

Department of Legislative Services
Maryland General Assembly
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FISCAL AND POLICY NOTE
Enrolled - Revised

House Bill 1279

(Montgomery County Delegation and Prince George's
County Delegation)

Health and Government Operations

Education, Health, and Environmental Affairs

**Maryland-National Capital Park and Planning Commission - Procurement -
Source Selection**
MC/PG 112-19

This bill authorizes the Maryland-National Capital Park and Planning Commission (M-NCPPC) to establish a minority business enterprise (MBE) program, under specified conditions, and a local small business enterprise (SBE) preference program. Authorization for the MBE program terminates October 1, 2022. M-NCPPC must complete a study to evaluate whether there is a compelling interest to implement specified remedial measures to assist minorities and women in participating in the commission's procurement; the study must be completed prior to establishing an MBE program. M-NCPPC must also adopt procurement regulations consistent with standards and methods for source selection in State law. **The bill takes effect June 1, 2019.**

Fiscal Summary

State Effect: None. Specified State agencies can provide assistance, as required under the bill, to M-NCPPC with existing resources. Revenues are not affected.

Local Effect: M-NCPPC expenditures increase by approximately \$300,000 in FY 2020 to conduct a disparity study. Ongoing costs (as much as \$120,000 annually) for staffing are incurred to the extent that the commission establishes MBE and/or SBE programs. No effect on revenues. **This bill imposes a mandate on a unit of local government.**

Small Business Effect: Potential meaningful.

Analysis

Bill Summary:

Definitions

“Local small business enterprise” means a business enterprise that has its principal place of operation in Montgomery County or Prince George’s County and has been certified as an SBE by either county.

“Minority business enterprise” has the same definition as in State law.

Disparity Study

M-NCPPC must, in consultation with the Maryland Department of Transportation (MDOT) and the Office of the Attorney General, complete a study, which may include an analysis of the State’s disparity study, to determine whether there is a compelling interest to implement remedial measures. MDOT, as the State’s certification agency, must consult with the commission to determine if the State’s disparity study applies to the types of goods and services procured by the commission. In conducting the study, the commission must evaluate race-neutral programs or other methods that may be used to address the needs of minority- and women-owned businesses that seek to participate in the commission’s procurement process.

By January 1, 2020, M-NCPPC must report to the Montgomery and Prince George’s county delegations and the Legislative Policy Committee on the study’s findings. Montgomery and Prince George’s counties may provide sufficient resources to implement the bill, including funding necessary to conduct a study or analysis required to determine whether there is discrimination against MBEs or whether local small businesses have been underutilized.

Minority Business Enterprise Program

If, based on the results of the disparity study, M-NCPPC determines that there is a compelling interest to implement remedial measures, M-NCPPC may establish an MBE program that can include:

- procedures to maximize notice to MBEs and the opportunity for them to participate in the procurement process;
- provisions to extend reasonable preferences or goals for certified MBEs, under appropriate circumstances and to the extent authorized by State and federal law based on the results of the mandated study; and
- to the extent applicable, provisions consistent with the State’s MBE program.

Small Business Enterprise Program

If M-NCPPC elects to establish a local SBE program to encourage local small businesses to participate in procurement activities, the program may include:

- procedures for reliable documentation of a business entity's official designation as an SBE by either Montgomery County or Prince George's County;
- procedures to maximize notice to SBEs and the opportunity for them to participate in the procurement process; and
- provisions to extend reasonable preferences and procurement goals for SBEs and to reserve particular procurement activities for local SBEs.

By October 31 of each year, M-NCPPC must report to the Montgomery County and Prince George's County delegations on the effectiveness of any MBE or local SBE programs established under the bill.

Current Law: For a complete description of the State's MBE program and the most recent disparity study, please see the **Appendix – Minority Business Enterprise Program**.

State Qualification as a Small Business

Chapter 75 of 2004 defined a "small business" as either a certified minority-owned business or a business other than a broker that is independently owned and operated, not a subsidiary of another firm, and not dominant in its field of operation. In addition, Chapters 538 and 539 of 2012 (as amended by Chapter 76 of 2014) established that, to qualify as a small business, a business must meet *either* of the following criteria in its most recently completed three fiscal years:

- the firm did not employ more than 25 people in its retail operations; 50 people in either its wholesale or construction operations; or 100 people in either its service, manufacturing, or architectural and engineering operations; *or*
- average gross sales did not exceed \$2.0 million for manufacturing operations, \$3.0 million for retail operations, \$4.0 million for wholesale operations, \$4.5 million for architectural and engineering services, \$7.0 million for construction operations, and \$10.0 million for service operations.

Small businesses self-report their small business status by registering on eMaryland Marketplace, the State's online procurement portal. More than 6,000 businesses have self-qualified as small businesses.

Background: M-NCPPC is a bi-county agency responsible for a regional system of parks and land use planning in Montgomery and Prince George’s counties, as well as a public recreation program in Prince George’s County. M-NCPPC was first authorized to operate a Minority Business Enterprise Utilization Program in 1992, subject to the findings of a disparity study, but the program terminated September 30, 2013 (after multiple reauthorizations). According to the bill’s preamble, M-NCPPC has reported that its utilization of MBEs declined when its utilization program terminated.

Local Expenditures: M-NCPPC advises that its expenditures increase by \$300,000 in fiscal 2020 to hire a consultant to conduct a disparity study using the data available from the State’s study, and for other related costs; these costs may be passed on to Montgomery and Prince George’s counties. M-NCPPC expenditures increase by as much as \$120,000 annually to employ a compliance officer if the commission elects to establish MBE and/or local SBE programs. Costs for procurement may increase minimally due to the application of procurement preferences.

Small Business Effect: Small, minority- and women-owned businesses in Montgomery and Prince George’s counties may benefit from procurement preferences and/or set-aside programs administered by M-NCPPC.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Prince George’s County; Maryland-National Capital Park and Planning Commission; Maryland Department of Transportation; Department of Legislative Services

Fiscal Note History: First Reader - March 3, 2019
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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 2019. 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 Minority Business Enterprise 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 2017, the most recent year for which data is available.

Exhibit 2
Minority Business Enterprise Participation Rates, by Agency
Fiscal 2017

<u>Cabinet Agency</u>	<u>% Participation</u>
Aging	0.4%
Agriculture	7.6%
Budget and Management	6.0%
Commerce	3.1%
Education	23.0%
Environment	57.4%
Executive Department	4.6%
General Services	19.5%
Health	11.5%
Higher Education Commission	16.1%
Housing and Community Development	32.0%
Human Services	8.3%
Information Technology	4.1%
Juvenile Services	7.1%
Labor, Licensing, and Regulation	13.1%
Military	30.2%
Natural Resources	3.9%
Planning	7.5%
State Police	11.9%
Public Safety and Correctional Services	53.9%
Transportation – Aviation Administration	23.1%
Transportation – Motor Vehicle Administration	11.3%
Transportation – Office of the Secretary	27.9%
Transportation – Port Administration	24.9%
Transportation – State Highway Administration	21.2%
Transportation – Transit Administration	16.5%
Transportation – Transportation Authority	22.2%
Statewide Total¹	21.0%

¹Includes the University System of Maryland, Morgan State University, St. Mary's College of Maryland, and non-Cabinet agencies.

Source: Governor's Office of Small, Minority, and Women Business Affairs

Requirements for Minority Business Enterprise 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 2019 is \$1,749,347.