

Department of Legislative Services
Maryland General Assembly
2020 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

Senate Bill 779

(Senator Griffith, *et al.*)

Education, Health, and Environmental Affairs

Health and Government Operations

Commission on Minority- and Women-Owned Small Business Participation in
State Procurement

This bill establishes the Commission on Minority- and Women-Owned Small Business Participation in State Procurement, staffed by the Department of Legislative Services (DLS). A member of the commission is not entitled to compensation but may be reimbursed for expenses. The commission must report its preliminary findings and recommendations to the Governor and General Assembly by December 1, 2020, and submit its final report by December 1, 2021. **The bill takes effect June 1, 2020, and terminates June 30, 2022.**

Fiscal Summary

State Effect: DLS can staff the commission with existing resources. Any expense reimbursements are assumed to be minimal and absorbable within existing budgeted resources. No effect on revenues.

Local Effect: None.

Small Business Effect: Minimal.

Analysis

Bill Summary: The commission must:

- study current State practices concerning small, minority, and women business participation in State procurement;

- review State practices that have helped improve outcomes for minority- and women-owned small businesses;
- determine whether any statutory or regulatory provisions or State practices prevent minority- and women-owned small businesses from effectively competing for State contracts;
- review the best practices of the federal government and other states to improve outcomes for minority- and women-owned small businesses; and
- make recommendations regarding best practices for engaging and improving outcomes for minority- and women-owned businesses.

The bill expresses the intent of the General Assembly that any business that participates in the commission will not be favored, disfavored, or disqualified with respect to contracts or other benefits from the State.

Current Law: For an overview of the State’s Minority Business Enterprise Program, please see the **Appendix – Minority Business Enterprise Program**.

Additional Information

Prior Introductions: None.

Designated Cross File: None.

Information Source(s): Governor’s Office of Small, Minority, and Women Business Affairs; Department of General Services; Department of Legislative Services

Fiscal Note History: First Reader - February 26, 2020
rh/ljm Third Reader - March 16, 2020
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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 Small, Minority, and Women Business Affairs (GOSBA), 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.

In August 2013, GOSBA 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 2020. GOSBA 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.

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%

MBE: Minority Business Enterprise

Source: Governor’s Office of Small, Minority, and Women Business 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 Minority Business Enterprise 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 2017 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) were 37% lower than for comparable nonminority males; average annual wages for nonminority women were 33% lower than for comparable nonminority males. It also found continued disparities in the use of MBEs by the State compared to their availability in the marketplace to perform work in designated categories of work. For instance, African American-owned construction businesses were paid 5.1% of State construction contract dollars, but they made up 10.3% of the construction sector in the relevant State marketplace. Nonminority women-owned construction businesses were paid 7.5% of State construction contract dollars but made up 13.7% of the construction sector. According to the analysis, these differences were large and statistically significant.

The MBE program is scheduled to terminate July 1, 2022; it has been reauthorized eight times since 1990, the latest by Chapter 340 of 2017. **Exhibit 2** provides MBE participation rates for major Executive Branch agencies based on contract awards made during fiscal 2018, the most recent year for which data is available.

Exhibit 2
Minority Business Enterprise Participation Rates, by Agency
Fiscal 2018

<u>Cabinet Agency</u>	<u>% Participation</u>
Aging	6.3%
Agriculture	4.6%
Budget and Management	3.8%
Commerce	5.0%
Education	9.1%
Environment	25.5%
Executive Department	8.7%
General Services	15.5%
Health	3.5%
Higher Education Commission	0.9%
Housing and Community Development	30.0%
Human Services	6.0%
Information Technology	28.4%
Juvenile Services	23.3%
Labor, Licensing, and Regulation ¹	21.2%
Military	13.1%
Natural Resources	6.0%
Planning	4.0%
State Police	16.1%
Public Safety and Correctional Services	16.0%
Transportation – Aviation Administration	20.4%
Transportation – Motor Vehicle Administration	21.1%
Transportation – Office of the Secretary	36.1%
Transportation – Port Administration	19.5%
Transportation – State Highway Administration	17.8%
Transportation – Transit Administration	12.0%
Transportation – Transportation Authority	14.6%
Statewide Total²	15.1%

¹Has since been renamed the Maryland Department of Labor.

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

Source: Governor's Office of Small, Minority, and Women Business Affairs

Requirements for Minority Business Enterprise 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, 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 2020 is \$1,771,564.