SB 210

Department of Legislative Services

Maryland General Assembly
2001 Session

FISCAL NOTE
Revised

Senate Bill 210 (The President, *et al.*) (Administration)

Economic and Environmental Affairs Commerce and Government Matters

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Procurement - Minority Business Participation

This Administration bill alters the goal for the percentage of the total dollar value of procurement contracts with minority business enterprises (MBE), and extends the Minority Business Participation program to July 1, 2006. The bill also requires: (1) a study, due by September 30, 2005, to evaluate the program's compliance with the *Croson* decision, and any race neutral or other methods to address the needs of minority businesses; and (2) two studies due by December 31, 2001, by the Board of Public Works.

The bill is effective July 1, 2001.

Fiscal Summary

State Effect General fund expenditures would increase by a minimum of $900,000 for the required studies, which would be spread out from FY 2002 to FY 2005. Potential increase in general, special, or federal fund expenditures associated with project costs.

Local Effect: None.

Small Business Effect: A small business impact statement was not provided by the Administration for inclusion in this fiscal note. A revised fiscal note will be issued when the Administration's assessment becomes available.

Analysis

Bill Summary: The bill establishes the following goals for procurement units:

- a minimum of 7% of the total dollar value of procurement contracts is directly or indirectly with African-American-owned businesses that are certified as MBEs;

- a minimum of 10% of the total dollar value of procurement contracts is directly or indirectly with women-owned businesses that are certified as MBEs; and

- an overall minimum of 25% of the total dollar value of procurement contracts is directly or indirectly with certified MBEs.

The bill also requires each procurement unit to: (1) implement a program enabling the unit to evaluate each contract to determine the appropriateness of the goal; and (2) meet the maximum feasible portion of the goals by using race neutral measures to facilitate MBE participation in the procurement process.

The bill adds to the current definition of a "minority business enterprise" the requirement that a for-profit entity be managed by, and have the daily operations controlled by, one of the socially and economically disadvantaged individuals that own it.

Socially and economically disadvantaged individuals are defined as citizens or lawfully admitted permanent residents of the U.S. who are: (1) African American; (2) American Indian/Native American; (3) Asian; (4) Hispanic; (5) physically or mentally disabled; (6) women; or (7) otherwise found by the certification agency to be a socially and economically disadvantaged individual. The bill establishes a rebuttable presumption that an individual that is a member of a minority group (the first six categories) is a socially and economically disadvantaged individual.

Socially disadvantaged individual is defined as an individual who has been subject to racial or ethnic prejudice or cultural bias within American society because of his/her membership in a group without regard to the individual's qualities. Also, the social disadvantage must stem from circumstances beyond the control of the individual.

Economically disadvantaged individual is defined as a socially disadvantaged individual whose ability to compete in the free enterprise system has been impaired due to diminished credit and capital opportunities compared to other individuals in the same or similar line of business who are not socially disadvantaged.

The bill provides that an individual with a personal net worth of $750,000 or more is not an economically disadvantaged individual. Personal net worth is defined as the net value of assets after total liabilities are deducted, and includes the individual's share of assets held jointly or as community property with the individual's spouse. Net worth does not include the individual's: (1) ownership interest in a minority business enterprise or the applicant for MBE certification; and (2) equity in his/her primary place of residence.

The bill continues the current law exemption for Maryland Department of Transportation (MDOT) construction contracts for less than $50,000 and the current law provision allowing procurement units to consider the practical severability of construction projects. The bill clarifies the current law requirements for contractors in meeting the goals by specifying that the requirements also apply to certified MBEs.

The bill expands the annual report requirement for procurement units to include reporting to the certification agency (currently MDOT), not just the Office of Minority Affairs. For the report due on September 30, 2005, the Board of Public Works may adopt regulations requiring a unit of State government to require bidders and offerors to submit information necessary for the report. The Board of Public Works may designate that certain information received under the regulations is confidential. However, the certification agency may provide the information to any person under contract with the certification agency to assist in the study.

