

Department of Legislative Services
Maryland General Assembly
2023 Session

FISCAL AND POLICY NOTE
Enrolled - Revised

House Bill 809

(Delegate Harris, *et al.*)

Health and Government Operations

Budget and Taxation

State Procurement – Minority Business Enterprise Program – Extension and Reports

This bill (1) extends the termination date for the Minority Business Enterprise (MBE) program by one year, to July 1, 2025; (2) extends the due date for the related disparity study also by one year, to September 30, 2024; and (3) makes corresponding adjustments to the termination and due dates for MBE contracting requirements and related disparity analyses under current law. **The bill takes effect July 1, 2023.**

Fiscal Summary

State Effect: None. Extending the due dates for the disparity study and related analyses does not affect the total cost of those studies. The bill is otherwise technical and procedural in nature and has no effect on State government finances.

Local Effect: None.

Small Business Effect: Minimal.

Analysis

Bill Summary/Current Law:

Minority Business Enterprise Program

For a detailed description of the State’s MBE program, please see the **Appendix – Minority Business Enterprise Program**. As the appendix notes, the MBE program is scheduled to terminate July 1, 2024, and the disparity study is required to be completed by September 30, 2023.

Offshore Wind Projects

To the extent practicable and authorized by the United States Constitution, approved applicants for a proposed offshore wind project must comply with the State's MBE program. The Maryland Department of Transportation (MDOT) must 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 the Legislative Policy Committee by December 1, 2022.

Within six months of the approval of an offshore wind renewable energy credit (OREC) by the Public Service Commission (PSC), the Governor's Office of Small, Minority, and Women Business Affairs (GOSBA), in consultation with the Office of the Attorney General 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. These requirements terminate July 1, 2023.

The bill extends the termination of the authorization for MBE participation goals and procedures for offshore wind projects by two years, to July 1, 2025, to align with the new termination date of the MBE program. The bill also extends the deadline for the analysis of the disparity study by 22 months, to September 30, 2024, to align with the new deadline for the completion of the MBE program's disparity study, and clarifies that the analysis should be based on the disparity study currently underway.

Video Lottery Terminals

A video lottery operation applicant or a licensee is subject to the minority business participation goal established under current law for any construction related to video lottery terminals (VLTs) and for any procurement, including the procurement of equipment and ongoing services, related to the operation of VLTs. If a county in which a video lottery facility will be located has a higher MBE participation goal than the State, an applicant must meet the county's higher standard to the extent possible. A county in which a video lottery facility will be located may impose local business, local minority business participation, and local hiring requirements to the extent authorized by local law and allowed by the United States Constitution. These requirements terminate July 1, 2023.

The bill extends these requirements for two years, to July 1, 2025, to align with the new termination date of the MBE program.

Public-private Partnerships (P3s)

The Board of Public Works may not approve a P3 agreement until a reporting agency, if permissible, establishes reasonable and appropriate MBE participation goals and procedures for the project, as specified. MDOT must conduct specified analyses of MBE requirements for P3s by September 30, 2020, and again by December 1, 2022.

The bill extends the deadline for MDOT's follow-up analysis by 22 months, to September 30, 2024, to align with the new deadline for the completion of the MBE program's disparity study, and clarifies that the analysis should be based on the disparity study currently underway.

Capital Projects

Chapter 728 of 2021 requires GOSBA, by June 30, 2022, to establish policies and guidelines for the development of MBE contract goals for capital projects that receive State capital grants of \$3.0 million or more from a miscellaneous grant program, a House of Delegates initiative, or a Senate initiative. Following the issuance of policies and guidelines, GOSBA must – prior to the release of funds to an eligible grant recipient – review each project for subcontracting opportunities under the State's MBE program and, if practicable, establish MBE subgoals for the project. Finally, it requires GOSBA to report to the General Assembly by December 1, 2022, on the establishment of MBE subgoals in accordance with the Act.

The bill extends the deadline for GOSBA to establish policies and guidelines by three years to July 1, 2025. It also extends the deadline for GOSBA's report to the General Assembly by more than three years, to December 31, 2025.

State Retirement and Pension System Brokerage and Investment Management

Chapter 641 of 2022 requires MDOT and GOSBA, in consultation with specified entities, to conduct a study regarding brokerage and investment management services used by the State Retirement and Pension System to evaluate whether remedial measures to assist minority- and women-owned businesses in those sectors are consistent with specified federal or constitutional requirements. MDOT and GOSBA must submit the findings of their study to the Legislative Policy Committee (LPC) by July 1, 2023. The Act also requires GOSBA to develop race- and gender-neutral approaches to address the needs of minority and women-owned businesses in the brokerage and investment management services industry and market. It must submit its report to LPC by December 1, 2022.

The bill extends both reporting deadlines to December 31, 2025.

Additional Information

Prior Introductions: Similar legislation has not been introduced within the last three years.

Designated Cross File: SB 334 (Senator Hayes) - Budget and Taxation.

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; Maryland State Lottery and Gaming Control Agency; Public Service Commission; Department of Legislative Services

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Analysis by: Michael C. Rubenstein

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

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 Office of the Attorney General (OAG). 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 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 2023. 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. However, Chapters 155 and 156 of 2022 require GOSBA to refer prime contractors that persistently fail to meet MBE participation goals on their contracts to OAG for debarment for up to three years.

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, 2024; Chapter 117 of 2022, which reauthorized the program for the ninth time since its inception, required a new disparity study to be completed by September 2023 to inform the subsequent reauthorization process. **Exhibit 2** provides MBE participation rates for major Executive Branch agencies based on contract awards made during fiscal 2021, the most recent year for which data is available.

Exhibit 2
Minority Business Enterprise Participation Rates, by Agency
Fiscal 2021

<u>Cabinet Agency</u>	<u>% Participation</u>
Aging	0.1%
Agriculture	5.0%
Budget and Management	1.0%
Commerce	2.2%
Education	4.4%
Environment	33.4%
Executive Department	2.2%
General Services	15.3%
Health	3.6%
Higher Education Commission	0.7%
Housing and Community Development	22.6%
Human Services	NA
Information Technology	6.0%
Juvenile Services	12.6%
Labor	3.3%
Military	1.4%
Natural Resources	1.2%
Planning	1.2%
State Police	8.2%
Public Safety and Correctional Services	33.3%
Transportation – Aviation Administration	21.5%
Transportation – Motor Vehicle Administration	32.8%
Transportation – Office of the Secretary	28.20%
Transportation – Port Administration	17.8%
Transportation – State Highway Administration	24.5%
Transportation – Transit Administration	23.9%
Transportation – Transportation Authority	19.3%
Statewide Total¹	17.2%

¹ Includes the University System of Maryland, Morgan State University, St. Mary’s College of Maryland, and non-Cabinet agencies.

NA: Not Available/Did Not Report

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 2023 is \$1,995,008.