

Department of Legislative Services
Maryland General Assembly
2016 Session

FISCAL AND POLICY NOTE
Enrolled - Revised

House Bill 264
Economic Matters

(Delegate B. Robinson, *et al.*)

Finance

Task Force to Investigate the Challenges of and Opportunities for Minorities in Business

This bill establishes the Task Force to Investigate the Challenges of and Opportunities for Minorities in Business to (1) investigate discriminatory practices against minority- and women-owned businesses, including minority- and women-owned franchisees; (2) review, examine, and assess issues related to access to working capital for small, minority-owned, and women-owned businesses; and (3) review, examine, and assess incentives for business entities that employ ex-felons. The task force must conduct hearings as considered appropriate. The Governor's Office of Minority Affairs (GOMA) must provide staff for the task force. By December 31, 2017, the task force must report its findings and recommendations, including any recommended legislation, to the Governor and the General Assembly.

The bill takes effect June 1, 2016, and terminates June 30, 2018.

Fiscal Summary

State Effect: GOMA can provide staff for the task force with existing budgeted resources. Any expense reimbursements for task force members are assumed to be minimal and absorbable within existing budgeted resources. No effect on revenues.

Local Effect: None.

Small Business Effect: None.

Analysis

Current Law/Background:

Franchises

The Maryland Franchise Registration and Disclosure Law defines a franchise as an expressed or implied, oral or written agreement in which:

- a purchaser is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan or system prescribed in substantial part by the franchisor;
- the operation of the business under the marketing plan or system is associated substantially with the trademark, service mark, trade name, logotype, advertising, or other commercial symbol that designates the franchisor or its affiliate; and
- the purchaser must pay, directly or indirectly, a franchise fee.

The law also expresses the finding of the General Assembly that (1) the widespread sale of franchises has created many investment and business problems and (2) franchisees have suffered substantial losses when the franchisor or its representative has not given complete information about the franchisor-franchisee relationship, the franchise agreement, and the business experience of the franchisor or its representative. The law is intended to (1) give each prospective franchisee necessary information about any franchise offer; (2) prohibit the sale of franchises if the sale would lead to fraud or a likelihood that the franchisor's representations would not be fulfilled; and (3) protect the franchisor-franchisee relationship.

In connection with an offer to sell or sale of a franchise, a person, directly or indirectly, may not:

- employ a device, scheme, or artifice to defraud;
- make an untrue statement of a material fact or omit to state a material fact necessary in order to make the statement not misleading; or
- engage in an act, practice, or course of business that operates or would operate as a fraud or deceit on another person.

According to the most recent U.S Census Bureau data available, there were approximately 453,000 franchise businesses in the United States in 2007. A [report](#) by the International Franchise Association, based on that data, indicates that 20.5% of those franchise businesses were owned by minorities.

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. State agencies had an MBE participation rate of 27.3% in fiscal 2014. For a complete description of the State's MBE program, see the **Appendix – Minority Business Enterprise Program.**

Employment of Ex-felons

Chapter 394 of 2006 established the Pilot Program for the Long-Term Employment of Qualified Ex-Felons, which terminated on June 30, 2012. Under the program, business entities could receive a fidelity bond for employing a qualified ex-felon and a tax credit for wages paid to a qualified ex-felon employee. Between tax years 2007 and 2011, taxpayers claimed a total of \$76,881 in credits.

While the program terminated on June 30, 2012, the Department of Labor, Licensing, and Regulation (DLLR) continues to administer the Federal Bonding Program, which provides fidelity bonds to businesses who hire qualified high-risk applicants, including individuals with a history of arrest, conviction, or incarceration. Fidelity bonds insure the business against stealing by theft, forgery, larceny, or embezzlement. In fiscal 2015, DLLR issued 29 fidelity bonds.

The federal Work Opportunity Tax Credit provides an incentive to employers to hire targeted groups of hard-to-employ individuals, including qualified ex-felons. The credit is generally 40% of the first \$6,000 of qualified wages paid to each member of a targeted group during the first year of employment and 25% in the case of wages attributable to individuals meeting only specified minimum employment levels. The credit was recently extended through tax year 2019.

In fiscal 2015, 9,129 individuals who had been convicted of a felony were discharged from Department of Public Safety and Correctional Services facilities.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Governor's Office of Minority Affairs; Office of the Attorney General; Department of Labor, Licensing, and Regulation; U.S Census Bureau; International Franchise Association; Department of Legislative Services

Fiscal Note History: First Reader - February 1, 2016
md/mcr Revised - House Third Reader - March 29, 2016
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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 Minority Affairs (GOMA), in consultation with the Secretary of Transportation and the Attorney General. In a year in which there is a delay in establishing the overall goal, the previous year's goal applies. Likewise, the Special Secretary (in consultation with the Secretary of Transportation and the Attorney General) is 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.