The bill requires the Board of Public Works to study conditions for certifying nonminority males who own a business located in a qualified distressed county under the Minority Business Enterprise Program. The board is to report to the House Commerce and Government Matters Committee and the Senate Economic and Environmental Affairs Committee by December 1, 2001 on the study and its findings and recommendations.

The bill requires the Board of Public Works to study establishing a process for awarding credits or points in the award of a State procurement contract for achieving MBE participation in a prime contractor's private-sector projects that do not have minority business goals or requirements. The board is to report to the Legislative Policy Committee by December 1, 2001 on the study.

Current Law: In general, 14% of the total value of contracts for a procurement unit is the goal for contracts with certified MBEs, including both the direct (contractor) and indirect (subcontractor) contracts. Exceptions are: (1) real property leases; and (2) MDOT construction contracts for less than $50,000. In addition each procurement unit may consider the practical severability of construction projects.

An MBE is defined as a nonprofit entity organized to promote the interests of physically or mentally disabled individuals, or organized to engage in commercial transactions, and a for-profit entity that is at least 51% owned and controlled by one or more individuals that are members of a socially and economically disadvantaged group including: (1) African Americans; (2) American Indians; (3) Asians; (4) Hispanics; (5) women; and (6) physically or mentally disabled individuals.

The 14% goal can be achieved by any combination of contracts with entities in any of the six for-profit categories or nonprofits. To meet the goal contractors must: (1) identify work areas for subcontracting; (2) solicit minority business enterprises through written notice or personal contact; (3) assist minority businesses to meet bonding requirements or a waiver of bonding requirements; and (4) attend pre-bid or other meetings scheduled by the procurement unit. If a bid is accepted, the contractor must submit a list of minority businesses that the contractor has negotiated with that includes price quotes from minority and nonminority firms.

Within 90 days of the end of each fiscal year, each procurement unit must report to the Governor's Office of Minority Affairs. The report must include for the previous fiscal year: (1) the total number and value of contracts with minority business enterprises by specific category of minority business enterprise; and (2) by specific category of minority business enterprise, the percentage of the total number and value of procurement contracts that are with minority business enterprises.

The Minority Business Participation Subtitle of procurement law sunsets on July 1, 2002. A report was required by January 10, 2001 on compliance with the *Croson* decision, and the use of race neutral and other measures to meet the needs of minority businesses.

Background: The State's MBE program began in 1978. 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 response to the *Croson* decision, the Board of Public Works (BPW) commissioned a Minority Business Utilization Study to support Maryland's MBE program. In 1990 the General Assembly altered the State's MBE program by removing Alaskan Natives and Pacific Islanders from the list of socially and economically disadvantaged individuals and authorizing the BPW to designate a single agency for the certification of MBEs. The Maryland Department of Transportation was subsequently charged with this responsibility. The 1990 legislation also authorized a study to monitor the MBE program's compliance with the *Croson* and subsequent decisions, and included a June 30, 1995 sunset date.

In accordance with the 1990 law a study was conducted prior to the 1995 session. In response to the study, the General Assembly amended the program to establish a 14% MBE participation goal for all units in State government subject to the State's procurement law. There was an exception for MDOT contracts of less than $100,000. The program enacted in 1995 was scheduled to sunset on July 1, 2000. The 1995 law required that an additional study of the MBE program be completed by September 30, 1999; in September 1999, however, MDOT requested a 45-day extension of the report's due date. However, questions were raised about the methodology used in the study before it was completed, and absent a completed study, there was no basis upon which to project recommended goals for the MBE program.

As a result, Chapters 495 and 496 of the Acts of 2000 made the following changes: (1) extended the sunset date of the MBE program to July 1, 2002; (2) required submission of the executive summary of the third study to the Legislative Policy Committee by December 1, 2000; (3) required submission of the final report by January 10, 2001; and (4) reduced the level for the MDOT exemption from $100,000 to $50,000.

