

**Department of Legislative Services**  
Maryland General Assembly  
2022 Session

**FISCAL AND POLICY NOTE**  
**Third Reader**

Senate Bill 192

(Chair, Budget and Taxation Committee)(By Request -  
Departmental - Transportation)

Budget and Taxation

Health and Government Operations

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**State Procurement - Minority Business Enterprise Program - Reauthorization  
Extension**

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This departmental bill extends the termination date for the State’s Minority Business Enterprise (MBE) program by two years, until July 1, 2024. It also extends the deadline for the Maryland Department of Transportation (MDOT) to submit a completed disparity study to the General Assembly by two years, until September 30, 2023. **The bill takes effect July 1, 2022.**

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**Fiscal Summary**

**State Effect:** Special fund expenditures, now projected to be \$2.5 million beginning in FY 2022, are delayed by up to two years due to the delay in completing the mandated disparity study. Revenues are not affected.

**Local Effect:** None.

**Small Business Effect:** MDOT has determined that this bill has a meaningful impact on small business (attached). The Department of Legislative Services concurs with this assessment, as discussed below.

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**Analysis**

**Current Law/Background:** For a detailed description of the State’s MBE program, see the **Appendix – Minority Business Enterprise Program.**

As noted in the appendix, the MBE program is scheduled to terminate July 1, 2022, and Chapter 340 of 2017 required the disparity study to be completed by September 30, 2021, so that the General Assembly could review the report before the 2022 legislative session. However, MDOT has requested an extension until September 2023 because delays in procuring a contractor to conduct the study mean that it will not be completed until then.

**State Expenditures:** MDOT awarded the disparity study contract to MGT of America in December 2021, with a base value of \$2.5 million; there is a two-year renewal option worth \$349,000. Given the September 2023 deadline to complete the study, most expenditures under the contract are expected to occur in fiscal 2022 and 2023, with a small amount in fiscal 2024 to finalize and print the report. This analysis assumes that 30% of contract expenditures occur in fiscal 2022, 60% occur in fiscal 2023, and 10% occur in fiscal 2024.

The fiscal and policy note for [Chapter 340](#) (Senate Bill 4 of 2017) estimated the cost of the disparity study to be \$3.5 million, with \$2.625 million spent in fiscal 2021 and \$875,000 spent in fiscal 2022. As the disparity study was already required to be completed, this analysis treats expenditures for the disparity study contract as delayed, rather than new, expenditures.

**Small Business Effect:** The reauthorization of the MBE program continues to facilitate the participation of minority-owned businesses in State procurement and, therefore, benefits them economically. The Department of Legislative Services notes, however, that the program has been reauthorized eight times since 1990, so any benefits for MBEs are already well established.

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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; Maryland Department of Transportation; Office of the Attorney General; Department of Legislative Services

**Fiscal Note History:** First Reader - January 21, 2022  
rh/ljm Third Reader - February 22, 2022

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Analysis by: Michael C. Rubenstein

Direct Inquiries to:  
(410) 946-5510  
(301) 970-5510

## 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. The Maryland Department of Transportation (MDOT) is the State’s MBE certification agency.

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 2022. 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. MBE prime contractors may count their own work for up to 50% of a contract’s MBE goal and up to 100% of any contract subgoal. Their full participation counts toward the State’s 29% 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 disparity study completed in 2017 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; Chapter 340 of 2017, which reauthorized the program for the eighth time since its inception, required a new disparity study to be completed by September 2021 to inform the subsequent reauthorization process. However, MDOT has requested an extension to September 2023 due to delays in procuring a consultant to conduct the study. The program may be reauthorized in its current form pending the completion of the study. **Exhibit 2** provides MBE participation rates for major Executive Branch agencies based on contract awards made during fiscal 2020, the most recent year for which data is available.

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**Exhibit 2**  
**Minority Business Enterprise Participation Rates, by Agency**  
**Fiscal 2020**

<b><u>Cabinet Agency</u></b>	<b><u>% Participation</u></b>
Aging	0.6%
Agriculture	7.2%
Budget and Management	0.8%
Commerce	9.1%
Education	3.7%
Environment	9.0%
Executive Department	1.4%
General Services	16.5%
Health	10.5%
Higher Education Commission	1.1%
Housing and Community Development	20.9%
Human Services	7.2%
Information Technology	3.7%
Juvenile Services	5.6%
Labor	6.0%
Military	3.3%
Natural Resources	2.5%
Planning	6.6%
State Police	24.0%
Public Safety and Correctional Services	11.3%
Transportation – Aviation Administration	25.0%
Transportation – Motor Vehicle Administration	38.6%
Transportation – Office of the Secretary	22.0%
Transportation – Port Administration	14.3%
Transportation – State Highway Administration	18.4%
Transportation – Transit Administration	17.0%
Transportation – Transportation Authority	20.3%
<b>Statewide Total<sup>1</sup></b>	<b>14.1%</b>

<sup>1</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 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.

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 2022 is \$1,847,024.

## ANALYSIS OF ECONOMIC IMPACT ON SMALL BUSINESSES

**TITLE OF BILL:** State Procurement – Minority Business Enterprise Program – Reauthorization Extension

**BILL NUMBER:** SB 192

**PREPARED BY:** Maryland Department of Transportation  
(Dept./Agency)

### **PART A. ECONOMIC IMPACT RATING**

This agency estimates that the proposed bill:

WILL HAVE MINIMAL OR NO ECONOMIC IMPACT ON MARYLAND SMALL BUSINESS

OR

WILL HAVE MEANINGFUL ECONOMIC IMPACT ON MARYLAND SMALL BUSINESSES

### **PART B. ECONOMIC IMPACT ANALYSIS**

Chart below demonstrates historic expenditures/dollars awarded to small businesses certified as MBE.

<b>MBE Program Award Dollars (Billions of Dollars)</b>	
State Fiscal Years	Award Dollars
2020	\$1.1
2019	\$1.3
2018	\$1.3
2017	\$1.5
2016	\$1.6
2015	\$2.2
2014	\$2.1
TOTAL AWARDS	\$11.1 Billion Dollars
<i>Data Published by GOSBA</i>	