
EVALUATION OF THE MINORITY BUSINESS ENTERPRISE PROGRAM JANUARY 2022



OFFICE OF PROGRAM EVALUATION AND GOVERNMENT ACCOUNTABILITY
DEPARTMENT OF LEGISLATIVE SERVICES
MARYLAND GENERAL ASSEMBLY

Evaluation of the Minority Business Enterprise Program

**Department of Legislative Services
Office of Program Evaluation and Government Accountability
Annapolis, Maryland**

January 2022

Primary Staff for this Report

Michael Rubenstein
Diana Winter
Lindsay Rowe
Tonya Webb
April Morton
Michael Powell

Others Who Contributed to this Report

Baili Volluz
Annette Haldeman
Mya Dempsey
Maureen Merzlak

For further information concerning this document contact:

Library and Information Services
Office of Policy Analysis
Department of Legislative Services
90 State Circle
Annapolis, Maryland 21401

Baltimore Area: 410-946-5400 • Washington Area: 301-970-5400

Other Areas: 1-800-492-7122, Extension 5400

TTY: 410-946-5401 • 301-970-5401

TTY users may also use the Maryland Relay Service
to contact the General Assembly.

Email: libr@mlis.state.md.us

Home Page: <http://dls.maryland.gov>

The Department of Legislative Services does not discriminate on the basis of age, ancestry, color, creed, marital status, national origin, race, religion, gender, gender identity, sexual orientation, or disability in the admission or access to its programs, services, or activities. The Department's Information Officer has been designated to coordinate compliance with the nondiscrimination requirements contained in Section 35.107 of the Department of Justice Regulations. Requests for assistance should be directed to the Information Officer at the telephone numbers shown above.



DEPARTMENT OF LEGISLATIVE SERVICES
OFFICE OF PROGRAM EVALUATION AND
GOVERNMENT ACCOUNTABILITY
MARYLAND GENERAL ASSEMBLY

Victoria L. Gruber
Executive Director

Michael Powell
Director

January 25, 2022

Senator Clarence K. Lam, M.D., Senate Chair, Joint Audit and Evaluation Committee
Delegate Carol L. Krimm, House Chair, Joint Audit and Evaluation Committee
Members of the Joint Audit and Evaluation Committee

Ladies and Gentlemen:

At the direction of Ms. Victoria L. Gruber, Executive Director of the Department of Legislative Services, the Office of Program Evaluation and Government Accountability (OPEGA) has conducted a performance evaluation of the State's Minority Business Enterprise (MBE) program. This evaluation was performed consistent with § 2-1234 of the State Government Article.

While conducting the evaluation, OPEGA analyzed (1) MBE payment data from more than 3,000 completed State contracts as of June 2020 and (2) survey responses from more than 2,700 MBE and non-MBE vendors. The study team also interviewed senior staff from the Governor's Office of Small, Minority, and Women Business Affairs (GOSBA), the Maryland Department of Transportation (MDOT), the Department of General Services (DGS), and the Board of Public Works (BPW). Although implementation of MBE program requirements is the responsibility of all State procurement units, these four agencies are generally responsible for administering and providing oversight for the program, in different capacities.

The report addresses four key research questions and includes 19 recommendations for improving the efficiency and effectiveness of the MBE program. Written responses to the report from GOSBA, MDOT, and DGS, are included as Appendix A.

We wish to express our appreciation for the cooperation and assistance provided by GOSBA, MDOT, DGS, and BPW during this evaluation. Their willingness to share not only available data but also their expertise was critical to this endeavor.

Respectfully submitted,

Michael Powell
Director

MP/mpd

Legislative Services Building · 90 State Circle · Annapolis, Maryland 21401-1991
410-946-5560 · FAX 410-946-5508 · TDD 410-946-5401
301-970-5560 · FAX 301-970-5508 · TDD 301-970-5401
Other areas in Maryland 800-492-7122

Contents

Letter of Transmittal.....	iii
Executive Summary	ix
Note from the Office of Program Evaluation and Government Accountability	xv
Chapter 1. Introduction and Overview of the Study	1
Purposes and Scope of the Study	1
Study Methodology	2
Data Collection.....	2
Limitations of the Data.....	3
Profile of Survey Respondents and Focus Group Participants	6
Survey Respondents	6
Focus Group Participants	7
Agency Review	8
Chapter 2. The Minority Business Enterprise Program.....	9
History of the Minority Business Enterprise Program.....	9
Aftermath of the U.S. Supreme Court’s Decision in <i>Croson</i>	9
Current MBE Program Structure and Requirements	11
MBE Definition and Certification Process	11
Statewide MBE Goal.....	13
Role of the MBE Program in the Procurement Process.....	14
MBE Program Accountability and Reporting.....	16
Other Resources for Minority- and Women-owned Businesses	19
State Resources	19
Federal Resources, Local Programs, and Nongovernmental Organizations.....	22
Preference Programs in Other States.....	23

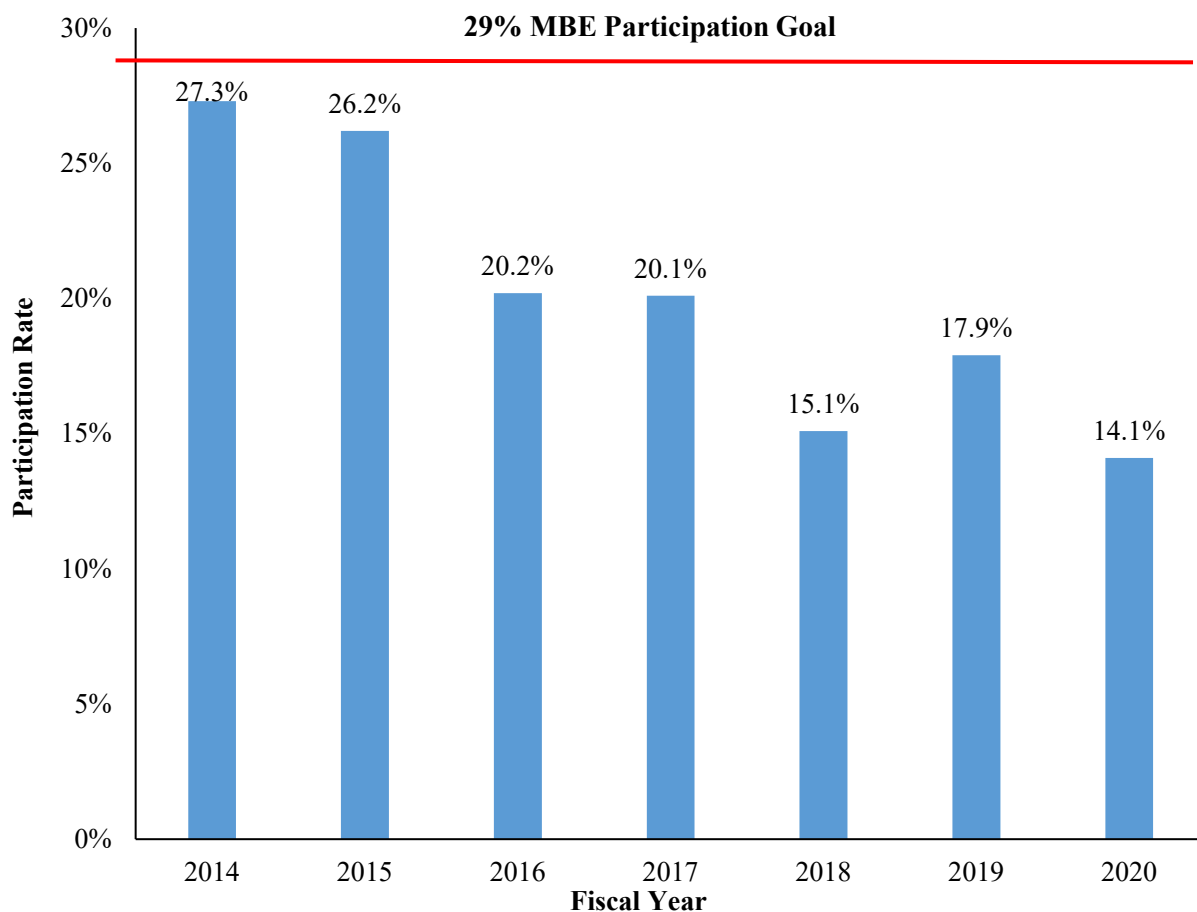
Chapter 3: Setting the Statewide Minority Business Enterprise Participation Goal.....	25
Goal-setting Methodology Involves Two Steps.....	25
Step One: Determining Availability of Minority- and Women-owned Businesses.....	26
Step Two: Evaluating Past Participation.....	27
MBE Participation Contract Subgoals	28
MBE Participation Goal of 29% Has Not Been Met	30
Chapter 4: Barriers to Expanding Minority Business Enterprise Participation in State Procurement ...	33
Large Contracts and Lack of Set Asides Viewed as the Biggest Barriers to MBE Participation	33
Certification Process Not Considered a Barrier to MBE Participation.....	35
Chapter 5: Contract Goals	37
Agencies Follow Established Procedures to Set MBE Contract Goals	37
Standard Contract Goal-setting Process.....	37
Nonstandard Contracts Pose Unique Challenges (and Opportunities) for Setting MBE Goals...	40
GOSBA Reviews Solicitations and Task Orders Valued at More Than \$25 Million.....	41
Agencies Track Compliance, but Accountability Is Lacking	41
Prime Contractors Rarely Request Waivers from MBE Participation Goals	42
Contract-level Data Reviewed by the Office of Program Evaluation and Government Accountability	44
Contract-level MBE Participation Goals Are Well Below the Statewide Goal.....	46
Only About Half of State Contracts Complied with Their Contractual MBE Participation Obligations.....	48
Overall Payments to MBE Firms	51
Chapter 6: Experience of Minority Business Enterprises	55
Less Favorable Views of Certification Renewal Than Initial Certification.....	55
State Outreach Helps with Understanding, but MBEs Want More Networking Opportunities....	57
Existing Relationships with Prime Contractors Is Key to Success	59
Two-thirds of MBE Respondents Say MBE Participation Schedules Were Honored, but Improper Changes Do Occur, Without Consequences	60

