

Department of Legislative Services
Maryland General Assembly
2017 Session

FISCAL AND POLICY NOTE
Enrolled - Revised

Senate Bill 4

(Chair, Education, Health, and Environmental Affairs Committee)(By Request - Departmental - Office of Minority Affairs)

Education, Health, and Environmental Affairs

Health and Government Operations

Minority Business Enterprises - Program Participation - Requirements and Reauthorization

This departmental bill extends the termination date of the State's Minority Business Enterprise (MBE) preference program by five years, to July 1, 2022, and requires the Maryland Department of Transportation (MDOT) to complete a new disparity study by September 30, 2021. The bill also requires each MBE serving as a subcontractor on an awarded contract to submit a document to *both* the prime contractor and the procurement officer – within 10 days of notification of the contract award by the prime contractor – specifying the percentage and type of work that is assigned to MBE.

The bill takes effect July 1, 2017.

Fiscal Summary

State Effect: Special fund expenditures by MDOT increase by approximately \$3.5 million in FY 2021 and 2022; it is assumed that roughly three-quarters of the expenditures occur in FY 2021 and one-quarter occur in FY 2022 to complete the study by September 2021. Although the extension of the MBE program may result in higher procurement costs than if the program were allowed to terminate, the program is well-established, having existed in its current form for more than 25 years and been reauthorized seven times. Therefore, its extension has no practical fiscal effect. State agencies can implement changes to MBE procedures with existing resources. No effect on revenues.

(in dollars)	FY 2018	FY 2019	FY 2020	FY 2021	FY 2022
Revenues	\$0	\$0	\$0	\$0	\$0
SF Expenditure	0	0	0	2,625,000	875,000
Net Effect	\$0	\$0	\$0	(\$2,625,000)	(\$875,000)

Note: () = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate increase; (-) = indeterminate decrease

Local Effect: None.

Small Business Effect: The Governor's Office of Minority Affairs (GOMA) has determined that this bill has a meaningful impact on small business (attached). The Department of Legislative Services concurs with this assessment as discussed below. (The attached assessment does not reflect amendments to the bill.)

Analysis

Bill Summary/Current Law/Background: The bill establishes that the General Assembly, based on its review of the disparity study published on February 8, 2017, finds, among other things, that there are substantial and statistically significant disparities that are consistent with discrimination against minorities and nonminority women in State procurement. It also establishes that the MBE program is consistent with the study data and is narrowly tailored to the compelling interests of the State.

Under current law, within 10 days of notification of contract award, the apparent awardee (prime contractor) must submit a participation certification affidavit to the procurement officer that affirms the percentage and type of work to be performed by each MBE subcontractor. The form is signed by each subcontractor, but GOMA has received complaints from subcontractors that prime contractors make changes to the form after the MBE subcontractors have signed it, or that they signed a blank affidavit and learned later that their share of the contract was changed (from the original proposal) on the submitted affidavit. The bill, therefore, requires each MBE subcontractor to submit an affidavit directly to the procurement officer as well as to the prime contractor that specifies the percentage and type of work assigned to the subcontractor by the prime contractor.

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

State Fiscal Effect: The previous reauthorization of the MBE program required that the next disparity study be completed by MDOT and submitted to the General Assembly by September 30, 2016. The study, which had a not-to-exceed cost of \$3.5 million, was published on February 8, 2017, following MDOT's request for an extension.

It is assumed that the new study mandated for September 2021 will cost approximately the same as the previous study. Given that the due date for the study is just three months into fiscal 2022, it is assumed that the bulk of the expenditures for the study are incurred in the prior fiscal year for data collection activities, and that expenditures in fiscal 2022 are largely for analysis and printing of the final report.

Small Business Effect: The reauthorization of the MBE program continues to facilitate the participation of small, minority-owned businesses in State procurement and, therefore, benefits them economically. The bill's additional provisions should reduce mistreatment of MBE firms, which may provide tangible economic benefits to firms that would otherwise experience diminished participation in State procurement.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Governor's Office of Minority Affairs; Department of General Services; Board of Public Works; Maryland Department of Transportation; Department of Legislative Services

Fiscal Note History: First Reader - February 15, 2017
mm/ljm Third Reader - March 20, 2017
Revised - Amendment(s) - March 20, 2017
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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.

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 2017. 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.

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%

MBE: Minority Business Enterprise

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 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. A new disparity study is in process; by statute it was required to be completed by September 2016, but it was not completed by that date.

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 based on contract awards made during fiscal 2015, the most recent year for which data is available.

Exhibit 2
MBE Participation Rates, by Agency
Fiscal 2015

<u>Cabinet Agency</u>	<u>% MBE Participation</u>
Aging	30.0%
Agriculture	3.4%
Budget and Management	2.4%
Commerce	8.8%
Education	17.0%
Environment	10.1%
Executive Department	17.2%
General Services	21.5%
Health and Mental Hygiene	66.3%
Higher Education Commission	59.5%
Housing and Community Development	32.0%
Human Resources	9.8%
Information Technology	6.8%
Juvenile Services	10.0%
Labor, Licensing, and Regulation	30.7%
Military	24.5%
Natural Resources	12.5%
Planning	7.8%
State Police	21.9%
Public Safety and Correctional Services	53.9%
Transportation – Aviation Administration	24.1%
Transportation – Motor Vehicle Administration	38.9%
Transportation – Office of the Secretary	39.0%
Transportation – Port Administration	9.5%
Transportation – State Highway Administration	24.1%
Transportation – Transit Administration	15.6%
Transportation – Transportation Authority	25.8%
Statewide Total¹	26.2%

MBE: Minority Business Enterprise

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.

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 2017 is \$1,692,682.

ANALYSIS OF ECONOMIC IMPACT ON SMALL BUSINESSES

TITLE OF BILL: Minority Business Enterprises- Program Reauthorization-Participation

BILL NUMBER: SB 4

PREPARED BY: Chantal Kai-Lewis, MBE Compliance Manager and Policy, GOMA

PART A. ECONOMIC IMPACT RATING

This agency estimates that the proposed bill:

- WILL HAVE MINIMAL OR NO ECONOMIC IMPACT ON MARYLAND SMALL BUSINESS
OR
- WILL HAVE MEANINGFUL ECONOMIC IMPACT ON MARYLAND SMALL BUSINESSES

PART B. ECONOMIC IMPACT ANALYSIS

While it is difficult to ascertain the estimated amount of economic impact, added safeguards such as those outlined in this bill will have the effect of aiding Maryland's minority and small businesses economically by ensuring that they receive the percentage of work and dollars designated to them under certain contracts with minority business enterprise goals.