

Department of Legislative Services
 Maryland General Assembly
 2024 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 696
 Finance

(Senator Feldman)

Energy Generation Projects - Labor and Minority Business Enterprise Requirements

This bill requires the developers of specified energy generating stations with cumulative nameplate capacities of one megawatt or more to meet requirements relating to (1) prevailing wage rates and (2) contractor/subcontractor certifications and records. The Maryland Department of Labor (MDL) must enforce compliance and adopt implementing regulations. The Public Service Commission (PSC) must, to the extent practicable and authorized by the U.S. Constitution, condition approval of a Certificate of Public Convenience and Necessity (CPCN) or approval to construct under the CPCN exemption process on the developer meeting the requirements of the State’s Minority Business Enterprise (MBE) Program.

Fiscal Summary

State Effect: General fund expenditures for MDL increase by at least \$86,400 in FY 2025 and by at least amounts shown in future years. Transportation Trust Fund (TTF) expenditures increase by \$25,000 to \$50,000 only in FY 2025 for the Maryland Department of Transportation (MDOT) to conduct a disparity study; for purposes of this estimate, the midpoint is shown. General fund revenues increase minimally to the extent MDL recovers Public Information Act (PIA) request costs through fees.

(in dollars)	FY 2025	FY 2026	FY 2027	FY 2028	FY 2029
GF Revenue	-	-	-	-	-
GF Expenditure	\$86,400	\$103,600	\$108,200	\$112,900	\$117,900
SF Expenditure	\$37,500	\$0	\$0	\$0	\$0
Net Effect	(\$123,900)	(\$103,600)	(\$108,200)	(\$112,900)	(\$117,900)

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

Local Effect: The bill does not directly affect local governmental operations or finances.

Small Business Effect: Meaningful.

Analysis

Bill Summary: The bill applies only to the construction of a “covered project,” which means a generating station with a cumulative nameplate capacity of one megawatt or more for which PSC has approved (1) a CPCN or (2) construction under the CPCN exemption process. A covered project does not include an offshore wind project under § 7-704.1 of the Public Utilities Article. The bill applies only prospectively and may not be applied or interpreted to have any effect on or application to any covered project that received a CPCN or approval for construction under the CPCN exemption process before the bill’s effective date.

On approval of a CPCN or approval to construct under the CPCN exemption process for a covered project, a developer must comply with requirements relating to prevailing wage rates and contractor/subcontractor certifications and records, as described below.

Prevailing Wage Rates

Generally, the developer of a covered project must ensure that workers are paid at least the prevailing wage rate determined under the State Finance and Procurement Article, as specified. The lone exception is if the covered project is subject to a project labor agreement with specified terms and conditions.

Contractor/Subcontractor Certifications and Records

The developer of a covered project must ensure that each contractor and subcontractor involved in the construction of the project completes a certification that the contractor or subcontractor meets certain requirements. Specifically, the developer must ensure that each contractor and subcontractor:

- has the necessary resources to perform the relevant portion of the project, including the necessary technical, financial, and personnel resources;
- has all licenses, certifications, or credentials required under State or local law;
- participates in apprenticeship training (through a registered apprenticeship program) for each construction trade employed on the project;
- during the immediately preceding three years, (1) has not been debarred by any government agency; (2) has not defaulted on any project; (3) has not had any license, certification, or other credential relating to the business revoked or suspended; and (4) has not been found in violation of any applicable law that resulted in the payment of a fine, back pay damages, or any other penalty of at least \$10,000;
- will pay individuals employed on the project at least the applicable wage and fringe benefit rates for each individual’s classification; and
- has not misclassified and will not misclassify employees as independent contractors.

The developer of a covered project must submit to MDL a certification of compliance with the requirements described above at least 30 days before beginning construction of the project (along with a copy of a project labor agreement, if applicable). If a certification contains false, misleading, or materially inaccurate information, the developer, contractor, or subcontractor that executed the certification must, after notice and opportunity to be heard, be subject to debarment from entering into a contract with a public body. A contractor or subcontractor is also subject to penalties established by MDL by regulation.

Each developer, contractor, and subcontractor that is not subject to a project labor agreement must maintain records relating to the wages and hours worked by each individual working on a covered project, as specified. The records must include a signed statement affirming, among other requirements, that the records are correct, that applicable wage and other requirements have been met, and that the developer, contractor, or subcontractor does not receive kickbacks from an employee or employee welfare fund.

The payroll for a covered project must be considered a public record subject to inspection and copying.

