

**Department of Legislative Services**  
Maryland General Assembly  
2021 Session

**FISCAL AND POLICY NOTE**  
**Third Reader - Revised**

Senate Bill 649

(Senator Griffith, *et al.*)

Education, Health, and Environmental Affairs

Health and Government Operations

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**Procurement - MBE Program Compliance Review and Oversight**

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This bill requires State agencies to submit specified contracts valued at \$1.0 million or more to the Governor's Office of Small, Minority, and Women Business Affairs (GOSBA) for review and approval of minority business enterprise (MBE) goals and subgoals established for the contract, as specified. State agencies must also (1) make a good faith effort to solicit at least one bid from a certified MBE for Category II and Category III small procurements and (2) require prospective contractors to attend a prebid or preproposal meeting as a prerequisite to submitting a bid or proposal, and then share the contact information of each prospective contractor with all attendees. The bill also expands annual reporting requirements for State agencies as well as for GOSBA in accordance with the bill's requirements. The Department of Legislative Services (DLS) must study the implementation of statutory and regulatory requirements of the State's MBE program, and report its findings and recommendations to specified committees of the General Assembly by December 15, 2021. **The bill takes effect July 1, 2021, but the provisions related to GOSBA's expanded oversight responsibilities take effect July 1, 2022, contingent on the statutory extension of the MBE program.**

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**Fiscal Summary**

**State Effect:** No effect in FY 2022 as DLS can conduct the review with existing resources. General fund expenditures increase by \$446,800 in FY 2023 to otherwise implement the bill; out-year expenditures reflect ongoing costs. Submission of procurement solicitations to GOSBA for review may result in brief delays in the release of solicitations. Revenues are not affected.

(in dollars)	FY 2022	FY 2023	FY 2024	FY 2025	FY 2026
Revenues	\$0	\$0	\$0	\$0	\$0
GF Expenditure	0	446,800	434,200	449,700	465,700
Net Effect	\$0	(\$446,800)	(\$434,200)	(\$449,700)	(\$465,700)

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

**Local Effect:** None.

**Small Business Effect:** Potential meaningful.

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## Analysis

### **Bill Summary:**

#### *Oversight by the Governor's Office of Small, Minority, and Women Business Affairs*

In general, before awarding a contract with a value of at least \$1.0 million, a State agency must submit to GOSBA (1) a draft of any proposed MBE participation goals and subgoals for the contract and (2) for sole source procurements, an explanation of any proposed waivers of requirements to establish MBE goals for the contract. However, agencies do not need to submit emergency or expedited contracts to GOSBA for review.

Within 10 days of receiving an agency's submission, GOSBA must either (1) approve the MBE goals and subgoals or, for sole source procurements, the proposed waiver of the establishment of MBE goals and subgoals; (2) establish alternative MBE goals and subgoals for the contract; or (3) require the agency to establish alternative MBE goals and subgoals based on recommendations from GOSBA. If appropriate, GOSBA must make recommendations on how a procurement can be unbundled to facilitate participation by MBEs.

If GOSBA provides recommendations to a State agency regarding MBE goals or unbundling, the agency must (1) consider the recommendations made by GOSBA and (2) notify GOSBA of any changes to the MBE goals and subgoals or any unbundling that results from GOSBA's feedback. If a unit unbundles a procurement based on GOSBA's recommendations, it must resubmit each resulting contract to GOSBA for review, regardless of the value of the resulting contracts.

#### *Study and Report by the Department of Legislative Services*

The review by DLS must examine:

- the process for certifying businesses as MBEs;
- the process for establishing MBE participation goals and subgoals for procurement contracts;
- outreach, training, and notification regarding the MBE program provided to specified businesses;

- the application of MBE participation goals and program requirements to different types of contracts;
- the experience of MBEs that participate in State procurements; and
- tracking of actual MBE participation upon contract completion.

**Current Law:** For a broad overview of the State's MBE program, please see the **Appendix – Minority Business Enterprise Program**. Additional information related to the MBE program is discussed below.

#### *Small Procurements*

In general, a small procurement is a procurement for which an agency spends \$50,000 or less. Regulations classify small procurements into three categories. Category II consists of procurements with a value of more than \$5,000 but not more than \$15,000, and Category III consists of procurements with a value of more than \$15,000 but not more than \$50,000. For Categories II and III, responsive bids or acceptable offers from at least two vendors should be obtained. Each procurement agency must solicit bids or offers from a sufficient number of certified MBEs.

#### *Minority Business Enterprise Program Waivers*

For sole source, emergency, and expedited procurements, the head of a State agency may waive any of the requirements related to the establishment, use, and waiver of MBE contract goals if the public interest cannot reasonably accommodate use of those requirements.

For solicitations or contracts that have MBE participation goals, a State agency may award a waiver of any part of a contract's MBE goals if the contractor provides a reasonable demonstration of good-faith efforts to achieve the goals. In general, when a waiver is granted, the head of the agency must issue the determination in writing, keep a copy of the waiver and the reasons for it, and provide a copy of the waiver to GOSBA.

By July 31 of each year, agencies must submit a report directly to GOSBA and the Board of Public Works (BPW) that includes (1) contract titles, numbers, and dates; (2) the number of waivers requested; (3) the number of waivers granted; and (4) any other information specifically requested by BPW. In turn, BPW reports annually on waivers granted by all State agencies.

