

Department of Legislative Services
Maryland General Assembly
2011 Session

FISCAL AND POLICY NOTE
Revised

Senate Bill 120

(Senator Conway, *et al.*)

Education, Health, and Environmental Affairs

Health and Government Operations

Procurement - Minority Business Participation

This bill extends the termination date of the State's minority business enterprise (MBE) program for one year, until July 1, 2012, and makes substantive and technical changes to the program. It also establishes the severability of the bill's provisions.

The bill takes effect July 1, 2011.

Fiscal Summary

State Effect: The Maryland Department of Transportation (MDOT), the Governor's Office of Minority Affairs (GOMA), the Board of Public Works (BPW), and State procurement units can carry out the bill's requirements with existing budgeted resources. Although the extension of the State's MBE program could result in higher procurement costs than if the program were allowed to terminate, the program is well-established, having existed in its current form for 20 years and been extended four different times. Therefore, its extension results in no practical fiscal effect.

Local Effect: None.

Small Business Effect: Potential meaningful, to the extent that termination of the MBE program would have a detrimental effect on MBEs in the State, the vast majority of which are small businesses.

Analysis

Bill Summary: The bill maintains the current overall goal of 25% but eliminates the statutory subgoals for women- and African American-owned businesses of 10% and 7%, respectively. Instead, it authorizes GOMA, in consultation with MDOT and the Office of the Attorney General, to establish guidelines for each unit to consider while determining whether to set subgoals for individual procurements based on existing categories for minority groups. It also clarifies that a procurement unit should consider the practical severability of contracts and establish MBE participation goals for each contract based in part on (1) the potential subcontract opportunities available in the prime contract; (2) the availability of certified MBEs to respond competitively to those opportunities; and (3) GOMA's guidelines regarding subgoals.

The bill repeals the exemption from MBE provisions for MDOT construction contracts valued at \$50,000 or less.

The bill codifies in statute and clarifies existing regulatory provisions related to the granting of waivers from MBE participation goals in individual procurements and authorizes procurement units to exempt sole source, expedited, or emergency procurements from MBE contract goals if the public interest cannot reasonably accommodate their use. It also adds a requirement that procurement units must retain copies of each waiver granted and the reasons for it and report annually by July 31 to GOMA and BPW on the number of waivers requested and granted and any other information requested by BPW. The report must identify each contract for which a waiver was considered. Contractors that are granted waivers may not be required to renegotiate any subcontract to achieve a different result with respect to compliance with MBE program goals.

Regulations developed by BPW to implement the program must (1) establish standards to require MBEs to perform commercially useful functions on State contracts; and (2) include a requirement that procurement units work with GOMA to exclude certain contracts from the MBE goals.

The bill also declares the General Assembly's intent to eliminate discrimination against minority- and woman-owned businesses in a specified manner based on the evidence of discrimination in the February 17, 2011 study *The State of Minority- and Woman-owned Business Enterprise: Evidence from Maryland*.

Current Law:

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 are required to use race-neutral strategies to encourage greater MBE participation in State procurements.

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. An MBE owned by a woman who is also a member of an ethnic or racial minority group is certified as either owned by a woman or owned by a racial or ethnic minority, but not both. MDOT is the State's MBE certification agency and is responsible for conducting the mandated disparity study.

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, adjusted annually for inflation, is not considered economically disadvantaged. The inflation-adjusted limit for calendar 2011 is \$1,530,652.

The MBE program is scheduled to terminate July 1, 2011.

MBE Waivers

BPW must issue regulations consistent with State procurement law to carry out the purposes of the MBE program, including procedures allowing a contractor to request and obtain a waiver from MBE contract requirements. 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 a 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.

Background: In 1989, the U.S. Supreme Court held in the *City of Richmond v. J.A. Croson Co.*, that state or local MBE programs using race-based classifications are subject to strict scrutiny under the equal protection clause of the Fourteenth Amendment to the U.S. Constitution. In addition, the ruling held that an MBE program must demonstrate clear evidence that the program is narrowly tailored to address actual disparities in the marketplace for the jurisdiction that operates the program. As a result, prior to each reauthorization of the State's MBE program, the State conducts a disparity study to determine whether there is continued evidence that MBEs are underutilized in State contracting. Since the program was established in its current form in 1990 in response to the *Croson* decision, it has been reauthorized four times, in 1995, 2000, 2001, and 2006. A disparity study was completed in 2006, just prior to the previous reauthorization; that reauthorization included a requirement for another study to be completed by September 30, 2010. The study was completed in February 2011.

The 2011 disparity study found continued and ongoing disparities in the overall annual wages, business earnings, and rates of business formation between nonminority males

and minorities and women in Maryland. For instance, average annual wages for African Americans (both men and women) and nonminority women were 33% lower than for comparable nonminority males. It also found continued disparities in the use of MBEs compared to their availability in the market place to perform work in designated categories of work. For instance, African American-owned businesses were paid 4.5% of State construction contract dollars, but they make up 9.7% of the construction sector in the State. Woman-owned businesses were paid 8.5% of maintenance contract dollars, despite making up 18.0% of the maintenance contract sector. Similar disparities were found in other contracting sectors and for other MBE categories.

Exhibit 1 shows the level of MBE participation by agency for fiscal 2009, the most recent data available.

Exhibit 1
MBE Participation Rates, by Agency
Fiscal 2009

<u>Cabinet Agency</u>	<u>% MBE Participation</u>
Aging	15.5%
Agriculture	6.9%
Budget and Management	6.1%
Business and Economic Development	58.8%
Education	28.6%
Environment	26.1%
Executive Department	21.5%
General Services	26.2%
Health and Mental Hygiene	47.5%
Higher Education Commission	46.8%
Housing and Community Development	33.9%
Human Resources	8.8%
Information Technology	27.9%
Juvenile Services	13.6%
Labor, Licensing, and Regulation	16.3%
Natural Resources	8.2%
Planning	11.4%
State Police	8.9%
Public Safety and Correctional Services	31.4%
Transportation – Aviation Administration	37.1%
Transportation – Motor Vehicle Administration	36.7%
Transportation – Office of the Secretary	26.6%
Transportation – Port Administration	6.9%
Transportation – State Highway Administration	22.3%
Transportation – Transit Administration	12.7%
Transportation – Transportation Authority	24.7%
Veterans Affairs	1.7%
Cabinet Agency Total	23.7%
Statewide Total	22.2%

Source: Governor's Office of Minority Affairs

Additional Information

Prior Introductions: None.

Cross File: HB 456 (Delegate Morhaim, *et al.*) - Health and Government Operations.

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

Fiscal Note History: First Reader - March 1, 2011
ncs/rhh Revised - Senate Third Reader - April 4, 2011

Analysis by: Michael C. Rubenstein

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