



## GOVERNOR'S COORDINATING OFFICES

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February 8, 2022

The Honorable Shane E. Pendergrass  
Chair, House Health and Government Operations Committee  
241 House Office Building  
Annapolis, MD 21401

***Re: Letter of Information – House Bill 389 – Procurement - Minority Business Enterprises - Revisions***

Dear Chair Pendergrass and Committee Members:

The Governor's Office of Small, Minority & Women's Business Affairs (GOSBA) offers the following information and respectfully submits recommendations for the Committee's consideration with regard to HB389 and its potentially wide sweeping operational impact on this Office and the Minority Business Enterprise (MBE) Program as a whole.

We have organized our responses pursuant to the overarching requirements of the bill's respective provisions:

### **GOAL-SETTING PROVISIONS**

**Bill Text at Pg. 3, Lines 13-19 and Pg. 4, Lines 4-10 requires invitations for bids and requests for proposals to include a summary of the factors used to determine the expected degree of MBE participation for the procurement contract, including subcontracting opportunities identified for the project, any NAICS codes linked to the subcontracting opportunities, and the number of certified MBEs in those industries.**

#### **Considerations/Recommendations:**

GOSBA submits for the Committee's consideration that the factors used to analyze the appropriate degree of MBE participation in a procurement are consistent and are publicly available on the Board of Public Works (BPW) web site via "BPW Advisory 2001-1<sup>1</sup>." The subcontracting opportunities identified by the procuring unit and the accompanying NAICS codes are advisory in nature. Prime contractors are encouraged to utilize firms within the industries identified by the procuring unit and/or, where practicable, to utilize MBE subcontractors in other innovative or appropriate subcontracting categories, which the prime contractor itself has identified for the purposes of fulfilling the MBE goal requirement. Publishing the unit's identified categories could have a more limiting effect.

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<sup>1</sup> [BPW Advisory 2001-1 Procurement Review Groups: SBR Designation, MBE and VSBE Determinations](#)

**Bill Text at Pg. 5, Lines 21-33, requires the Special Secretary of GOSBA in consultation with the Secretary of Transportation and the Office of the Attorney General, to establish statewide goals by *industry* type on a biennial basis.**

Considerations/Recommendations:

The impact on MBEs by industry-specific goal-setting cannot be determined absent further analysis, but it has the potential to be negative. Industry-specific goal-setting has the potential to exclude some ethnic groups from MBE Program participation in industries where they happen to be faring well in terms of State utilization, but not overall when other indicators of disparity are considered. Without deference to other barriers to participation such as those considered by the State's Disparity Study (e.g., lack of access to credit, depressed firm formation rates due to discrimination, etc.), this provision could have an unintentional adverse impact on firms owned by groups whose utilization is used as the sole barometer for assessing the presence (or absence) of significant disparity. A more practical and efficient approach would be to track spending patterns with respect to MBE participation in the various State contracting industries to determine the impact before making substantive alterations to the application of goals and subgoals.

**PRIME CONTRACTOR ACCOUNTABILITY PROVISIONS**

**Bill Text at Pg 12, Line 15 requires GOSBA to maintain and publish on its website a list of prime contractors who persistently fail to meet contract goals in the absence of mitigating factors.**

Considerations/Recommendations:

This provision presents a significant strain on GOSBA's resources given the contract volume at each procuring unit and the work required to resolve ambiguities in the bill text in terms of creating parameters for review/investigation and an appeal process for prime contractors. Before establishing a requirement to develop and maintain such a list, particularly given the volume of data to be analyzed and time-consuming nature of the investigative and appellate processes, GOSBA believes that the state should evaluate the pros and cons of such a requirement including the legal implications of public admonishment of contractors deemed non-compliant.

As a strengthening amendment to this provision, GOSBA recommends improved contract monitoring by the procuring unit and access to better compliance tracking tools throughout the life of the project. This would ensure MBE goals are being met and reduce non-compliant performance by prime contractors in real-time as opposed to post-contract.

**CERTIFICATION PROVISIONS**

**Bill Text at Pg 18, Lines 14-17 calls for the Special Secretary's authorization for minority businesses that held MBE certification and have been decertified to obtain or retain certification dependent on their participation in a mentoring program.**

Considerations/Recommendations:

GOSBA has concerns about the legality and constitutional viability of this provision as continuing certification for former MBEs arguably discriminates against non-MBE firms and creates a preference for former MBEs absent any evidentiary basis as required for such remedial measures under the Equal Protection Clause.