Twenty Percent of MBE Respondents Say Payments from Prime Contractors Are Not Paid Timely	64
MBE Program Helps Minority- and Women-owned Firms, but May Discourage Primes	65
Chapter 7: Observations and Recommendations.....	67
Contract Minority Business Enterprise Participation Goals Are Not Consistently Being Met ..	67
Prime Contractors Are Not Held Accountable for Failing to Achieve MBE Contract Goals	67
The MBE Program Does Not Facilitate Growth and Self-sufficiency of Minority- and Women-owned Firms.....	69
The State Has Limited Resources and Authority to Resolve Frequent Disputes Between MBEs and Prime Contractors.....	71
Agency Accountability Is Not Linked to Actual Spending	72
Outdated Technology Hampers the Efficiency and Effectiveness of the MBE Program	73
Key Aspects of the MBE Program Lack Transparency	74
State Outreach Efforts Provide Insufficient Opportunities for MBEs to Meet Prime Contractors and Be Mentored	75
Appendix A. Response from the Minority Business Enterprise Program	77
Appendix B. Major Legislative Changes Affecting the Minority Business Enterprise Program 2010-2021.....	99
Appendix C. Major Regulatory Changes Affecting the Minority Business Enterprise Program 2012-2021.....	105
Appendix D. Aggregate Minority Business Enterprise Participation, Based on Contract Awards Fiscal 2015-2020.....	111
Appendix E. Resources for Minority Business Enterprises	115
Appendix F. Preference Programs in Other States.....	125
Appendix G. Evaluation Request Letter	137

Evaluation of the Minority Business Enterprise Program Executive Summary

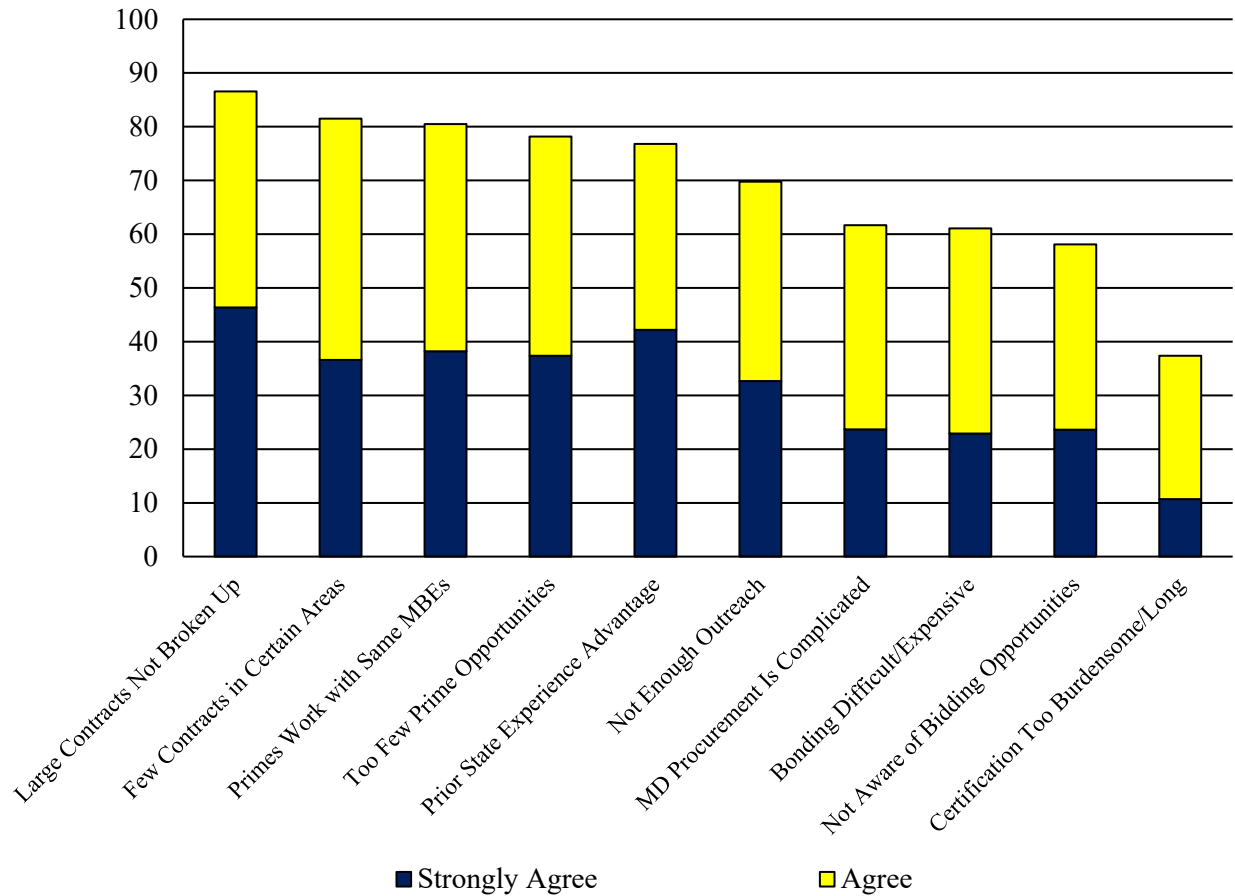
Partially due to the COVID-19 State of Emergency, Minority Business Enterprise (MBE) participation in fiscal 2020 declined to 14.1%, the lowest in at least 11 years. The rate was 26.2% as recently as fiscal 2015.

MBE Participation Based on Contract Awards Fiscal 2014-2020



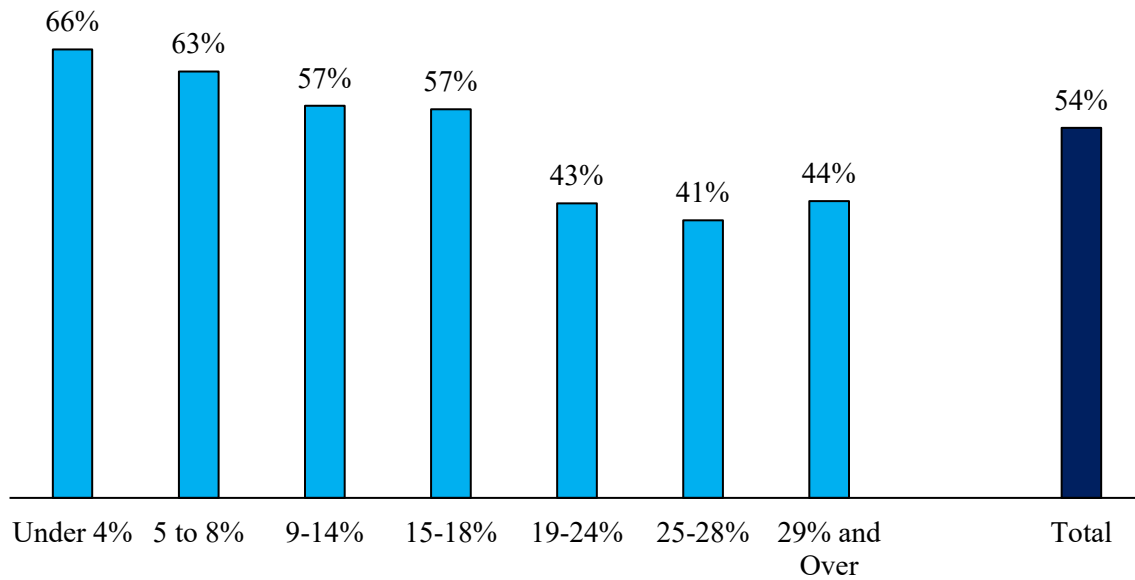
Minority businesses report the greatest barrier to greater participation is that large contracts are not broken into several smaller contracts.

