

Department of Legislative Services  
Maryland General Assembly  
2003 Session

**FISCAL AND POLICY NOTE**

Senate Bill 82 (Senator Mooney)  
Education, Health, and Environmental Affairs

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**Procurement - Minority Business Opportunity - Hispanic-Owned Businesses**

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This bill establishes a 2% minimum as the goal for the total value of procurement contracts to be awarded to certified Hispanic-owned businesses.

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**Fiscal Summary**

**State Effect:** Administrative expenditures for procurements would not be directly affected. Potential increase in general, special, or federal fund expenditures associated with project costs.

**Local Effect:** Potential minimal due to local jurisdictions' requirement to meet State minority business enterprise (MBE) participation rates in public school construction projects financed through the State public school construction program.

**Small Business Effect:** Meaningful. According to the 1997 Economic Census by the U.S. Department of the Census, in Maryland 2.8% of all firms and 1.8% of all firms with employees are Hispanic-owned. The Survey of U.S. Businesses for 1998 showed that 92.9% of all firms with employees in Maryland had 50 or fewer employees. The establishment of a procurement goal could provide a significant increase in opportunities for Hispanic-owned small businesses.

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**Analysis**

**Current Law:** Chapter 339 of 2001 established the current overall goal of 25% for the total value of contracts being awarded to certified minority business enterprises and separate goals of 7% for African-American businesses and 10% for women-owned businesses.

Each procurement unit must: (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.

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.

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.

An individual with a personal net worth of more than \$750,000 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.

Procurement units must annually report to the certification agency (currently the Maryland Department of Transportation) and the Office of Minority Affairs. The Board of Public Works (BPW) may adopt regulations requiring a unit of State government to require bidders and offerors to submit information necessary for a study of the program. Data collected in this manner will be the basis for a report due to BPW on September 30, 2005. BPW may designate certain information received under the regulations as confidential. However, the certification agency may provide the information to any person under contract with the certification agency to assist in the study.

The Maryland Department of Transportation (MDOT) construction contracts less than \$50,000 are exempt from participation in the MBE program and procurement units may consider the practical severability of construction projects.

**Background:** The 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, 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 BPW to designate a single agency for the certification of MBEs. MDOT 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 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 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**

<u>Classification</u>	<u>Availability %</u>	<u>Utilization %</u>
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 the current goals established by Chapter 339 of 2001.

**State Fiscal Effect:** All the State agencies responding to a request for information advised that the bill would have no fiscal impact on their administrative expenditures for procurements.

The Department of Budget and Management advises that because the establishment of a new goal increases the potential number of required subcontractors for a given contract, any increased costs for the contractor would be passed on to the State. This would result in a small increase in State contract costs.

MDOT advises that the establishment of a new goal would result in an increase in the current procurement contracting development, processing, and award time frames. MDOT further advises that the 2001 NERA study does not support an individual goal of 2% for Hispanic-owned businesses, and that adding the goal could open up the study to further scrutiny and jeopardize the legality of the MBE program.

The Department of Legislative Services advises that for a few types of procurement, the availability percentages for Hispanic 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.

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### **Additional Information**

**Prior Introductions:** In 2002, SB 133, a similar bill, received an unfavorable report from the Education, Health, and Environmental Affairs Committee. Also in 2002, HB 1394, a similar bill, was assigned to the House Rules and Executive Nominations Committee. No further action was taken.

**Cross File:** None.

**Information Source(s):** Department of General Services, Department of Health and Mental Hygiene, University System of Maryland, Department of Transportation, Office of Minority Affairs, Department of Budget and Management, Department of Public Safety and Correctional Services, Department of Legislative Services

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