

Department of Legislative Services
Maryland General Assembly
2013 Session

FISCAL AND POLICY NOTE

Senate Bill 1063
Finance

(Senator McFadden)

Evaluation of the Application of Minority Business Enterprise Program by the
Public Service Commission

This bill requires the Public Service Commission (PSC), the Maryland Department of Transportation (MDOT), and the Governor's Office of Minority Affairs (GOMA), in consultation with the Office of the Attorney General (OAG), to study the feasibility and legality of applying the State's minority business enterprise (MBE) requirements to the procurement of wholesale electricity by electric companies to supply standard offer service (SOS) (including acquisition or construction of energy-generation facilities). The agencies must report their findings and recommendations to the General Assembly by December 1, 2013.

The bill takes effect July 1, 2013, and terminates June 30, 2014.

Fiscal Summary

State Effect: PSC, MDOT, GOMA, and OAG can complete the mandated study with existing budgeted resources. No effect on revenues.

Local Effect: None.

Small Business Effect: None.

Analysis

Current Law/Background: To ensure a sufficient supply of electricity in the State for SOS, PSC has statutory authority to require or allow investor-owned electric companies (*i.e.*, utilities) to construct, acquire, or lease and operate their own generating and

transmission facilities, subject to appropriate cost recovery. Although PSC can mandate the procurement of a new facility, it is not a party to the contract for the construction of the facility, which is between one or more electric companies and a private construction firm. Therefore, the contract is not subject to State procurement law.

Even so, an electric company participating in SOS is required to obtain its electricity supply through a competitive process that is designed to obtain the best price in light of market conditions and the need to protect customers from excessive price increases. The process must include a series of competitive wholesale bids in which the electric company solicits offers for its SOS load as part of a portfolio of blended wholesale supply contracts of short, medium, and long terms as needed to meet demand in a cost-effective manner.

The competitive process may include different bidding structures and mechanisms for base load, peak load, and very short-term procurement. To prevent an excessive amount of load being exposed to upward price risks and volatility, PSC may stagger the competitive wholesale auction dates and may allow a date to be altered based on market conditions. By regulation or order, PSC may allow an electric company to refuse to accept some or all of the bids made in a competitive wholesale auction. The electric company must publicly disclose the names of all bidders and the names and load allocation of all successful bidders 90 days after all contracts for supply are executed.

In September 2011, concerned about the potential shortage of electricity supply in the Southwest Mid-Atlantic Area Council (SWMAAC) Locational Deliverability Area, PSC ordered electric companies in the State to issue a request for proposals (RFP) for the construction of a natural gas-powered electricity-generating facility in the SWMAAC region. PSC subsequently revised the RFP in response to comments received from stakeholders and issued a final version in December 2011, which was ultimately awarded to CPV Maryland, LLC to construct a 661-megawatt natural gas plant in Waldorf. In April 2012, PSC issued a final order instructing the electric companies to enter into a Contract for Differences with CPV for the construction of the new plant. Under a Contract for Differences, the differences between the supplier's actual revenue from energy sales and the fixed contract price results in a payment or credit. If actual revenues are below the fixed price, the electric company must pay the supplier the difference (and likely recoup the cost from a consumer surcharge). If the actual revenue exceeds the fixed price, the supplier pays the electric company the excess (which may be passed on to consumers). Settlement of differences occurs monthly.

For a description of the State's MBE Program and the *Croson* decision, see the **Appendix – Minority Business Enterprise Program**. Under the *Croson* decision, the government must first study whether there is a history of discrimination, its effects, and how MBE requirements would help address discrimination. Also, as noted above,

because the State is not a party to the contract for the construction of the new natural gas plant in Waldorf, MBE requirements do not apply.

Additional Information

Prior Introductions: None.

Cross File: HB 1055 (as amended) (Delegate Braveboy, *et al.*) – Economic Matters.

