

Department of Legislative Services
 Maryland General Assembly
 2021 Session

FISCAL AND POLICY NOTE
 First Reader

House Bill 650 (Delegate Boyce)
 Health and Government Operations

Minority Business Enterprises - Sexual and Gender Minorities (Imari's Business Pride Act)

This bill expands the definition of “socially and economically disadvantaged individual” for the purpose of certifying minority business enterprises (MBEs) to include a member of a sexual or gender minority, including a lesbian, gay, bisexual, or transgender (LGBT) individual, regardless of race or ethnicity.

Fiscal Summary

State Effect: Special fund (Transportation Trust Fund (TTF)) expenditures increase by \$100,000 in FY 2022 and 2023 combined for a disparity study. TTF and general fund expenditures increase beginning in FY 2024 as shown below to accommodate an anticipated expansion in the number of firms being certified as MBEs and participating in the MBE program. No effect on revenues.

(in dollars)	FY 2022	FY 2023	FY 2024	FY 2025	FY 2026
Revenues	\$0	\$0	\$0	\$0	\$0
GF Expenditure	0	0	78,800	76,400	79,100
SF Expenditure	25,000	75,000	150,400	145,200	150,500
Net Effect	(\$25,000)	(\$75,000)	(\$229,200)	(\$221,700)	(\$229,600)

Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate increase; (-) = indeterminate decrease

Local Effect: None.

Small Business Effect: Potential meaningful.

Analysis

Current Law: For an overview of the State’s MBE program, including the current definition of “socially and economically disadvantaged individual” and a description of the State’s certification of MBEs, please see the **Appendix – Minority Business Enterprise Program**.

As the MBE certification agency, the Maryland Department of Transportation (MDOT) must complete its review of an application for MBE certification within 90 days of receiving a complete application that includes all of the necessary information. However, MDOT can extend the review period by an additional 60 days if it provides the applicant with written notice that it is doing so.

State Fiscal Effect:

Disparity Study

As noted in the Appendix, a disparity study must first find evidence of contracting disparities in the marketplace before a public entity can give a procurement preference to a specified disadvantaged group. Thus, a disparity study for the LGBT population must first be conducted before that group can be included in the MBE program. MDOT estimates the cost of that analysis to be between \$80,000 and \$120,000 and the duration to be about 18 months; this analysis assumes the cost to be \$100,000, with \$25,000 spent in fiscal 2022 and \$75,000 in fiscal 2023.

Minority Business Enterprise Certification and Oversight

MDOT’s Office of Minority Business Enterprises (OMBE), which manages the MBE certification process, currently has 10 MBE certification staff (not including a certification manager). In calendar 2019, OMBE received almost 850 applications for certification, or about 85 applications per staff member.

The designation of LGBT individuals as socially disadvantaged individuals means that OMBE likely receives more applications for MBE certification, but a reliable estimate is not available.

Given the uncertainty in the number of potential applications for certification, the Department of Legislative Services (DLS) estimates that two additional MBE certification officers can likely handle any immediate increase in certification applications and still meet the statutory deadlines for processing of certification applications; to the extent that the volume of applications grows in future years, OMBE may require additional staff in the out-years, which it can request through the normal budget process. DLS notes that the

disparity study will likely derive a reliable estimate of the prevalence of LGBT-owned businesses in the State.

In addition, the Governor’s Office of Small, Minority, and Women Business Affairs (GOSBA), which oversees the implementation of the MBE program, has four compliance monitors, including one devoted entirely to the video lottery terminal industry. As the number of certified MBE firms is likely to increase due to the bill, DLS estimates that GOSBA will require one additional compliance monitor once the program is active.

Therefore, TTF expenditures increase by an additional \$150,355 in fiscal 2024, which reflects the cost of hiring two MBE certification officers to manage the increased volume of MBE certification applications. General fund expenditures by GOSBA increase by \$78,840 in fiscal 2024 to hire one additional MBE compliance officer to oversee the inclusion of LGBT-owned businesses in the MBE program. Both of these estimates include salaries, fringe benefits, one-time start-up costs, and ongoing operating expenses. The assumptions used in calculating the estimates are stated below:

- certification and inclusion of LGBT-owned businesses in the MBE program cannot begin concurrent with the effective date of the bill;
- procurement for the disparity study occurs in fiscal 2022, with the contract award and beginning stages of the study occurring in the second half of fiscal 2022;
- the disparity study is completed by the end of fiscal 2023 (meaning that expenditures end in that year) and finds that a disparity exists;
- in fiscal 2024, additional staff are needed at both MDOT and GOSBA as certification and inclusion of LGBT-owned businesses in the MBE program begins.

	<u>MDOT (TTF)</u>	<u>GOSBA (GF)</u>
Positions	2.0	1.0
Salaries and Fringe Benefits	\$138,865	\$73,095
Operating Expenses	<u>11,490</u>	<u>5,745</u>
Total FY 2024 State Expenditures	\$150,355	\$78,840

Future year expenditures reflect annual increases and employee turnover and ongoing operating expenses. These estimates are subject to adjustment based on the disparity study’s findings regarding the prevalence of LGBT-owned businesses in the marketplace.

Small Business Effect: Assuming that the disparity study finds existing disparities in the marketplace, LGBT-owned small businesses likely experience expanded opportunities to participate in State procurement.

Additional Information

Prior Introductions: None.

Designated Cross File: SB 765 (Senator Washington) - Education, Health, and Environmental Affairs.

Information Source(s): Governor's Office of Small, Minority, and Women Business Affairs; Maryland Department of Transportation; Department of Legislative Services

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md/ljm

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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 Attorney General. 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.

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 2021. 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. 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.

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. Instead, agencies are required to use race-neutral strategies to encourage greater MBE participation in State procurements.

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 most recent disparity study was completed in 2017 and 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, 2022; it has been reauthorized eight times since 1990, the latest by Chapter 340 of 2017. **Exhibit 2** provides MBE participation rates for major Executive Branch agencies based on contract awards made during fiscal 2019, the most recent year for which data is available.

Exhibit 2
Minority Business Enterprise Participation Rates, by Agency
Fiscal 2019

<u>Cabinet Agency</u>	<u>% Participation</u>
Aging	1.4%
Agriculture	4.9%
Budget and Management	7.4%
Commerce	1.2%
Education	6.0%
Environment	28.6%
Executive Department	1.8%
General Services	15.0%
Health	14.6%
Higher Education Commission	3.0%
Housing and Community Development	38.4%
Human Services	14.7%
Information Technology	15.4%
Juvenile Services	19.5%
Labor	26.1
Military	7.0%
Natural Resources	NA ¹
Planning	4.6%
State Police	15.0%
Public Safety and Correctional Services	17.5%
Transportation – Aviation Administration	27.2%
Transportation – Motor Vehicle Administration	16.0%
Transportation – Office of the Secretary	18.5%
Transportation – Port Administration	18.5%
Transportation – State Highway Administration	20.3%
Transportation – Transit Administration	15.1%
Transportation – Transportation Authority	11.6%
Statewide Total²	17.9%

¹ Data not provided.

² 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. The Maryland Department of Transportation is the State's MBE certification agency.

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 2021 is \$1,788,677.