SB 979

Department of Legislative Services
Maryland General Assembly
2005 Session

FISCAL AND POLICY NOTE

Senate Bill 979 (Senator Jones, *et al.*)
Education, Health, and Environmental Affairs

Education - Providers of Supplemental Educational Services - Applicability of Minority Business Participation Programs

---

This bill provides that Supplemental Educational Services (SES) providers are subject to existing State minority business enterprise (MBE) participation goals. If a county has a more stringent MBE participation goal, that goal shall take the place of the State 25% goal. The bill also requires the Maryland State Department of Education (MSDE) to develop and maintain a list of SES providers who meet MBE program goals. MSDE is required to review the list annually to determine continued compliance by SES providers. MSDE must report certain business and employment data on each SES provider to the General Assembly by December 31 each year.

Fiscal Summary

State Effect: General fund expenditures could increase by $84,100 beginning in FY 2006. Future year expenditures reflect annualization and inflation. Revenues would not be affected.

(in dollars)	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Revenues	$0	$0	$0	$0	$0
GF Expenditure	84,100	102,000	108,100	114,700	121,900
Net Effect	($84,100)	($102,000)	($108,100)	($114,700)	($121,900)

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

Local Effect: Local school system expenditures could increase to reflect contract price increases for supplemental educational services.

Small Business Effect: Potential meaningful.

Analysis

Current Law:

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.

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.

Supplemental Educational Service Providers

The federal No Child Left Behind Act (NCLB), signed into law in January 2002, requires all public school students to be tested in reading and mathematics annually from third through eighth grade and once again during high school. Student performance on State assessments must be disaggregated into eight separate subgroups, all of which must make "adequate yearly progress" (AYP) towards proficiency in the subjects. NCLB requires schools that fall short of achieving AYP targets to take specific steps to bring up the level of student performance. A school where students do not make AYP for two consecutive years must offer students the option of transferring to another public school in the district. After a third of year of not meeting AYP goals, a school must offer supplemental education services to the low-income students in the school. Continued inability to make AYP leads to more severe corrective actions or, eventually, school restructuring.

Supplemental educational service providers typically provide tutoring services. MSDE certifies providers, and local school systems are allowed to use a portion of their federal education funding to pay for the services.

Background:

MBE Participation

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

FY	Total State Procurement Spending	Total Minority Business Participation	Total Minority Business Participation	African American-owned Business Participation	Women-owned Business Participation
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. Pena*, 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 (10^{th} Cir. 2000).

Supplemental Educational Service Providers

Estimates indicate that there is potentially over $30 million available to SES providers through NCLB. MSDE has certified 37 providers since NCLB became effective, and it is expected that at least 20 additional providers will be added annually. In fiscal 2005, approximately 114 schools serving approximately 48,000 students were identified as not making AYP under NCLB. MSDE procedures provide that MBEs are encouraged to apply to become SES providers.

State Fiscal Effect: Pursuant to this legislation, MSDE must ensure that each SES provider that a county board of education contracts with complies with the standards and requirements of the MBE program. This means that the SES provider must attempt to apportion 25% its contracting dollars to MBEs. MSDE is then required to maintain a list of private-sector SES providers that meet the appropriate MBE goals. In order to track the contracting activities of these SES providers, MSDE will need a fiscal compliance auditor, an office secretary, and a temporary employee.

General fund expenditures could increase by $84,068 in fiscal 2006, which accounts for the bill's October 1, 2005 effective date. This estimate reflects the cost of hiring a fiscal compliance auditor, an office secretary, and a temporary employee in MSDE to monitor SES provider contracting as well as maintain a list of MBE-compliant SES providers. It includes salaries, fringe benefits, one-time start-up costs, and ongoing operating expenses.

Salaries and Fringe Benefits	$67,510
Other Operating Expenses	16,558
Total FY 2006 State Expenditures	**$84,068**

Future year expenditures reflect: (1) full salaries with 4.6% annual increases and 3% employee turnover; and (2) 1% annual increases in ongoing operating expenses.

Local Fiscal Effect: In that SES providers must meet MBE participation goals under the bill, their costs will increase. These expenses will be passed on to local school systems in the contract price for SES services. Should the local systems' costs increase such that they meet their federal NCLB assistance limit, the number of SES contracts may be limited.

Small Business Effect: SES providers will be required to attempt to meet previously inapplicable MBE procurement goals. These providers will need to become aware of which other businesses are MBEs, where to advertise, and how to otherwise meet these requirements applicable formerly to only State units of government.

Additional Information

Prior Introductions: None.

Cross File: HB 1433 (Delegate Cane, *et al.*) – Ways and Means.

Information Source(s): Department of Legislative Services

Fiscal Note History: First Reader - March 21, 2005
ncs/hlb

Analysis by: Martin L. Levine

Direct Inquiries to:
(410) 946-5510
(301) 970-5510