Barriers to Expanding MBE Participation, According to Survey Respondents

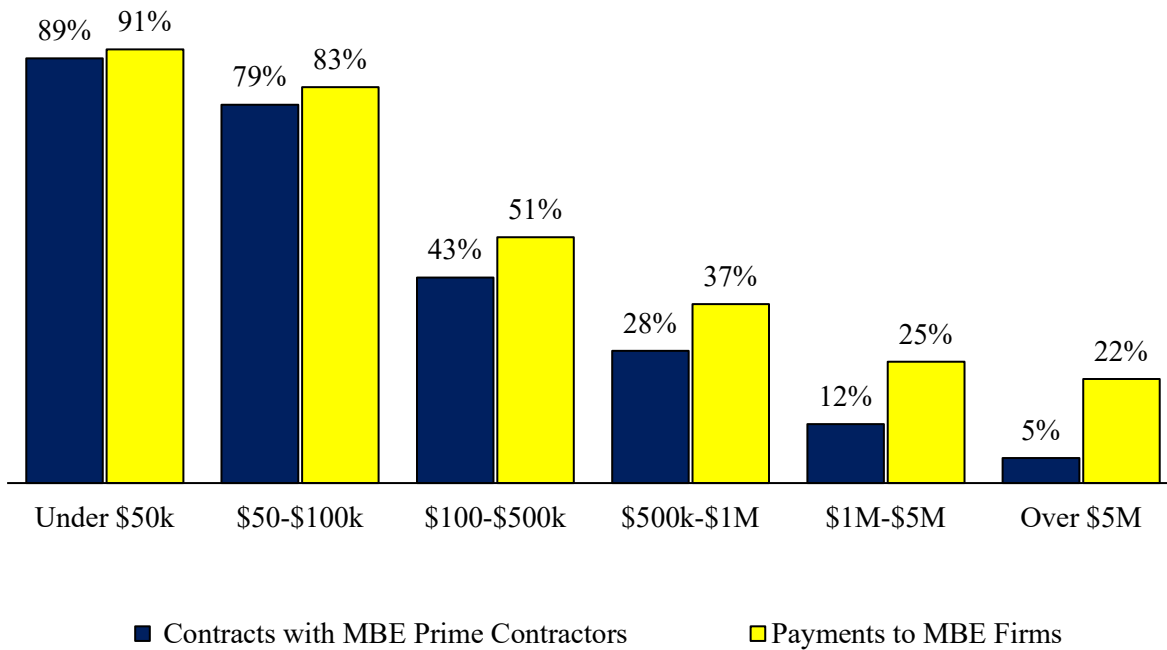


Just over half of contracts actually pay MBEs the percentage of participation agreed upon in the contract. Larger contracts have less MBE participation and are more likely to fall short of the agreed MBE participation.

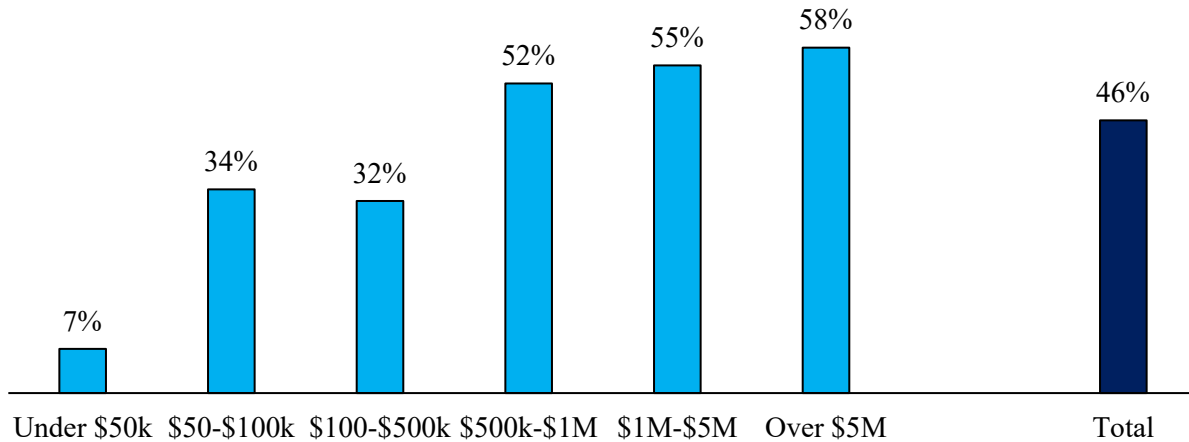
Percent of Contracts That Achieved MBE Goal By Initial MBE Goal



Payments to MBEs and MBE Prime Contractors By Contract Size



Percent of Contracts with Lower MBE Payments Than Expected By Award Size



Select OPEGA Recommendations

1. Require the Governor's Office of Small, Minority, and Women Business Affairs (GOSBA) to publish a summary of contract compliance assessments.
2. Require GOSBA to publish a list of prime contractors that repeatedly are at fault for failing to fulfill contractual MBE obligations.
3. Prime contractor past performance regarding MBE payments should be a factor in determining eligibility for future awards.
4. Codify the executive order that generally requires procurements between \$50,000 and \$500,000 to be set aside for small businesses.
5. Create an MBE Ombudsman within GOSBA to advocate on behalf of MBEs in disputes with prime contractors.
6. Require GOSBA to establish statewide MBE goals by industry type.

7. Consider breaking up large contracts into smaller components to expand bidding opportunities for MBEs.
8. Study the value of merging the MBE and Small Business Reserve programs.
9. Give agencies expanded authority to withhold payments to prime contractors who have not paid subcontractors timely.

Note from the Office of Program Evaluation and Government Accountability

An early draft of this report, which was provided to agencies for their response, contained an error. Page 69 of the earlier version contained the following statement:

“However, set-asides for small businesses are not subject to constitutional limits, and expanding their use substantially benefits MBEs as well. An analysis of MBE certification data provided by MDOT reveals that 93% of certified MBEs (7,167 firms as of summer 2021) are also certified as small business enterprises under the SBR program.”

Based on feedback from both the Governor’s Office of Small, Minority, and Women Business Affairs (GOSBA) and the Maryland Department of Transportation (MDOT), our revised report now says:

“However, set-asides for small businesses are not subject to constitutional limits, and expanding their use can benefit MBEs as well. An analysis of MBE certification data conducted by GOSBA in 2020 reveals that approximately 14% of certified MBEs are also registered for the SBR program. Codifying the Executive Order may provide motivation for more MBEs to self-certify for SBR so they can take advantage of more set-aside opportunities, a preference that many MBE respondents indicated in their survey responses.”

The Office of Program Evaluation and Government Accountability regrets the error and appreciates that GOSBA and MDOT brought it to our attention.

Chapter 1. Introduction and Overview of the Study

According to the Governor’s Office of Small, Minority, and Women Business Affairs (GOSBA), the purpose of Maryland’s Minority Business Enterprise (MBE) program is to increase procurement opportunities for minority- and women-owned firms in State contracting. The program, established in 1978, requires that a statewide goal for MBE contract participation, either as prime contractors or as subcontractors, be established biennially through the regulatory process. The current goal, in effect since 2013, is 29% of the total value of contract awards. The program also provides guidelines for State procurement units to consider in deciding whether to establish subgoals for different minority groups recognized in statute. GOSBA creates policies, reports on program achievement, conducts outreach, and hosts internal and external training regarding program best practices, but responsibility for implementing the program’s requirements rests with approximately 70 procurement units within State government, including Cabinet agencies. The Maryland Department of Transportation (MDOT) is designated as the agency responsible for certifying MBEs for the State.

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.

In part because the MBE program has not met the 29% goal since it was established, the program has been the subject of a substantial amount of proposed legislation to try to enhance MBE participation in State procurement. During the 2021 legislative session, for instance, at least 21 bills were introduced to alter or expand the MBE program. In light of this level of interest in strengthening the program, and its imminent reauthorization, the Executive Director of the Department of Legislative Services (DLS) directed the Office of Program Evaluation and Government Accountability (OPEGA) to evaluate the program (see **Appendix G**).

Purposes and Scope of the Study

The purposes of this study are to (1) assess the MBE program’s success in fulfilling its goals; (2) identify the factors that contribute to the State’s lack of success in achieving the statewide MBE performance goal; and (3) make recommendations to enhance the program’s effectiveness and efficiency.

To fulfill the purposes of the study, the research team developed a series of research questions to guide the collection and analysis of data for the study and, in effect, delineate the scope of the study. Those research questions are:

1. Is the process for establishing the statewide MBE goal and subgoal guidance appropriate and adequate?
2. What are the major barriers to MBE participation in State procurement?

3. How are individual contract MBE goals established by agencies?
 - a. Do the goals adequately reflect the availability of MBEs in the marketplace?
 - b. Are the goals met by prime contractors upon contract completion?
4. What is the experience of MBEs that participate in State procurement with respect to interactions with State agencies and with prime contractors?
 - a. Are they paid in a timely fashion?
 - b. Do prime contractors fulfill commitments for levels of MBE contract participation?
 - c. Are MBE's concerns/complaints addressed?

Study Methodology

The evaluation was completed over a single legislative interim, beginning in May 2021, and ending with a published report in January 2022. The evaluation team consisted of a project director and four analysts from OPEGA and the Office of Policy Analysis (OPA), both within DLS. Direct oversight was provided by the Director of OPEGA, with additional guidance provided by OPA policy workgroup leaders.

Data Collection

The evaluation relies on a combination of quantitative and qualitative data collection and analysis to capture the complexity of the MBE program. The program has multiple stakeholders, including (1) MBEs; (2) prime contractors that solicit MBEs as subcontractors; and (3) State agencies that oversee and implement the program. Qualitative data collection, typically in the form of structured interviews and focus groups, included each of those constituencies. Transcripts or detailed interview writeups were produced for each interview and focus group, with responses organized by topic for the purpose of analysis.