Other Requirements for the Maryland Department of Labor

MDL must distribute a list to all units, departments, and political subdivisions of the State providing the names of individuals or firms that MDL has found to have (1) failed to meet the bill's requirements; (2) been debarred by federal or State government; or (3) submitted false, misleading, or materially inaccurate information under the bill. The Secretary of Labor must also adopt regulations implementing the bill.

Condition of CPCN or CPCN Exemptions on Developer Meeting Minority Business Enterprise Requirements

PSC must, to the extent practicable and authorized by the U.S. Constitution, condition approval of a CPCN or approval to construct under the CPCN exemption process on the developer meeting the requirements of the State's MBE Program.

By December 1, 2024, the Governor's Office of Small, Minority, and Women Business Affairs (GOSBA), in consultation with the Office of the Attorney General, must establish a clear plan for setting reasonable and appropriate MBE participation goals for covered projects. To the extent practicable, the goals and procedures must be based on the requirements of the State MBE law and regulations.

Current Law:

Wage and Labor Requirements for Utility Contractors

Chapters 12 and 21 of the 2021 special session required investor-owned gas and/or electric utilities to require contractors and subcontractors on specified underground infrastructure projects to pay their employees at least the applicable prevailing wage rate. Chapter 336 of 2023 required MDL to enforce the requirement and specified that the applicable prevailing wage rate is the one solely determined by the Commissioner of Labor and Industry, in a process substantially similar to the process for determining prevailing wage rates on public works contracts.

Chapter 38 of 2022 (The Climate Solutions Now Act) required an investor-owned electric company or gas and electric company to require a contractor or subcontractor that is working on specified projects to meet certain wage and labor requirements for federally funded electric infrastructure work, including paying the area prevailing wage rate. The requirements apply to a project that (1) involves the construction, reconstruction, installation, demolition, restoration, or alteration of any electric infrastructure of the company (and any related traffic control activities) and (2) is funded by federal funds to meet the State's policy goals for the electric distribution system, as specified. The wage and labor requirements only apply to the portion of a project supported by the federal funds.

Chapter 652 of 2023 requires the developer of a community solar energy generating system with a generating capacity of more than one megawatt to ensure that workers are paid at least the prevailing wage rate, unless the system is subject to a project labor agreement, as specified (the requirement applies only to projects that have not received a queue position in the Community Solar Energy Generating Systems Program before January 1, 2025).

Prevailing Wage – Generally

Contractors and subcontractors working on eligible public works projects in Maryland must pay their employees the prevailing wage rate. “Public works” are structures or works that are constructed for public use or benefit or paid for entirely or in part by public money. Recently, prevailing wage requirements have also been applied to utility related work (as detailed above). See the **Appendix 1 – Maryland’s Prevailing Wage Law** for additional information.

Certificate of Public Convenience and Necessity

PSC is the lead agency for licensing the siting, construction, and operation of power plants and related facilities in the State through CPCNs. See the **Appendix 2 – Certificate of Public Convenience and Necessity** for additional information.

Minority Business Enterprise Program

MDOT is designated in State regulations as the State's MBE certification agency. See the **Appendix 3 – Minority Business Enterprise Program** for additional information.

Public Information Act

Maryland's PIA establishes that all persons are entitled to have access to information about the affairs of government and the official acts of public officials and employees. Each governmental unit that maintains public records must identify a representative whom a member of the public may contact to request a public record.

Generally, a custodian of a public record must permit inspection of any public record at any reasonable time but may deny inspection under specified conditions. A custodian must deny inspection of a public record or any part of a public record if (1) the public record is privileged or confidential by law or (2) the inspection would be contrary to a State statute, a federal statute or regulation, the Maryland Rules, or an order of a court of record. PIA also requires denial of inspection for specified personal and confidential records and information, including, for example, personnel and student records. A custodian may charge an applicant the actual cost of the search, preparation, and reproduction of any public record, subject to additional specified requirements depending on the format of the record. Fees may also be waived under specified circumstances.

State Expenditures:

Maryland Department of Labor

MDL advises that it cannot quantify the fiscal or operational effect of the bill at this time, since the number of covered projects is unknown, but expects at least an operational impact. Among other requirements, MDL must develop regulations, provide guidance, receive certifications, ensure compliance with PIA and the bill's record release requirements, enforce compliance with prevailing wage requirements, and distribute information regarding noncompliant contractors/subcontractors to other governmental units.

