

**Department of Legislative Services**  
 Maryland General Assembly  
 2021 Session

**FISCAL AND POLICY NOTE**  
**First Reader**

House Bill 1348 (Delegate Sample-Hughes)  
 Health and Government Operations

**Procurement - Department of General Services - MBE Program Compliance Officer**

The bill requires the Secretary of General Services, in consultation with the Chief Procurement Officer, to appoint a Minority Business Enterprise (MBE) Program compliance officer in the Office of State Procurement to ensure agency compliance with the State’s MBE participation goals. By September 1 of each year, the compliance officer must report to the Board of Public Works (BPW) and the Legislative Policy Committee (LPC) specified information regarding MBE waivers and participation and any other relevant information required by BPW. Agencies must forward copies of specified MBE waiver reports in current law to the compliance officer.

**Fiscal Summary**

**State Effect:** General fund expenditures increase by \$234,700 in FY 2022 to implement the bill; out-year expenditures reflect annualization. The compliance officer’s duties and reporting responsibilities are duplicative of existing statutory requirements, as described below. Revenues are not affected.

(in dollars)	FY 2022	FY 2023	FY 2024	FY 2025	FY 2026
Revenues	\$0	\$0	\$0	\$0	\$0
GF Expenditure	234,700	278,700	287,300	297,500	308,000
Net Effect	(\$234,700)	(\$278,700)	(\$287,300)	(\$297,500)	(\$308,000)

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

**Local Effect:** None.

**Small Business Effect:** Minimal.

## Analysis

**Bill Summary:** The annual report prepared by the compliance officer must include:

- a detailed summary of the reasons provided by an agency head for granting each MBE waiver; and
- a detailed comparison of the MBE participation goal set by an agency and the actual participation by MBEs in the agency's procurements at the end of the fiscal year.

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

### *Minority Business Enterprise Program Waivers*

A State agency may award a waiver of any part of a contract's MBE goals if the contractor provides a reasonable demonstration of good-faith efforts to achieve the goals. In general, when a waiver is granted, the head of the agency must issue the determination in writing, keep a copy of the waiver and the reasons for it, and provide a copy of the waiver to the Governor's Office of Small, Minority, and Women Business Affairs (GOSBA).

By July 31 of each year, agencies must submit a report directly to GOSBA and BPW that includes (1) contract titles, numbers, and dates; (2) the number of waivers requested; (3) the number of waivers granted; and (4) any other information specifically requested by BPW. In turn, BPW reports annually on waivers granted by all State agencies.

### *Minority Business Enterprise Program Compliance Monitoring and Reporting*

The Special Secretary of GOSBA is charged with, subject to the limitations of law that governs the activities of other units of the Executive Branch, carrying out each State or federal program that is created to promote the growth of, or participation in, MBEs. To ensure proper implementation of the MBE program by State agencies, GOSBA employs four MBE compliance monitors.

Within 90 days of the end of each fiscal year, each agency must submit a report to GOSBA, the Maryland Department of Transportation (as the MBE certification agency), and the Joint Committee on Fair Practices and Personnel Oversight that includes, among other things:

- the total number and value of procurement contracts between the agency and certified MBEs, including whether the MBE participated as a prime contractor or as a subcontractor; and

- the percentage that those contracts represent, by specific category of MBEs, of the total number and value of procurement contracts.

By December 31 of each year, GOSBA must submit a summary report to BPW and LPC. The agency level MBE participation rates from GOSBA’s fiscal 2019 report are summarized in the appendix to this analysis.

**State Expenditures:** The Department of Legislative Services (DLS) notes that the reporting requirements for the new MBE compliance officer within the Department of General Services (DGS) replicate reports already provided by GOSBA (MBE participation) and BPW (waivers), as described above. Further, GOSBA has four compliance monitors, including one dedicated to monitoring compliance only by video lottery terminal operators, to carry out the same tasks required of the DGS compliance officer in the bill. DGS advises that it can carry out the bill’s requirements with three compliance staff.

Therefore, general fund expenditures increase by \$234,713 in fiscal 2022, which accounts for the bill’s October 1, 2021 effective date. This estimate reflects the cost of DGS hiring a compliance officer (manager) and two compliance monitors to ensure compliance with MBE requirements, gather the necessary data for the annual reports, and complete the annual reports. It includes salaries, fringe benefits, one-time start-up costs, and ongoing operating expenses.

Positions	3.0
Salaries and Fringe Benefits	\$217,969
Operating Expenses	<u>16,744</u>
<b>Total FY 2022 State Expenditures</b>	<b>\$234,713</b>

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

**Additional Comments:** DLS notes that agencies are required by statute to submit their MBE contract data to GOSBA, which then assembles the data and reports it annually. The bill does not require agencies to provide that same data to DGS for the same purpose (it only requires them to provide data on MBE waivers to DGS).

### Additional Information

**Prior Introductions:** None.

**Designated Cross File:** SB 649 (Senator Griffith, *et al.*) - Education, Health, and Environmental Affairs.

**Information Source(s):** Department of General Services; Board of Public Works; Department of Legislative Services

**Fiscal Note History:** First Reader - March 31, 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 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.