

Department of Legislative Services
Maryland General Assembly
2021 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

House Bill 1214

(Delegate Wilson)

Health and Government Operations

Education, Health, and Environmental Affairs

Procurement - Transparency and Application to County Contracts

This bill applies State procurement law to any county governmental entity entering into a procurement contract either using State funds or for the benefit of the State. It also requires the Governor’s Office of Small, Minority, and Women Business Affairs (GOSBA) to assign a staff member to each State and county procurement unit to observe procurement processes and ensure that minority business enterprise (MBE) goals are met to the best of the unit’s capacity. Annually, the Secretary of General Services must review and evaluate all contracts using State funds that were executed in the prior year and report by July 1 of each year on specified findings to specified committees of the General Assembly. The bill requires specified procurement-related information to be posted publicly, specified notices to be sent to bidders and offerors, and specified information to be included in solicitations. It also alters the timeframes for the filing of bid protests.

Fiscal Summary

State Effect: General fund expenditures increase significantly – potentially by as much as \$6.2 million for additional staff in FY 2022 (\$5.9 million for GOSBA and \$292,500 for the Department of General Services (DGS)) and ongoing costs in the out-years – to implement the bill, as discussed below. Other provisions of the bill are generally procedural in nature and likely have no material effect on State finances but may create administrative inefficiencies in State procurement processes. No effect on revenues.

Local Effect: Local expenditures likely increase to conform procurement practices to State procurement law, but a reliable estimate of any such effect is not feasible. No effect on local revenues. **This bill imposes a mandate on a unit of local government.**

Small Business Effect: Potential meaningful.

Analysis

Bill Summary:

Oversight by the Governor's Office of Small, Minority, and Women Business Affairs

The Special Secretary of Small, Minority, and Women Business Affairs must assign a staff member from the office to each unit (including each unit of a county government) authorized by law to enter into a procurement contract that is subject to the State's MBE program. Each staff assigned to a unit must (1) observe the procurement processes of the unit, including the development of a request for proposals or request for qualifications and the evaluation of bids and offers and (2) ensure that the State's MBE goals are met to the best of the unit's capability.

Annual Review of Contracts

Contracts subject to annual review by the Secretary of General Services include all contracts using State funds or contracts for the benefit of the State, a unit of the State, or State officials or employees. The Secretary must adopt regulations to ensure that local units and third parties provide the information necessary for the review to be thorough and complete.

For each contract, the review must examine:

- changes in final cost compared to the bid or offer price;
- how closely the completed contract met the criteria listed in the request for proposals or invitation for bids; and
- whether proper procurement procedures were followed to solicit and award the contract.

Solicitations

Each invitation for bids or request for proposals must include instruction on how to (1) submit a bid protest; (2) access procurement-related materials that are open to public inspection under current law; and (3) request an unsuccessful bidder debrief.

Notifications to Unsuccessful Bidders or Offerors

Notice of specified awards must be published in eMaryland Marketplace (eMM) within 15 (instead of 30) days of the execution and approval of a contract in excess of \$50,000. Also within 15 days, a procurement unit must deliver by email and first-class mail

to each unsuccessful bidder or offeror a notice stating that the bidder or offeror was unsuccessful.

An unsuccessful bidder or offeror may request a debrief within three days after receiving the notice. Within five days after receiving a written request for a debrief, a procurement unit must provide a debrief to the unsuccessful bidder or offeror that addresses specified items.

Publication of Procurement-related Documents

If a procurement unit elects to have a pre-bid conference, minutes of the conference must be published in eMM. Other items that must be published on eMM are (1) a summary of the final evaluation of a proposal; (2) all proposals (after an award is made); and (3) the contents of a bid and any documents submitted with a bid.

Bid Protests

Bid protests must be submitted within 10 days after the later of (1) the date on which a notice of contract award is published; (2) the date on which the bidder or offeror received a notice of contract award; or (3) the date on which the bidder or offeror first received notice that their bid was unsuccessful.

Current Law: For a complete description of the State's MBE program, please see the **Appendix – Minority Business Enterprise Program**. Regulations require each procurement agency in the State to designate an employee to be an MBE liaison, which must be a high-level employee reporting directly to the Secretary or head of the agency. The MBE liaison is responsible for coordinating agency outreach efforts to MBEs, reviewing agency contracting procedures to ensure compliance with program requirements, and other related tasks.

County governments currently are not subject to State procurement law, including for their procurements that use State funds.

When a contract is awarded on some basis other than price alone, unsuccessful offerors may request a debriefing, which must be provided at the earliest feasible time. The debriefing is limited to specified topics and may not include discussion or dissemination of the thoughts, notes, or rankings of individual members of the evaluation committee.

Bid protests must be submitted within the time required under regulations adopted by the primary procurement unit responsible for the procurement. Regulations specify that protests based on alleged improprieties in a solicitation that are apparent before bid opening or the closing date for receipt of proposals must be filed before bid opening or the closing

date for receipt of proposals. In all other cases, a protest must be filed within seven days after the basis for the protest is known or should have been known, whichever is earlier.

