

Department of Legislative Services
 Maryland General Assembly
 2003 Session

FISCAL AND POLICY NOTE
Revised

Senate Bill 526

(Senator Jones, *et al.*)

Finance and Education, Health, and Environmental Affairs

Economic Matters

**Economic Development Financial Assistance - Minority Business Enterprise
 Procurement Goals**

This bill specifies that certain procurements by local jurisdictions or private entities using financial assistance from the Economic Development Opportunities Program Fund (Sunny Day Fund) and the Maryland Economic Development Assistance Authority and Fund (MEDAAF) must attempt to meet the goals of the State Minority Business Enterprise (MBE) Program.

The bill is effective January 1, 2004.

Fiscal Summary

State Effect: FY 2004 implementation costs could be handled with existing resources. General fund expenditures in the Department of Business and Economic Development (DBED) would increase by \$69,700 in FY 2005 due to monitoring, auditing, and verification of MBE participation rates.

(in dollars)	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Revenues	\$0	\$0	\$0	\$0	\$0
GF Expenditure	0	69,700	67,600	71,300	75,200
Net Effect	\$0	(\$69,700)	(\$67,600)	(\$71,300)	(\$75,200)

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

Local Effect: Significant effect on local jurisdictions that receive financial assistance from the Sunny Day Fund and MEDAAF.

Small Business Effect: Meaningful effect on all small businesses that receive financial assistance from the Sunny Day Fund and MEDAAF, and on MBEs that could provide goods and services to local jurisdictions or private entities that receive financial assistance from the Sunny Day Fund and MEDAAF.

Analysis

Bill Summary: DBED would be required to determine if local jurisdiction MBE programs are acceptable. This bill does not define criteria that would identify an acceptable program. If a program is acceptable to DBED, the department must require the local jurisdiction to apply the requirements of its MBE program to any financial assistance received from the Sunny Day Fund and MEDAAF.

If the local jurisdiction does not have an MBE program in place, it must agree to include a provision in the agreement providing financial assistance from the Sunny Day Fund and MEDAAF that would encourage procurement of goods and services from minority business enterprises. DBED is required to take into account the intended use of the proceeds of the financial assistance and the feasibility of obtaining the required goods or services from minority business enterprises.

Recipients of financial assistance may be required by the department to submit a list or an updated list of the MBEs from which goods or services were procured and the nature and dollar amount of those goods and services.

An MBE is defined as an individual who has a social or economic impediment that is beyond the personal control of the individual, such as lack of financial capacity, geographical or regional economic distress, or lack of formal education, and does not limit the ability of the individual to provide the required goods or services. MBEs also mean a business entity that is at least 51% owned and controlled by individuals who meet the standards listed above.

Current Law: Chapter 339 of 2001 established the current overall goal for State agencies 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 is 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 an MBE 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.

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. The Maryland Department of Transportation (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.

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: This bill requires DBED to monitor MBE programs of all political subdivisions, their agencies or instrumentalities, as the programs relate to the procurement of goods and services from financial assistance from the Sunny Day Fund. DBED would have to do the same for local government MBE programs for assistance from the MEDAAF. There are 23 counties and 157 municipalities (including Baltimore City) in Maryland for a total of 180 local governments. To comply with the bill, DBED would have to collect information regarding current MBE programs and any future changes to those programs. DBED indicates that the department's Equal Opportunity Employment Office (EEO) has already begun an informal cataloguing of MBE programs and could begin implementation of this bill with existing resources.

Contracts for financial assistance would have to be altered on a case-by-case basis. DBED counsel indicates that the additional language required for each award could also be handled with existing resources in fiscal 2004.

In addition, the department would have to collect data from some recipients of financial assistance from the Sunny Day Fund and MEDAAF. In fiscal 2002, 1 transaction totaling \$1.3 million was approved from the Sunny Day Fund and 73 transactions totaling \$34.5 million were approved from MEDAAF. The data would need to be collected when awards closed.

DBED indicates that it can stretch fiscal 2004 existing resources from the January 1, 2004 effective date through June 30, 2004 to begin implementation of this bill. The department does indicate a need for additional administrative support for the continued operation of the program. Fiscal 2005 general fund administrative expenditures would increase by \$69,657. This cost reflects the hiring of one-half administrative officer III to monitor and analyze changes to local MBE programs and one-third legal counsel to monitor and maintain legal agreements with recipients of financial assistance. It includes salaries, fringe benefits, one-time start-up costs and ongoing operating expenses.

Salaries and Fringe Benefits	\$59,033
Other Operating Expenses	<u>10,624</u>
Total FY 2005 State Expenditures	\$69,657

Future year expenditures reflect: (1) full salaries with 4.5% annual increases and 3% employee turnover; and (2) 1% annual increases in ongoing operating expenses.

Funding sources specifically mentioned in the bill were utilized in the following manner in fiscal 2002:

<i>MEDAAF</i>		<u>Approved</u>		<u>Closed or Funded</u>
MEDAAF 1 Significant Strategic Economic Development Opportunities	3	\$ 9,500,000	5	\$13,200,000
MEDAAF 2 Local Economic Development Opportunity	19	\$12,536,000	14	\$4,381,000
MEDAAF 3 Direct Assistance to Local Jurisdictions or MEDCO	30	\$8,375,235	24	\$4,370,491
MEDAAF 4 Regional or Local Revolving Loan Fund	6	\$1,028,906	5	\$769,303
MEDAAF 5 Special Purposes Grant and Loans	15	\$3,067,500	18	\$3,678,925
TOTAL	73	\$34,507,641	66	\$26,399,719

Sunny Day – one transaction for \$1.25 million

Local Fiscal Effect: All local jurisdictions that receive financial assistance from the Sunny Day Fund and MEDAAF would be required to maintain a list of certified MBEs utilized in the procurement of goods and services.

Small Business Effect: Increase in business opportunities for MBEs as local jurisdictions and private entities try to achieve MBE participation goals included in financial assistance agreements.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Governor’s Office, Department of Business and Economic Development, Department of Legislative Services

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