Prior to the enactment of Chapters 252 and 253 of 2011 and Chapter 154 of 2012, State law established a goal that at least 25% of the total dollar value of each agency's procurement contracts be awarded to MBEs, including subgoals of 7% for African American-owned businesses and 10% for woman-owned businesses. In August 2013, GOMA 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 2016. GOMA issued subgoal guidelines in July 2011, summarized in **Exhibit 1**, which are also still in effect. 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. In June 2014, new regulations took effect, allowing MBE prime contractors to count their own work for up to 50% of a contract's MBE goal and up to 100% of any contract subgoal. Previously, certified MBE prime contractors could not count their own participation toward any goal or subgoal on an individual contract, but their participation was counted toward the State's MBE goal.

There are no penalties for agencies that fail to reach the statewide target. Instead, agencies are required to use race-neutral strategies to encourage greater MBE participation in State procurements.

Exhibit 1
Subgoal Guidelines for MBE Participation

	<u>Construction</u>	<u>Architectural/ Engineering</u>	<u>Maintenance</u>	<u>Information Technology</u>	<u>Services</u>	<u>Supplies/ Equipment</u>
African American	7%	6%	8%	7%	7%	6%
Hispanic	-	2%	3%	2%	-	-
Asian	4%	-	3%	-	4%	5%
Women	-	9%	-	8%	12%	10%
Total	11%	17%	14%	17%	23%	21%
Total +2	13%	19%	16%	19%	25%	23%

Source: Governor's Office of Minority Affairs

History and Rationale of the MBE 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 typically conducts a disparity study to determine whether there is continued evidence that MBEs are underutilized in State contracting.

The most recent disparity study was published in February 2011 and serves as the basis for the two most recent reauthorizations 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) and nonminority women were 33% lower than for comparable nonminority males. It also found continued disparities in the use of MBEs compared to their availability in the marketplace to perform work in designated categories of work. For instance, African American-owned businesses were paid 4.5% of State construction contract dollars, but they made up 9.7% of the construction sector in the State. Woman-owned businesses were paid 8.5% of maintenance contract dollars, despite making up 18.0% of the maintenance contract sector. Similar disparities were found in other contracting sectors and for other MBE categories. The next disparity study is due by September 30, 2016.

The MBE program is scheduled to terminate July 1, 2017; it has been reauthorized seven times since 1990, the latest by Chapters 200 and 201 of 2013. **Exhibit 2** provides MBE participation rates for major Executive Branch agencies for fiscal 2014, the most recent year for which data is available.

Exhibit 2
MBE Participation Rates, by Agency
Fiscal 2014

<u>Cabinet Agency</u>	<u>% MBE Participation</u>
Aging	26.1%
Agriculture	4.9%
Budget and Management	8.1%
Business and Economic Development ¹	23.0%
Education	13.6%
Environment	32.8%
Executive Department	27.5%
General Services	27.2%
Health and Mental Hygiene	51.0%
Higher Education Commission	8.7%
Housing and Community Development	43.5%
Human Resources	17.9%
Information Technology	52.1%
Juvenile Services	2.6%
Labor, Licensing, and Regulation	26.0%
Military	23.0%
Natural Resources	9.3%
Planning	4.6%
State Police	26.3%
Public Safety and Correctional Services	54.5%
Transportation – Aviation Administration	18.7%
Transportation – Motor Vehicle Administration	55.2%
Transportation – Office of the Secretary	33.4%
Transportation – Port Administration	20.1%
Transportation – State Highway Administration	19.9%
Transportation – Transit Administration	18.1%
Transportation – Transportation Authority	27.1%
Statewide Total²	27.3%

¹The Department of Business and Economic Development has since been reorganized and renamed.

²Includes University System of Maryland, Morgan State University, St. Mary's College of Maryland, Baltimore City Community College, and nonCabinet agencies.

Source: Governor's Office of Minority Affairs

Requirements for MBE 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, American Indian/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 is certified as either owned by a woman or owned by a racial or ethnic minority, but not both. The Maryland Department of Transportation is the State's MBE certification agency.

A socially disadvantaged individual is someone who has been subjected 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 in the same or similar line of business 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 2016 is \$1,674,928.