The evaluation team facilitated an online survey of vendors to provide an opportunity for them to share their experiences with, and attitudes toward, the MBE program in a systematic manner. The survey was administered to all businesses registered to do business with the State. It was tailored to collect data from both certified MBEs and non-MBEs. Individual email addresses for each firm were downloaded from eMaryland Marketplace Advantage (eMMA), the State's procurement portal, and from the directory of certified MBEs maintained by MDOT. Links to the survey were provided in individual emails to each firm as well as on MDOT's website and through a monthly electronic newsletter published by GOSBA; one round of reminders was sent to nonrespondents after one week. DLS also contacted professional associations that represent

minority businesses to encourage their members to participate in the survey. The survey remained open for three weeks and received more than 2,700 responses. There were nearly equal numbers of responses from MBEs (1,345) and non-MBEs (1,341), as well as 47 responses from former or graduated MBEs (*i.e.*, MBEs that have exceeded specified size limits, as discussed in Chapter 2).

Quantitative data collection included collecting contract award and payment data from GOSBA and MDOT and certification data from MDOT. In most cases, the evaluation team requested data from fiscal 2016 through 2020. The following section provides additional information on the types and quality of the quantitative data solicited, received, and analyzed.

The following list summarizes the data collection and analysis strategies used for the evaluation.

- Review of relevant statutes, regulations, reports, and court decisions that affect, or are related to, the operation of the MBE program, including the 2017 Disparity Study and the U.S. Supreme Court decision in *J.A. Croson v. City of Richmond*.
- Analysis of contract-level MBE goal and payment data provided by GOSBA and MDOT.
- Analysis of MBE certification data provided by MDOT.
- Interviews with program and procurement staff in multiple agencies with direct involvement in the implementation of the MBE program, including GOSBA, MDOT, the Department of General Services (DGS), and the Board of Public Works (BPW).
- Interviews with representatives of constituent groups representing minority- and women-owned businesses in the State, including the Maryland Minority Contractors' Association, the Maryland Women's Business Center, and the Maryland Washington Minority Companies Association.
- Small focus group interviews with a total of 13 vendors.
- Online surveys of certified MBEs and all other vendors registered to do business with the State.

Limitations of the Data

MDOT Compliance Data

MDOT is the only State agency that systematically collects and reports MBE compliance data on a contract-by-contract basis. It does so because it also administers the federal Disadvantaged Business Enterprise (DBE) program for the U.S. Department of Transportation, which has compliance monitoring and reporting requirements that are more rigorous than those

required by the MBE program. As the MBE and DBE programs operate largely in tandem (the certification requirements are largely identical, prompting many firms to seek concurrent certification), the compliance data collected by MDOT is directly relevant to any examination of the MBE program. At our request, MDOT provided the compliance data that it collected for fiscal 2016 through 2020. These data provide important opportunities to examine goal setting and compliance patterns and trends by contract type and by MBE certification category. Although it encompasses more than 800 contracts over multiple years, it covers only MDOT's experience.

GOSBA Award and Payment Data

Under authority given to it under § 14-305 of the State Finance and Procurement Article, GOSBA collects and reports annual contract award data from all State agencies. With respect to contract awards, statute requires each agency to provide GOSBA, for the immediate prior fiscal year:

- the total number and value of procurement contracts with certified MBEs, by category of MBE certification, including whether the MBE participated as a prime contractor or as a subcontractor; and
- the percentage that MBE contract awards represent of the total number and value of contract awards, by category of MBE certification.

Section 14-305 also authorizes GOSBA to collect "other such information...approved by the Board [of Public Works]." GOSBA must summarize the data it receives from agencies in an annual report to BPW and the General Assembly.

The statutory language does not explicitly authorize GOSBA to collect data on payments to MBEs following contract award, and prior to fiscal 2004, the Governor's Office of Minority Affairs (GOMA), the predecessor agency to GOSBA, did not systematically collect or report payment data. A 2002 performance audit by the Office of Legislative Audits recommended that GOMA collect and analyze payment data, which it began doing with the fiscal 2004 annual report. However, until fiscal 2016, GOMA collected only payments made to MBEs, not total contract payments made. Thus, GOMA could not analyze or report on the extent to which MBE contract goals were achieved because it did not have data on total contract payments made to prime contractors.

Beginning in fiscal 2016, GOSBA began requesting that agencies report total contract payments for the purpose of tracking compliance with MBE contract goals.

As GOSBA is the repository for MBE data from all State agencies, DLS requested from GOSBA any available contract *and* payment data for fiscal 2016 through 2020. GOSBA complied with our request but noted limitations in the data that it was providing. First, the contract award data is reported only in the aggregate by agencies. Therefore, GOSBA does not have award data on a contract-by-contract basis. This precludes analysis of MBE contract goals on a

contract-by-contract basis. Second, GOSBA expressed concerns about the validity of some of the compliance data that it provided.

As GOSBA has been collecting MBE payment data for individual contracts since fiscal 2004, it has well-established procedures for collecting that data, and GOSBA advised that it has high confidence in the accuracy and reliability of that data. The same is not true of the compliance data (*i.e.*, the data on total contract payments on a contract-by-contract basis), as GOSBA only began collecting those data in fiscal 2016. Specifically, GOSBA advised that data from the first few years in particular were incomplete and full of irregularities (which DLS confirmed in our review of the data provided by GOSBA). For instance, in fiscal 2016, only 48 of more than 70 reporting agencies provided any compliance data, and many of those, including some larger agencies, provided data on only a handful of contracts. GOSBA has advised that it has since improved its data collection procedures for the compliance data and that it has more confidence in the data collected most recently (fiscal 2020). However, GOSBA has chosen not to use those data to analyze compliance out of an abundance of caution until it can further validate the data. DLS examined the internal consistency of the fiscal 2020 data provided by GOSBA and concluded that it was internally consistent. It also compared the GOSBA data provided for fiscal 2020 with comparable data provided by MDOT and found that trends with respect to MBE compliance were similar across both sets of data. This gave DLS sufficient confidence to use the fiscal 2020 data from GOSBA to examine MBE compliance across multiple State agencies.

Survey Data

The survey was administered to more than 30,000 firms registered with eMMA to do business with the State, including approximately 7,100 firms certified as MBEs by the State. As noted above, we received responses from more than 2,700 firms, including roughly equal numbers of MBEs and non-MBEs. The MBE responses total nearly one-in-five (19%) of all certified MBEs; the non-MBE responses are a substantially smaller proportion of the universe of non-MBE firms registered to do business with the State (5%). Many firms contacted the evaluation team to advise that, because they had not actually participated in any Maryland procurements, they would not respond to the survey. OPEGA cannot make a reliable estimate of the total number of registered firms that have not actually done, or attempted to do, business with the State, but this lack of engagement likely affected the response rate to the survey.

The survey responses cannot be assumed to be statistically representative of all MBEs or non-MBEs in the State. The evaluation elected to survey all registered firms rather than a representative sample of them, and the response rates are not sufficiently large to allow any claims of representativeness.

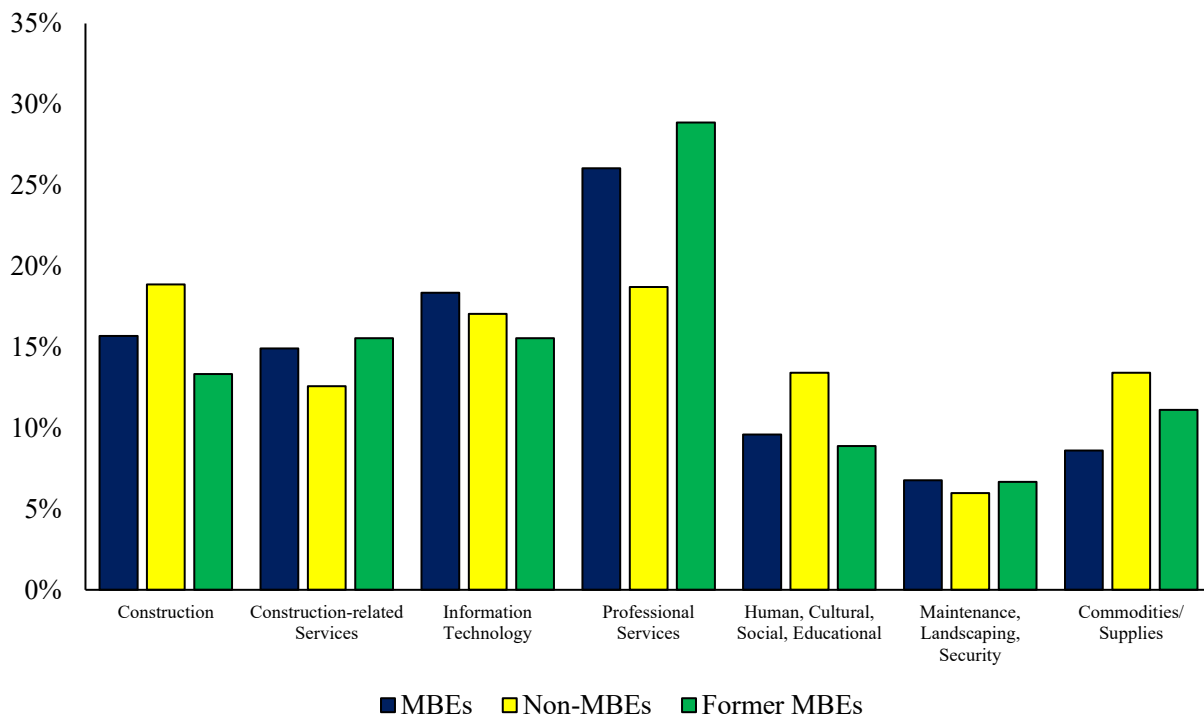
For the purposes of this study, however, the number of respondents is sufficient to provide a useful perspective on the experiences of a substantial number of MBEs and non-MBEs. For that reason, survey responses are reported as the number and/or percentage of respondents in specified categories (*e.g.*, MBEs, non-MBEs).

