office of Minority Affairs
