

Department of Legislative Services
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FISCAL AND POLICY NOTE
Revised

Senate Bill 187

(Senator Pugh, *et al.*)

Education, Health, and Environmental Affairs

Health and Government Operations

State Procurement - Bundling of Procurements

This bill limits the ability of State procurement units to bundle a procurement. Units may not bundle a procurement, limit the number of competitive bidders or offerors, or limit participation to a predetermined group of bidders or offerors for the purpose of precluding or limiting the participation of minority business enterprises (MBEs) or small businesses. “Bundle” is defined as consolidating two or more procurement requirements for supplies or services that were previously performed under separate contracts into one contract that is unlikely to be accessible to MBEs or small businesses. The bill does not apply to bundling for procurements for the Small Business Reserve Program.

Fiscal Summary

State Effect: No direct effect on State procurement expenditures; procurement units may still bundle procurements to promote efficiency in State contracting as long as they are not likely to limit access by small businesses and MBEs.

Local Effect: None.

Small Business Effect: Potential meaningful.

Analysis

Current Law: The State Finance and Procurement Article establishes 10 fundamental purposes for State procurement law, including providing increased economy and getting the maximum benefit from the purchasing power of the State.

Minority Business Enterprise Program. The State's MBE program establishes a goal that at least 25% of the total dollar value of each agency's procurement contracts be awarded to MBEs, including 7% to African American-owned businesses and 10% to woman-owned businesses. There are no penalties for agencies that fail to reach these targets. Instead, agencies must use race-neutral strategies to encourage greater MBE participation in State procurements. Procurement units must consider the practical severability of construction projects to maximize the participation of MBEs in those projects.

In establishing MBE goals for construction procurements, agencies must consider the practical severability of construction projects to achieve the MBE requirements. There is no similar requirement for other procurement types, but the Board of Public Works is authorized to develop regulations to maximize the opportunity for MBEs to participate in State procurement.

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. The Maryland Department of Transportation is the State's MBE certification agency.

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.

The MBE program is scheduled to terminate July 1, 2012.

Small Business Reserve Program. Chapter 75 of 2004 established the Small Business Reserve Program and defined a small business as either a minority-owned business that meets the criteria specified below, or a business other than a broker that is independently owned and operated; not a subsidiary of another firm; and not dominant in its field of operation.

In addition, a business must meet the following criteria to qualify for small business certification by the State:

- average annual gross sales over the last three years did not exceed \$2.0 million for manufacturing firms, \$3.0 million for retail businesses, \$4.0 million for wholesale distributors, \$4.5 million for architectural and engineering firms, \$7.0 million for construction companies, or \$10 million for service firms; and
- the firm does not employ more than 25 people in its retail operations, 50 people in either its wholesale or construction operations, or 100 people in either its service, manufacturing, or architectural and engineering operations.

The Small Business Reserve Program requires most State procurement units to structure their procurements so that at least 10% of the total dollar value of their procurements is made directly to small businesses. Under regulations adopted by the Department of General Services (DGS), each agency must prepare an annual forecast of its total procurement spending. The agency must then develop a plan to allocate at least 10% of its forecast spending to contracts for small businesses serving as prime contractors.

The Small Business Reserve Program terminates September 30, 2010.

Exemptions from State Procurement Law. The University System of Maryland, Morgan State University, and St. Mary's College of Maryland are exempt from most provisions of State procurement law. However, they are subject to the goals and procedures of the State's MBE program and the University System of Maryland and Morgan State University participate in the Small Business Reserve Program. State law also exempts other agencies, in whole or in part, from State procurement law, including:

- Blind Industries and Services of Maryland;
- Maryland State Arts Council;
- Maryland Health and Higher Educational Facilities Authority;
- Department of Business and Economic Development;
- Maryland Food Center Authority;
- Maryland Public Broadcasting Commission;

- Maryland State Planning Council on Developmental Disabilities;
- Maryland Automobile Insurance Fund;
- Maryland Historical Trust;
- Rural Maryland Council;
- Maryland State Lottery Agency;
- Maryland Health Insurance Plan;
- Maryland Energy Administration;
- Maryland Developmental Disabilities Administration;
- Maryland Stadium Authority; and
- State Retirement and Pension System.

Background:

MBE Program. The fiscal 2007 MBE report issued by the Governor’s Office on Minority Affairs, the most recent data available, found that 20% of the value of State procurement contracts had been awarded to MBEs. This represented a slight decrease from the 22% of contract awards made to MBEs in fiscal 2006, and still short of the State’s 25% target. African American-owned firms received 3.6% of contract awards and woman-owned firms received 5.7%, which were also below the targets for those subgroups. Legislative Services notes that these figures represent contract awards rather than actual payments to MBEs, which experience has shown are often lower than promised participation levels at the time of contract awards. The 2006 MBE disparity study mandated by law and conducted by NERA Economic Consulting found continuing disparities between the availability and use of MBE firms for State contracts across all contracting categories and demographic groups.

Small Business Reserve Program. Twenty-two State agencies were subject to the Small Business Reserve Program in fiscal 2006 and 2007. Chapters 388 and 389 of 2008 added the Department of Information Technology and the Maryland Transportation Authority as participating agencies. In fiscal 2007, only 4 of the 22 agencies achieved the program’s target of 10% of procurement dollars being awarded to certified small businesses, down from 7 agencies in fiscal 2006.

Small Business Effect: Limiting bundling of procurements under certain circumstances has both positive and adverse effects on small businesses, many of which are MBEs. On the positive side, limiting contract bundling enables more small businesses to compete directly for State contracts because the scale of work for unbundled contracts is likely to be within their capacity.

At the same time, limiting contract bundling may reduce subcontracting opportunities for small businesses. Both DGS and the Department of Budget and Management advise that bid solicitations that require a single type of work often carry relatively small MBE goals, but solicitations that require multiple types of work (*e.g.*, security, janitorial, and fire protection services for a single facility) often carry much larger MBE goals because it is rare that a prime contractor can provide all of those services.

Additional Information

Prior Introductions: SB 772 of 2008, as amended, was similar to this bill. It passed the Senate and was heard by the House Health and Government Operations Committee, but no further action was taken.

Cross File: HB 124 (Delegate Morhaim, *et al.*) - Health and Government Operations.

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

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