Profile of Survey Respondents and Focus Group Participants

Survey Respondents

Exhibit 1.1 shows that survey respondents generally represent a diversity of industries that participate in State procurement.

Exhibit 1.1
Survey Respondents, by Industry Classification

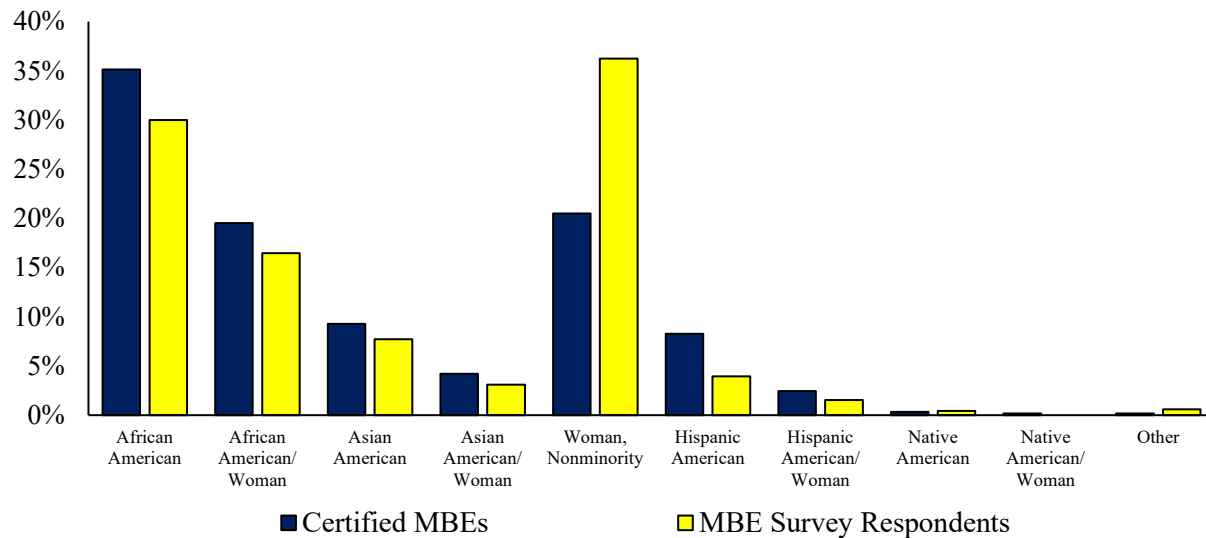


MBE: minority business enterprise

Source: Department of Legislative Services

Exhibit 1.2 shows that MBE survey respondents generally reflect the diversity of program participants (*i.e.*, MBEs certified by the State, as discussed in Chapter 2), except that nonminority women-owned firms are overrepresented among survey respondents. However, 225 MBE and former MBE respondents did not provide their certification category.

Exhibit 1.2
Profile of MBE Survey Respondents, by Certification



MBE: minority business enterprise

Source: Maryland Department of Transportation; Department of Legislative Services

Among MBE respondents, 43% had not participated in a bid or proposal within the previous two years, including 28% that had never participated in a bid or proposal to the State. Among non-MBEs, 36% had not participated in a bid or proposal within the previous two years. MBE respondents that had participated in State procurement in the past two years submitted an average of nine bids/proposals during that time and were awarded an average of four contracts. The success rate of MBE respondents in winning contract awards varied by MBE certification category. Hispanic women-owned firms had the lowest success rate (22%) among respondents, and nonminority women-owned firms had the highest success rate (39%).

Focus Group Participants

DLS conducted a total of five focus group interviews, each with two or three participants. For four of the five focus groups, participants were referred by stakeholder groups and then contacted by the evaluation team to secure and arrange their participation. The fifth group consisted of three participants who received the online survey and contacted the evaluation team independently to expand on their answers to the survey. All focus groups were conducted virtually using Zoom. Participants were advised prior to their involvement that their participation was confidential and that their identities would not be disclosed.

A total of 13 individuals participated in the focus groups, of which 12 represented MBEs and 1 was a non-MBE. Of the 12 MBE participants, 10 were African American, 1 was Asian, and 1 was Hispanic; 5 participants were women. Of the 13 total participants, 7 worked in construction, 4 provided construction-related services (including engineering, trucking, and recycling), 1 worked in human services, and 1 worked in information technology (the non-MBE representative).

Agency Review

A preliminary draft of the report was shared with four agencies involved in the administration of the MBE program: GOSBA, MDOT, DGS, and BPW; each agency was asked to provide feedback on factual errors and/or omissions in the draft and on the draft recommendations. Based on their feedback, the study team made necessary corrections and clarifications to the report and then sent the final version of the report back to the same agencies, giving them two weeks to provide their formal responses. Their written responses are included in **Appendix A**; BPW elected not to submit a written response.

Chapter 2. The Minority Business Enterprise Program

History of the Minority Business Enterprise Program

The Minority Business Enterprise (MBE) program was created by Chapter 575 of 1978, which required the departments of Education and General Services, the University of Maryland, and the Interagency Committee on Public School Construction to structure procedures for purchasing materials, supplies, equipment, and services (including construction services) to attempt to achieve the result that at least 10% of the total dollar value of the purchases be made directly or indirectly from MBEs. The 10% goal also applied to the Maryland Department of Transportation (MDOT) but only to construction service contracts in excess of \$100,000, taking into account the practical severability of the construction services.

In preamble language, the General Assembly noted its concern that, contrary to the policy of the State, businesses may have experienced discrimination in the awarding or letting of contracts or subcontracts based solely on the minority status of the business, and as a result the economic development and expansion of minority enterprises may have been impeded. The General Assembly further noted, however, that the measure was enacted as a policy direction to the Executive Branch that would be enforceable only through the oversight function of the General Assembly and not through the Judicial Branch. The program was set to terminate in 1983. In the fiscal analysis prepared for the bill, the Department of Fiscal Services (now Department of Legislative Services (DLS)) stated that the Mass Transit Authority division of MDOT already complied with the bill but also noted that the probability of the 10% goal being achieved in fiscal 1979 was quite low. Instead, the fiscal analysis assumed the State would increase its purchases from minority businesses at a rate of 2% annually, projecting that the 10% goal may be met over the following five years. The 10% goal stood until 1995 when Chapter 116 increased it to 14%.

Chapter 193 of 1983 reauthorized the MBE program and broadened the law to encourage all procurement agencies to structure procedures for procuring supplies, services, and construction to encourage participation by minority business enterprises and to attempt to provide minority business enterprises a “fair share” of State contracts.

Chapter 48 of 1988 revised the State Finance and Procurement Article as part of the DLS long-term code revision project. As part of this project, the MBE program was reauthorized and recodified in Title 14, Subtitle 3 of the revised article.

Aftermath of the U.S. Supreme Court’s Decision in *Croson*

In 1989, the U.S. Supreme Court decided *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). In that case, Croson challenged the City of Richmond’s MBE program, which required that at least 30% of the dollar amount of each contract must go to one or more MBEs. The court found that:

- a “public entity...has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice;”
- the compelling interest must be based on evidence of the effects of past discrimination in the relevant market; and
- the plan to remedy the effects of past discrimination must be narrowly tailored and include race-neutral measures.

The *Croson* decision effectively outlawed strict race-based quotas in state and local contracting and required state and local governments to base any race-based preference programs on actual evidence of the effects of discrimination within their jurisdictions. In response to the *Croson* decision, the Board of Public Works (BPW) commissioned a Minority Business Utilization Study to determine whether Maryland was justified in operating the MBE program on the basis of real disparities between the availability of MBEs in the marketplace and their participation in State contracting. Following an affirmative finding in 1990, the General Assembly authorized BPW to designate a single agency for the certification of MBEs. MDOT was subsequently charged with this responsibility.

Chapter 496 of 2000 extended the program again, maintaining the 14% goal and making it applicable to MDOT construction contracts in excess of \$50,000, rather than \$100,000. Chapter 339 of 2001 increased the overall MBE participation goal for each State procurement unit from 14% to 25% of the total dollar amount of contracts issued. In reaching the 25% goal, the measure required that at least 7% of the dollar amount of contracts be with certified African American-owned businesses and at least 10% of the dollar amount of contracts awarded be with certified women-owned businesses. Chapter 339 revised the definition of minority business enterprise to require that the daily business operations be managed by one or more socially and economically disadvantaged individuals who are also owners. The measure also defined socially and economically disadvantaged individuals and created a rebuttable presumption that individuals who fall within the defined criteria are socially and economically disadvantaged, subject to an exclusion for individuals with high personal net worth.

Chapters 252 and 253 of 2011 maintained the overall goal of 25% but eliminated the statutory subgoals for women- and African American-owned businesses. Instead, it authorized the Governor’s Office of Minority Affairs (now the Governor’s Office of Small, Minority, and Women Business Affairs (GOSBA)), in consultation with MDOT and the Office of the Attorney General (OAG), to establish guidelines for each unit to consider while determining whether to set subgoals for individual procurements based on existing categories for minority groups. The measures also repealed the exemption from MBE provisions for MDOT construction contracts valued at \$50,000 or less.