The Department of Legislative Services (DLS) also cannot determine the number of covered projects at this time. However, there will be multiple covered projects each year, and the amount is likely to increase over time as the renewable energy industry continues to grow. Therefore, MDL requires, at a minimum, an additional assistant Attorney General to handle operational effects and may require additional compliance-related staff or information technology expenditures, depending on the number of covered projects.

Accordingly, general fund expenditures for MDL increase by at least \$86,397 in fiscal 2025, which accounts for the bill’s October 1, 2024 effective date. This estimate reflects the cost of hiring one assistant Attorney General to assist in the promulgation of regulations and ensure compliance under the bill. It includes a salary, fringe benefits, one-time start-up costs, and ongoing operating expenses.

Position	1.0
Salary and Fringe Benefits	\$79,141
Operating Expenses	<u>7,256</u>
Minimum FY 2025 MDL Expenditures	\$86,397

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

MDL expenditures may further increase if it is required to enforce prevailing wage requirements on a substantially higher number of construction projects. The number of projects subject to prevailing wage cannot be reliably estimated because it depends on the number covered projects and the subset of those that are not covered by a project labor agreement.

Other Agencies

The bill is not expected to affect the finances or operations of PSC, the Department of Natural Resources, or the Maryland Department of the Environment relating to the CPCN process.

TTF expenditures increase by \$25,000 to \$50,000 in fiscal 2025 for MDOT to conduct a disparity study (independent of an ongoing statewide disparity study scheduled for completion in September 2024) in accordance with constitutional requirements for the MBE program. After completion of the study, it is assumed that GOSBA can establish a plan for setting MBE goals for covered projects with existing resources.

State Revenues: General fund revenues increase minimally to the extent that MDL seeks to recover any costs related to responding to PIA requests under the bill through fees charged in accordance with PIA.

Small Business Effect: Complying with the bill’s wage and labor standards, recordkeeping, and certification requirements is likely to meaningfully impact small contractors and subcontractors working on covered projects, as well as small business renewable energy developers who may otherwise seek to construct a covered generating station. Conditioning CPCNs and approvals to construct under the CPCN exemption

process may reallocate industry spending from non-MBEs to MBEs, including small businesses.

Additional Comments: DLS notes the following:

- the bill does not specify which test must be used for determining employee misclassification – different tests can sometimes yield different results;
- it is unclear how certified information from contractors and subcontractors would be verified as accurate, as there is no specific requirement on either the general contractor or MDL to do so. Additionally, some of the information – such as certain penalties for violation of any applicable law – would be administratively difficult to verify across multiple levels of government; and
- payroll records may have personal and confidential information that cannot be released under PIA.

Additional Information

Recent Prior Introductions: Similar legislation has been introduced within the last three years. See SB 170 of 2023; and SB 418 and HB 569 of 2022.

Designated Cross File: HB 682 (Delegate Atterbeary) - Economic Matters.

Information Source(s): Maryland Department of Labor; Public Service Commission; Office of People’s Counsel; Governor’s Office of Small, Minority, and Women Business Affairs; Office of the Attorney General; Department of General Services; Board of Public Works; Maryland Department of Transportation; Department of Legislative Services.

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Appendix 1 – Maryland’s Prevailing Wage Law

Contractors and subcontractors working on eligible public works projects in Maryland, including mechanical service contractors that are part of public works projects, must pay their employees the prevailing wage rate. “Public works” are structures or works, including a bridge, building, ditch, road, alley, waterwork, or sewage disposal plant, that are constructed for public use or benefit or paid for entirely or in part by public money.

Eligible public works projects are:

- those carried out by the State;
- any public work for which at least 25% of the money used for construction is State money;
- specified projects in tax increment financing districts if the local governing body approves of the application of prevailing wages; and
- construction projects by investor-owned gas and/or electric companies involving any underground gas or electric infrastructure.

Applicability in Maryland

Generally, any public works contract valued at less than \$250,000 is not required to pay prevailing wages. However, the prevailing wage law was amended in 2022 to include mechanical service contracts valued at more than \$2,500. Mechanical service contracts are defined as contracts for (1) heating, ventilation, and air conditioning, including duct work; (2) refrigeration systems; (3) plumbing systems, as specified; (4) electrical systems, as specified; and (5) elevator systems, as specified.

The State prevailing wage rate also does not apply to (1) any part of a public works contract funded with federal funds for which the contractor must pay the prevailing wage rate determined by the federal government; (2) specified construction projects carried out by public service companies under order of the Public Service Commission (except the underground projects mentioned above); or (3) local House or Senate initiatives that receive State funds in the capital budget.

