

Department of Legislative Services
 Maryland General Assembly
 2011 Session

FISCAL AND POLICY NOTE

House Bill 914 (Delegate Branch, *et al.*)
 Health and Government Operations

**Minority Business Enterprise Participation - Application for Certification as a
 Minority Business Enterprise and Termination Extension**

This bill extends the termination date for 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 clarifies that the Maryland Department of Transportation (MDOT) must complete its review of an application for MBE certification within 90 days of receiving a completed application, including all required supporting documentation.

The bill takes effect July 1, 2011, except that the clarifying language regarding the review of MBE applications takes effect October 1, 2011.

Fiscal Summary

State Effect: Special fund expenditures by MDOT increase by \$68,300 in FY 2012 to hire one additional investigator to assist with the review of MBE applications. Out-year costs reflect annualization and inflation. 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. It is assumed that the intent of the bill is to extend the deadline for the mandated disparity study due by September 2010, not to require that a new study be completed by September 2012.

(in dollars)	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016
Revenues	\$0	\$0	\$0	\$0	\$0
SF Expenditure	68,300	65,300	68,600	72,100	75,800
Net Effect	(\$68,300)	(\$65,300)	(\$68,600)	(\$72,100)	(\$75,800)

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

Chapters 578 and 579 of 2010 require the Board of Public Works (BPW) to develop regulations requiring that MDOT complete its review of an application for MBE certification and notify the applicant within 90 days of receiving a complete application that includes all information needed to make a decision. The regulations must also authorize MDOT to extend only once the notification requirement by not more than 60 days after providing the applicant with a written notice and explanation of the extension.

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

MDOT's Office of Minority Business Enterprises (OMBE), which manages the agency's certification of MBEs under State law as well as the certification of Disadvantaged Business Enterprises (DBEs) under federal procurement law, interpreted Chapters 578 and 579 of 2010 to mean that the initial 90-day limit started upon the completion of its own investigative report and financial analyses prepared by OMBE's investigators. However, the U.S. Department of Transportation advises that federal regulations require the 90-day timeframe for DBE applications begins "after the applicant has submitted all required information pursuant to [federal regulations] (emphasis in original)." This means that OMBE's interpretation of Chapters 578 and 579 with regard to MBEs is not consistent with federal requirements for DBEs.

OMBE employs eight investigators to review and process approximately 105 applications for new certification each month (1,260 annually). Investigative reports are typically completed within 45 days of their assignment to an investigator. Total processing time averages about 140 days, including, on average, a delay of 12 days due to incomplete applications.

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

All of MDOT's operating expenses, including the budget for OMBE, are paid the Transportation Trust Fund.

State Fiscal Effect: OMBE's average completion time of 140 days is within the 150-day limit established by Chapters 578 and 579 (including the discretionary 60-day extension). However, there are undoubtedly some complicated applications that take longer and risk exceeding the 150-day limit. Thus, OMBE may require additional staff to help clear and/or prevent bottlenecks and backlogs in the review process. OMBE's response that it could comply with the requirements of Chapters 578 and 579 with existing resources was based on its erroneous interpretation of the bill's requirements. Even so, the Department of Legislative Services believes the additional staffing needs necessary to comply with the bill's requirements are minimal given current processing schedules.

Therefore, special fund expenditures by MDOT increase by \$68,334 in fiscal 2012, which accounts for the October 1, 2011 effective date of the provisions governing the MBE review process. This estimate reflects the cost of hiring one new investigator to supplement existing staff and help preclude backlogs and bottlenecks during the review process. The estimate includes a salary, fringe benefits, one-time start-up costs, and ongoing operating expenses.

Position	1.0
Salary and Fringe Benefits	\$61,389
Other Operating Costs	<u>6,945</u>
Total FY 2012 State Expenditures	\$68,334

Future year expenditures reflect a full salary with 4.4% annual increases and 3% employee turnover as well as 1% annual increases in ongoing operating expenses.

The disparity study originally scheduled for completion by September 2010 was completed in February 2011. It is assumed that the intent of the bill was to grant MDOT an extension for the mandated study and not to require that an additional study be completed by September 2012, which would not be practical or feasible. Therefore, MDOT does not incur any additional costs to complete another disparity study.

Additional Information

Prior Introductions: None.

Cross File: SB 834 (Senator Jones-Rodwell) - Education, Health, and Environmental Affairs.

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

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