Chapter 154 of 2012 repealed the codified statewide MBE goal and instead required that a statewide goal be established biennially through the regulatory process under the Administrative Procedure Act. The goal is established by the Special Secretary for GOSBA, in consultation with

the Secretary of Transportation and the Attorney General. That process set the statewide goal at 29%, where it remains at the time of this publication.

For a detailed description of legislative and regulatory changes to the MBE program, see **Appendix B** and **Appendix C**.

Current MBE Program Structure and Requirements

GOSBA is the coordinating office within the Executive Branch. Its responsibilities include (1) creating policies aimed at connecting small and minority businesses with greater economic opportunities; (2) monitoring performance of the State's three socioeconomic procurement policies across approximately 70 agencies; (3) conducting statewide outreach and training programs; (4) providing online resources for small business growth and development; and (5) advocating on behalf of certified firms facing challenges on State procurements. Under the leadership of the Special Secretary, GOSBA works with a wide variety of stakeholder groups, and the Special Secretary serves on the Minority Business Enterprise Advisory Committee, the Procurement Improvement Council, the Governor's Subcabinet on International Affairs, the Commerce Department's Small Business Workgroup, the Maryland Offshore Wind Workforce Training Program Grant Review Team, and the Senior Procurement Advisory Group. GOSBA performs outreach to MBEs at tradeshow, seminars, workshops, and other events to explain the program, MBE rights and responsibilities, the procurement marketplace, and the impact of new legislation.

GOSBA collects performance data for the MBE program from the agencies that are required to participate in the MBE program. The primary data points used to monitor the MBE program's statewide performance are award dollars, payment dollars, utilization by classification, and utilization by procurement category.

As noted above, MDOT is responsible for certifying MBEs; that responsibility is carried out by MDOT's Office of Minority Business Enterprise (OMBE).

Each State agency must designate an employee to serve as an MBE liaison officer to administer the agency's MBE program. The liaison officer must be a high-level employee who reports directly to the agency head or deputy. The MBE liaison is responsible for coordinating agency outreach efforts to the minority business community, ensuring agency compliance with program requirements, assisting in the resolution of contract issues, and submitting required MBE reports and information.

MBE Definition and Certification Process

Under Maryland law, a minority business enterprise is any legal entity, except a joint venture, that is (1) organized to engage in commercial transactions; (2) at least 51% owned and controlled by one or more individuals who are socially and economically disadvantaged; and

(3) 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 a citizen or lawfully admitted permanent resident of the United States who is (1) African American, American Indian/Native American, Asian, Hispanic, physically or mentally disabled, or is a woman; or (2) otherwise found by OMBE to be a socially and economically disadvantaged individual. There is a rebuttable presumption that an individual who is a member of one of the listed minority groups is socially and economically disadvantaged. However, an individual whose personal net worth exceeds \$1,500,000, as adjusted annually for inflation according to the Consumer Price Index, may not be found to be economically disadvantaged. As of January 2022, the inflation-adjusted personal net worth threshold is \$1,847,024.

OMBE recently implemented an electronic submission system for MBE certification applications to expedite the process. Nevertheless, it advises that about half of all submissions are incomplete and require follow-up with the applicant to complete the submission. When an MBE applies for initial certification, OMBE investigators review documents and perform site visits to confirm that the applicant is a bona fide business that meets the certification requirements. Most applications are then referred to an Internal Review Committee for final approval. Applications requiring additional clarifications are referred to the MBE Advisory Committee (consisting of eight representatives of State agencies and four members of the general public) for more intensive review. Each year, certified firms must provide an affidavit and supporting documents stating that their status as an MBE (*i.e.*, personal net worth and business size) has not changed in order to maintain their certification. Chapters 578 and 579 of 2010 required that MDOT complete its review of an application for initial MBE certification and notify the applicant within 90 days of receiving a complete application that includes all information needed to make a decision. MDOT may extend the notification requirement once by up to 60 days after providing the applicant with a written notice and explanation of the extension.

OMBE maintains an online [database](#) of certified MBEs to facilitate the identification of MBEs that are eligible to perform specified types of work. The database is searchable by industry classification and includes contact information for all certified MBEs. It is also available for download as a spreadsheet file. The number of certified MBEs grew more than 28% from fiscal 2016 through 2020, from 5,802 in fiscal 2016 to 7,445 in fiscal 2020.

Chapters 222 and 233 of 2009 allowed a woman-owned business that is owned by a member of a racial or ethnic minority group to be certified as both a woman-owned business and as a business owned by a member of a recognized racial or ethnic minority group. The Acts specified, however, that firms with dual certification could participate in an individual procurement contract as either a woman-owned business or as a business owned by a member of a racial or ethnic minority group, but not both. However, Chapter 322 of 2021 reversed the latter provision by allowing a business with dual woman- and minority-owned certification to be counted as a business owned by both a woman (or women) *and* a member of an ethnic or racial minority on a single contract.

Chapters 315 and 316 of 2019 required that regulations governing the MBE program allow for the certification of a business as an MBE if the business has obtained certification under the federal Disadvantaged Business Enterprise (DBE) Program and meets the eligibility requirements of the State's MBE program. Although the DBE program is a federal program under the U.S. Department of Transportation, each state manages certification of DBEs within its jurisdiction. In Maryland, the criteria and process for DBE and MBE certification are almost identical (the personal net worth cap for DBE certification is lower than the MBE cap), and many firms seek concurrent certification. Thus, Chapters 315 and 316 have minimal effect on MBE certification because firms that obtain either Maryland or out-of-state DBE certification still have to meet MBE criteria to obtain MBE certification.

MBE Graduation

A certified MBE that reaches or exceeds federal small business standards may no longer participate in a procurement as an MBE and enters graduated status. The standards vary by industry classification, but generally are based on average gross receipts over three years or average number of employees over 12 months. If, within three years, an MBE in graduated status again becomes eligible under the federal small business size standards, the MBE is taken out of graduated status and may resume participation as an MBE. However, if, after three consecutive years the MBE has not requalified under the size standards, the MBE loses its certification.

If an MBE graduates or otherwise becomes ineligible during the performance of a State contract (e.g., if an owner surpasses the personal net worth cap), the MBE's participation in the contract may still be counted toward compliance with the MBE contract goal. MBE ineligibility that occurs during the performance of a contract may not by itself be the basis for the termination of an MBE from an existing contract.

Statewide MBE Goal

As noted above, Chapter 154 of 2012 repealed the codified statewide MBE goal and required that it be established biennially by GOSBA in consultation with MDOT and OAG. Also, Chapters 252 and 253 of 2011 authorized GOSBA, in consultation with MDOT and OAG, to establish guidelines for setting subgoals for specified subgroups of certified MBE firms (for instance, for African American- or women-owned firms); the resulting subgoal guidance is discussed in the next chapter. For fiscal 2013, GOSBA established a statewide goal of 29%, an increase from the existing goal at the time of 25%. Although current law requires the goal to be checked every two years, the goal has remained unchanged since then.

To comply with *Croson's* requirements that the State show a compelling interest by demonstrating evidence of the effects of discrimination in State contracting, the State conducts a disparity study approximately every five years, in conjunction with periodic reauthorization of the MBE program. The purpose of the disparity studies is to determine, using both quantitative and qualitative data, whether there is a difference between the availability of minority- and women-owned firms in the marketplace and their participation in State contracts. The Supreme Court's decision in *Croson* noted that evidence of such disparities would fulfill the requirement to

demonstrate a compelling interest. The disparity studies, procured and managed by MDOT, have consistently confirmed such disparities across all racial groups and for women-owned firms. The most recent study was completed in 2017. With the MBE program scheduled to terminate July 1, 2022, statute required a new study to be completed by September 2021, so that its results could be considered in determining whether, and under what terms, to reauthorize the program. However, MDOT has requested an extension until September 2023 due to unforeseen delays in the procurement of the contract for the study.

In establishing the statewide goal, § 14-302 of the State Finance and Procurement Article requires the Special Secretary to allow for public participation by consulting with minority, women's, and general contractor groups; community organizations; and other officials that can be expected to have relevant information. In establishing the statewide goal, GOSBA must consider:

- the relative availability of minority- and women-owned businesses to participate in State procurement as demonstrated by the State's most recent disparity study;
- past participation of MBEs in State procurement, except in real property; and
- other factors that contribute to constitutional goal setting.

Role of the MBE Program in the Procurement Process

Each State agency must structure its procurement procedures to try to achieve the overall statewide MBE goal through the direct or indirect participation of MBEs in State contracts, but the statewide goal does not apply directly to individual contracts. Consistent with the requirements of the *Croson* decision, and except as described below, agencies must determine appropriate MBE participation goals for each contract in accordance with guidelines established by GOSBA. State agencies must (1) consider the practical severability of all contracts and not bundle contracts for the purpose of limiting participation by small or minority-owned businesses and (2) use race-neutral measures to facilitate MBE participation in the procurement process.

Guidance from BPW requires each agency head to establish a Procurement Review Group (PRG) to determine appropriate MBE participation goals for each solicitation. The agency's chief procurement official and MBE liaison officer, or designees of either, must serve as standing members of the PRG. GOSBA is responsible for establishing formal guidelines for PRGs to consider when determining the appropriate MBE participation percentage goal and subgoals for a solicitation.