Prevailing wages are wages paid to at least 50% of workers in a given locality who perform the same or similar work on projects that resemble the proposed public works project. If fewer than 50% of workers in a job category earn the same wage, the prevailing wage is the rate paid to at least 40% of those workers. If fewer than 40% receive the same wage rate, the prevailing wage is calculated using a weighted average of local pay rates. The State Commissioner of Labor and Industry is responsible for determining prevailing wages

for each public works project and job category based on annual wage surveys, in which contractors and subcontractors working on both public works and private construction projects may participate.

The University System of Maryland (USM), Morgan State University (MSU), St. Mary's College of Maryland, and the Maryland Stadium Authority (MSA) are all exempt from the prevailing wage law. However, USM and MSU advise that they voluntarily comply with prevailing wage requirements for contracts that exceed the \$250,000 threshold. MSA largely administers its own prevailing wage program, using wage rates borrowed from the commissioner's annual wage survey.

Enforcement

The commissioner has the authority to enforce contractors' compliance with the prevailing wage law, including issuing a stop work order if the commissioner makes an initial determination that a contractor or subcontractor may have violated the prevailing wage requirements. Contractors found to have violated the prevailing wage law must pay restitution to the employees and liquidated damages to the public body in the amount of \$20 a day for each worker who is paid less than the prevailing wage, or \$250 per worker per day if the employer knew or reasonably should have known of the obligation to pay the prevailing wage. If an employer fails to comply with an order by the commissioner to pay restitution, either the commissioner or an employee may sue the employer to recover the difference between the prevailing wage and paid wage. The court may order the employer to pay double or triple damages if it finds that the employer withheld wages or fringe benefits willfully and knowingly or with deliberate ignorance or reckless disregard for the law.

The Governor must include at least \$385,000 in the budget each year for the Prevailing Wage Unit within the Maryland Department of Labor (MDL).

The number of prevailing wage projects rose dramatically following the Great Recession and has remained high each year since. MDL advises that, during fiscal 2023, its Prevailing Wage Unit monitored 913 projects, consistent with 921 projects in fiscal 2022, but significantly higher than the 496 projects in fiscal 2014. To accommodate the increase in projects, the number of prevailing wage investigators increased in fiscal 2016 from three to six; as of January 2024, there are five investigators in the unit. In fiscal 2024, the legislature provided five new wage and hour investigators to the division, three of which were designated to the Prevailing Wage Unit and are under active recruitment. This brings the total number of field investigator positions to eight.

History of the Prevailing Wage

The federal Davis-Bacon Act, originally enacted in 1931, requires contractors working on federal public works contracts valued at more than \$2,000 to pay their employees the prevailing local wage for their labor class, as determined by the U.S. Secretary of Labor. The general intent of the law, and similar state and local laws, is to stabilize local wage rates by preventing unfair bidding practices and wage competition. Thirty-two states and the District of Columbia currently have prevailing wage laws; since 1979, nine states have repealed their prevailing wage laws.

Maryland adopted a prevailing wage law in 1945 (Chapter 999), but it only applied to road projects in Allegany, Garrett, and Washington counties. In 1969, the statute was amended to include State public works contracts of \$500,000 or more. There have been periodic changes to the law and the definition of “prevailing wage.” In 1983, the law was broadened to include public works projects in which the State funds 50% or more of the total project costs and 75% or more in the case of public schools. Chapter 208 of 2000 reduced the prevailing wage threshold for public schools from 75% to 50% of construction costs, thereby bringing school construction projects in line with prevailing wage requirements for other public works projects. Chapters 281 and 282 of 2014 further lowered the State funding threshold for school construction projects to 25% of total construction costs, thereby requiring the vast majority of public school construction projects in the State to pay the prevailing wage, subject to the \$500,000 contract value threshold. Chapters 57 and 58 of 2021 lowered the State funding threshold for all public works projects (including school construction) to 25% of total construction costs and lowered the contract value threshold for payment of prevailing wages to \$250,000; however, legislative bond initiatives that receive State funds in the capital budget are exempt from the requirement to pay prevailing wages. As noted above, Chapter 51 of 2022 extended the prevailing wage requirement to mechanical service contracts valued at more than \$2,500.

Six Maryland jurisdictions – Allegany, Baltimore, Charles, Montgomery, and Prince George’s counties and Baltimore City – have local prevailing wage laws requiring public works projects in the jurisdiction to pay prevailing wages.

