

Department of Legislative Services
Maryland General Assembly
2021 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

House Bill 1212

(Delegate Washington)

Health and Government Operations

Education, Health, and Environmental Affairs

Workgroup to Study Enhanced Opportunities for Socially and Economically
Disadvantaged Individuals in the State

This bill establishes a Workgroup to Study Enhanced Opportunities for Socially and Economically Disadvantaged Individuals in the State, staffed by the Department of Legislative Services (DLS). The workgroup must study the expansion of the Minority Business Enterprise (MBE) program and other topics related to expanding economic opportunities for socially and economically disadvantaged individuals in the State. Members of the workgroup are not entitled to compensation but may be reimbursed for expenses. The workgroup must report its findings and recommendations to the Governor and the General Assembly by December 31, 2021. **The bill takes effect June 1, 2021, and terminates June 30, 2022.**

Fiscal Summary

State Effect: None. DLS can staff the workgroup and reimburse expenses with existing budgeted resources. No effect on revenues.

Local Effect: None.

Small Business Effect: Minimal.

Analysis

Bill Summary: In addition to studying the expansion of the MBE program, the workgroup must study:

- the establishment of a program that provides a procurement preference to entities that hire employees from economically depressed areas of the State;
- enhancing job opportunities for socially and economically disadvantaged individuals;
- what other states and governmental entities have done to enhance opportunities for socially and economically disadvantaged individuals;
- existing research on ways to enhance opportunities for socially and economically disadvantaged individuals;
- the effect that additional State programs or the enhancement of existing programs would have on existing State law;
- the use of the definition of “economically disadvantaged individuals” in State law and its effect on State programs, including whether a new definition should be enacted; and
- anything else the workgroup considers relevant.

Current Law: For an overview of the State’s MBE program, including the statutory definitions of “socially disadvantaged” and “economically disadvantaged” individuals, 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; Board of Public Works; Maryland Department of Transportation; Department of Legislative Services

Fiscal Note History: First Reader - March 2, 2021
rh/ljm Third Reader - March 30, 2021
Revised - Amendment(s) - March 30, 2021

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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.