Information Source(s): Public Service Commission, Maryland Department of Transportation, Department of Legislative Services

Fiscal Note History: First Reader - March 22, 2013
ncs/rhh

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Appendix – Minority Business Enterprise Program

The State’s Minority Business Enterprise (MBE) program, which is scheduled to terminate July 1, 2016, requires that a statewide goal for MBE contract participation be established biennially through the regulatory process under the Administrative Procedure Act. The biennial statewide MBE goal is established by the Special Secretary for the Governor’s Office of Minority Affairs (GOMA), in consultation with the Secretary of Transportation and the Attorney General. In a year in which there is a delay in establishing the overall goal, the previous year’s goal applies. The Special Secretary is also required to establish biennial guidelines for State procurement units to consider in deciding whether to establish subgoals for different minority groups recognized in statute. In a year in which there is a delay in issuing the guidelines, the previous year’s guidelines apply.

Prior to the enactment of Chapters 252 and 253 of 2011 (HB 456/SB 120) and Chapter 154 of 2012 (HB 1370), State law established a goal that at least 25% of the total dollar value of each agency’s procurement contracts be awarded to MBEs, including subgoals of 7% for African American-owned businesses and 10% for woman-owned businesses. As of January 2013, a new statewide goal had not been issued by GOMA, so the 25% statewide goal remains in effect. GOMA issued subgoal guidelines in July 2011, summarized in **Exhibit 1**, which are still in effect. The guidelines state that subgoals may be used only when the overall MBE goal for a contract is greater than or equal to the sum of all recommended subgoals for the appropriate industry, plus two percentage points.

Exhibit 1 Subgoal Guidelines Issued July 2011

	<u>Construction</u>	<u>Architectural/ Engineering</u>	<u>Maintenance</u>	<u>Information Technology</u>	<u>Services</u>	<u>Supplies/ Equipment</u>
African American	7%	6%	8%	7%	7%	6%
Hispanic	–	2%	3%	2%	–	–
Asian	4%	–	3%	–	4%	5%
Women	–	9%	–	8%	12%	10%
Total	11%	17%	14%	17%	23%	21%
Total +2	13%	19%	16%	19%	25%	23%

Source: Governor’s Office of Minority Affairs

There are no penalties for agencies that fail to reach the statewide target. Instead, agencies are required to use race-neutral strategies to encourage greater MBE participation in State procurements.

History and Rationale of the MBE Program

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 most recent disparity study was completed in February 2011 and serves as the basis for the most recent reauthorization of the MBE program. It 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 marketplace 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.

Another disparity study is due by December 31, 2015, prior to the July 1, 2016 termination date for the MBE program. (The program has been reauthorized six times since 1990, most recently by Chapter 154 of 2012.) **Exhibit 2** provides MBE participation rates for major Executive Branch agencies for fiscal 2011, the most recent year for which data is available.

Requirements for MBE Certification

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. There are no restrictions on the size or management structure of not-for-profit entities that can be considered MBEs.

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 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 his or her 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 2013 is \$1,615,663.

Exhibit 2
MBE Participation Rates, by Agency
Fiscal 2011

<u>Agency</u>	<u>% MBE Participation</u>
Aging	30.7%
Agriculture	6.9%
Budget and Management	10.5%
Business and Economic Development	43.9%
Education	20.3%
Environment	25.2%
Executive Department	14.0%
General Services	33.9%
Health and Mental Hygiene	46.1%
Higher Education Commission	14.0%
Housing and Community Development	21.9%
Human Resources	8.4%
Information Technology	13.7%
Juvenile Services	8.9%
Labor, Licensing, and Regulation	36.1%
Morgan State University	22.3%
Natural Resources	10.9%
Planning	8.3%
State Police	8.8%
Public Safety and Correctional Services	33.0%
Transportation – Aviation Administration	26.2%
Transportation – Motor Vehicle	46.7%
Transportation – Office of the Secretary	29.5%
Transportation – Port Administration	7.8%
Transportation – State Highway	26.1%
Transportation – Transit Administration	16.8%
Transportation – Transportation Authority	25.4%
University System of Maryland	19.7%
Veterans Affairs	18.2%
Statewide Total¹	23.8%

¹Includes additional non-Cabinet agencies.

Source: Governor's Office of Minority Affairs
