HB 313

Department of Legislative Services

Maryland General Assembly
2020 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

House Bill 313 (Delegate D. Barnes, *et al.*)

Environment and Transportation and Appropriations | Budget and Taxation

Minority Business Enterprise Program – Public–Private Partnerships, Offshore Wind Projects, and Video Lottery Terminals

This bill restores the applicability of the State's Minority Business Enterprise (MBE) program to public-private partnerships (P3s) established under current law and to offshore wind projects authorized in current law. The application of the MBE program to construction projects and procurements as they relate to video lottery terminals (VLTs) is extended for three additional years – until July 1, 2023. The Maryland Department of Transportation (MDOT) must conduct specified analyses of MBE requirements for P3s and offshore wind energy projects. **The bill takes effect July 1, 2020; provisions related to P3s and offshore wind projects terminate June 30, 2023.**

Fiscal Summary

State Effect: Transportation Trust Fund (TTF) expenditures likely increase by $75,000 in FY 2021 and by $150,000 in FY 2023 to conduct the required analyses, as discussed below. State agencies can otherwise implement the bill with existing resources. To the extent potential private-sector partners on P3 projects or offshore wind projects do not want to be subject to MBE requirements, competition for future projects may be reduced. Extension of MBE requirements for VLTs has no practical effect on State finances. No effect on revenues.

(in dollars)	FY 2021	FY 2022	FY 2023	FY 2024	FY 2025
Revenues	$0	$0	$0	$0	$0
SF Expenditure	75,000	0	150,000	0	0
Net Effect	($75,000)	$0	($150,000)	$0	$0

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

Local Effect: None.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary:

Public-private Partnerships

The Board of Public Works (BPW) may not approve a P3 agreement until a reporting agency, if permissible, establishes reasonable and appropriate MBE participation goals and procedures for the project, as specified.

MDOT must conduct specified analyses of MBE requirements for P3s by September 30, 2020, and again by December 1, 2022.

Offshore Wind Projects

To the extent practicable and authorized by the United States Constitution, approved applicants for a proposed offshore wind project must comply with the State's MBE program. MDOT must conduct an analysis of the 2017 disparity study, to determine if it applies to the type of work likely to be performed by an approved offshore wind project, and report its findings to the Legislative Policy Committee by December 1, 2022.

Within six months of the approval of an offshore wind renewable energy credit (OREC) by the Public Service Commission (PSC), the Governor's Office of Small, Minority, and Women Business Affairs (GOSBA), in consultation with the Office of the Attorney General (OAG) and an approved applicant, must establish a clear plan for setting reasonable and appropriate MBE participation goals and procedures for each phase of the qualified offshore wind project. To the extent practicable, the goals and procedures for offshore wind projects must be based on the requirements of the State's MBE program. Every six months following the approval of an OREC application, an approved applicant must submit a report to PSC on its progress in establishing and implementing MBE participation goals and procedures.

Current Law/Background:

Minority Business Enterprise Program

For an overview of the State's MBE program, please see the **Appendix – Minority Business Enterprise Program**.

Public-private Partnerships

Chapter 5 of 2013 established a new framework for the approval and oversight of P3s. Chapter 5 defined a P3 as a method for delivering public infrastructure assets using a long-term, performance-based agreement between specified State "reporting" agencies and a private entity where appropriate risks and benefits can be allocated in a cost-effective manner between the contract partners, in which:

- a private entity performs functions normally undertaken by the government, but the reporting agency remains ultimately accountable for the public infrastructure asset and its public function; and

- the State may retain ownership of the public infrastructure asset and the private entity may be given additional decision making rights in determining how the asset is financed, developed, constructed, operated, and maintained over its life cycle.

A "public infrastructure asset" is a capital facility or structure, including systems and equipment related to the facility or structure intended for public use.

Chapter 5 establishes the public policy of the State to utilize P3s, if appropriate, for (1) developing and strengthening the State's public infrastructure assets; (2) apportioning between the public sector and the private sector the risks involved in the development and strengthening of public infrastructure assets; (3) fostering the creation of new jobs; and (4) promoting the State's socioeconomic development and competitiveness. The public policy also asserts that private entities that enter into P3s must comply with the provisions of the Labor and Employment Article and the federal Fair Labor Standards Act.

BPW must approve all P3 agreements, but a reporting agency may not issue a public notice of solicitation or request that BPW designate a project as a P3 until the Comptroller, Treasurer, budget committees, and Department of Legislative Services (DLS) have had at least 45 days to review and comment on a presolicitation report that contains specified information (for transportation facilities projects, the presolicitation report is submitted only to the budget committees and DLS).

