

Department of Legislative Services
 Maryland General Assembly
 2018 Session

FISCAL AND POLICY NOTE
 Third Reader - Revised

House Bill 1622
 Ways and Means

(Delegate Wilson, *et al.*)

Budget and Taxation

Video Lottery Terminals - Minority Business Participation Goals - Sunset
 Extension

This bill extends by one year, to July 1, 2019, the requirement that a video lottery facility applicant or licensee be subject to the minority business enterprise (MBE) participation goal set in State law and any other corresponding MBE provisions. It clarifies that an applicant or licensee is subject to the MBE participation goal established by the Special Secretary for the Office of Small, Minority, and Women Business Affairs (GOMA), under specified provisions of State law. The bill also requires the Maryland Department of Transportation (MDOT) to conduct a study, by December 14, 2018, of the MBE requirement’s compliance with federal law. **The bill takes effect June 1, 2018.**

Fiscal Summary

State Effect: No likely effect on expenditures in FY 2018, but Transportation Trust Fund (TTF) expenditures increase by \$75,000 in FY 2019 to conduct the required study. GOMA can handle any monitoring and enforcement responsibilities with existing budgeted 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	-	75,000	0	0	0
Net Effect	(-)	(\$75,000)	\$0	\$0	\$0

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

Local Effect: None.

Small Business Effect: Meaningful.

Analysis

Bill Summary: In preparation for MDOT's study, the State Lottery and Gaming Control Commission must require video lottery operation applicants and licensees to provide any information necessary to conduct the study. The study must evaluate race-neutral programs or other methods that can be used to address the needs of minority investors and minority businesses. The study must be submitted to the Legislative Policy Committee by December 14, 2018, so that the General Assembly may review the report before the 2019 session.

Current Law: Through June 30, 2018, for the construction and procurement, including the procurement of equipment and ongoing services, a video lottery operation applicant or a licensee must at a minimum meet the same specified minority business participation requirements of a designated unit for minority business participation. If a county in which a video lottery facility will be located has a higher MBE participation goal than the State, an applicant must meet the county's higher standard to the extent possible. A county in which a video lottery facility will be located may impose local business, local minority business participation, and local hiring requirements to the extent authorized by local law and allowed by the United States Constitution.

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

Chapter 4 of the 2007 Special Session, which first required the licensing of video lottery facilities in the State, included a requirement that construction and procurement related to the operation of the facilities meet the same requirements for minority business participation specified for State agencies in State law. That provision was scheduled to terminate July 1, 2011, but was reauthorized until July 1, 2018, by Chapter 507 of 2011.

Chapter 1 of the Second Special Session of 2012 added the provision in current law authorizing counties to impose local business, local MBE participation, and local hiring requirements. It also expanded the application of the MBE requirement to applicants and licensees to include procurement of equipment and ongoing services, which remains in current law. This was done because, with some exceptions, Chapter 1 also required video lottery facilities to own or lease their own video lottery terminals (VLTs), whereas prior to Chapter 1, the facilities had used VLTs owned by the State. The requirement to own or lease their own VLTs was delayed until March 31, 2015, for existing facilities in Anne Arundel and Cecil counties; existing facilities in Allegany and Worcester counties were allowed to apply for permission to own their VLTs, but neither did. Chapter 339 of 2017 requires the facilities in Allegany and Worcester counties to own or lease their own VLTs by March 31, 2020.

State Expenditures: The appendix describes the constitutional rationale for requiring a disparity study prior to implementing a race-based procurement preference program. Whereas the State typically conducts a disparity study about every five years prior to reauthorizing its MBE program, the original disparity analysis conducted for the VLT program has not been updated since it was completed following the enactment of Chapter 507 of 2011. The VLT industry was not included in the State's most recent disparity study completed in 2017. As MDOT is the State's certification agency, it is responsible for carrying out any necessary disparity studies, so TTF expenditures by MDOT increase by \$75,000 to update the disparity study in fiscal 2019. If the study is initiated in June, some portion of that cost may be incurred in fiscal 2018 instead.

Small Business Effect: Small and minority-owned businesses continue to benefit from the one-year extension of the MBE participation requirement for video lottery facilities.

Additional Information

Prior Introductions: None.

Cross File: SB 383 (Senator Benson, *et al.*) - Budget and Taxation.

Information Source(s): Governor's Office of Small, Minority, and Women Business Affairs; Maryland State Lottery and Gaming Control Agency; Maryland Department of Transportation; Department of Legislative Services

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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 Small, Minority, and Women Business 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 2018. 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 Small, Minority, and Women Business 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 2017 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) were 37% lower than for comparable nonminority males; average annual wages for nonminority women were 33% lower than for comparable nonminority males. It also found continued disparities in the use of MBEs by the State compared to their availability in the marketplace to perform work in designated categories of work. For instance, African American-owned construction businesses were paid 5.1% of State construction contract dollars, but they made up 10.3% of the construction sector in the relevant State marketplace. Nonminority women-owned construction businesses were paid 7.5% of State construction contract dollars but made up 13.7% of the construction sector. According to the analysis, these differences were large and statistically significant.

The MBE program is scheduled to terminate July 1, 2022; it has been reauthorized eight times since 1990, the latest by Chapter 340 of 2017. **Exhibit 2** provides MBE participation rates for major Executive Branch agencies based on contract awards made during fiscal 2016, the most recent year for which data is available.

Exhibit 2
MBE Participation Rates, by Agency
Fiscal 2016

<u>Cabinet Agency</u>	<u>% MBE Participation</u>
Aging	0.4%
Agriculture	4.7%
Budget and Management	23.8%
Commerce	5.0%
Education	15.2%
Executive Department	13.2%
General Services	21.0%
Health and Mental Hygiene*	11.2%
Higher Education Commission	4.0%
Housing and Community Development	20.1%
Human Resources*	19.8%
Information Technology	2.5%
Juvenile Services	6.8%
Labor, Licensing, and Regulation	20.8%
Military	11.3%
Natural Resources	7.2%
Planning	12.1%
State Police	10.1%
Public Safety and Correctional Services	48.8%
Transportation – Aviation Administration	20.7%
Transportation – Motor Vehicle Administration	54.3%
Transportation – Office of the Secretary	22.0%
Transportation – Port Administration	19.4%
Transportation – State Highway Administration	19.3%
Transportation – Transit Administration	20.3%
Transportation – Transportation Authority	21.1%
Statewide Total¹	20.2%

MBE: Minority Business Enterprise

¹Includes University System of Maryland, Maryland Department of the Environment, and non-Cabinet agencies.

*Former names of the Maryland Department of Health and the Department of Human Services

Source: Governor’s Office of Small, Minority, and Women Business 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 2018 is \$1,713,333.