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Maryland General Assembly
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FISCAL AND POLICY NOTE
First Reader

House Bill 258
Ways and Means

(Delegate B. Robinson, *et al.*)

Community Colleges - Minority Business Enterprise Programs - Establishment

This bill requires that each community college in the State, except for Montgomery Community College and Prince George's Community College, conduct a study to assess the appropriate scope, if any, for a minority business enterprise (MBE) program. If the study shows a compelling need for an MBE program, the board of trustees of the community college must establish a program to facilitate the participation of certified MBEs in contracts awarded by the community college in accordance with competitive bidding requirements. In conducting a study, each community college must comply with the requirements of the U.S. Supreme Court's decision in *City of Richmond v. J.A. Croson Co.* and any other federal or constitutional requirements.

Fiscal Summary

State Effect: None. As a State agency, Baltimore City Community College participates in the State's MBE program.

Local Effect: Each affected community college must conduct a disparity study. A reliable estimate of the cost of such studies is not feasible, given the variation in the size of each jurisdiction, but is likely in the hundreds of thousands of dollars for most counties, and possibly in excess of \$1.0 million in some counties. No effect on local revenues. **This bill imposes a mandate on a unit of local government.**

Small Business Effect: Potential meaningful for MBEs.

Analysis

Current Law: For a detailed description of the State’s MBE program and a summary of the *Croson* decision, please see the **Appendix – Minority Business Enterprise Program**.

The Board of Trustees of Montgomery Community College must establish a mandatory MBE utilization program to facilitate the participation of responsible certified MBEs in contracts awarded by the board in accordance with competitive bidding requirements. Statute also requires the Board of Trustees of Prince George’s Community College to adopt a similar program if an internal and market fact-finding study conducted in 1990 demonstrates “a compelling governmental interest” to adopt such a program.

Baltimore City Community College is a State agency and must adhere to the State’s MBE program requirements.

Background: Montgomery College has established a policy that creates a Minority Business Utilization Program to facilitate the participation of responsible certified MBEs in contracts awarded by the college. The policy states that it does not authorize the award of contracts that are fiscally disadvantageous to the college, nor does it confer any special privilege or status upon any MBE. Procedures established pursuant to the policy require the Director of Procurement to attempt to achieve a 15% participation rate by MBEs, as measured by total dollars awarded through the procurement process.

Prince George’s Community College conducted the internal and market fact-finding study required by statute in 1989, which determined that there was not a compelling interest to establish an MBE program for the college, so no program was established. However, in 2011, the college’s Board of Trustees adopted a policy establishing a Minority Utilization Business Program to encourage and facilitate the participation of MBEs in contracts awarded by the board. The policy establishes two MBE participation goals: 15% for discretionary operational expenses and 25% for construction and capital-related projects. The policy specifies that the goals are not intended to preclude the award of any contract to the lowest bidder meeting the specifications, or to require the award of any subcontract or material order to any MBE.

Local Fiscal Effect: The bill requires that each community college comply with the requirements of the *Croson* decision, which typically requires that a jurisdiction demonstrate that there are actual disparities in the use of MBEs in the marketplace. The State conducts a disparity study every five years to determine whether such disparities exist in the State as part of its MBE program. It is assumed that each community college that establishes an MBE program as a result of this bill would have to do the same for its jurisdiction. The Maryland Department of Transportation, which is responsible for conducting the State’s disparity study, advises that the current study underway has a

maximum cost of \$3.5 million. Studies confined to specific counties undoubtedly are less costly, but the costs will vary depending on the size and presence of MBEs for each jurisdiction. Therefore, a reliable estimate of the cost of each disparity study is not feasible, but is likely several hundreds of thousands of dollars, and in some cases more than \$1.0 million.

Small Business Effect: MBEs may benefit from increased opportunities to participate in procurement with community colleges.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Prince George's Community College, Montgomery College, Baltimore City Community College, Maryland Department of Transportation, Department of Legislative Services

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mel/rhh

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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.