

Department of Legislative Services
Maryland General Assembly
2024 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 856 (Delegate Alston)

Health and Government Operations and
Economic Matters

**Procurement - Minority Business Enterprise Program - Work Performed by a
Regulated Lobbyist or Government Relations Firm**

This bill allows a contractor or subcontractor who, in connection with a procurement contract, retains a regulated lobbyist or government relations firm that is a certified minority business enterprise (MBE) to apply the costs for the work performed by the lobbyist or government relations firm toward the contract's MBE goals.

Fiscal Summary

State Effect: State agencies can likely implement the bill with existing budgeted resources. No effect on revenues.

Local Effect: None.

Small Business Effect: Meaningful.

Analysis

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

Small Business Effect: Lobbyists and government relations firms that are certified MBEs may benefit from increased demand for their services in connection with State contracts. Similarly, prime contractors responding to State solicitations may have an easier time qualifying for selection if they can count the costs of lobbying or government relations services toward a contract's MBE goal.

Additional Comments: The Department of Legislative Services notes that current law establishes several conditions under which subcontracted work by a certified MBE can be counted toward a contract's MBE goal. Among them, the certified MBE must be identified at the time a bid or proposal is submitted, and the work performed by the MBE must be within the scope of the contract. If these conditions are not met, it is unlikely that the work of a registered lobbyist can count toward a contract's goal, even under the bill.

Additional Information

Recent 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; Department of General Services; Department of Public Safety and Correctional Services; Maryland Department of Transportation; State Ethics Commission; 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 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.