

Department of Legislative Services
 Maryland General Assembly
 2021 Session

FISCAL AND POLICY NOTE
Third Reader

Senate Bill 689

(Senator Sydnor)

Education, Health, and Environmental Affairs

Health and Government Operations

Office of Small, Minority, and Women Business Affairs - Duties of the Special Secretary - Minority Business Enterprises

This bill expands the duties of the Special Secretary for the Office of Small, Minority, and Women Business Affairs (GOSBA) to include (1) establishing a mentoring program in which large and established minority business enterprises (MBEs) mentor start-up and small MBEs; (2) conducting a feasibility study for providing one-on-one assistance to MBEs in submitting competitive and successful bids and proposals for procurement contracts; (3) providing training and educational opportunities for nonminority prime contractors regarding their duties under the State’s MBE program; and (4) establishing an annual awards program to recognize localities that demonstrate the highest excellence in MBE support.

Fiscal Summary

State Effect: General fund expenditures increase by \$161,100 in FY 2022 to implement the bill. Out-year expenditures reflect annualization, ongoing operating expenses, and the termination of one-time costs. No effect on revenues.

(in dollars)	FY 2022	FY 2023	FY 2024	FY 2025	FY 2026
Revenues	\$0	\$0	\$0	\$0	\$0
GF Expenditure	161,100	162,500	166,900	172,400	178,000
Net Effect	(\$161,100)	(\$162,500)	(\$166,900)	(\$172,400)	(\$178,000)

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

Local Effect: The bill is not expected to materially affect local government finances or operations.

Small Business Effect: Potential meaningful.

Analysis

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

GOSBA is established within the Executive Department, led by a Special Secretary who is appointed by, and serves at the pleasure of, the Governor. With respect to MBEs, the Special Secretary must, subject to the limitations of any law that governs the activities of other Executive Branch units:

- carry out each State or federal program that is created to promote the growth of or participation in MBEs;
- promote and coordinate training regarding the requirements of the MBE program;
- promote, coordinate, and participate in the plans, programs, and operations of State government that promote or otherwise affect the establishment, preservation, and strengthening of MBEs;
- promote activities and the use of the resources of State and local governments and private entities for the growth of MBEs;
- coordinate the effort of private entities and public agencies to develop MBEs;
- establish a system to develop, collect, summarize, and give out information related to establishing, operating, or promoting MBEs; and
- subject to the limitations of law and the availability of funds, provide technical and managerial assistance to MBEs and other related activities.

State Expenditures: Although the specific activities required by the bill already fall under GOSBA's existing statutory responsibilities, GOSBA lacks the staff necessary to carry them out. The mentoring program, in particular, requires (1) ongoing outreach to recruit and train new mentors and their protégés and (2) monitoring of the mentoring relationships to promote their effectiveness and to provide appropriate recognition, as required by the bill. GOSBA lacks the expertise to conduct the feasibility study and likely must contract with a third party to complete it. An annual awards program likely requires event planning as well as facility rental and catering costs. GOSBA does not have the staff or the resources to carry out all these tasks.

Therefore, general fund expenditures increase by \$161,057 in fiscal 2022, which accounts for the bill's October 1, 2021 effective date. This estimate reflects the cost of hiring one program director and one outreach coordinator to (1) manage the mentorship program; (2) develop, arrange, and provide training to nonminority prime contractors; and (3) organize an annual awards program and recognition of local governments. It includes salaries, fringe benefits, one-time start-up costs, and ongoing operating expenses. It also includes a one-time expense of \$20,000 for the feasibility study and ongoing expenses for the awards program.

Positions	2.0
Salaries and Fringe Benefits	\$114,894
One-time Feasibility Study	20,000
Awards Program	15,000
Other Operating Expenses	<u>11,163</u>
Total FY 2022 State Expenditures	\$161,057

Future year expenditures reflect full salaries with annual increases and employee turnover and ongoing operating expenses, and the termination of one-time expenses.

Small Business Effect: MBEs may be more successful in bidding on State contracts due to the mentoring they receive and the training provided to prime contractors.

Additional Information

Prior Introductions: None.

Designated Cross File: None.

Information Source(s): Governor's Office of Small, Minority, and Women Business Affairs; Department of Legislative Services

Fiscal Note History: First Reader - February 15, 2021
md/ljm Third Reader - March 17, 2021

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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 (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.

Exhibit 1 Subgoal Guidelines for Minority Business Enterprise Participation

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

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

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

<u>Cabinet Agency</u>	<u>% Participation</u>
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 ¹
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%
Statewide Total²	17.9%

¹ Data not provided.

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 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.