

Department of Legislative Services  
Maryland General Assembly  
2010 Session

FISCAL AND POLICY NOTE

House Bill 1236 (Delegate Taylor, *et al.*)  
Health and Government Operations

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**Procurement - Minority Business Enterprises - Waiver Requirements**

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This bill prohibits a State procurement unit from waiving the requirements associated with the minority business enterprise (MBE) program for a contractor unless the contractor first publishes a solicitation for MBE participation in a newspaper or other public forum and does not receive a response within 30 days of publishing the solicitation. The Board of Public Works (BPW) must include the bill's provisions in its regulations that allow waivers under specified circumstances.

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**Fiscal Summary**

**State Effect:** Potential operational impact due to delays and disruptions in the awarding of contracts that include MBE participation goals. The fiscal effect of those delays cannot be reliably estimated, but it may be significant.

**Local Effect:** None.

**Small Business Effect:** Potential meaningful.

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**Analysis**

**Current Law:** The State's MBE program establishes a goal that at least 25% of the total dollar value of each agency's procurement contract 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 are required to use race-neutral strategies to encourage greater MBE participation 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.

State law requires procurement units to issue solicitations for bids or proposals at least 20 days before they are due. In addition, prime contractors responding to solicitations that include an MBE goal must solicit MBE participation at least 10 days before bids or proposals are opened.

BPW must issue regulations consistent with State procurement law to carry out the purposes of the MBE program. Under the regulations (COMAR 21.11.03.11), a bidder or offeror may request a waiver from an MBE contract or subcontract goal. The waiver request must include:

- a detailed statement of the efforts made to select portions of the work proposed to be performed by certified MBEs; and
- a detailed statement of the efforts made to contact and negotiate with certified MBEs, by MBE classification (if appropriate). This statement must include, among other things, a list of contacts made with MBEs and reasons why any bids or offers received from MBEs were not accepted.

A waiver may be granted only if the bidder or offeror reasonably demonstrates that certified MBE participation could not be obtained, or could not be obtained at reasonable price, and if the agency head determines that the public interest is served by a waiver. By July 31 of each year, each State procurement unit must report to BPW the number of waivers requested and granted.

Failure to comply with MBE contract provisions, or to secure a waiver, can result in contract termination, referral to the Attorney General for appropriate action, or initiation of any other specific remedy identified in the contract.

**State Fiscal Effect:** As noted above, current law allows a procurement unit to grant a waiver if a prime contractor, after performing due diligence to solicit MBE participation, is unable to find an MBE able or willing to perform the work at a reasonable price. Under this bill, if an MBE responds to the newspaper solicitation required by the bill, the procurement unit is precluded from granting the prime contractor a waiver, even if the

responding MBE is not able or willing to do the work at a reasonable price. In some cases, this may force a prime contractor to accept an unqualified or overpriced MBE that responds to the solicitation just to qualify to bid on a solicitation. In other cases, prime contractors may opt not to bid on a solicitation rather than submit an uncompetitive proposal.

Also, the 30-day waiting period specified in the bill exceeds both the 20-day minimum period of solicitation and 10-day minimum period of MBE solicitation specified in statute. As a result, contract awards may be delayed by several weeks to give MBEs time to respond to newspaper solicitations and negotiate with prime contractors.

**Small Business Effect:** Small businesses that seek to bid on State contracts as prime contractors may have a much harder time obtaining an MBE waiver if they are not able to find an MBE that is able or willing to perform the necessary work at a reasonable price. This may exclude them from participating in State procurements.

At the same time, the requirement that prime contractors publish solicitations in newspapers or other public forums increases the chance that small businesses become aware of procurement opportunities available through the State.

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### **Additional Information**

**Prior Introductions:** None.

**Cross File:** None.

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

**Fiscal Note History:** First Reader - March 14, 2010  
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