

Department of Legislative Services
Maryland General Assembly
2016 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 1070 (Senator Muse)
Budget and Taxation

Certified Business Enterprises - Gaming and Lottery Control Commission
Contracts - Preferences

This bill requires the Maryland Lottery and Gaming Control Commission (MLGCC) to implement a procurement preference program for specified minority- and women-owned small, disadvantaged, or airport concessions disadvantaged business enterprises. The commission must also apply procurement preferences for joint ventures, as specified by the bill.

Fiscal Summary

State Effect: General and special fund expenditures increase for the Maryland Lottery and Gaming Control Agency beginning in FY 2017, to the extent that the preference program results in contracts being awarded to bidders who do not submit the lowest responsive bid or to offerors who do not submit the proposal that is most advantageous to the State. A reliable estimate of the effect is not feasible. MLGCC can likely implement the bill with existing resources, but it may create operational inefficiencies and delay the awarding of some contracts. No effect on revenues.

Local Effect: None.

Small Business Effect: Potential meaningful for small businesses that do business with MLGCC.

Analysis

Bill Summary: A “certified business enterprise (CBE)” is a minority- or women-owned small, disadvantaged, or airport concessions disadvantaged business enterprise that is

certified by (1) the Maryland Department of Transportation (MDOT); (2) the Washington Metropolitan Airports Authority; or (3) a certification agency designated by the U.S. government or the District of Columbia to certify minority- and women-owned small or disadvantaged business enterprises.

A “joint venture” is a business enterprise that includes a member with at least 45% interest in the business and is certified by any of the entities described above.

Certified Business Enterprises

A CBE responding as a prime contractor may be awarded a preference under the bill only if it has at least four years of past performance providing lottery services to a lottery agency of the United States or of another state (*i.e.*, past service with MLGCC does not qualify for a preference).

For a proposal for goods or services, MLGCC must apply the following preferences:

- two points for a certified small business enterprise (SBE);
- five points for a certified minority business enterprise (MBE);
- five points for a certified disadvantaged business enterprise (DBE);
- two points for a certified airport concession DBE; and
- two points for a certified SBE, MBE, or DBE that has its principal place of business or operations in an enterprise zone.

For a bid for goods or services, MLGCC must apply the following preferences:

- 3% for a certified SBE;
- 5% for a certified MBE;
- 5% for a certified DBE;
- 2% for a certified airport concession DBE; and
- 2% for a certified SBE, MBE, or DBE that has its principal place of business or operations in an enterprise zone.

MLGCC may not award a preference of more than 12 points or a price reduction of more than 12% to any single business entity.

Joint Ventures

MLGCC must also award preferences to joint ventures in the procurement of goods or services. If all members of the joint venture are CBEs, the joint venture is assigned the same preference as the majority certified business enterprise plus (1) four points for any

CBE whose percentage ownership in the joint venture is greater than 35% but does not exceed 50% and (2) two points for any CBE whose percentage ownership in the joint venture is greater than 20% but does not exceed 35%.

If a joint venture includes noncertified business enterprises, the bill specifies the criteria for assigning preferences to the joint venture based on the percentage of ownership of the noncertified businesses. A joint venture may not receive more than 12 points under the preference program.

Current Law/Background: For a full description of the State's MBE program, please see the **Appendix – Minority Business Enterprise Program**. The federal government operates a DBE program for contractors who work on contracts that include federal funds. MDOT certifies both MBEs and DBEs for the State. The Metropolitan Washington Airports Authority, which operates both Reagan-National Airport and Dulles International Airport, has a DBE program in accordance with federal regulations.

Since 1973, the Maryland Lottery and Gaming Control Agency has administered and operated lottery games to generate revenue for the State. The lottery currently offers the following games: Pick 3; Pick 4; Keno; Keno Bonus and Super Keno Bonus; Mega Millions; Powerball; Bonus Match Five; Instant Games; Multi-Match; Racetrax and Racetrax Bonus; 5 Card Cash; and most recently Cash4Life.

MLGCC has oversight responsibility for the agency. In 2008, the commission was expanded to address additional responsibilities stemming from the video lottery terminal (VLT) legislation. The agency is responsible for the administration of the VLT program including accounting for and distributing VLT revenues, managing the program's central system, and regulating and licensing of operators. In fiscal 2012, the agency's responsibilities were further expanded to include the regulation of table games at the previously authorized VLT facilities, among other new duties.

Small Business Effect: MBEs and DBEs that do business with MLGCC are more likely to be awarded contracts under the preference program.

Additional Comments: State law does not require the use of points in assessing proposals for procurements that use competitive sealed proposals. To the extent that MLGCC does not use points, it may not be able to implement the bill's point preferences for proposals.

Additional Information

Prior Introductions: None.

Cross File: HB 1574 (Delegate Holmes) - Rules and Executive Nominations.

Information Source(s): Department of Budget and Management, Department of General Services, Board of Public Works, Metropolitan Washington Airports Authority, Maryland Department of Transportation, Maryland State Lottery and Gaming Control Agency, Department of Legislative Services

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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. Likewise, the Special Secretary (in consultation with the Secretary of Transportation and the Attorney General) is 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 applied to fiscal 2014 and 2015; as no new goal has been established, the 29% goal remains in effect for fiscal 2016. GOMA issued subgoal guidelines in July 2011, summarized in **Exhibit 1**, which are also 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%	16%	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 typically conducts a disparity study to determine whether there is continued evidence that MBEs are underutilized in State contracting.

The most recent disparity study was published in February 2011 and serves as the basis for the two most recent reauthorizations 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 next disparity study is due by September 30, 2016.

The MBE program is scheduled to terminate July 1, 2017; it has been reauthorized seven times since 1990, the latest by Chapters 200 and 201 of 2013. **Exhibit 2** provides MBE participation rates for major Executive Branch agencies for fiscal 2014, the most recent year for which data is available.

Exhibit 2
MBE Participation Rates, by Agency
Fiscal 2014

<u>Cabinet Agency</u>	<u>% MBE Participation</u>
Aging	26.1%
Agriculture	4.9%
Budget and Management	8.1%
Business and Economic Development ¹	23.0%
Education	13.6%
Environment	32.8%
Executive Department	27.5%
General Services	27.2%
Health and Mental Hygiene	51.0%
Higher Education Commission	8.7%
Housing and Community Development	43.5%
Human Resources	17.9%
Information Technology	52.1%
Juvenile Services	2.6%
Labor, Licensing, and Regulation	26.0%
Military	23.0%
Natural Resources	9.3%
Planning	4.6%
State Police	26.3%
Public Safety and Correctional Services	54.5%
Transportation – Aviation Administration	18.7%
Transportation – Motor Vehicle Administration	55.2%
Transportation – Office of the Secretary	33.4%
Transportation – Port Administration	20.1%
Transportation – State Highway Administration	19.9%
Transportation – Transit Administration	18.1%
Transportation – Transportation Authority	27.1%
Statewide Total²	27.3%

¹The Department of Business and Economic Development has since been reorganized and renamed.

²Includes University System of Maryland, Morgan State University, St. Mary's College of Maryland, Baltimore City Community College, 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.

A socially and economically disadvantaged individual is defined as a citizen or legal U.S. resident who is African American, American Indian/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 subjected 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 in the same or similar line of business 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 2016 is \$1,674,928.