

Department of Legislative Services
 Maryland General Assembly
 2016 Session

FISCAL AND POLICY NOTE
 First Reader

House Bill 282 (Delegate B. Robinson)
 Health and Government Operations

Procurement Preferences - Small Businesses and Minority Business Enterprises -
 Workshop Requirement

This bill adds a requirement that a business participate in the Ready, Set, GROW! workshop administered by the Governor’s Office of Minority Affairs (GOMA) (or a similar workshop or program) in order to qualify as a small business for the Small Business Preference (SBP) program or to be certified by the State as a minority business enterprise (MBE).

Fiscal Summary

State Effect: General fund expenditures by GOMA increase by \$70,700 in FY 2017 to hire a full-time trainer; out-year expenditures reflect annualization and inflation. No effect on revenues.

(in dollars)	FY 2017	FY 2018	FY 2019	FY 2020	FY 2021
Revenues	\$0	\$0	\$0	\$0	\$0
GF Expenditure	70,700	88,800	92,300	95,900	99,600
Net Effect	(\$70,700)	(\$88,800)	(\$92,300)	(\$95,900)	(\$99,600)

Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate effect

Local Effect: None.

Small Business Effect: Minimal. Small businesses seeking certification as MBEs or to participate in SBP must attend the two-hour workshop, which may assist them in competing for State contracts.

Analysis

Current Law: For a complete description of the State's MBE program, please see the **Appendix – Minority Business Enterprise Program.**

SBP was established in 1988 and applies to the procurement of supplies, services, and construction-related services by the Department of General Services (DGS), the Maryland Department of Transportation (MDOT), the University System of Maryland (USM), Morgan State University, and, with respect only to the construction of a State correctional facility, the Department of Public Safety and Correctional Services (DPSCS). Each agency (except DPSCS) is authorized to define what constitutes a small business for the purpose of the program, and the criteria may vary among industries to reflect their particular characteristics. DGS and MDOT are also authorized to designate procurements that qualify under SBP.

Both MDOT and DGS have established a base small business price preference of 5% for all SBP contracts. In accordance with Chapter 695 of 2008, SBP allows DGS and MDOT to establish a price preference of not more than 8% for small businesses that bid on qualified procurements, which includes a 2% price preference for veteran-owned small businesses and a 3% price preference for disabled veteran-owned small businesses. This allows each agency to award a procurement contract to a responsible small business if the gap between the small business bid and the lowest bid from a nonsmall business is less than the established price preference.

Only MDOT, DGS, and USM are required to report annually on the use of SBP.

Background: SBP is seldom used. The fiscal 2014 annual report on SBP, prepared by the Board of Public Works, found that neither DGS nor USM awarded any contracts under the SBP program. Within MDOT, the Maryland Aviation Administration designated 11 SBP-eligible contracts, the Maryland Transportation Authority designated 5 SBP-eligible contracts, and the State Highway Administration (SHA) designated 42 procurements as SBP eligible. All 42 of the SHA contracts were awarded to small businesses, but SHA could not establish if any of them were due to the application of the price preference. Of the remaining contracts, only one was awarded on the basis of the application of the SBP price preference.

Ready, Set, GROW! is a series of workshops provided by GOMA to help small businesses, including those that are minority and women owned, compete for State contracts. The workshops are two hours long and include State procurement officers discussing live or upcoming contracting opportunities at their agencies.

State Fiscal Effect: There are more than 5,000 certified MBEs and a similar number of certified small businesses in the State, although there may be substantial overlap between them. As both certifications require annual renewals, it is assumed that all existing MBEs and small businesses must complete the required workshop in order to maintain their certification. GOMA advises that it currently conducts one workshop every two months and anticipates having to increase that to twice per month (24 per year). Given the substantial number of firms involved, the Department of Legislative Services (DLS) believes that GOMA may be underestimating the number of workshops necessary to meet the demand.

Therefore, general fund expenditures by GOMA increase by \$70,692 in fiscal 2017, which accounts for the bill’s October 1, 2016 effective date. This estimate reflects the cost of hiring one full-time trainer to conduct year-round training sessions for prospective and current MBEs and small businesses. It includes a salary, fringe benefits, one-time start-up costs, and ongoing operating expenses.

