

**Department of Legislative Services**  
Maryland General Assembly  
2004 Session

**FISCAL AND POLICY NOTE**  
**Revised**

House Bill 1488 (The Speaker and the Minority Leader)  
(By Request – Administration)

Health and Government Operations

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**Office of Minority Affairs - Special Secretary - Minority Business Participation in Procurement Contracts**

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This Administration bill establishes the Office of the Special Secretary for Minority Affairs. The duties of the special secretary are identical to the current duties of the Director of the Office of Minority Affairs.

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**Fiscal Summary**

**State Effect:** The provisions of this bill could be handled with existing resources. To the extent that contractors do not bid on State contracts because of minority business enterprise (MBE) subcontractor participation requirements, State contract costs could increase minimally if potential low bidders do not participate in State procurements.

**Local Effect:** Potential significant impact on local school construction procurements that use State funds. **This bill may impose a mandate on a unit of local government.**

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

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**Analysis**

**Bill Summary:** The bill also requires agencies to include a statement of the expected level of minority business participation in the specifications of invitations for bids and requests for proposals. Bids and offers that do not provide the expected level of participation in bids and proposals are considered nonresponsive. Bidders and offerors

are required to submit proof of MBE participation at the time of submission of bids or offers. The Board of Public Works (BPW) is required to adopt regulations that an agency must include proof of a certified MBE commitment at the time of submissions of bids or proposals.

**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. 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 (MDOT)) and the Office of Minority Affairs. 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.

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.

The sunset for the MBE program is June 30, 2006.

**Background:** The Governor’s Commission on Minority Business Reform has reviewed the State’s MBE program and issued its final report. The commission held four public hearings and received written and oral testimonies from over 200 people. The commission focused its review of the MBE program on (1) strengthening the Office of Minority Affairs to carry out its mandate including resources for enforcement of State law, training, and evaluation of the program; (2) assisting business development by creating a one-stop shop with which small and minority business could interact with the State, enforcing existing law, changing the procurement system, and providing more support for business development; (3) improving MBE access to capital; and (4) providing incentives for certification as an MBE.

The commission concluded that the greatest barriers to the current MBE program are a lack of accountability, uniformity, and consistency in executing the program. The commission’s report stressed that training of procurement professionals is a critical component of strengthening the program.

National Economic Research Associates (NERA) found in 2001 that MBEs are underutilized. 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 percentage varied by type of procurement, **Exhibit 1** shows the overall percentage found in the NERA study.

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**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

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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.

**Local Fiscal Effect:** Local jurisdictions that use State funds for school construction projects would be required to include expected levels of MBE participation in IFBs and RFPs for school construction contracts. Local procurement offices could require additional personnel to develop MBE profiles for their jurisdictions and monitor compliance with IFB and RFP specifications.

**Small Business Effect:** The Department of Legislative Services advises that small MBEs may improve their ability to participate in State contracts with both (1) the added visibility of the program due to the elevation of the Office of Minority Affairs; and (2) the requirement that bidders and/or offerors include commitments from MBEs in submissions of bids and/or proposals.

**Additional Comments:** The bill refers to a responsible bid. Under State procurement law, a bidder or offeror (the individual or company) may be considered “responsible” or nonresponsible.” A bid or proposal may be considered “responsive” or “nonresponsive.”

The Department of Legislative Services advises that the provision in the bill that makes bids and offers without the expected level of MBE participation specified in the IFB or RFP nonresponsive are inconsistent with the State’s current MBE program and with the federal Disadvantaged Business Enterprise (DBE) program. The State’s MBE program is designed as and must be a set of aspirational goals, not a quota system. 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. The Maryland MBE program is a part of and modeled after, the DBE program. Overall goals in the U.S. Department of Transportation (USDOT) program represent the level of DBE participation a recipient would expect absent discrimination, and must be based on evidence of the availability of ready, willing, and able DBEs in the local market area. DBE contract goals are not required on every contract and state programs that are recipients of USDOT funds must meet as much as possible of their overall goals by using race-neutral measures. State programs should only use race-conscious measures, like contract goals, to make up the difference. The DBE program prohibits quotas. The use of set-asides is strictly limited to circumstances dealing with especially egregious cases of discrimination where no other mechanism has worked to remedy the situation.

## Additional Information

**Prior Introductions:** None.

**Cross File:** SB 903 (The President) (By Request – Administration) – Education, Health, and Environmental Affairs.

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

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