

Department of Legislative Services
Maryland General Assembly
2023 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 743

(Delegate Phillips, *et al.*)

Health and Government Operations

**Minority Business Enterprises - Calculation of Participation Rates -
Procurements From Maryland Correctional Enterprises**

This bill requires each State procurement unit to include the dollar value of its contracts with Maryland Correctional Enterprises (MCE) in the *total* dollar value of its procurements for the purpose of calculating the unit's performance relative to the State's minority business enterprise (MBE) goal.

Fiscal Summary

State Effect: The bill is generally procedural in nature and has no direct effect on governmental finances. The bill's effect on the State's performance relative to its MBE goal is uncertain, as discussed below.

Local Effect: None.

Small Business Effect: Potential meaningful.

Analysis

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

State procurement law defines a “preferred provider” to be a provider of supplies or services that is given preference in specified provisions of current State procurement law. Chapter 313 of 2016 consolidated certain procurement preferences such that, currently, a State or State-aided or -controlled entity must buy supplies and services from MCE first, then from Blind Industries and Services of Maryland, then from the Employment Works

Program if a community service provider or an individual with a disability-owned business provides the supplies or services, in that order of preference. Only if none of those entities produces or provides the desired supplies or services may a State agency issue a competitive procurement.

An agency's MBE performance for a given fiscal year is derived by dividing the total dollar value of contracts or subcontracts *awarded to MBEs* in a fiscal year (the numerator) by the total dollar value of *all* contracts awarded during the fiscal year (the denominator). In calculating the total dollar value of all contracts awarded (the denominator), an agency does not need to include the dollar value of any contracts awarded to preferred providers (including MCE).

State Fiscal Effect: By including the dollar value of MCE contracts in the total dollar value of all procurements, the bill increases the denominator used to calculate each agency's (and the State's) performance relative to the MBE goal. The bill has no effect on the numerator (value of MBE contracts and subcontracts). As a result, it lowers each agency's (and the State's) performance relative to the MBE goal. As agencies are required to purchase available goods and services from MCE, the bill likely has no effect on MCE sales. Similarly, the bill does not require, nor provide an incentive for, MCE to subcontract more of its business to MBEs since its sales to State agencies are mandated.

Instead, the bill creates an incentive for State agencies to increase the use of MBEs on all other contracts to offset the mathematical decrease in MBE performance that results from the bill. To the extent that they are able to do so, the bill has little or no effect on agencies' MBE performance relative to the goal. To the extent they are not able to do so, statewide MBE performance relative to the goal decreases.

Small Business Effect: The bill may enhance opportunities for MBEs to participate in State procurement.

Additional Information

Prior Introductions: Similar legislation has been introduced within the last three years. See SB 248 and HB 450 of 2022 and SB 635 and HB 1302 of 2021.

Designated Cross File: SB 438 (Senator Hayes) - Budget and Taxation.

Information Source(s): Governor's Office of Small, Minority, and Women Business Affairs; Department of General Services; Department of Public Safety and Correctional Services; 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 (GOSBA), in consultation with the Secretary of Transportation and the Office of the Attorney General (OAG). 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. The Maryland Department of Transportation is the State's MBE certification agency.

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 2023. 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. MBE prime contractors may count their own work for up to 50% of a contract's MBE goal and up to 100% of any contract subgoal. Their full participation counts toward the State's 29% goal.

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%
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. However, Chapters 155 and 156 of 2022 require GOSBA to refer prime contractors that persistently fail to meet MBE participation goals on their contracts to OAG for debarment for up to three years.

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 disparity study completed in 2017 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, 2024; Chapter 117 of 2022, which reauthorized the program for the ninth time since its inception, required a new disparity study to be completed by September 2023 to inform the subsequent reauthorization process. **Exhibit 2** provides MBE participation rates for major Executive Branch agencies based on contract awards made during fiscal 2021, the most recent year for which data is available.

Exhibit 2
Minority Business Enterprise Participation Rates, by Agency
Fiscal 2021

<u>Cabinet Agency</u>	<u>% Participation</u>
Aging	0.1%
Agriculture	5.0%
Budget and Management	1.0%
Commerce	2.2%
Education	4.4%
Environment	33.4%
Executive Department	2.2%
General Services	15.3%
Health	3.6%
Higher Education Commission	0.7%
Housing and Community Development	22.6%
Human Services	NA
Information Technology	6.0%
Juvenile Services	12.6%
Labor	3.3%
Military	1.4%
Natural Resources	1.2%
Planning	1.2%
State Police	8.2%
Public Safety and Correctional Services	33.3%
Transportation – Aviation Administration	21.5%
Transportation – Motor Vehicle Administration	32.8%
Transportation – Office of the Secretary	28.20%
Transportation – Port Administration	17.8%
Transportation – State Highway Administration	24.5%
Transportation – Transit Administration	23.9%
Transportation – Transportation Authority	19.3%
Statewide Total¹	17.2%

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

NA: Not Available/Did Not Report

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.

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 2023 is \$1,995,008.