GOSBA, in conjunction with the Office of State Procurement within the Department of General Services, has published guidelines for PRGs on how to evaluate the potential for MBE participation for an entire contract consistent with the procedures outlined in regulations. PRGs must complete an MBE evaluation worksheet for proposed procurement solicitations, contract options, or modifications, and sole-source contracts when the resulting contract is expected to exceed \$100,000.

Solicitation documents (*i.e.*, requests for proposals or invitations for bids) issued by State agencies must include the expected degree of MBE participation for each solicitation. MBE participation goals for each contract must be based on:

- the potential subcontract opportunities available in the contract;
- the availability of certified MBEs to respond competitively to the potential subcontract opportunities;
- the contract goal and subgoal guidelines developed by GOSBA; and
- other factors that contribute to constitutional goal setting.

An agency may, in some cases, determine that an MBE goal is not appropriate for a specific contract if it determines that the contract does not have subcontracting opportunities or that MBEs are not available to perform any portion of the contract. Agencies are barred from using quotas or any goal-setting process that relies only on the statewide goal or that fails to consider the factors outlined above.

The head of a State agency may waive the requirement to establish or use MBE participation goals for any sole source, emergency, or expedited contract in which the public interest cannot reasonably accommodate those requirements. Chapter 4 of the 2021 special session requires GOSBA, in consultation with MDOT and the Attorney General, to establish guidelines for each agency to consider when determining the appropriate MBE participation goal and outreach for emergency procurements.

For small procurements (*i.e.*, procurements valued at \$50,000 or less or construction procurements valued at \$100,000 or less), agencies must solicit bids or offers from a sufficient number of certified MBEs listed in the MDOT directory.

Solicitation Process and Waivers

For contracts with MBE participation goals, bidders or offerors must:

- identify specific work categories within the scope of the procurement that are appropriate for subcontracting;
- solicit certified MBEs in writing at least 10 days before bids or proposals are due;
- attempt to make personal contact with certified MBEs and document these attempts;
- assist certified MBEs to fulfill, or to seek a waiver from, bonding requirements; and
- attend prebid or other meetings that the agency schedules.

A bidder or offeror may request a waiver from an MBE contract goal if the bidder or offeror can demonstrate that it is unable to meet the goal after making a good faith effort to do so. Waiver requests are generally submitted with bids or proposals so they can be considered during the contract award phase of the procurement. Waiver requests must include specified documentation demonstrating the bidder's or offeror's good faith efforts, including a record of the efforts made to solicit and negotiate with certified MBEs. Waivers may be granted upon reasonable demonstration that the bidder or offeror was unable to obtain MBE participation, or that MBE participation could not be obtained at a reasonable price or in the appropriate MBE classifications. Agencies must report all waiver requests and waivers granted annually to BPW.

MBE Participation Schedules

A bidder or offeror must submit with the bid or proposal a completed MBE participation schedule that names each certified MBE that will be used on the contract and the percentage of contract value attributed to each MBE. Failure to accurately complete and submit the participation schedule with the bid or offer results in the bid or offer being deemed not responsive, unless the inaccuracy is determined to be a minor irregularity that can be cured or waived, as specified in regulations. Within 10 days following notification of an apparent award, additional documentation is required, including a signed statement by each named MBE that provides the percentage and type of work assigned to the subcontractor. All relevant documentation is considered part of the contract.

Following submission of a bid or proposal, but before contract execution, a bidder or offeror must notify the procurement officer if an MBE listed on the schedule has become or will become unavailable or ineligible to perform the required work. The bidder or offeror may also petition to change the schedule. Reasons for an MBE's ineligibility include, among others, graduation from the MBE program or loss of certification as a result of an owner exceeding the personal net worth cap. A request to change an MBE participation schedule must include, among other items, a description of efforts to substitute another certified MBE to perform the work. Prior to contract execution, any change to the MBE participation schedule requires the approval of the procurement officer, following consultation with the MBE liaison.

Following execution of a contract with the State, a contractor may not terminate or otherwise cancel a contract with an MBE on the MBE participation schedule without showing good cause and obtaining the prior written approval of the MBE liaison and the head of the agency. Good cause for removal of an MBE from an MBE participation schedule after contract execution includes documented nonperformance or election by the MBE to cease work. Failure of the MBE to provide a bond does not constitute nonperformance. Any change to the MBE participation schedule after contract execution requires an amendment to the contract.

MBE Program Accountability and Reporting

A certified MBE's participation can be counted toward the contract goal only if the MBE performs a commercially useful function, as defined in regulation. MBE contract goals apply in all instances, even if the prime contractor is a certified MBE. However, a certified MBE that is the

prime contractor may count its participation in the contract for up to 50% of the MBE participation goal for that contract. Only 60% of the participation of MBEs that serve as suppliers (“regular dealers,” as defined in statute) may be counted toward the MBE contract goal. A firm that is certified as both a woman-owned firm and as a firm owned by a member of a racial or ethnic minority may be counted as both for the purpose of meeting MBE goals (as noted above, this provision was enacted by Chapter 322 of 2021).

Each prime contractor is responsible for complying with the MBE contract goal for each contract, and agencies are responsible for monitoring compliance with the goals. A prime contractor must submit monthly reports listing all payments made to MBEs in the preceding 30 days and any unpaid invoices over 30 days old received from an MBE. Agreements between a prime contractor and an MBE must require the MBE to also report monthly to the contracting agency on payments it has received from the prime contractor and any unpaid invoices, for the purpose of verification. If an agency determines that a prime contractor is not in compliance, the agency must notify the contractor and specify corrective action that must be taken. If a prime contractor refuses or fails to take corrective action, the agency may terminate the contract. Chapter 154 of 2012 also authorized agencies to assess liquidated damages if the contractor fails to comply in good faith with the requirements of the MBE program. However, Chapters 481 and 482 of 2018 prohibit a State agency from assessing liquidated damages for an indefinite delivery contract or indefinite performance contract under specified conditions.

Upon completion of a contract, an agency must prepare a report that compares the dollar value of the payments that were actually received by MBEs with the payments that were expected to be made to MBEs under the contract’s participation goal.

Annual reporting requirements for State agencies and GOSBA are summarized in the prior chapter. **Exhibit 2.1** 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. MBE participation in State contract awards decreased from 17.9% in fiscal 2019 to 14.1% in fiscal 2020. **Appendix D** provides aggregate MBE participation rates for all State agencies, based on contract awards, for the six years from fiscal 2015 through 2020.

Exhibit 2.1
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%
University System of Maryland ¹	11.6%
Statewide Total²	14.1%

¹ Includes all campuses except University of Maryland, Baltimore, which did not report data.

² Includes Morgan State University, St. Mary's College of Maryland, and non-Cabinet agencies.

Other Resources for Minority- and Women-owned Businesses

State Resources

Financial Assistance Programs

In addition to the formal MBE program, a number of State programs provide financial support and assistance to small businesses that are either located in underserved areas or owned by socially or economically disadvantaged individuals. These programs include:

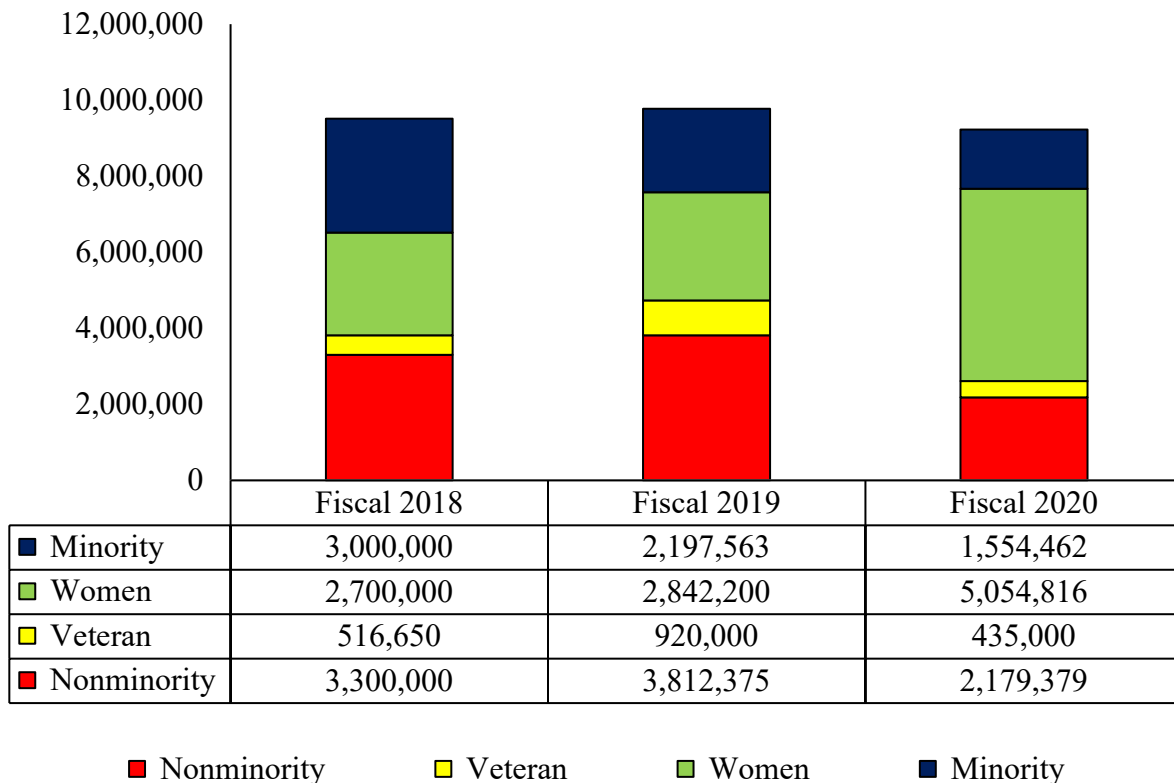
- the Small, Minority, and Women-Owned Businesses Account and the Maryland Small Business Development Financing Authority (Department of Commerce);
- the Neighborhood Business Works Program and the Microenterprise Loan Program (Department of Housing and Community Development (DHCD)); and
- the Builder Fund (Maryland Technology Development Corporation).