Research on the Effects of Prevailing Wage on Contract Costs

The Department of Legislative Services (DLS) has reviewed research on the effect of prevailing wage laws on the cost of public works contracts and has found inconsistent and/or unreliable results. The primary challenge confronted by all prevailing wage researchers is identifying an appropriate “control group” consisting of projects of similar type, timing, and location that do not pay the prevailing wage. In most jurisdictions that require a prevailing wage, all projects of a specified type and size are subject to it, so there is no natural control group. Some researchers have compared project costs in states or

localities before and after they adopted prevailing wage requirements, but their findings are clouded by the difference in time, during which construction costs changed and other factors were not consistent. Another deficiency in the research is that it almost always relies on project bid prices (*i.e.*, the anticipated cost prior to the beginning of construction) rather than actual final costs. As most construction projects experience change orders or cost overruns affecting their cost, reliance on bid prices negatively affects the validity of the findings. Therefore, research findings related to the effect of the prevailing wage on project costs are inconsistent and often inconclusive. A similar review of research conducted by MDL (at the time, the Department of Labor, Licensing, and Regulation) for the Task Force to Study the Applicability of the Maryland Prevailing Wage Law also concluded that “data limitations create difficulty for researchers on both sides of the issue.”

Local school systems occasionally solicit side-by-side bids with and without prevailing wages to help them decide whether they want to accept the full State match (and, thus, be subject to the prevailing wage) or a lesser State match without being subject to the prevailing wage. Data provided to the Public School Construction Program by Anne Arundel, Carroll, Frederick, Howard, and Washington counties, from 2012 through 2015, shows that the cost differential between bids with and without prevailing wages for 266 individual bids submitted for 26 different school construction and renovation projects averaged 11.7%, with a range from 0% to 49%. As with other research data, these represent bid prices, not actual construction costs. An independent analysis of the Maryland side-by-side bid data concluded that factors other than prevailing wages, including bid timing and the level of competition for the bids, accounted for most of the differences between the prevailing wage and nonprevailing wage bids.

One area of the research in which there is a general consensus, and which is supported by the U.S. Bureau of Labor Statistics, is that labor costs represent between 20% and 30% of construction costs (with materials and site costs making up most of the rest). Therefore, a 10% gap between prevailing wages and market wages could theoretically increase total contract costs by about 2.5%, and a 20% gap in wages could increase total contract costs by about 6%. Given the empirical evidence that prevailing wages tend to be higher than nonprevailing wages and that labor costs are a significant portion of overall project costs, DLS believes that it is reasonable to expect that the prevailing wage requirement adds between 2% and 5% to the cost of a public works project. Given the inconsistency and inconclusiveness of the empirical research, however, actual effects may vary by project, with some projects exhibiting higher cost differences and others experiencing negligible differences.

Appendix 2 – Certificate of Public Convenience and Necessity

General Overview

The Public Service Commission (PSC) is the lead agency for licensing the siting, construction, and operation of power plants and related facilities in the State through Certificates of Public Convenience and Necessity (CPCN). The CPCN process is comprehensive and involves several other State agencies, including the Department of Natural Resources (and its Power Plant Research Program), and the Maryland Department of the Environment. Subject to limited exemptions described below, a person may not begin construction in the State of a generating station, overhead transmission line, or qualified generator lead line unless a CPCN is first obtained from PSC.

State law provides that a “generating station” excludes a facility with up to 2 megawatts of capacity if it meets other specified requirements. Additionally, pursuant to Chapter 460 of 2023, a generating station excludes a combination of two or more co-located or adjacent facilities used for electricity production from solar photovoltaic systems or specified eligible customer-generators that have a maximum cumulative capacity of 14 megawatts (including maximum individual capacities of 2 megawatts) and meet other requirements.

The CPCN process, detailed further below, involves the notification of specified stakeholders, the holding of public hearings, the consideration of recommendations by State and local government entities, and the consideration of the project’s effects on various aspects of the State infrastructure, economy, and environment.

In December 2020, PSC initiated a rulemaking (RM 72) to revise regulations governing CPCNs for generating stations. Updated regulations became effective in September 2021. Among other changes, the regulations contain additional information requirements – to assist in project evaluation – and allow for electronic submission and distribution of application materials.

Notification Process

Upon receipt of a CPCN application, PSC – or the CPCN applicant, if required by PSC – must immediately provide notice to specified recipients, including the executive and governing body of affected local governments, affected members of the General Assembly, and other interested persons. When providing the notice, PSC must also forward the CPCN application to each appropriate unit of State and local government for review, evaluation, and comment and to each member of the General Assembly who requests a copy.

