

Department of Legislative Services
Maryland General Assembly
2003 Session

FISCAL AND POLICY NOTE
Revised

Senate Bill 715

(Senator Conway)

Education, Health, and Environmental Affairs

Health and Government Operations

Minority Business Enterprises - State Contracts

This bill requires the Board of Public Works to maintain records of waiver applications from the State's Minority Business Enterprise (MBE) Program. The board must submit a copy of the records to the General Assembly by October 1 of each year. The bill also requires several agencies that are exempt from State procurement law to comply with the State's MBE requirements.

Fiscal Summary

State Effect: Any expenditure increase in FY 2004 to implement the MBE program in agencies currently exempt from the program could be handled with existing resources. Additional expenditures (all funds) may be required in the out-years due to administration of the MBE program and depending on the volume of procurement each agency directly controls.

Local Effect: None.

Small Business Effect: Minimal.

Analysis

Bill Summary: All State agencies would be required to follow MBE participation laws except the Blind Industries and Services of Maryland and the University of Maryland for University College Overseas Programs. State agencies would also not be required to follow MBE participation laws for procurements from another unit of State government or multi-county or multi-State agencies.

Current Law: Chapter 339 of 2001 established the current overall goal of 25% for the total value of contracts being awarded to certified MBEs and separate goals of 7% for African-American businesses and 10% for women-owned businesses. The board is required to adopt regulations relating to any circumstances under which a unit may waive obligations of the contractor relating to MBE participation.

Units are required to obtain waivers from the Governor's Office of Minority Affairs only if a successful bidder or offeror is unable to meet the MBE goal in an individual solicitation. State law requires that procurement units try to achieve the annual MBE goals, but there are no penalties for units failing to meet annual goals.

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.

"Minority business enterprise" means any legal entity, except a joint venture, that is: (1) organized to engage in commercial transactions; (2) at least 51% owned and controlled by one or more individuals who are socially and economically disadvantaged; and (3) 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.

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 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

deduction of total liabilities, 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 an MBE or the applicant for MBE certification; and (2) equity in his/her primary place of residence.

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, 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.

The U.S. Supreme Court has indicated that affirmative action programs must be narrowly tailored and include goals that are flexible and aspirational, not mandatory.

State Fiscal Effect: Many procurement functions of the State are handled by control agencies. For instance, smaller State agencies do not perform their own contracting for information technology or building leases. Agencies that are currently exempt from MBE participation should be able to implement any required changes to their procurement policies with existing resources and administrative assistance from control agencies. State agencies that are required to implement the MBE program may require training which is provided by the Board of Public Works. Any expenditure increases can be absorbed within existing resources for fiscal 2004. Additional out-year expenditures may be required.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Department of General Services, Board of Public Works, University System of Maryland, Department of Transportation, Department of Budget and Management, Department of Legislative Services

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