

Department of Legislative Services
Maryland General Assembly
2005 Session

FISCAL AND POLICY NOTE

Senate Bill 976 (Senator Jones, *et al.*)
Education, Health, and Environmental Affairs

Procurement - Minority Business Enterprise and Small Business Reserve
Programs

This bill extends the termination dates for statutory provisions relating to minority business participation and the Small Business Reserve (SBR) program. The Minority Business Enterprise (MBE) program sunset date is extended from July 1, 2006 to July 1, 2012. The SBR program sunset extends from September 30, 2007 to June 30, 2012.

Fiscal Summary

State Effect: Expenditures for the MBE program and the SBR program will continue beyond FY 2007 and 2008, respectively. The proposed FY 2006 State budget includes \$2.9 million for the MBE program and \$57,000 for the SBR program.

Local Effect: None.

Small Business Effect: Meaningful.

Analysis

Current Law:

Small Business Reserve Program

The SBR program, established in Chapter 75 of 2004, is slated to terminate September 30, 2007. The program requires that specified units of State government are required to award at least 10% of the units' total dollar value of goods, supplies, services,

maintenance, construction, construction-related, architectural service, and engineering service contracts to small businesses.

The SBR program specifies that any procurement of goods, supplies, services, maintenance, construction, construction-related, architectural service, and engineering service contracts is eligible for inclusion in the small business reserve. Procurement officers of designated procurement units are required to award a contract to a small business if a small business submits a responsive bid and: (1) is the lowest bid price; (2) if the invitation for bids so provides, is the lowest evaluated bid price; or (3) is the bid or proposal most favorable to the State within the small business reserve.

In addition to the SBR program via Chapter 75 of 2004, State procurement law already had a small business price preference. The program requires the Secretaries of General Services and Transportation and the Chancellor of the University System of Maryland to establish a price preference, not to exceed 5%, for small businesses. Contracts designated for small business procurement must be awarded to the small business that: (1) is a responsible bidder; and (2) submits the lowest responsive bid from a small business if the difference between that bid and the lowest responsive non-small business bid is less than the established price preference. The reporting requirements in this bill exist in current law for the Secretaries of General Services and Transportation and the Chancellor.

Minority Business Enterprise Program

The MBE program is administered by the Maryland Department of Transportation. MBEs are any legal entity, except joint ventures, that are: (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.

Background: The MBE program aims for 25% of all State procurement dollars to go to certified MBEs, including a goal of 7% to African-American owned businesses and 10% to women-owned businesses. The Governor's Office for Minority Affairs has published statistics pertaining to MBE participation levels in State procurement spending. **Exhibit 1** shows participation levels for fiscal 1998 through 2003, the most recent data available.

Exhibit 1
MBE Participation Levels in Procurement Spending

<u>FY</u>	<u>Total State Procurement Spending</u>	<u>Total Minority Business Participation</u>	<u>Total Minority Business Participation</u>	<u>African-American-owned Business Participation</u>	<u>Women-owned Business Participation</u>
1998	\$2,813,739,071	\$570,556,854	20.28%	3.60%	3.51%
1999	3,398,761,724	686,848,909	20.21%	5.52%	3.96%
2000	3,131,160,829	461,610,516	14.74%	Not Available	Not Available
2001	4,350,069,637	833,072,071	19.15%	Not Available	Not Available
2002	4,263,166,146	704,186,039	16.52%	4.50%	5.20%
2003	3,690,826,714	576,863,620	15.63%	5.36%	4.95%

Source: Governor's Office of Minority Affairs, Department of Legislative Services

In the landmark U. S. Supreme Court case, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), the court found that state and local minority business contract set-aside programs are permissible devices, but must be evaluated under the strict-scrutiny standard. The analysis required a program to be narrowly tailored to meet a compelling governmental interest. The court reiterated the same strict-scrutiny standard in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) for federal contract set-asides based on race.

The Tenth Circuit Court of Appeals identified five factors to consider in determining whether minority preference provisions are sufficiently "narrowly tailored." They are: (1) the availability of race neutral alternative remedies; (2) *Limits on the duration of the challenged preference provision* (emphasis added); (3) flexibility of the preference provision; (4) numerical proportionality; and (5) over- or under-inclusiveness. *Adarand VII*, 228 F.3d 1147 (10th Cir. 2000).

State Fiscal Effect: The fiscal 2006 State budget allowance includes \$1,069,888 for the Governor's Office of Minority Affairs. The Office of Minority Affairs is designed to measure the State's compliance with the MBE program goals. The fiscal 2006 State budget allowance also includes \$1,789,414 in the Maryland Department of Transportation for the administration of the MBE program, which includes the certification of MBEs. Certification of small businesses is handled by the Department of General Services and has annual operating costs of approximately \$57,000. These costs for the two programs will increase before the 2006 and 2007 sunset dates for the MBE

and SBR programs, respectively. With the enactment of the bill, these program costs will continue.

Procurement costs could increase with the suspension of the MBE and SBR programs. These programs encourage greater participation and competition for State contracts and depress bid prices. The end of MBE efforts, without a remedy to nascent discrimination, whether it be private or public, could result in a detrimental impact on MBEs and decreased competition, and thus – increased procurement costs.

Small Business Effect: A 2001 study by National Economic Research Associates on the State MBE participation, found 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 2**.

Exhibit 2
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

A continuation of the MBE and SBR program will continue to reinforce a goal of increasing these groups' participation in State procurements. All small businesses, and more specifically – MBEs, will benefit from efforts to facilitate MBE participation in State contracting.

Additional Information

Prior Introductions: None.

Cross File: HB 1432 (Delegate Cane, *et al.*) – Health and Government Operations.

Information Source(s): Department of General Services, Governor's Office, Maryland Department of Transportation, Department of Budget and Management, Department of Legislative Services

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