National Economic Research Associates (NERA) conducted the study for the report submitted on January 8, 2001. One of the NERA's findings was that MBEs are underutilized. In other words, on a percentage basis, MBEs are utilized less than their availability. In general, availability is a measure of the number or percentage of businesses that are MBEs, and utilization is a measure of the number or percentage of contract awards (value) to MBEs. Although the utilization and availability percentages varied by type of procurement, the study found the overall percentages as shown in **Exhibit 1**:

Exhibit 1
Availability and Utilization Percentages by MBE Classification

Classification	Availability %	Utilization %
African American	7.90	4.49
Hispanic	2.13	1.79
Asian	4.27	3.07
Native American	.66	.07
White Female	12.74	7.66
All MBEs	26.90	17.08

Source: Utilization of Minority Business Enterprises by the State of Maryland, National Economic Research Associates, January 8, 2001

Although NERA, in its report, did not make a recommendation for specific goals for the MBE program, the overall availability percentages found in their research are reflected in this bill.

The total dollar value of MBE contracts in fiscal 1999 was $686.8 million. **Exhibit 2** following shows the total dollar value of MBE contracts by MBE classification for fiscal 1999.

Exhibit 2
MBE Dollars by MBE Classification
Fiscal 1999
($ in millions)

MBE Classification	MBE Dollars
African American	$187.6
Asian	74.6
Disabled	13.7
Hispanic	31.8
Native American	3.1
Women	134.7
Certified Shelter Workshop	198.0
Nonprofits	43.2
Total	$686.8

Source: Annual Report of the Office of Minority Affairs

State Fiscal Effect: Most governmental units contacted (Governor's Office, Attorney General, Department of General Services, Department of Budget and Management, Department of Transportation, and the Division of Correction) reported that the bill would have no fiscal impact.

The Department of Health and Mental Hygiene reported that the monitoring of contracts to meet subcontracting goals for specific minorities and the subsequent adjusting of goals will require additional staff time, which could be handled with existing resources.

The University System of Maryland (USM) reported that there would be a minimal increase in expenditures for additional record keeping. USM also expressed concern that the change to higher goal levels may result in some institutions not meeting the new goals.

The Board of Public Works reported that the new participation requirements might result in increased claims for noncompliance requiring more investigations by the board, which is charged with investigating violations of State procurement law. According to the board, an increase in noncompliance complaints and investigations may result in a need for additional resources. The board also advises that because of the December 1, 2001 due date for the reports the board will have to hire a contractor at an estimated cost of $100,000.

The Department of Legislative Services advises that the report due September 30, 2005 could cost approximately $800,000 (general funds). The three previous required studies were done by contractors. NERA's report was done under contract with the State at a cost of $793,690. Because the bill permits the State to require bidders to provide information, the study may require less work by the contractor, reducing the cost.

For a few types of procurement, the availability percentages for African American and women MBEs in the NERA study are less than the goals set in the bill. In addition, the availability of MBEs for some procurement categories may vary by region of the State. To the extent not enough MBEs are available, a procurement unit may not be able to meet the goals or will have to "bid" for the available MBEs. This could increase expenditures due to the increase in MBE associated project costs. If this encourages MBEs to enter the procurement process, it may be easier for procurement units to reach the goals; and project costs may decline due to the increased MBE competition. An increase in project costs could be in general, special, or federal funds, depending on the procurement unit and the nature of the contract.

There will be a minimal increase in general fund expenditures for some procurement units for administrative costs associated with record keeping and monitoring for the new MBE goals.

Additional Information

Prior Introductions: None.

Cross File: HB 306 (The Speaker, *et al.*) – Commerce and Government Matters.

Information Source(s): Attorney General, Board of Public Works, Department of Budget and Management, Department of General Services, Governor's Office, Department of Health and Mental Hygiene, Department of Public Safety and Correctional Services (Division of Correction), Department of Transportation, University System of Maryland, Department of Legislative Services

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