

Department of Legislative Services
Maryland General Assembly
2024 Session

FISCAL AND POLICY NOTE
First Reader - Revised

Senate Bill 154

(Senator Salling)

Budget and Taxation

**State Procurement - Preferences - Historically Underutilized Business Zone
Businesses**

This bill establishes a price preference for State procurement contracts made directly or indirectly with historically underutilized business zone (HUBzone) businesses, as defined by the bill; it also requires each State agency to structure its procurement procedures to try to achieve a goal of at least 10% of the total dollar value of its procurement contracts being made directly or indirectly with HUBzone businesses. The bill establishes penalties for persons who violate specified provisions.

Fiscal Summary

State Effect: General and/or special fund expenditures increase, likely significantly, beginning in FY 2024, to implement the HUBzone program, but a reliable estimate is not feasible, as discussed below. The addition of another large preference program likely reduces competition for State contracts, resulting in higher prices for many of those contracts, but a reliable estimate of any such effect is also not feasible. The bill's penalty provisions are not expected to materially affect State revenues.

Local Effect: None.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary:

HUBzone Businesses

A HUBzone business is a business that meets the standards adopted by the U.S. Small Business Administration (SBA) in federal regulations (13 CFR 126, Subpart B) and any

subsequent revision of that regulation. The definition of “small business” within the State’s Small Business Reserve (SBR) Program is expanded to include HUBzone businesses that also meet State criteria for small business certification.

HUBzone Preference Program

The Governor’s Office of Small, Minority, and Women Business Affairs (GOSBA) must adopt regulations to implement the bill, including (1) establishing the overall percentage goal for the program, which must be at least 10% of each State agency’s total dollar value of procurement contracts; (2) establishing the percentage price preference; (3) establishing procedures for tracking and reporting participation of HUBzone businesses in State procurement; and (4) reporting annually, by December 1, to the Legislative Policy Committee on specified information and an evaluation of the program’s effectiveness.

Penalty Provisions

A person may not:

- knowingly and with intent to defraud, fraudulently obtain, attempt to obtain, or aid another person in fraudulently obtaining or attempting to obtain public money, procurement contracts, or funds spent under a procurement contract to which the person is not entitled;
- knowingly and with intent to defraud, fraudulently represent participation of a HUBzone business in order to obtain or retain a bid preference or a procurement contract;
- willfully and knowingly make or subscribe to any statement, declaration, or other document that is fraudulent or false, as specified;
- willfully and knowingly aid, assist in, procure, counsel, or advise the preparation of a declaration, statement, or other document that is fraudulent or false, as specified;
- willfully and knowingly fail to file any declaration or notice with a State agency that is required by the bill; or
- establish, knowingly aid in the establishment of, or exercise control over a business found to have violated the above provisions.

A person who violates any of the above provisions:

- is guilty of a misdemeanor and on conviction is subject to a fine up to \$1,000 or imprisonment up to six months, or both;
- is liable for a civil penalty of (1) at least \$10,000 but not more than \$30,000 for a first offense and (2) between \$30,000 and \$50,000 for each subsequent offense; and

- pays all costs and attorney’s fees imposed and incurred by the plaintiff in a civil action or must be prohibited from participating in State contracts until the penalties are satisfied.

A person who willfully misrepresents a business as a HUBzone business for purposes of obtaining or retaining a contract or subcontract may be subject to suspension or debarment and civil penalties under the Maryland False Claims Act.

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

Small Business Reserve Program

SBR requires most State agencies to structure their procurements so that at least 15% of the total dollar value of their procurements is made directly to small businesses; Chapter 438 of 2017 raised the goal from 10% to 15%. Under regulations governing the program, each agency must prepare an annual forecast of its total procurement spending. The agency must then develop a plan to allocate at least 15% of its forecasted spending to contracts for small businesses serving as prime contractors. Under Chapter 438, an agency can apply toward its total SBR participation goal only payments made under a contract that is *designated* as an SBR procurement (not all payments to small businesses). The Special Secretary of Small, Minority, and Women Business Affairs must, in consultation with the Attorney General, establish standards and guidelines for participation in SBR every five years.

The University System of Maryland, Morgan State University, and St. Mary’s College of Maryland are exempt from most provisions of State procurement law, including SBR.

