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Maryland General Assembly
2016 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

Senate Bill 515

(Senator DeGrange)

Budget and Taxation

Appropriations

County Boards of Education - Procurements for Construction or Repair of
School Projects

This bill requires procurements by local school boards for construction or repair projects that receive more than \$25,000 in the State capital budget to use the competitive bidding process required for most other types of procurement. It also expands the applicability of the State's minority business enterprise (MBE) goals to most procurements by local school boards.

The bill takes effect January 1, 2017, and applies only prospectively to contracts entered into on or after that date.

Fiscal Summary

State Effect: None. The bill applies only to local school boards.

Local Effect: Local school boards can comply with the bill's requirements with existing resources but, to the extent that the bill bars them from using intergovernmental purchasing agreements (IPAs) for some capital projects, may experience operational inefficiencies and increased costs in some instances. Requiring local school boards to consider bidders' plans for meeting MBE goals may have a minimal effect on their procurement costs, to the extent that it results in contracts being awarded to bidders that do not submit the lowest bid.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary: “Construction” is defined as the process of building, altering, repairing, improving, or demolishing any structure or building or making any other improvements to real property. It includes any major work necessary to repair, prevent damage to, or sustain existing components of an improvement to real property.

In awarding contracts for construction or repair projects that receive at least \$25,000 from the State’s capital budget as well as for school buildings, improvements, supplies, or other equipment, local school boards must consider a bidder’s plan for meeting or exceeding the State’s MBE goals (among other considerations).

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

As required by statute, regulations issued by the Board of Public Works specify that the State’s MBE program goals apply to local procurements for school construction that use any amount of State funding. The State’s MBE program does not apply to any other type of procurement carried out by a local school board.

State law specifies processes that boards of education must follow when procuring school buildings, improvements, supplies, or equipment valued at more than \$25,000. “Construction” is not specifically included under current law. If the State raises the threshold for small procurements under State procurement law above \$25,000, then the new threshold applies to board of education procurements. The procedures do not apply to contracts for books or other instructional materials, emergency repairs, or most goods or commodities purchased through IPAs if the lead party follows public bidding procedures.

The required procurement processes require that at least two weeks before filing bids for a school building, improvement, supplies, or equipment valued at more than \$25,000, a board of education must advertise for bids in a medium accessible to the general public, including (1) a newspaper of general circulation in the region; (2) the *Maryland Contract Weekly* or comparable State publication; or (3) an electronic posting on a bid board and physical posting on the local school system bid board. Statute includes guidelines for the specifications included in the bid requests.

Contracts for school buildings, improvements, supplies, or equipment must be awarded to the lowest responsive bidder who conforms to the bid specifications, with consideration given to:

- the quantities involved;
- the time required for delivery;

- the purpose for which required;
- the competency and responsibility of the bidder;
- the ability of the bidder to perform satisfactory service; and
- the plan for utilization of minority contractors.

The bill adds the bidder's plan for meeting or exceeding MBE goals to this list. The county board may reject any and all bids and readvertise for other bids.

Board of Public Works regulations related to school construction require local school systems to use competitive sealed bidding in procuring school construction contracts, subject to specified exceptions. One such exception is that they may use specified forms of intergovernmental cooperative purchasing if they determine that it (1) will provide cost benefits, promote administrative efficiencies, or promote governmental cooperation and (2) is not intended to avoid competition.

Background: Beginning in 2005, Baltimore County Public Schools (BCPS) used the Pennsylvania Education Joint Purchasing Cooperative, an IPA, to procure roof replacement services for its schools. According to BCPS, use of intergovernmental cooperative purchasing saved time and money spent on the procurement process, accelerated project completion timelines, and improved work quality. However, a July 2015 audit by the Office of Legislative Audits found that BCPS did not use proper procedures required by statute for the use of IPAs; it also concluded that BCPS was paying a significantly higher cost per square foot for roof replacements compared to other local school systems. BCPS advises that it has ceased using the IPA for roof repairs and now competitively bids those projects.

In 2011, GAF Materials Corporation challenged in court the authority of the Baltimore County Board of Education to procure roof repair services through an IPA. In particular, it claimed that roof repair does not qualify as a "good" or "commodity," which are authorized to be purchased through IPAs. The case reached the Maryland Court of Appeals, which in 2012 upheld the board's authority in [*Building Materials Corporation of America d/b/a GAF Materials Corporation v. Board of Education of Baltimore County*](#): "When viewed in the context of the entire education law and regulations promulgated under that law, the competitive bidding statute does not bar the Board of Education from using its membership in an intergovernmental purchasing consortium for the procurement of roofing repair services."

Small Business Effect: To the extent that small construction businesses do not participate in IPAs, they may benefit from increased opportunities to bid on local school board construction projects.

Additional Information

Prior Introductions: None.

Cross File: HB 330 (Delegate Jones, *et al.*) - Appropriations.

Information Source(s): Maryland State Department of Education, Maryland Association of Boards of Education, Department of General Services, Board of Public Works, Office of Legislative Audits, Baltimore County, Department of Legislative Services

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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.