Public Hearing and Comment

PSC must provide an opportunity for public comment and hold a public hearing on a CPCN application in each county and municipality in which any portion of the construction of a generating station, overhead transmission line, or qualified generator lead line is proposed to be located. PSC must hold the hearing jointly with the governing body of the county or municipality and must provide weekly notice during the four weeks prior to the hearing, both in a newspaper and online, and must further coordinate with each local government to identify additional hearing notification options. PSC must ensure presentation and recommendations from each interested State unit and must allow representatives of each State unit to sit during the hearing of all parties. PSC must then allow each State unit 15 days after the conclusion of the hearing to modify the unit's initial recommendations.

Public Service Commission Considerations

PSC must take final action on a CPCN application only after due consideration of (1) recommendations of the governing body of each county or municipality in which any portion of the project is proposed to be located; (2) various aspects of the State infrastructure, economy, and environment; and (3) the effect of climate change on the project. For example, PSC must consider the effect of the project on the stability and reliability of the electric system and, when applicable, air and water pollution. There are additional considerations specifically for a generating station or an overhead transmission line. For example, PSC must consider the impact of a generating station on the quantity of annual and long-term statewide greenhouse gas emissions.

Generating Station Exemptions

There are three general conditions under which a person constructing a generating station may apply to PSC for an exemption from the CPCN requirement:

- the facility is designed to provide onsite generated electricity, the capacity is up to 70 megawatts, and the excess electricity can be sold only on the wholesale market pursuant to a specified agreement with the local electric company;
- at least 10% of the electricity generated is consumed onsite, the capacity is up to 25 megawatts, and the excess electricity is sold on the wholesale market pursuant to a specified agreement with the local electric company; or
- the facility is wind-powered and land-based, the capacity is up to 70 megawatts, and the facility is no closer than a PSC-determined distance from the Patuxent River Naval Air Station, among other requirements.

However, PSC must require a person who is exempted from the CPCN requirement to obtain approval from the commission before the person may construct a generating station as described above. The application must contain specified information that PSC requires, including proof of compliance with all applicable requirements of the independent system operator.

Appendix 3 – 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 Office of the Attorney General (OAG). 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. The Maryland Department of Transportation is the State’s MBE certification agency.

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 2024. 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. MBE prime contractors may count their own work for up to 50% of a contract’s MBE goal and up to 100% of any contract subgoal. Their full participation counts toward the State’s 29% 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. However, Chapters 155 and 156 of 2022 require GOSBA to refer prime contractors that persistently fail to meet MBE participation goals on their contracts to OAG for debarment for up to three years.

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 disparity study completed in 2017 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, 2025; Chapters 137 and 138 of 2023, which reauthorized the program for the tenth time since its inception, also extended the due date for the new disparity study to September 2024 to inform the subsequent reauthorization process. **Exhibit 2** provides MBE participation rates for major Executive Branch agencies based on contract awards made during fiscal 2022 and 2023.

Exhibit 2
Minority Business Enterprise Participation Rates, by Agency
Fiscal 2022 and 2023

<u>Cabinet Agency</u>	<u>% MBE Participation</u>	
	<u>FY 2022</u>	<u>FY 2023</u>
Aging	4.2%	1.2%
Agriculture	4.4%	3.2%
Budget and Management	7.4%	32.9%
Commerce	1.8%	53.8%
Education	23.0%	11.5%
Environment	18.9%	37.9%
Executive Department	6.6%	4.6%
General Services	20.1%	19.5%
Health	5.5%	8.4%
Higher Education Commission	2.1%	3.0%
Housing and Community Development	36.7%	48.5%
Human Services	15.0%	10.5%
Information Technology	1.6%	14.4%
Juvenile Services	6.0%	6.5%
Labor	1.4%	18.6%
Military	0.7%	22.3%
Natural Resources	0.6%	10.2%
Planning	0.3%	0.0%
State Police	13.3%	20.9%
Public Safety and Correctional Services	41.0%	6.2%
Transportation – Aviation Administration	22.6%	22.1%
Transportation – Motor Vehicle Administration	61.8%	20.2%
Transportation – Office of the Secretary	26.9%	48.5%
Transportation – Port Administration	9.7%	13.1%
Transportation – State Highway Administration	20.9%	21.7%
Transportation – Transit Administration	24.8%	12.0%
Transportation – Transportation Authority	18.8%	19.4%
Statewide Total¹	17.3%	17.9%

¹ 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.

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 2024 is \$2,073,412.