Chapter 75 of 2004 established SBR and defined a “small business” as either a certified minority-owned business or a business other than a broker that is independently owned and operated, not a subsidiary of another firm, and not dominant in its field of operation. In addition, Chapters 538 and 539 of 2012 (as amended by Chapter 76 of 2014) established that, to qualify as a small business under SBR, a business must meet *either* of the following criteria in its most recently completed three fiscal years:

- the firm did not employ more than 25 people in its retail operations; 50 people in either its wholesale or construction operations; or 100 people in either its service, manufacturing, or architectural and engineering operations; *or*
- average gross sales did not exceed \$2.0 million for manufacturing operations, \$3.0 million for retail operations, \$4.0 million for wholesale operations, \$4.5 million for architectural and engineering services, \$7.0 million for construction operations, and \$10.0 million for service operations.

Small businesses self-report their small business status by registering on eMaryland Marketplace Advantage, the State's online procurement portal. Chapter 119 of 2016 transferred responsibility for administering SBR from the Department of General Services (DGS) to GOSBA and repealed its termination date, making the program permanent.

Governor's Executive Order

Executive Order 01.01.2021.01, signed by the Governor on January 6, 2021, requires that any procurement by an Executive Branch agency for goods, supplies, services, maintenance, construction, construction-related services, architectural services, and engineering services with a total dollar value between \$50,000 and \$500,000 be designated for SBR, except for:

- procurements from a preferred provider;
- procurement involving expenditures of federal dollars, if inclusion in SBR conflicts with federal law or grant requirements;
- small procurements;
- procurements of human, social, cultural, or educational services; and
- certain term or master contracts, as determined by GOSBA and the Office of State Procurement (OSP).

A procurement is exempt from designation for SBR if GOSBA certifies, concurrently with the review of any waiver determinations for certified MBE contract goals, that it is not practicable to do so. OSP must assist GOSBA in establishing procedures and guidelines for the efficient exemption of procurements from SBR.

Federal HUBzone Program and Eligibility

The purpose of the federal program is to provide federal contracting assistance for qualified small businesses located in HUBzones in an effort to increase employment opportunities, investment, and economic development in those areas.

To be eligible for HUBzone certification by SBA, the business must:

- meet federal small business size standards;
- have a principal office in a HUBzone;
- have at least 35% of its employees reside in a HUBzone;
- be owned and controlled by a U.S. citizen; and
- meet additional ownership criteria based on race or socioeconomic status.

Department of General Services Study

Chapter 518 of 2022 required DGS, in consultation with GOSBA, to study the feasibility and impacts of establishing a State procurement percentage preference for businesses located in HUBzones. DGS submitted its report on December 1, 2022, which included a finding that GOSBA would require at least one additional position to manage the program. However, the report concluded that it found “no evidence to support any direct benefit to Maryland small businesses by creating a HUBzone preference within the SBR program.” Instead, it found that the greatest benefit to Maryland small businesses would result from their greater utilization of the existing federal HUBzone program.

State Expenditures: The bill establishes a new procurement preference program for HUBzone businesses, but its fiscal effect is ultimately unclear because it is not known whether the program is intended to operate as part of SBR or as a stand-alone preference program. The program is drafted in a section of procurement law that is separate from both the MBE and SBR programs; however, the definition of a HUBzone business is incorporated into the definition of a small business under SBR. Finally, the bill does not provide for the certification of HUBzone businesses under State law. Small businesses self-certify their eligibility for SBR, but MBEs must undergo a rigorous certification process managed by the Maryland Department of Transportation (MDOT). It is unclear how HUBzone businesses are to be certified.

If the HUBzone program is intended to operate within SBR (with the 10% goal being a subset of the overall 15% goal), given the expansion of the definition of “small business” in the bill, then it likely has minimal effect on State agencies and procurement costs, with businesses self-certifying their eligibility as they do currently for SBR. However, this is unlikely because the program is established in a separate section of procurement law. More likely, it operates parallel to the SBR and MBE programs and adds another substantial participation goal to State procurement, in addition to MBE’s 29% goal and SBR’s 15% goal (there is also a veteran-owned small business goal of 1%). As a result, it likely has a significant effect on State agencies and procurement costs, but in the absence of more detail and clarity, a reliable estimate of the bill’s effect is not feasible.

