

Department of Legislative Services
Maryland General Assembly
2023 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

House Bill 783

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

Health and Government Operations

Budget and Taxation and Education, Energy,
and the Environment

Washington Suburban Sanitary Commission – Minority Business Enterprise
Utilization Program – Revisions and Extension MC/PG 101–23

This bill (1) renews the authorization for the Washington Suburban Sanitary Commission (WSSC) to establish a minority business enterprise (MBE) procurement preference program until July 1, 2028; (2) eliminates the distinction between MBE programs established by WSSC for construction and goods/services; (3) establishes the legal justification for WSSC to operate an MBE program based on specified findings by the General Assembly; (4) streamlines and clarifies certification requirements for MBEs participating in the WSSC program; and (5) includes additional clarifying and technical changes to the WSSC MBE program authorization. **The bill takes effect June 1, 2023.**

Fiscal Summary

State Effect: None. The bill pertains only to WSSC.

Local Effect: The bill has no material effect on WSSC’s finances; WSSC can continue to operate its existing MBE program in accordance with the bill.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary/Current Law: For a detailed description of the State’s MBE program, on which the WSSC program is based, please see the **Appendix – Minority Business Enterprise Program**.

Washington Suburban Sanitary Commission

Established in 1918, WSSC is among the largest water and wastewater utilities in the country, providing water and sewer services to 1.9 million residents in Montgomery and Prince George’s counties. It has approximately 475,000 customer accounts, serves an area of approximately 1,000 square miles, and has networks of water pipelines and sewer pipelines each exceeding 5,500 miles.

Minority Business Enterprise Program Authorization

Under current law, WSSC must establish an MBE program for construction and design/build contracts, which is categorized as “mandatory,” and must establish an MBE program for contracts for goods and services only if specified conditions are met. Authority for these programs terminates June 30, 2023. The bill eliminates any distinction between the two programs and instead requires WSSC to establish a single MBE program, through July 1, 2028, if it determines that there is a strong basis in evidence that MBEs are subject to discrimination and that a program is necessary to remedy the effects of that discrimination. The bill includes the legal basis for that determination based on the results of a disparity study.

Minority Business Enterprise Definitions and Certification Requirements

Current law includes a unique definition of MBEs for construction and design/build contracts but uses the definition of MBEs in State procurement law for goods and services contracts. The bill establishes a single definition of MBEs based on State procurement law. It also clarifies that an MBE certified by the State or by any other certification program that WSSC determines substantially duplicates the State’s requirements may participate in WSSC’s MBE program, under specified conditions. The bill also provides WSSC with flexibility to allow businesses that do not satisfy certification requirements to participate in the MBE program under specified conditions.

Geographic Preference

Current law requires regulations to include provisions that require an MBE’s geographic location and the principal place of business to be a consideration for participation in the WSSC MBE program for goods and services. It also establishes a 40% participation target each for businesses located in Montgomery and Prince George’s counties.

Small Business Effect: Certified minority- and women-owned businesses continue to benefit from the preferences provided by WSSC's MBE program, as reconstituted by the bill.

Additional Information

Prior Introductions: Similar legislation has not been introduced within the last three years.

Designated Cross File: None.

Information Source(s): Governor's Office of Small, Minority, and Women Business Affairs; Montgomery and Prince George's counties; Washington Suburban Sanitary Commission; Department of General Services; Maryland Department of Transportation; 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>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. 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.