

Department of Legislative Services
Maryland General Assembly
2011 Session

FISCAL AND POLICY NOTE

Senate Bill 611 (Senator Jones-Rodwell, *et al.*)
Education, Health, and Environmental Affairs

**Minority Business Enterprise Participation - Contracts, Debarment, and
Termination Extension**

This bill extends the termination date of the State's minority business enterprise (MBE) program by two years, until July 1, 2013, and extends the deadline for completion of the mandated disparity study by two years, until September 30, 2012. It also requires that each procurement contract include a clause that, in the absence of a waiver, requires a contractor to meet the expected degree of MBE participation in the procurement solicitation. Contractors who, in the absence of a waiver, knowingly violate that contract clause are subject to debarment for up to one year.

The bill takes effect July 1, 2011, except that the MBE compliance and debarment provisions take effect October 1, 2011.

Fiscal Summary

State Effect: None. State procurement units can carry out the bill's requirements with existing budgeted resources. Any increase in the number of debarment investigations and proceedings by the Office of the Attorney General and the Board of Public Works (BPW), respectively, as a result of the bill is not expected to be significant and can also be handled with existing 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

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. The Maryland Department of Transportation (MDOT) 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, 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 Compliance and Waivers

BPW must issue regulations consistent with State procurement law to carry out the purposes of the MBE program. Procurement regulations issued under this authority require bidders and offerors to submit with each bid or proposal an MBE participation schedule that includes the name of each certified MBE that will participate in the project, the work that each MBE will perform, and the price or contract percentage to be paid to each MBE. Failure to include the participation schedule can result in a bid or proposal being deemed not responsive. The regulations also require that procurement units verify that MBEs listed on the participation schedule actually perform the work and receive compensation consistent with the schedule.

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.

Debarment

A person is subject to automatic debarment from procurement with any public body in the State only if the person has been convicted under the laws of the State for bribery, attempted bribery, or conspiracy to bribe, committed in the furtherance of obtaining a contract with a public body. In all other cases, generally involving criminal convictions or failing to perform according to contract provisions, debarment is subject to the determination of BPW, based on evidence provided by the Office of the Attorney General

following an investigation. Except for automatic debarments described above, a person has a right to a hearing before BPW prior to being debarred.

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. The last disparity study was completed in 2006, and there is a statutory requirement for another study to be completed by September 30, 2010, but the study has not been completed.

Exhibit 1 shows the level of MBE participation by agency for fiscal 2009.

State Fiscal Effect: The Office of Minority Business Enterprise within MDOT is the State's MBE certification entity. MDOT advises that the disparity study originally scheduled for completion by September 2010 is in the final stages of review and should be released shortly. Therefore, MDOT does not incur any additional costs to complete the study by the extended deadline.

Additional Comments: The bill essentially alters the MBE program from its current statutory framework as a goal to a contract requirement. The Department of Budget and Management, which oversees State procurement for services, advises that the bill's provisions may cause the MBE program to violate constitutional requirements under *Croson*. Specifically, the bill subjects contractors to the possibility of sanctions if they are unable to meet a contract's MBE participation requirement for legitimate reasons, *i.e.*, changes in the availability of MBEs during the contract period or problems with the quality of work performed by MBEs. Under *Croson's* strict scrutiny standard, this may not be acceptable.

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 194 (Delegate B. Robinson, *et al.*) - Health and Government Operations.

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

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