**CREATION OF AN OMBUDSMAN POSITION**

**Bill Text at Pg 17, Lines 1-31 calls for the establishment of an Ombudsman position to act as a resource to units of State Government, Prime Contractors, and MBEs in resolving disputes related to contracts that include an MBE Goal.**

Considerations/Recommendations:

Given that there are 70 units and nearly a billion dollars in awards and over a billion dollars in payments to MBEs annually (per FY2020 Annual Report figures), fulfilment of the duties proposed by this legislation would pose a Herculean feat for *one* Ombudsman without any support staff.

By way of reference, the Office of State Procurement (OSP), which fulfills similar functions as outlined in the proposed Ombudsman’s duties, has over 30 personnel.

***OSP Personnel***

<b>Division</b>	<b>No. of Personnel</b>
Procurement Bureau	3
Goods & Services	10
Construction & AE	10
IT & Professional Services	10

As the goal of this legislation is to ensure that MBE participation is maximized and thereby touching procurements in all of the industries above, the staff supporting the Ombudsman and the Office should be sufficient to manage the volume of contracts in the respective industries as well as the internal and external stakeholder communications and investigations required.

Operationally, these tasks would more reasonably necessitate:

1 Ombudsman	1 at Grade 22 or higher
1 Compliance Administrator for Goods & Services Contracts	1 at Grade 16/17
1 Compliance Administrator for Construction & A&E Contracts	1 at Grade 16/17
1 Compliance Administrator for IT & Professional Services Contracts	1 at Grade 16/17

These are not functions that can be absorbed by GOSBA’s current staff of two (2) MBE Compliance Managers, who currently work to: conduct training to the internal and vendor community,

collect and report MBE data, and act in an advisory capacity to the 70 procuring units on day-to-day contract administration and best practices.

### **REMOVAL OF LIQUIDATED DAMAGES CONTRACT PROVISIONS**

**Bill Text at Pg 8, Lines 21-33 calls for the removal of mandatory liquidated damages provisions, which apply in the event that a prime contractor fails to comply in good faith with MBE requirements on State contracts that include an MBE Goal.**

#### Considerations/Recommendations:

GOSBA is a proponent of liquidated damages as a deterrent for noncompliance with established MBE contract goals. It is one of the few program enforcement safeguards available to the State. Prime contractors who do not perform in good faith after winning an award are in violation of the contract. This provision gives the State a way to respond to such violations. Hesitancy by procurement staff to use this provision is likely due to inadequate understanding of how to assess liquidated damages. This could be resolved with more training and/or support from the Office of the MBE Ombudsman (if such a position and support staff is approved). GOSBA is not in favor of removing the liquidated damages provision.

### **SMALL BUSINESS RESERVE PROGRAM EXPANSION**

**Bill Text Pg. 13, Lines 10-11 require that a procurement with a total dollar value between \$50,000 and \$500,000 shall be designated for the Small Business Reserve Program.**

#### Considerations/Recommendations:

GOSBA supports this provision, which is already in practice pursuant to Executive Order 01.01.2021.01- Increasing Small Business Participation in State Procurements<sup>2</sup>.

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GOSBA would submit to the Sponsor and Committee that many of the MBE Program shortfalls are not the result of a lack of comprehensive legislation or policy. Our MBE Program's framework is technically sound and considered the gold standard amongst diversity and inclusion programs across the nation. However, we all know that policies are only as effective as their level of enforcement.

The ultimate goal of the MBE Program's implementation is the uniform application of the legislative intent within our existing laws. As such, we believe the following three areas must be premised on greater accountability and transparency:

- MBE goal determinations at the agency level,
- contract compliance to ensure that goals set are met, and
- timely resolution of contracting disputes.

In closing, GOSBA does not believe that new legislation which imposes additional requirements is needed, but rather a greater focus on the tactical implementation of existing policies.

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<sup>2</sup> [Executive Order 01.01.2021.01- Increasing Small Business Participation in State Procurements](#)

Respectfully submitted,

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