

Department of Legislative Services
Maryland General Assembly
2022 Session

FISCAL AND POLICY NOTE
Enrolled - Revised

Senate Bill 9

(Senator West, *et al.*)

Budget and Taxation

Health and Government Operations

Procurement - Minority Business Enterprises - Study

This bill requires the Maryland Department of Transportation (MDOT) to study options for streamlining the certification process for minority business enterprises (MBEs). It also requires specified State entities to provide, within 75 days, information requested by MDOT to assess the need for remedial measures, including the application of a program to assist businesses owned by women or minorities. Each entity must require licensees, preapproved licensees, applicants, grantees, and other program participants to provide any information deemed necessary within 60 days of the request. **The bill takes effect July 1, 2022.**

Fiscal Summary

State Effect: MDOT can conduct the required streamlining study with existing resources. MDOT can also collect data and include it in the existing disparity study with existing resources. Other agencies may experience financial and/or operational effects, potentially significantly, to comply with the bill, as discussed below. No effect on revenues.

Local Effect: There is no direct fiscal impact; however, local governments, as grantees, may need to respond to information requests.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary:

Maryland Department of Transportation Streamlining of Certification Study

The study must include:

- a review of options to allow other State and federal certifications to be accepted as satisfying the requirement for certification as an MBE; and

- recommendations to streamline and improve the process for certification of an MBE that do not disadvantage Maryland businesses.

MDOT must submit its findings to the Legislative Policy Committee (LPC) by December 1, 2022.

Maryland Department of Transportation Assessment of Remedial Measures

The bill's requirements apply to:

- the Natalie M. LaPrade Medical Cannabis Commission (MMCC);
- the Public Service Commission (PSC);
- the State Lottery and Gaming Control Commission (SLGCC);
- units that are parties to a public-private partnership (P3) agreement under State law; and
- the Department of General Services (DGS) with respect to projects in the capital grant program in State law.

Information required by MDOT may include, without limitation, information broken down by fiscal year for fiscal 2017 through 2022, including:

- a list of each program participant's expenditures for each State fiscal year; and
- for each expenditure, a description of (1) the work performed; (2) the dollar value of the expenditure; and (3) whether the work was performed by the program participant or a contractor or subcontractor (and the identity of any contractors or subcontractors).

Data provided under the bill constitutes confidential commercial information and confidential financial information. It may be used only for purposes authorized by the bill and may be disclosed only in an anonymized format or aggregated format.

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

Current law and regulations allow certification of a business as an MBE if the business has obtained certification under the federal Disadvantaged Business Enterprise (DBE) program and also meets the eligibility requirements of the MBE program.

The federal DBE program is the U.S. Department of Transportation's (DOT) equivalent to the State's MBE program for transportation-related projects that receive federal funds. It

began in 1980 as a minority/women's business enterprise program and has been reauthorized numerous times, most recently in 2015. DOT regulations place primary responsibility for the certification of DBEs on state transportation agencies. In addition to being the certification agency for the State's MBE program, MDOT certifies DBEs for the federal program. The eligibility guidelines for DBE certification are comparable to the requirements for MBE certification (but the personal net worth cap is lower for DBEs), and many firms seek simultaneous dual certification from MDOT to reduce the administrative burden.

State Lottery and Gaming Control Agency and Commission

The State Lottery and Gaming Control Agency (SLGCA) administers lottery games and the State's casino and sports betting programs to generate revenue for the State. SLGCA is responsible for the administration of the video lottery terminal (VLT) program, including accounting for and distributing VLT revenues, managing the program's central system, and regulating and licensing of operators. In fiscal 2012, SLGCA's responsibilities were further expanded to include the regulation of table games at the previously authorized VLT facilities. Lastly, under Chapter 356 of 2021, SLGCA is responsible for regulating sports wagering and fantasy gaming in the State. SLGCC serves as an independent advisory board to SLGCA.

Many entities licensed and/or regulated by SLGCA are subject to MBE-related requirements. Chapter 553 of 2020 extended the application of the MBE program to VLTs for three years (until July 1, 2023). In addition, Chapter 356 expressed the intent of the General Assembly that the sports wagering program is to be implemented in a manner that, to the extent permitted by law, maximizes the ability of minorities, women, and minority and women-owned businesses to participate in the sports wagering industry, including through the ownership of licensed sports wagering entities. Accordingly, a sports wagering licensee must, to the extent practicable and authorized by the U.S. Constitution, comply with the State's MBE program until July 1, 2024. Within six months of the issuance of a sports wagering license, the Governor's Office of Small, Minority, and Women Business Affairs (GOSBA) – in consultation with the Office of the Attorney General (OAG) and the licensee – must establish a clear plan for setting reasonable and appropriate MBE participation goals for the procurement of goods and services related to sports wagering, including procurement of construction, equipment, and ongoing services.

To evaluate compliance with any relevant federal and constitutional requirements, MDOT, as the State's certification agency and in consultation with OAG and GOSBA, must initiate an analysis of specified MBE program requirements, of specified remedial measures, and of the most recent disparity study. A report on the analysis must be submitted to LPC by December 1, 2023.

Further, for Class B-1, B-2, and mobile sports wagering licenses, the Sports Wagering Application Review Commission (SWARC) – in consultation with MDOT, GOSBA, and OAG – must (1) evaluate a study of the sports wagering industry and market to determine whether there is a compelling interest to implement remedial measures, besides the application of the MBE program or a similar program, to assist minorities and women in the sports wagering industry; (2) evaluate race-neutral programs or other methods to address the needs of minorities, women, and minority and women-owned businesses seeking to participate in the sports wagering industry, including through ownership of licensed sports wagering entities; (3) consider whether an applicant for a Class B-1 or B-2 license intends to conduct sports wagering at a facility located in an opportunity zone or an enterprise zone; and (4) consider allowing early access to the mobile sports wagering market to entities with a meaningful partnership with minorities, women, and minority and women-owned businesses. SWARC must actively seek to achieve racial, ethnic, and gender diversity when awarding licenses and encourage MBE and small, minority, and women-owned businesses to apply for sports wagering licenses.

