

Department of Legislative Services  
Maryland General Assembly  
2021 Session

FISCAL AND POLICY NOTE  
First Reader

Senate Bill 207 (Senator Ellis)  
Education, Health, and Environmental Affairs

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State Procurement - Minority Business Enterprise Participation Goals -  
Performance of Unit Employees

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This bill bars procurement officers and other procurement-related employees from receiving merit increases or promotions in any fiscal year in which their agency does not meet the State's minority business enterprise (MBE) goal and does not show improvement over the prior year's performance. If there is no improvement in meeting the goal over three consecutive fiscal years, the agency must either terminate the employees' employment or reassign them to a position that does not involve procurement. **The bill takes effect July 1, 2021.**

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Fiscal Summary

**State Effect:** Likely short-term reductions in expenditures (all funds) for employee compensation, but expenditures likely increase significantly over time for employee recruitment and training due to employee turnover, as discussed below.

**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.**

**State Fiscal Effect:** As the appendix shows, in fiscal 2019, only one agency met the State's 29% goal for MBE contracting, and the State as a whole fell well short of the goal.

Moreover, the State has not met its MBE goal for at least the past 10 years. Thus, the bill likely results in a significant number of State employees not qualifying for annual merit increases or promotions. Although this has the potential to reduce State expenditures (all funds) for employee compensation in the near term, it also has the potential to lead to significant staff turnover, resulting in significant recruitment and training costs and loss of efficient State operations over the long term.

These effects may be offset to the extent that the bill provides incentives for agencies (particularly, procurement staff in those agencies) to improve MBE performance, but it is not clear that it does so. The 29% MBE goal currently set in regulation is a statewide aspirational goal and is not intended to serve as a goal for each contract or for each agency. The role of procurement staff within agencies is to set MBE goals for each contract that maximize MBE contracting opportunities based on the goods or services being purchased and the availability of certified MBEs in the marketplace for those specific goods or services. Many contracts have goals that are well below 29% because the marketplace does not have the capacity to reach that level for a specific good or service. Thus, depending on the mix of goods and services that a particular agency purchases, procurement staff in an agency can implement the MBE program as it is designed and intended to be implemented and still not achieve the goal. Moreover, responsibility for enforcing contract goals rests with an agency's contract managers, not procurement staff. Thus, under the bill, procurement staff may be held accountable for something they cannot control.

**Small Business Effect:** To the extent that the bill results in agencies improving their performance relative to the State's MBE participation goal, small businesses experience an increase in opportunities to do business with the State.

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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 Budget and Management; Department of General Services; Maryland Department of Transportation; 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

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## *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.