As enacted, Chapter 5 included the language in this bill that required P3 projects to follow the State's MBE requirements. However, Chapter 5 required those provisions to terminate effective June 30, 2016, consistent with the termination date for the MBE program at the time. As noted in the appendix, Chapter 340 of 2017 reauthorized the MBE program for five years following the completion of a new disparity study in that year, but its application to P3 projects was not restored.

Offshore Wind Projects

Chapter 3 of 2013 established an application and review process by PSC for proposed offshore wind projects. It prohibited PSC from approving an application until GOSBA, in consultation with OAG and the applicant, established a clear plan for setting MBE goals and related procedures for each phase of an offshore wind project. To the extent practicable, those goals and procedures had to be based on MBE program requirements. The provisions related to MBE procedures and goals terminated June 30, 2016, consistent with the termination date for the MBE program at the time – and, ultimately, before any offshore wind projects were approved by PSC.

Video Lottery Terminals

Through June 30, 2020, 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.

State Expenditures:

Public-private Partnership Projects

OAG advises that, in order to apply MBE program requirements to P3 projects, analyses of the existing disparity study must be conducted to ensure that there is a compelling State interest to apply the MBE program to P3 projects. A similar analysis was conducted for the application of the MBE program to VLTs, at an approximate cost of $100,000. DLS anticipates that an analysis for P3 projects will be more straightforward, as P3s generally are large construction projects and construction is one of the categories that is already included in the disparity study. Therefore, TTF expenditures increase by an estimated $75,000 in each of fiscal 2021 and 2023 to conduct the required analyses.

Offshore Wind Projects

Following the enactment of Chapter 3 of 2013, MDOT reanalyzed data from the 2012 disparity study to identify the capacity of MBE firms to participate in the development and installation of offshore wind energy facilities. The reanalysis was necessary because, in the absence of an existing offshore wind farm industry, the study could not identify existing MBE capacity or potential disparities. The reanalysis examined comparable industries to estimate potential MBE capacity in the offshore wind farm industry. As the reanalysis of the 2017 disparity study required by this bill is not due to be completed until December 1, 2022, DLS estimates that, with inflation, a reanalysis of the 2017 disparity study will cost approximately $75,000. This analysis assumes that MDOT spends those funds in fiscal 2023.

Small Business Effect: Extending application of MBE requirements to P3 projects and offshore wind projects and continuing its application to VLTs may expand contracting opportunities for certified MBEs in the construction, service, and energy sectors through fiscal 2023.

Additional Information

Prior Introductions: None.

Designated Cross File: SB 442 (Senator Hayes, *et al.*) - Budget and Taxation.

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

Fiscal Note History: First Reader - February 10, 2020
rh/ljm Third Reader - March 17, 2020
Revised - Amendment(s) - March 17, 2020

Analysis by: Michael C. Rubenstein

Direct Inquiries to:
(410) 946-5510
(301) 970-5510

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 (GOSBA), 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, GOSBA 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 2020. GOSBA 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

	Construction	Architectural/ Engineering	Maintenance	Information Technology	Services	Supplies/ Equipment
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 2018, the most recent year for which data is available.

Exhibit 2
Minority Business Enterprise Participation Rates, by Agency
Fiscal 2018

Cabinet Agency	% Participation
Aging	6.3%
Agriculture	4.6%
Budget and Management	3.8%
Commerce	5.0%
Education	9.1%
Environment	25.5%
Executive Department	8.7%
General Services	15.5%
Health	3.5%
Higher Education Commission	0.9%
Housing and Community Development	30.0%
Human Services	6.0%
Information Technology	28.4%
Juvenile Services	23.3%
Labor, Licensing, and Regulation[1]	21.2
Military	13.1%
Natural Resources	6.0%
Planning	4.0%
State Police	16.1%
Public Safety and Correctional Services	16.0%
Transportation – Aviation Administration	20.4%
Transportation – Motor Vehicle Administration	21.1%
Transportation – Office of the Secretary	36.1%
Transportation – Port Administration	19.5%
Transportation – State Highway Administration	17.8%
Transportation – Transit Administration	12.0%
Transportation – Transportation Authority	14.6%
Statewide Total[2]	**15.1%**

[1]Has since been renamed the Maryland Department of Labor.
[2]Includes 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 2020 is $1,771,564.