#### *Minority Business Enterprise Program Compliance Monitoring and Reporting*

The Special Secretary of GOSBA is charged with, subject to the limitations of law that governs the activities of other units of the Executive Branch, carrying out each State or SB 649/ Page 3

federal program that is created to promote the growth of, or participation in, MBEs. To ensure proper implementation of the MBE program by State agencies, GOSBA employs two MBE compliance monitors.

Within 90 days of the end of each fiscal year, each agency must submit a report to GOSBA, the Maryland Department of Transportation (MDOT, as the MBE certification agency), and the Joint Committee on Fair Practices and Personnel Oversight that includes, among other things:

- the total number and value of procurement contracts between the agency and certified MBEs, including whether the MBE participated as a prime contractor or as a subcontractor; and
- the percentage that those contracts represent, by specific category of MBEs, of the total number and value of procurement contracts.

By December 31 of each year, GOSBA must submit a summary report to BPW and the Legislative Policy Committee. The agency level MBE participation rates from GOSBA's fiscal 2019 report are summarized in the appendix to this analysis.

**State Expenditures:** Based on data provided by BPW and MDOT, it is anticipated that the bill results in approximately 350 solicitations being submitted for GOSBA's review each year. With just two MBE compliance monitors, GOSBA lacks the staff to conduct the necessary reviews of that many solicitations.

Therefore, general fund expenditures increase by \$446,821 in fiscal 2023, which assumes extension of the MBE program so that the provisions related to GOSBA's oversight responsibilities take effect July 1, 2022. The estimate reflects the cost of GOSBA hiring one MBE compliance manager, three MBE compliance monitors, and one administrator to review agency submissions, provide feedback to agencies on their submissions, and report the additional data required by the bill. It includes salaries, fringe benefits, one-time start-up costs, and ongoing operating expenses. It also assumes that existing MBE compliance staff can develop policies and procedures during fiscal 2022 for GOSBA's new oversight responsibilities, which begin in fiscal 2023.

Positions	5.0
Salaries and Fringe Benefits	\$418,096
Operating Expenses	<u>28,725</u>
<b>Total FY 2023 State Expenditures</b>	<b>\$446,821</b>

Future year expenditures reflect full salaries with annual increases and employee turnover and ongoing operating expenses.

**Small Business Effect:** MBEs benefit from more opportunities to participate in State procurement to the extent that the additional review by GOSBA results in (1) State procurements having higher MBE participation goals; (2) more contracts having MBE participation goals; or (3) larger contracts being unbundled.

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## **Additional Information**

**Prior Introductions:** None.

**Designated Cross File:** HB 1348 (Delegate Sample-Hughes) - Health and Government Operations.

**Information Source(s):** Department of General Services; Board of Public Works; Department of Legislative Services

**Fiscal Note History:** First Reader - February 15, 2021

rh/ljm Third Reader - April 1, 2021

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## Appendix – Minority Business Enterprise Program

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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 2021. GOSBA issued subgoal guidelines in July 2011 and then updated them effective August 2020, as summarized in **Exhibit 1**. 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.

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### Exhibit 1 Subgoal Guidelines for Minority Business Enterprise Participation

	<u>Architectural/ Construction</u>	<u>Engineering</u>	<u>Information Maintenance</u>	<u>Technology</u>	<u>Supplies/ Services</u>	<u>Equipment</u>
African American	8%	7%	9%	10%	-	6%
Hispanic	-	-	3%	-	2%	2%
Asian	-	-	2%	-	3%	-
Women	11%	10%	-	10%	10%	8%
<b>Total</b>	<b>19%</b>	<b>17%</b>	<b>14%</b>	<b>20%</b>	<b>15%</b>	<b>16%</b>
<b>Total +2</b>	<b>21%</b>	<b>19%</b>	<b>16%</b>	<b>22%</b>	<b>17%</b>	<b>18%</b>

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

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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 2019, the most recent year for which data is available.

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**Exhibit 2**  
**Minority Business Enterprise Participation Rates, by Agency**  
**Fiscal 2019**

<b><u>Cabinet Agency</u></b>	<b><u>% Participation</u></b>
Aging	1.4%
Agriculture	4.9%
Budget and Management	7.4%
Commerce	1.2%
Education	6.0%
Environment	28.6%
Executive Department	1.8%
General Services	15.0%
Health	14.6%
Higher Education Commission	3.0%
Housing and Community Development	38.4%
Human Services	14.7%
Information Technology	15.4%
Juvenile Services	19.5%
Labor	26.1
Military	7.0%
Natural Resources	NA <sup>1</sup>
Planning	4.6%
State Police	15.0%
Public Safety and Correctional Services	17.5%
Transportation – Aviation Administration	27.2%
Transportation – Motor Vehicle Administration	16.0%
Transportation – Office of the Secretary	18.5%
Transportation – Port Administration	18.5%
Transportation – State Highway Administration	20.3%
Transportation – Transit Administration	15.1%
Transportation – Transportation Authority	11.6%
<b>Statewide Total<sup>2</sup></b>	<b>17.9%</b>

<sup>1</sup> Data not provided.

<sup>2</sup> 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 may be certified as being owned by both a woman and by a member of a racial or ethnic minority, but for the purpose of participating on a contract as an MBE, it can only be counted as one or the other. 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 2021 is \$1,788,677.