For a separate program, the DGS report advises that GOSBA likely requires at least one additional staff position to oversee the program (with an annualized cost of about \$95,000); GOSBA advises that this bill likely requires two additional such staff. If MDOT handles certification of HUBzones (as it does for MBEs), it likely requires additional staff to do so. The bill also requires an evaluation of the program, which likely requires contracting with a third party to conduct the evaluation. State agencies likely require additional procurement staff to set HUBzone goals for each procurement, monitor vendor compliance with those goals, and track and report HUBzone business participation to GOSBA. A HUBZone certification program, if implemented, would likely be administered by MDOT or GOSBA and require a significant infusion of staff to oversee the process.

These potential costs, though significant, are not reflected in this analysis because the bill lacks specificity about how the preference program will operate.

Finally, establishing another preference program in addition to the three existing programs further limits competition for State contracts. It also likely creates confusion among vendors and overlapping priorities in State contracts, which may have the effect of further limiting vendor participation in State procurement. Reduced competition for procurement contracts has been shown to increase the costs of procurement contracts, but a reliable estimate of any such effect is not feasible.

Small Business Effect: Small businesses in HUBzones benefit from increased opportunities to participate in State contracting.

Additional Comments: The bill includes definitions of HUBzone businesses that potentially conflict with each other. It defines a HUBzone business as a business that meets specified federal standards established by SBA. Those federal standards include industry-specific size standards. However, the bill also specifies that HUBzone businesses must meet industry-specific size standards established for SBR in State law. To the extent that these two sets of business size standards conflict, certification/designation of HUBzone businesses may be affected.

Additional Information

Recent Prior Introductions: Similar legislation has been introduced within the last three years. See SB 908 of 2023 and SB 644 of 2022.

Designated Cross File: None.

Information Source(s): Office of the Attorney General; Judiciary (Administrative Office of the Courts); University System of Maryland; Department of Public Safety and Correctional Services; Maryland Department of Transportation; Department of General Services; Board of Public Works; Governor's Office of Small, Minority, and Women Business Affairs; Department of Legislative Services

Fiscal Note History: First Reader - January 16, 2024
rh/ljm Revised - Updated Information - January 17, 2024

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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 2024. 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, 2025; Chapters 137 and 138 of 2023, which reauthorized the program for the tenth time since its inception, also extended the due date for the new disparity study to September 2024 to inform the subsequent reauthorization process. **Exhibit 2** provides MBE participation rates for major Executive Branch agencies based on contract awards made during fiscal 2022 and 2023.

Exhibit 2
Minority Business Enterprise Participation Rates, by Agency
Fiscal 2022 and 2023

<u>Cabinet Agency</u>	<u>% MBE Participation</u>	
	<u>FY 2022</u>	<u>FY 2023</u>
Aging	4.2%	1.2%
Agriculture	4.4%	3.2%
Budget and Management	7.4%	32.9%
Commerce	1.8%	53.8%
Education	23.0%	11.5%
Environment	18.9%	37.9%
Executive Department	6.6%	4.6%
General Services	20.1%	19.5%
Health	5.5%	8.4%
Higher Education Commission	2.1%	3.0%
Housing and Community Development	36.7%	48.5%
Human Services	15.0%	10.5%
Information Technology	1.6%	14.4%
Juvenile Services	6.0%	6.5%
Labor	1.4%	18.6%
Military	0.7%	22.3%
Natural Resources	0.6%	10.2%
Planning	0.3%	0.0%
State Police	13.3%	20.9%
Public Safety and Correctional Services	41.0%	6.2%
Transportation – Aviation Administration	22.6%	22.1%
Transportation – Motor Vehicle Administration	61.8%	20.2%
Transportation – Office of the Secretary	26.9%	48.5%
Transportation – Port Administration	9.7%	13.1%
Transportation – State Highway Administration	20.9%	21.7%
Transportation – Transit Administration	24.8%	12.0%
Transportation – Transportation Authority	18.8%	19.4%
Statewide Total¹	17.3%	17.9%

¹ 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.

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 2024 is \$2,073,412.