

Department of Legislative Services  
Maryland General Assembly  
2021 Session

FISCAL AND POLICY NOTE  
First Reader

Senate Bill 197 (Senator Ellis)  
Education, Health, and Environmental Affairs

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**Procurement - Minority Business Participation Goals - Waiver**

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This bill prohibits a unit of State government from waiving provisions in State procurement law related to the establishment, use, and waiver of minority business enterprise (MBE) contract goals for expedited or emergency procurements. It also prohibits units of State government from waiving MBE goals for emergency, expedited, or commodities contracts. **The bill takes effect July 1, 2021.**

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**Fiscal Summary**

**State Effect:** The bill may impede or delay the use of emergency or expedited procurements, as discussed below. No effect on revenues.

**Local Effect:** None.

**Small Business Effect:** Potential meaningful.

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**Analysis**

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

*Minority Business Enterprise Goal Setting*

To meet the State's MBE goal (currently 29%), State agencies must evaluate each procurement to determine an appropriate MBE participation goal, if any, for the resulting contract. Determination of MBE contract goals must be based on:

- the potential subcontract opportunities available in the prime contract;
- the availability of certified MBEs to respond to available subcontracting opportunities;
- statewide goal and subgoal guidelines issued by the Governor's Office of Small, Minority, and Women Business Affairs; and
- other factors that contribute to constitutional goal setting.

### *Emergency and Expedited Procurements*

For procurements of at least \$50,000, and subject to specified exceptions, a procurement officer may, with the approval of the head of the unit, make an emergency procurement to avoid or mitigate serious damage to public health, safety, or welfare. Emergency procurements may use any method considered to be appropriate but must obtain as much competition as possible under the circumstances. Emergency procurements are not subject to prior approval by the Board of Public Works (BPW), but agencies must notify BPW of each emergency procurement within 45 days of contract award; the notification must include a justification for the use of the emergency procurement method.

Unlike emergency procurements, the use of the expedited procurement method must receive prior approval from BPW. Only the Maryland Port Commission or the Maryland Aviation Administration may make a procurement on an expedited basis, and only if the head of the unit and BPW find that:

- urgent circumstances require prompt action;
- an expedited procurement best serves the public interest; and
- the need for the expedited procurement outweighs the benefits of making the procurement on the basis of competitive sealed bids or competitive sealed proposals.

Expedited procurements must attempt to obtain as much competition as reasonably possible.

The head of a unit may waive specified requirements in State procurement law related to the establishment, use, and waiver of MBE contract goals for emergency or expedited procurements.

**State Expenditures:** State procurement law requires agencies to evaluate each procurement to determine an appropriate MBE goal for the contract. Although agencies can decide not to assign an MBE goal to a specific contract, that decision must be based on the availability of MBEs in the marketplace, among other factors. Thus, if MBEs are found to be available, a decision not to include an MBE goal cannot be supported by the available data.

Emergency procurements often waive the requirement to assess MBE participation and, thus, do not include MBE goals because the process of conducting the research necessary to determine the appropriate goal can delay the completion of the procurement process. Moreover, requiring prime contractors to recruit and secure the participation of MBEs can also delay the execution and completion of the contract. For instance, the Department of General Services advises that none of the emergency procurements for medical supplies and services in the aftermath of the COVID-19 emergency declaration included MBE goals for those reasons, but other methods were used to secure the participation of small and minority-owned businesses.

Thus, to the extent that the bill prevents State agencies from opting not to assign an MBE goal to a particular emergency or expedited contract, it may impede or delay those contracts from being executed and carried out. Delays in carrying out contracts can increase contract costs. Moreover, as timing is often of critical importance with regard to emergency and expedited contracts, the bill may affect the State's ability to respond in a timely fashion to future emergency situations.

**Small Business Effect:** Minority-owned small businesses may have increased opportunities to participate in emergency, expedited, and commodities contracts.

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### **Additional Information**

**Prior Introductions:** None.

**Designated Cross File:** None.

**Information Source(s):** Governor's Office of Small, Minority, and Women Business Affairs; Department of General Services; Board of Public Works; Department of Legislative Services

**Fiscal Note History:** First Reader - February 2, 2021  
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## Appendix – Minority Business Enterprise Program

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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.

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### 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%
<b>Total</b>	<b>19%</b>	<b>17%</b>	<b>14%</b>	<b>20%</b>	<b>15%</b>	<b>16%</b>
<b>Total +2</b>	<b>21%</b>	<b>19%</b>	<b>16%</b>	<b>22%</b>	<b>17%</b>	<b>18%</b>

Source: Governor’s Office of Small, Minority, and Women Business Affairs

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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.

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

<b><u>Cabinet Agency</u></b>	<b><u>% Participation</u></b>
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 <sup>1</sup>
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%
<b>Statewide Total<sup>2</sup></b>	<b>17.9%</b>

<sup>1</sup> Data not provided.

<sup>2</sup> 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 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 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.