The procurement-related documents required to be published on eMM under the bill (e.g., pre-bid conference minutes, summaries of final proposal evaluations, etc.) are all open to public inspection, subject to specified restrictions under Maryland's Public Information Act.

State Expenditures: Most of the bill's requirements as they relate to State agencies are procedural in nature and have no material effect on State finances, though additional bid protests may result in a higher workload for the State Board of Contract Appeals. However, two provisions have potentially significant effect on State expenditures: (1) the bill's requirement that GOSBA assign staff to provide oversight of State and county procurement agencies; and (2) the Secretary of General Services' annual review of contracts that use State funds.

Oversight by the Governor's Office of Small, Minority, and Women Business Affairs

As noted above, current law already requires each agency to designate a senior official employed by the agency as its MBE liaison. The bill differs from current law in that it specifies that GOSBA must assign *a member of its own staff* to each agency to oversee the implementation of MBE program requirements. GOSBA currently has two positions devoted to MBE compliance and, therefore, lacks sufficient personnel to assign to each agency in State and local government.

The bill specifies that GOSBA staff assigned to each unit must observe the procurement processes of the unit, including the development of requests for proposals and requests for qualifications as well as the process of evaluating bids and offers. As these procurement functions are ongoing activities within State agencies, it is assumed that GOSBA must assign a single staff person to each State agency as well as at least one to each county to provide the necessary oversight on an ongoing, permanent basis. There are approximately 70 State agencies authorized to enter into procurement contracts and an unknown number of county procurement units that must be supervised by GOSBA under the bill. To the extent that multiple agencies in each county engage in procurement with State funds, some counties may require more than one GOSBA staff to be assigned.

Under this set of assumptions and *for illustrative purposes only*, GOSBA must hire at least 92 new MBE compliance officers (for 70 agencies and 24 counties, accounting for the 2 MBE compliance managers it already employs) at a total cost of \$5.9 million in fiscal 2022, which accounts for the bill's October 1, 2021 effective date. To the extent that the bill does not require a constant on-site presence in each agency by the GOSBA monitor,

GOSBA may be able to assign a single monitor to multiple agencies and reduce the costs associated with this requirement.

Annual Review of Contracts

The bill requires DGS to review well in excess of 1,000 contracts each year, including contracts entered into by all counties and municipalities in the State. As a starting point, the Board of Public Works (BPW) reviews and approves approximately 500 contracts each year. Under State law, BPW approval is generally required for contracts valued at \$200,000 or more (the threshold is \$1.0 million for public universities), except that road and bridge contracts by the Maryland Department of Transportation (MDOT) are not subject to BPW approval. MDOT advises that it executes about 80 contracts annually that are not subject to BPW approval. Adding in the hundreds of State contracts that are valued at less than \$200,000 (or \$1.0 million for public universities), including numerous small commodities contracts, as well as the untold number of county and municipal contracts that include any State funds, the bill requires DGS to collect information on and review more than 1,000 contracts from multiple sources over which it does not have jurisdiction.

Two of the three elements required to be reviewed for each contract are qualitative in nature and, thus, must be conducted by staff, and DGS lacks the staff to carry out the necessary review. Therefore, general fund expenditures increase by \$292,543 in fiscal 2022, which accounts for the bill's October 1, 2021 effective date. This estimate reflects the cost of hiring five procurement officers to review the contracts in accordance with the bill. It includes salaries, fringe benefits, one-time start-up costs, and ongoing operating expenses.

Positions	5.0
Salaries and Fringe Benefits	\$264,637
Operating Expenses	<u>27,906</u>
Total FY 2022 DGS Expenditures	\$292,543

Future year expenditures reflect full salaries with annual increases and employee turnover and ongoing operating expenses.

DGS notes that, although the bill requires it to assess the final cost of each contract executed in the prior year at closeout, many contracts have terms that exceed one year, so the closeout review for those contracts will be delayed until contract termination. Further, this analysis assumes that there is a one-year lag in reporting. The mandated review is for contracts executed in the prior year, with a reporting due date of July 1 each year. As the fiscal year ends on June 30, and DGS cannot complete its review in one day, it is assumed that each report covers contracts for the second prior fiscal year.

Local Expenditures: County governments likely have to modify their procurement processes and requirements to conform to State procurement law and to provide DGS the necessary information to conduct its review of affected contracts, at least with regard to procurements that use State funds. This leaves open the possibility that some counties may have two separate processes, one for contracts that use only local funds and one for contracts that include State funds. It is assumed that most counties require additional staff to carry out procurements consistent with State procurement law, but a reliable estimate of the overall effect on county expenditures is not feasible.

Small Business Effect: Small businesses, especially MBEs, may benefit from increased oversight and enforcement of MBE requirements.

Additional Comments: The Department of Legislative Services notes that eMM has been rebranded as eMaryland Marketplace Advantage (known as eMMA), although the name has not been updated in statute.

Additional Information

Prior Introductions: HB 991 of 2020 received a hearing in the House Health and Government Operations Committee, but no further action was taken.

Designated Cross File: None.

Information Source(s): Montgomery and Prince George's counties; University System of Maryland; Department of General Services; Board of Public Works; Maryland Department of Transportation; 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 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.