Position	1
Salary and Fringe Benefits	\$65,877
Operating Expenses	<u>4,815</u>
Total FY 2017 State Expenditures	\$70,692

Future year expenditures reflect a full salary with annual increases and employee turnover as well as annual increases in ongoing operating expenses.

DLS assumes that the intent of the bill is that each certified MBE and small business complete the workshop only once. Therefore, demand likely drops off after the first year once all current MBEs and small businesses have completed the workshop. At that point, GOMA’s estimate of twice-monthly workshops is more realistic to meet the demand of prospective MBEs and small businesses. Even so, GOMA would still require a dedicated trainer to arrange the workshops and keep track of firms that have completed them.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Governor’s Office of Minority Affairs, University System of Maryland, Morgan State University, Department of General Services, Maryland Department of Transportation, Department of Legislative Services

Fiscal Note History: First Reader - February 16, 2016
kb/ljm

Analysis by: Michael C. Rubenstein

Direct Inquiries to:
(410) 946-5510
(301) 970-5510

Appendix – Minority Business Enterprise Program

The State's Minority Business Enterprise (MBE) program 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. Likewise, the Special Secretary (in consultation with the Secretary of Transportation and the Attorney General) is 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 and Chapter 154 of 2012, 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. In August 2013, GOMA announced a new statewide goal of 29% MBE participation that applied to fiscal 2014 and 2015; as no new goal has been established, the 29% goal remains in effect for fiscal 2016. GOMA issued subgoal guidelines in July 2011, summarized in **Exhibit 1**, which are also 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. In June 2014, new regulations took effect, allowing MBE prime contractors to count their own work for up to 50% of a contract's MBE goal and up to 100% of any contract subgoal. Previously, certified MBE prime contractors could not count their own participation toward any goal or subgoal on an individual contract, but their participation was counted toward the State's MBE goal.

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.

Exhibit 1
Subgoal Guidelines for MBE Participation

	<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

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 typically conducts a disparity study to determine whether there is continued evidence that MBEs are underutilized in State contracting.

The most recent disparity study was published in February 2011 and serves as the basis for the two most recent reauthorizations 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 made 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. The next disparity study is due by September 30, 2016.

The MBE program is scheduled to terminate July 1, 2017; it has been reauthorized seven times since 1990, the latest by Chapters 200 and 201 of 2013. **Exhibit 2** provides MBE participation rates for major Executive Branch agencies for fiscal 2014, the most recent year for which data is available.

Exhibit 2
MBE Participation Rates, by Agency
Fiscal 2014

<u>Cabinet Agency</u>	<u>% MBE Participation</u>
Aging	26.1%
Agriculture	4.9%
Budget and Management	8.1%
Business and Economic Development ¹	23.0%
Education	13.6%
Environment	32.8%
Executive Department	27.5%
General Services	27.2%
Health and Mental Hygiene	51.0%
Higher Education Commission	8.7%
Housing and Community Development	43.5%
Human Resources	17.9%
Information Technology	52.1%
Juvenile Services	2.6%
Labor, Licensing, and Regulation	26.0%
Military	23.0%
Natural Resources	9.3%
Planning	4.6%
State Police	26.3%
Public Safety and Correctional Services	54.5%
Transportation – Aviation Administration	18.7%
Transportation – Motor Vehicle Administration	55.2%
Transportation – Office of the Secretary	33.4%
Transportation – Port Administration	20.1%
Transportation – State Highway Administration	19.9%
Transportation – Transit Administration	18.1%
Transportation – Transportation Authority	27.1%
Statewide Total²	27.3%

¹The Department of Business and Economic Development has since been reorganized and renamed.

²Includes University System of Maryland, Morgan State University, St. Mary's College of Maryland, Baltimore City Community College, and non-Cabinet agencies.

Source: Governor's Office of Minority Affairs

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.

A socially and economically disadvantaged individual is defined as a citizen or legal U.S. resident who is African American, American Indian/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 subjected 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 in the same or similar line of business 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 2016 is \$1,674,928.