

Department of Legislative Services
Maryland General Assembly
2007 Session

FISCAL AND POLICY NOTE

Senate Bill 862 (Senator Pugh)
 Education, Health, and Environmental Affairs

Procurement - Minority Business Enterprise Program - Policy Statements

This bill requires that State agencies award contracts only to bidders or offerors who make good faith efforts to meet the goals of the Minority Business Enterprise (MBE) program. It also charges the Maryland Department of Transportation (MDOT) with monitoring and certifying that agencies comply with the bill's provisions.

The bill takes effect July 1, 2007.

Fiscal Summary

State Effect: Special fund expenditures by MDOT increase by \$75,200 in FY 2008 to hire one compliance officer. General fund expenditures by the Board of Public Works (BPW) increase by \$150,000 in FY 2009 only to retain a nonprofit organization to review school construction procurements by local school systems. Out-year increases reflect annualization and inflation. Procurement costs may increase to the extent that the administrative requirements of the bill place financial burdens on contractors, who pass those costs to the State.

(in dollars)	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Revenues	\$0	\$0	\$0	\$0	\$0
GF Expenditure	75,200	224,400	78,200	82,200	86,400
Net Effect	(\$75,200)	(\$224,400)	(\$78,200)	(\$82,200)	(\$86,400)

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

Local Effect: None.

Small Business Effect: Meaningful. Small businesses that participate in State procurement will incur significant costs to meet the bill's administrative requirements.

Analysis

Bill Summary: A bidder or offeror may be awarded a contract only if it documents that it has secured sufficient participation by a minority business enterprise or socially or economically disadvantaged individual (“MBE”) to meet the goals of the MBE program, or has made a good faith effort to do so. To document that it has made a good faith effort, a bidder or offeror must provide:

- a list of MBEs it contacted;
- a description of the information provided to MBEs regarding plans, specifications, and time schedule for the procurement;
- a detailed statement why the quotation submitted by an MBE was deemed unacceptable; and
- a list of MBEs that were not available to perform the work, and an affidavit from each one attesting to its unavailability.

The bill specifies criteria that State procurement officers must use to assess whether bidders or offerors have made good faith efforts to secure sufficient MBE participation.

For any contract that is longer than two years and has had a price modification of more than 35% of the original cost, the procuring unit must:

- report and verify the contractor’s actual payment to MBEs to determine the contractor’s level of compliance with MBE goals;
- determine if new MBE goals should be established for the contractor;
- apply administrative sanctions if a contractor has failed to comply with MBE program requirements; and
- report the results of any contract modifications to the Governor’s Office of Minority Affairs (GOMA) by June 30 of each year.

BPW must designate a State entity and contract with a nonprofit entity to evaluate and document the efforts of State agencies, bidders, and offerors to meet the goals of the MBE program with respect to fiscal 2008 procurements for school construction. By December 1, 2008, they must report their findings to the Governor and the General Assembly.

Current Law: The State MBE program establishes a goal that 25% of the value of all State procurement awards should go to certified MBEs, including a goal of 7% to African American-owned businesses and 10% to women-owned businesses. State agencies are encouraged to meet the MBE program goals through their procurement policies and

outreach efforts to MBEs, but they are not required to award contracts only to bidders or offerors that meet those goals. There are no statutory penalties for agencies that fail to meet the MBE program goals.

An MBE is a legal entity, other than a joint venture, that is:

- organized to engage in commercial transactions;
- at least 51% owned and controlled by one or more individuals who are socially and economically disadvantaged; and
- 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.

MBEs include not-for-profit entities organized to promote the interests of physically or mentally disabled individuals.

A socially and economically disadvantaged individual is defined as a citizen or legal U.S. resident who is African American, Native American, Asian, Hispanic, physically or mentally disabled, a woman, or otherwise found by the State's MBE certification agency to be socially and economically disadvantaged. MDOT serves as the MBE certification agency for the State.

A socially disadvantaged individual is someone who has been subject to racial or ethnic prejudice or cultural bias within American society because of their membership in a group and without regard to individual qualities. An economically disadvantaged individual is someone who is socially disadvantaged whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities compared with those who are not socially disadvantaged. An individual with a personal net worth in excess of \$1.5 million is not considered economically disadvantaged.

Local school systems are required to adopt procedures consistent with the State's MBE policies or public school construction contracts.

Background: GOMA reports annually on MBE participation in State procurements. **Exhibit 1** shows participation levels for fiscal 2003 through 2006. Overall MBE participation and participation by women-owned businesses has increased in recent years, but participation by African American-owned businesses has declined. None of the State's three MBE goals were met in the past four years.

Exhibit 1
MBE Participation Levels in Procurement Spending

Fiscal Year	Total State Procurement Spending (\$)	Total Minority Business Participation (\$)	Total Minority Business Participation (%)	African-American-owned Business Participation (%)	Women-owned Business Participation (%)
2003	3,690,826,714	576,863,620	15.6%	5.4%	4.9%
2004	3,685,656,960	641,337,401	17.4%	4.2%	5.4%
2005	4,549,669,468	954,263,508	21.0%	4.0%	5.7%
2006	4,597,866,799	1,019,679,834	22.0%	4.3%	5.7%

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

State Fiscal Effect: MDOT's Office of Minority Business Enterprise projects that it will need 15 new positions to carry out the bill's monitoring functions. The Department of Legislative Services (DLS) believes this estimate is excessive, but acknowledges that the agency may require one compliance officer to implement the bill's significant monitoring provisions across all State agencies. Special fund expenditures could increase by an estimated \$75,242 in fiscal 2008, which accounts for the bill's July 1, 2007 effective date. This estimate reflects the cost of hiring one compliance officer to monitor agencies' compliance with the bill's requirements for awarding procurement contracts. It includes a salary, fringe benefits, one-time start-up costs, and ongoing operating expenses.

Salary and Fringe Benefits	\$71,232
Start-up Costs	2,300
Ongoing Operating Expenses	<u>1,710</u>
Total FY 2008 State Expenditures	\$75,242

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

BPW indicates that it will designate the Public School Construction Program (PSCP) to coordinate the mandated review of school construction procurements. It also estimates that it will need approximately \$150,000 in fiscal 2009 to procure the services of a nonprofit organization to review fiscal 2008 school construction procurements in all 24 of the State's local school systems, which are responsible for procuring school construction contracts. DLS concurs with this estimate. DLS also assumes that PSCP can coordinate and oversee the work of the nonprofit organization with existing resources.

In addition, procurement spending could increase to the extent that the requirements of the bill impose financial burdens on bidding contractors, who in turn pass costs through to the State during the bid process. Additionally, the requirements may prompt contractors to not bid on State contracts, thereby limiting the market for competitive bidding.

Small Business Effect: The requirements of the bill place a significant burden on small business contractors to demonstrate adherence to MBE goals and procedures. Additionally, small businesses will be disadvantaged in comparison to large businesses that have significant resources to assist MBEs.

Additional Information

Prior Introductions: HB 1269 of 2005, a similar bill, was heard by the Health and Government Operations Committee, but no further action was taken on the bill.

Cross File: HB 1388 (Delegate Vaughn, *et al.*) – Health and Government Operations.

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

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