An applicant for a sports wagering license that is seeking investors must make serious and good-faith efforts to solicit and interview a reasonable number of minority and women investors and must submit related documentation as part of the application. An applicant that is awarded a license must sign a memorandum of understanding with SWARC that requires the licensee to again make good-faith efforts to interview minority and women investors in any future effort to raise venture capital or attract investors.

Public-Private Partnerships

Chapter 5 of 2013 established a new framework for the approval and oversight of P3s. Chapter 5 defined a P3 as a method for delivering public infrastructure assets using a long-term, performance-based agreement between specified State “reporting” agencies and a private entity where appropriate risks and benefits can be allocated in a cost-effective manner between the contract partners. To the extent practicable and allowed by the U.S. Constitution, the provisions of the MBE program apply to P3s.

Natalie M. LaPrade Medical Cannabis Commission

MMCC is responsible for implementation of the State’s medical cannabis program, which is intended to make medical cannabis available to qualifying patients in a safe and effective manner. The program allows for the licensure of growers, processors, and dispensaries and the registration of their agents, as well as registration of independent testing laboratories and their agents. There is a framework to certify health care providers (including physicians, dentists, podiatrists, nurse practitioners, nurse midwives, and physician assistants), qualifying patients, and their caregivers to provide qualifying patients with medical cannabis legally under State law via written certification.

Chapter 598 of 2018 required MMCC, in consultation with MDOT, GOSBA, and OAG, to (1) evaluate a disparity study of the medical cannabis industry and market to determine whether there is a compelling interest to implement remedial measures, which may include applying the requirements of the State’s MBE program, to assist minorities and women in the medical cannabis industry; (2) evaluate race-neutral programs or other methods that may address the needs of minority and women applicants and minority and women-owned businesses seeking to participate in the medical cannabis industry; and (3) submit emergency regulations, if necessary and allowed by law, based on the findings of the study.

Capital Grant Program

The DGS Office of Capital Grants and Loans oversees local, private, and nonprofit grantees that receive grants from the State to partially fund capital projects. Currently, there are almost 1,700 active projects, with about 300 new projects added each fiscal year. Chapter 728 of 2021 required GOSBA – prior to the release of funds to a recipient of a State capital grant of \$3.0 million or more from a miscellaneous grant program, a House of Delegates initiative, or a Senate initiative – to review the project for subcontracting opportunities under the MBE program and, if practicable, establish MBE subgoals for the project.

Wind Energy Projects

Chapter 553 of 2020 required, to the extent practicable and authorized by the U.S. Constitution, approved applicants for a proposed offshore wind project to comply with the State’s MBE program. It further required MDOT to conduct an analysis of the 2017 disparity study to determine if it applies to the type of work likely to be performed by an approved offshore wind project and report its findings to LPC by December 1, 2022.

Within six months of the approval of an offshore wind renewable energy credit (OREC) by PSC, GOSBA, in consultation with OAG and an approved applicant, must establish a clear plan for setting reasonable and appropriate MBE participation goals and procedures for each phase of the qualified offshore wind project. To the extent practicable, the goals and procedures for offshore wind projects must be based on the requirements of the State’s MBE program. Every six months following the approval of an OREC application, an approved applicant must submit a report to PSC on its progress in establishing and implementing MBE participation goals and procedures.

State Expenditures: MDOT advises that any data collected for the purpose of determining remedial measures related to the MBE program will be incorporated into the disparity study that is currently underway, and that doing so has no effect on the total cost of the study – assuming that such data is provided on a timely basis.

The fiscal effect of the bill's requirement that specified entities collect and provide data requested by MDOT "without limitation" related to their licensees, preapproved licensees, applicants, grantees, and other program participants is contingent on the data that MDOT requests and, therefore, cannot be reliably estimated. The bill's authorization is broad and extends beyond limitations in current law. For instance, with respect to capital grantees, Chapter 728 applies only to grantees that receive grants of at least \$3.0 million, but the bill authorizes MDOT to collect data on all grantees, which encompasses thousands of grantees going back to fiscal 2017. With limited staff, the DGS Office of Capital Grants and Loans likely cannot comply with an expansive request for data of that nature. If requests by MDOT are limited only to grantees receiving grants of at least \$3.0 million, compliance by DGS is substantially less burdensome.

Similarly, the bill requires each entity to provide data on every expenditure made by their grantees, licensees, and other specified parties over a six-year period, without distinguishing among expenditures for staff, overhead, and other expenditure categories that are unrelated to their use of MBEs. Collecting all such data from every licensee, grantee, and other specified parties may similarly be beyond the capacity of the specified entities.

Small Business Effect: At least some of the licensees, grantees, and other entities that are subject to the bill are small businesses. Under the bill, they must provide any information requested by MDOT for the past six fiscal years within 60 days of the request. This may create a substantial administrative and/or financial burden on these small businesses.

Additional Information

Prior Introductions: None.

Designated Cross File: None.

Information Source(s): Board of Public Works; Maryland Department of Transportation; Department of Legislative Services

Fiscal Note History:
km/ljm

First Reader - January 20, 2022
Third Reader - March 28, 2022
Revised - Amendment(s) - March 28, 2022
Enrolled - April 26, 2022
Revised - Amendment(s) - April 26, 2022

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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. 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.

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 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.

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

<u>Cabinet Agency</u>	<u>% Participation</u>
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%
Statewide Total¹	14.1%

¹ 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.

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.