

Department of Legislative Services
Maryland General Assembly
2021 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 722 (Delegate Ivey)
Health and Government Operations

Procurement - Disparity Studies - African American-Owned Businesses

This bill requires the Maryland Department of Transportation (MDOT), in its capacity as the certification agency for the Minority Business Enterprise (MBE) program and in consultation with the Office of the Attorney General (OAG), to contract with an independent consultant to review the State’s 2017 disparity study. The review must evaluate, by October 1, 2021, whether the data in the study demonstrate a compelling interest to implement remedial measures to assist African American-owned businesses separately from the existing MBE program. If the findings are inconclusive, MDOT, in consultation with OAG, must initiate a disparity study to determine if there are patterns of discrimination in awarding State contracts to African American-owned businesses as compared with patterns of discrimination against firms owned by members of other minority groups. If a second study is required, it must be completed by June 30, 2022. **The bill takes effect June 1, 2021, and terminates June 30, 2023.**

Fiscal Summary

State Effect: Special fund (Transportation Trust Fund) expenditures increase by \$75,000 in FY 2022. Special fund expenditures increase further – by a total of between \$1.0 million and \$3.0 million and not likely until FY 2023 and 2024 combined – if a second disparity study is required. This analysis does not reflect any potential effects of additional remedial measures designed to address patterns of discrimination against African America-owned businesses, as those are contingent on the findings of the two studies and currently unknown. No effect on revenues.

Local Effect: None.

Small Business Effect: Minimal.

Analysis

Current Law: For an overview of the State’s MBE program, including information about the disparity study, please see the **Appendix – Minority Business Enterprise Program**.

State Expenditures: The initial reanalysis of the 2017 disparity study costs approximately \$75,000 to conduct. MDOT advises that, after factoring in the time necessary to procure the contractor to conduct the study and the six to nine months necessary to complete the analysis, the bill’s October 1, 2021 deadline cannot be met.

If the results of the first analysis are inconclusive, MDOT must conduct a second study. As the study must compare patterns of procurement discrimination for African American-owned businesses as compared with businesses owned by other minorities, it is equivalent to a full disparity study (which also examines disparities for multiple racial and ethnic minorities and women). MDOT estimates the cost of the second study to be approximately \$1.0 million; the Department of Legislative Services notes that the 2017 disparity study cost more than \$3.0 million. MDOT further advises that a second study would take between 12 and 18 months to conduct and, thus, could not be completed by the bill’s June 30, 2022 deadline.

MDOT further advises that it is currently conducting a procurement for the next disparity study. To the extent that the second study (if needed) can be conducted in conjunction with the statewide study, the cost may be less. Given the timing of the current procurement, it is likely that the new contract would already be in place and a contract modification would be needed to add a second study.

Additional Information

Prior Introductions: None.

Designated Cross File: None.

Information Source(s): Governor’s Office of Small, Minority, and Women Business Affairs; Board of Public Works; Maryland Department of Transportation; Department of Legislative Services

Fiscal Note History: First Reader - March 1, 2021
rh/ljm

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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 2021. GOSBA issued subgoal guidelines in July 2011 and then updated them effective August 2020, as summarized in **Exhibit 1**. 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 Minority Business Enterprise Participation

	<u>Construction</u>	<u>Architectural/ Engineering</u>	<u>Maintenance</u>	<u>Information Technology</u>	<u>Services</u>	<u>Supplies/ Equipment</u>
African American	8%	7%	9%	10%	-	6%
Hispanic	-	-	3%	-	2%	2%
Asian	-	-	2%	-	3%	-
Women	11%	10%	-	10%	10%	8%
Total	19%	17%	14%	20%	15%	16%
Total +2	21%	19%	16%	22%	17%	18%

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 2019, the most recent year for which data is available.

Exhibit 2
Minority Business Enterprise Participation Rates, by Agency
Fiscal 2019

<u>Cabinet Agency</u>	<u>% Participation</u>
Aging	1.4%
Agriculture	4.9%
Budget and Management	7.4%
Commerce	1.2%
Education	6.0%
Environment	28.6%
Executive Department	1.8%
General Services	15.0%
Health	14.6%
Higher Education Commission	3.0%
Housing and Community Development	38.4%
Human Services	14.7%
Information Technology	15.4%
Juvenile Services	19.5%
Labor	26.1
Military	7.0%
Natural Resources	NA ¹
Planning	4.6%
State Police	15.0%
Public Safety and Correctional Services	17.5%
Transportation – Aviation Administration	27.2%
Transportation – Motor Vehicle Administration	16.0%
Transportation – Office of the Secretary	18.5%
Transportation – Port Administration	18.5%
Transportation – State Highway Administration	20.3%
Transportation – Transit Administration	15.1%
Transportation – Transportation Authority	11.6%
Statewide Total²	17.9%

¹ Data not provided.

² Includes 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 may be certified as being owned by both a woman and by a member of a racial or ethnic minority, but for the purpose of participating on a contract as an MBE, it can only be counted as one or the other. 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 2021 is \$1,788,677.