

Department of Legislative Services  
Maryland General Assembly  
2011 Session

FISCAL AND POLICY NOTE

Senate Bill 555 (Senator Pugh, *et al.*)  
Education, Health, and Environmental Affairs

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Minority Business Enterprise Participation - Disclosure and Termination  
Extension

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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 requires the Board of Public Works (BPW) to implement new recordkeeping and reporting procedures regarding the granting of waivers from State MBE requirements, and requires changes to procurement regulations governing the determination of expected MBE participation for individual contracts.

The bill takes effect July 1, 2011, except that the new recordkeeping and reporting requirements and the requirement for regulatory changes take effect October 1, 2011.

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Fiscal Summary

**State Effect:** BPW and other State procurement units can carry out the bill's recordkeeping and reporting requirements with existing budgeted resources. BPW can also develop new regulations with existing resources. The public reporting requirement for waivers may extend and delay the procurement process. 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 2011.

**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.

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## **Analysis**

**Bill Summary:** BPW must keep a record of each waiver of obligations relating to MBE participation in a State contract that is requested by and granted to a prime contractor. The record must also reflect the reason the waiver was granted. BPW must also develop regulations requiring State procurement units to provide written public notice of waivers granted and the reason why a waiver was necessary.

BPW must also amend existing regulations governing the calculation of the expected degree of MBE participation for a procurement to include the availability of MBEs to respond competitively to the prime contract. The regulations must also require procurement units to provide a written public explanation of their determination of the availability of MBEs to respond competitively to prime contracts and potential subcontract opportunities.

### **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.

State law and procurement regulations generally require that the procurement of school construction services by local school systems for projects that receive State funding generally conform to State rules with regard to competitive procurement and MBE processes.

#### *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.

#### *Availability of MBEs*

In issuing a procurement announcement, a procurement unit must specify the expected degree of MBE participation in the resulting contract based in part on the potential subcontract opportunities available under the prime contract and the availability of MBEs to respond competitively to those subcontract opportunities. The availability of MBEs to bid on the prime contract itself is not a factor in the determination.

**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.

**Exhibit 2** displays the number of waivers requested and granted by each procurement agency for fiscal 2008 and 2009. BPW reports that it is currently assembling data for fiscal 2010. Agencies not included in the exhibit did not receive waiver requests in either year.

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**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%
<b>Cabinet Agency Total</b>	<b>23.7%</b>
<b>Statewide Total</b>	<b>22.2%</b>

Source: Governor's Office of Minority Affairs

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**Exhibit 2**  
**MBE Waivers Requested and Granted**  
**Fiscal 2008 and 2009**

<u>Agency</u>	<u>FY 2008</u>		<u>FY 2009</u>	
	<u>Requested</u>	<u>Granted</u>	<u>Requested</u>	<u>Granted</u>
Aging	0	0	1	1
Agriculture	0	0	1	1
Budget and Management	1	1	0	0
College Savings Plan of MD	1	1	0	0
Environment	0	0	1	1
General Services	8	6	16	8
Housing and Community Development	0	0	1	1
Human Resources	5	3	0	0
Juvenile Services	0	0	1	1
MD Automobile Insurance Fund	0	0	1	1
MD Environmental Service	3	1	3	1
MD Food Center Authority	0	0	1	1
MD Insurance Administration	0	0	1	1
MD Stadium Authority	0	0	2	2
Morgan State University	1	1	0	0
Natural Resources	1	1	0	0
Public Service Commission	0	0	1	1
Treasurer	1	1	0	0
State Highway Administration	68	6	13	1
MD Aviation Administration	3	2	5	0
Motor Vehicle Administration	1	1	0	0
MD Port Administration	5	0	3	2
MD Transportation Authority	2	0	0	1
MD Transit System	1	1	2	0
University of Maryland, College Park	3	3	10	9
University of Maryland Eastern Shore	0	0	1	1
Salisbury University	0	0	1	1
Towson State University	0	0	2	2
<b>State Agency Subtotal</b>	<b>104</b>	<b>28</b>	<b>67</b>	<b>37</b>
Public School Construction Program	237	237	209	209
<b>Total</b>	<b>341</b>	<b>265</b>	<b>276</b>	<b>246</b>

Source: Board of Public Works

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The Public School Construction Program (PSCP) advises that local school systems have traditionally done a poor job of communicating MBE requirements to contractors and have not adequately enforced MBE requirements during the procurement process. This has resulted in a large number of waiver requests coming to PSCP for school construction contracts. PSCP further notes that the reason that all waiver requests were granted in fiscal 2008 and 2009 is because they had been reviewed and approved by local school systems prior to their submission to PSCP. More recently, PSCP says it has been working more closely with local school systems to communicate better with contractors regarding MBE requirements so that, when it receives waiver requests, they are more likely to be well substantiated.

**State Fiscal Effect:** The number of waivers granted for State contracts is minimal. Not including waivers granted by PSCP, which affect contracts entered into by local school boards rather than State agencies, the number of waivers has not exceeded 40 across all agencies in each of the last two fiscal years. Therefore, Legislative Services believes that BPW and State procurement units can carry out the additional MBE waiver recordkeeping and reporting requirements with existing resources.

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.

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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, Public School Construction Program, Maryland Department of Transportation, University System of Maryland, Department of Legislative Services

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