

Department of Legislative Services
Maryland General Assembly
2015 Session

FISCAL AND POLICY NOTE

Senate Bill 324 (Senator Bates)
Education, Health, and Environmental Affairs

**Minority Business Enterprise Participation - Liquidated Damages - Architectural
or Engineering Services**

This bill exempts architectural and engineering (A&E) service contracts that are subject to selection and negotiation by the General Selection Board from regulations adopted by the Board of Public Works (BPW) that require payment of liquidated damages in the event that the contractor fails to comply in good faith with the minority business enterprise (MBE) provisions or the pertinent terms of the contract.

Fiscal Summary

State Effect: Potential minimal. The State may forego some future revenue from liquidated damages on A&E contracts, but the liquidated damages provisions in current law have not been invoked since they were enacted in 2012. No effect on revenues.

Local Effect: None.

Small Business Effect: Potential meaningful for small A&E firms that bid on State projects.

Analysis

Current Law: For a complete description of the MBE program, please see the **Appendix – Minority Business Enterprise Program**.

Regulations adopted by BPW to implement the program must include a requirement that all contracts containing MBE participation goals include a liquidated damages provision that applies in the event that the contractor fails to comply in good faith with the provisions of the MBE program or the pertinent terms of the applicable contract.

General Selection Board

The Maryland Architectural and Engineering Services Act (Chapter 48 of 1988) established both the General Professional Services Selection Board (referred to elsewhere in statute as the General Selection Board) and the Transportation Professional Services Selection Board to review agency procurements for A&E services and advise BPW on the selection of A&E contractors. Except for a unit of the Maryland Department of Transportation, State agencies that intend to procure an A&E contract for at least \$200,000 must submit a request to the General Selection Board. The board may approve the request only if it determines that the services cannot be provided feasibly and economically by State employees. The board also evaluates proposals received in response to requests for proposals for A&E services and conducts negotiations with the most qualified responder. After selecting a contractor, the board makes a recommendation to BPW. Under State law, the board may waive provisions of the Act under specified circumstances, and an offeror may appeal the board's decision.

Background: Chapter 154 of 2012 added the provision requiring contracts with MBE participation goals to include liquidated damages provisions. The Department of General Services, which procures most A&E contracts on behalf of the State and oversees the General Selection Board, advises that liquidated damages provisions in those contracts have not been invoked.

Small Business Effect: Small A&E firms that bid on State contracts do not have to pay liquidated damages if they are unable, in good faith, to meet MBE program requirements on their contracts.

Additional Information

Prior Introductions: None.

Cross File: HB 379 (Delegate Bromwell) - Health and Government Operations.

Information Source(s): Department of Budget and Management, Department of General Services, University System of Maryland, Department of Legislative Services

Fiscal Note History: First Reader - February 17, 2015
min/ljm

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Appendix – Minority Business Enterprise Program

The State's Minority Business Enterprise (MBE) program 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 and Chapter 154 of 2012, 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. In August 2013, GOMA announced a new statewide goal of 29% MBE participation that applies to fiscal 2014 and 2015. 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. In June 2014, new regulations took effect allowing MBE prime contractors to count their own work for up to 50% of a contract's MBE goal and up to 100% of any contract subgoal. Previously, certified MBE prime contractors could not count their own participation toward any goal or subgoal on an individual contract, but their participation was counted toward the State's MBE goal.

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.

Exhibit 1
Subgoal Guidelines for MBE Participation

	<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%	19%	19%	25%	23%

Source: Governor's Office of Minority Affairs

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 made 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.

The MBE program is scheduled to terminate July 1, 2016; it has been reauthorized six times since 1990, the latest by Chapter 154 of 2012. **Exhibit 2** provides MBE participation rates for major Executive Branch agencies for fiscal 2013, the most recent year for which data is available.

Exhibit 2
MBE Participation Rates, by Agency
Fiscal 2013

<u>Cabinet Agency</u>	<u>% MBE Participation</u>
Aging	33.9%
Agriculture	5.5%
Budget and Management	2.5%
Business and Economic Development	79.9%
Education	16.0%
Environment	16.9%
Executive Department	15.8%
General Services	18.6%
Health and Mental Hygiene	56.5%
Higher Education Commission	5.2%
Housing and Community Development	30.5%
Human Resources	13.5%
Information Technology	13.8%
Juvenile Services	8.7%
Labor, Licensing, and Regulation	18.4%
Military	3.6%
Natural Resources	5.4%
Planning	4.7%
State Police	10.4%
Public Safety and Correctional Services	41.3%
Transportation – Aviation Administration	22.5%
Transportation – Motor Vehicle Administration	70.8%
Transportation – Office of the Secretary	22.6%
Transportation – Port Administration	11.7%
Transportation – State Highway Administration	16.5%
Transportation – Transit Administration	11.3%
Transportation – Transportation Authority	28.4%
Statewide Total¹	24.4%

¹Includes University System of Maryland and non-Cabinet agencies

Source: Governor's Office of Minority Affairs

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 2015 is \$1,669,419.