HB 1319

Department of Legislative Services

Maryland General Assembly
2013 Session

FISCAL AND POLICY NOTE

House Bill 1319 (Delegate Rosenberg, *et al.*)
Health and Government Operations

Procurement - Competitive Sealed Proposals - Construction Contracts - Economic Inclusion Plans

---

This bill authorizes the use of competitive sealed proposals for State public works projects with a value of at least $25 million that are appropriated between October 1, 2013, and September 30, 2015, provided that any request for proposals (RFP) issued in accordance with the bill requires an economic inclusion plan. The bill applies to public institutions of higher education that are otherwise exempt from most provisions of State procurement law.

The bill terminates September 30, 2016.

Fiscal Summary

State Effect: The Board of Public Works (BPW) and State procurement agencies can implement the bill with existing budgeted resources. The addition of an economic inclusion plan to the procurement of a public works project likely causes the cost of the project to increase to the extent that contractors either pass on higher costs to the State or refrain from participating in State procurement, thereby reducing competition for State contracts. No effect on revenues.

Local Effect: The bill applies to State projects only, but local governments may derive indirect benefits due to increased employment and skills training for local residents.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary: The bill defines "local" to be the county in which work is to be performed under the contract, and "locally" includes any county in which work is to be performed if two or more counties are involved. "Locally owned business" is a business located in a county where work is to be performed, and "local resident" mean a resident who resides in a county where work is to be performed. In addition to requiring an economic inclusion plan, an RFP issued under the bill must specify the counties that will be used to evaluate the plan regarding locally owned businesses, local residents, local skilled laborers, and local community groups.

An economic inclusion plan must be included with a proposal submitted in response to an RFP (if the requirement does not conflict with a federal law or grant) and, to the extent practicable, promote the involvement of locally owned businesses and the training and employment of local residents. It must include:

- procedures for implementing, monitoring, and providing oversight of the plan;
- goals for participation of locally owned businesses, as a percentage of the total value of the contract;
- goals for the participation of local residents, as a percentage of the total value of the contract;
- a process for assessing local residents, giving them job-readiness skills and other services, and encouraging local skilled laborers to seek employment opportunities; and
- any other related information at the offeror's discretion.

The bill includes criteria for the evaluation of an economic inclusion plan submitted by an offeror, and additional requirements for the implementation of a plan, including the possibility of waiving some of its requirements. It also specifies that an offeror or contractor awarded a contract under the bill must make a good faith effort to achieve minority business enterprise (MBE) goals established by the State.

The requirement for an economic inclusion plan may be waived for emergency procurements or if the procurement unit determines that a waiver is in the best interest of the State.

An independent third-party contractor selected by the unit and paid for by the contractor must determine whether the offeror is in compliance with the plan. If a contractor is found not to be in compliance, the unit may (1) void the contract; (2) terminate the contract by default of the contractor; (3) issue a notice to the contractor with the number of days the contractor has to come into compliance and submit a schedule for compliance; or (4) assess penalties or liquidated damages.

BPW must adopt regulations to carry out the bill's provisions. By October 1 of each year, BPW must report to designated committees of the General Assembly the number of procurements awarded and waivers issued under the bill.

Current Law: Statute exempts multiple State agencies from State procurement law. Most are relatively small agencies that generally do not have public works projects of at least $25 million, except for the University System of Maryland, Morgan State University, and St. Mary's College of Maryland. All three institutions, however, are subject to specified provisions, including those related to collusion, fraud, nondiscrimination, retainage, and MBEs.

For a description of the State's MBE program, please see the **Appendix – Minority Business Enterprise Program**.

State procurement law authorizes the use of competitive sealed proposals for the procurement of human, social, cultural, or educational services or if the head of the procurement unit determines that it is preferable to using competitive sealed bidding, which is the preferred method. For procurements using competitive sealed proposals, contracts are awarded to the responsible offeror who submits the proposal or best and final offer that is determined to be the most advantageous to the State, considering the evaluation factors described in the RFP.

There is no requirement for economic inclusion plans to be submitted or used in conjunction with procurements for State public works projects.

Background: State Center is a proposed public-private partnership between State Center LLC, the State of Maryland, and the City of Baltimore to build a 28-acre transit-oriented development in Baltimore City with office space, housing, parking, shops, and other amenities. In May 2011, the State Center Development Team executed an economic inclusion plan in collaboration with neighborhood groups that promotes significant involvement of minority-, women-, and locally owned businesses in the development of State Center, as well as the training and employment of local residents in the ongoing transformation of the State Center area. Specifically, the plan establishes contracting and procurement goals of having 35% of construction-related and design- and engineering-related contracts awarded to minority-, women-, and locally owned businesses. In addition, the plan's workforce inclusion goal is for at least 50% of work hours to be performed by local residents, with a minimum of 20% of total jobs going to local residents.

State Center is currently dormant following a January 2013 ruling by the Baltimore City Circuit Court that voided its contracts because the State did not follow State procurement law in soliciting the project. In February 2013, the State filed an appeal, seeking an expedited decision.

State Fiscal Effect:

Administrative Costs: The bill requires the use of an economic inclusion plan only for public works projects that use competitive sealed proposals, a decision that remains at the discretion of State procurement units. Given the limited number of State public works projects valued at $25 million that are procured each year (generally only a few and mostly in higher education), the bill's termination date, the discretion provided to procurement units, and the fact that compliance with plans is determined by a third-party contractor, State procurement units should be able to implement the bill's requirements with existing budgeted resources. Similarly, BPW can draft regulations and comply with the reporting requirements with existing budgeted resources.

For projects that do use economic inclusion plans, the appropriate agency must procure a third-party evaluator. However, the cost of the evaluation contract is borne entirely by the contractor, so there is no direct cost to the State. To the extent that the contractor passes along the cost to the State in the form of a higher proposal price, the cost of the project increases (as discussed below).

Procurement Costs: The bill requires contractors on affected contracts to provide local residents with job-readiness skills and industry-specific training and to offer related services. It also requires them to pay the cost of retaining a third-party evaluator to assess their compliance with the economic inclusion plan. These services likely increase the cost associated with these contracts, which contractors will undoubtedly pass on to the State in the form of higher contract prices. Alternatively, these requirements may dissuade some bidders or offerors from participating in State procurement because the required activities are beyond their expertise. Such reduced competition for State contracts may result in higher proposal prices. The Department of Legislative Services (DLS) cannot reliably quantify these increased costs, but they may be substantial given that the bill only applies to large contracts.

Small Business Effect: Small businesses involved in affected State public works projects may have to comply with the terms of economic inclusion plans. To the extent that they must, their discretion in hiring employees is curtailed. It is assumed that the cost of any services they provide under an economic inclusion plan are passed on to the State.

Additional Comments: DLS notes that it may pose a conflict of interest for the contractor to pay the cost of a third-party evaluator, as required by the bill, who is responsible for determining whether the contractor is complying with an economic inclusion plan.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Howard, Montgomery, and Prince George's counties; Baltimore City; 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

Fiscal Note History: First Reader - March 11, 2013
ncs/rhh

Analysis by: Michael C. Rubenstein

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

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

	Construction	Architectural/ Engineering	Maintenance	Information Technology	Services	Supplies/ Equipment
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

Agency	% MBE Participation
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 Total[1]	**23.8%**

[1]Includes additional non-Cabinet agencies.

Source: Governor's Office of Minority Affairs