Small, Minority, and Women-Owned Businesses Account: Article XIX of the Maryland Constitution authorizes video lottery terminals (VLTs) in multiple locations throughout the State, with a portion of the proceeds going to the State. This provision was enacted under Chapter 5, Acts of the 2007 Special Session and ratified by Maryland voters in the November 2008 General Election. As a result, Chapter 4, Acts of the 2007 Special Session also became effective and established the Small, Minority, and Women-Owned Businesses Account (SMWOBA or the Account), which is administered by the Department of Commerce.

State law requires that 1.5% of the proceeds from VLTs at each video lottery facility be paid into the Account. Grants from SMWOBA go to eligible fund managers to provide investment capital and loans to small, minority, and women-owned businesses in the State. Fund managers must allocate at least 50% of available funds to eligible businesses in the jurisdictions and communities surrounding the State's video lottery facilities. Additionally, Chapter 757 of 2019 requires the Maryland Energy Administration to transfer \$7.0 million to the Account from the Strategic Energy Investment Fund for the purpose of providing access to capital for small, minority, women, and veteran-owned businesses in the clean energy industry.

The Account began receiving funds in fiscal 2011, when the first VLT facility began gaming operations in the State. From the inception of the Account to June 30, 2020, \$64.9 million was deployed to small, minority, and women-owned businesses, broken down as follows: \$20.1 million (approximately 31%) to minority-owned businesses; \$21.5 million (approximately 33%) to women-owned businesses; \$3.9 million (approximately 6%) to veteran-owned businesses; and \$19.2 million (approximately 30%) to nonminority small businesses. **Exhibit 2.2** provides more details on settled transactions for fiscal 2018 through 2020.

Exhibit 2.2
SMWOBA Settled Transactions by Status
Fiscal 2018-2020



SMWOBA: Small, Minority, and Women-Owned Businesses Account

Source: Department of Commerce; Department of Legislative Services

In 2020, Commerce submitted a report to the chairs of the Maryland General Assembly budget committees detailing SMWOBA fund manager transactions since program inception and lending goals established for fund managers, including targets for the number of loans to veteran-, women-, and disabled-owned businesses as well as loans in rural areas and in the clean energy, manufacturing, and cyber industries. The goals identified in the report did not include a target for loans to minority-owned businesses. The report noted that not all the targets were met in fiscal 2019 and 2020 but did not discuss any remedies.

Maryland Small Business Development Financing Authority: The Maryland Small Business Development Financing Authority (MSBDFA) provides financing options for small businesses that are not able to qualify for financing from private lending institutions or are owned by socially and economically disadvantaged persons. MSBDFA is the only Commerce program

with multiple capabilities (surety bonds, loan guarantees, lines of credit, and term loans) that can serve existing and startup businesses that the private market will not support. A private contractor, currently Meridian Management Group, Inc., reviews the financing applications for presentation to the MSBDFA board. MSBDFA has four programs: the Contract Financing Program; the Long-term Guaranty Program; the Surety Bond Program; and the Equity Participation Investment Program.

From fiscal 2015 through 2020, MSBDFA awarded incentives to fewer than 30 businesses annually; the lowest number of businesses receiving incentives was 16 in 2020 and the highest was 29 in fiscal 2016. The total value of incentives awarded by MSBDFA during that time ranged from a low of \$4.2 million (in fiscal 2020) to a high of \$10.2 million (in fiscal 2019). The average individual incentive amount during this time period ranged from \$257,185 (in fiscal 2015) to \$364,890 (in fiscal 2019). While MSBDFA collects some information regarding the minority status of successful applicants, this information is not collected or reported in a consistent manner. From fiscal 2015 through 2020, for example, MSBDFA collected minority-status information from just 77 successful applicants – a number representing only slightly more than half of the 141 businesses that received awards during this period. Moreover, this data is not broken down by program, making it difficult to determine how many minority-, women-, and veteran-owned businesses participated in a particular program during a given year.

Neighborhood BusinessWorks Program: DHCD's Neighborhood BusinessWorks loan program provides flexible financing to new or expanding small businesses and nonprofit organizations in sustainable communities, priority funding areas, and opportunity zones throughout the State. The program provides loans in amounts up to \$5 million to Maryland-based small businesses (as defined by the U.S. Small Business Administration), local development corporations, and nonprofit organizations whose activities contribute to a broader revitalization effort, and whose projects are intended to promote investment in commercial districts or town centers. Notably, DHCD requires a Minority Business Enterprise Plan for all projects where Neighborhood BusinessWorks funds will exceed \$250,000 for construction or rehabilitation. In fiscal 2020, DHCD loaned approximately \$10.6 million through the Neighborhood BusinessWorks Program.

Microenterprise Loan Program: DHCD's Microenterprise Loan Program is designed to provide entrepreneurs with flexible financing for microenterprise startups and expansions within designated sustainable communities, priority funding areas, and opportunity zones throughout the State. To be eligible for a microenterprise loan, a business may not exceed \$500,000 in annual revenue and may have no more than five employees at the time of application. Loan amounts are capped at \$50,000. DHCD does not directly originate or administer microenterprise loans, but instead partners with community-based microlenders who act as intermediaries for the department.

Builder Fund: The Maryland Technology Development Corporation (TEDCO) is an independent entity established by the Maryland General Assembly in 1998 to facilitate the creation of technology companies and encourage collaboration between these emerging businesses and federal and State research laboratories. TEDCO also aims to promote new research activity and investments that lead to business development in Maryland. TEDCO's Builder Fund (formerly the

Minority Business Pre-Seed Fund) provides both early-stage investments and executive management services and mentorship to companies run by individuals with a socially or economically disadvantaged background that hinders access to traditional forms of capital. Specific to the Builder Fund, in addition to meeting TEDCO's general eligibility requirements, a business must meet the following requirements:

- at least one founder or executive manager works at the applicant company full time;
- the founder of the applicant company has a demonstrated economic disadvantage;
- if required by TEDCO, the founders, managers, or officers agree to receive executive support; and
- if there is more than one founder, founders with a combined ownership of at least 50% have demonstrated economic disadvantage.

Under TEDCO regulations, TEDCO may make an investment of up to \$100,000 in each business selected for participation in the Builder Fund. Funded companies are also provided Builder Fund resources which may include both hands-on and educational executive support, peer-to-peer mentorship and collaboration, and networking opportunities. The Builder Fund program received \$1.0 million in general funds each year from fiscal 2020 through 2022. Chapter 415 of 2021 requires the Governor to include an appropriation to the fund of \$5.0 million in fiscal 2023, \$6.2 million in fiscal 2024, and \$7.5 million annually beginning in fiscal 2025.

Federal Resources, Local Programs, and Nongovernmental Organizations

In addition to the various State resources available to MBEs, several federal agencies, some local jurisdictions, and many nongovernmental organizations provide support for minority-owned businesses.

At the federal level, the Minority Business Development Agency (MBDA) within the U.S. Department of Commerce invests in a national network of MBDA business centers, specialty centers, and grantees, that support the growth and global competitiveness of American minority-owned businesses. Although not focused solely on minority-owned businesses, the U.S. Small Business Administration (SBA) works with a resource partner network that includes SCORE business mentors, small business development centers, women's business centers, and veterans business opportunity centers, to provide counseling and training to a broad range of small business owners. SBA also operates a number of contracting assistance programs that target businesses located in underserved areas or owned by members of socially or economically disadvantaged groups, such as the Small Disadvantaged Business Program, the Women-Owned Small Business Federal Contracting Program, the 8(a) Business Development Program, the 7(j) Management and Technical Assistance Program, and the HUBZone Program.

Seven counties in the State operate a county-level minority business program: Anne Arundel; Baltimore; Charles; Howard; Montgomery; and Prince George's counties and Baltimore City. Anne Arundel County's program, however, is a self-directed program through the Office of Central Services. It has no specific minority participation goals and is not legally mandated through the county code or by executive order.

In addition to these government-sponsored programs, a variety of private minority business promotion organizations have formed throughout the State, coalescing based on industry, region, or minority group served. Many of these organizations provide training, financial information and grants, and networking opportunities for minority businesses, as well as reviewing legislation and advocating the interests of their members before government.

For a detailed list of State, federal, county, and private resources for minority businesses, see **Appendix E**.

Preference Programs in Other States

According to MDOT, Maryland's MBE program is the oldest in the country. Since its establishment in 1978, more than 25 states have implemented preference programs, only some of which are strictly race-based (see **Appendix F** for a more detailed listing and description of state preference programs). States have broadened the scope of preference programs to include not only minorities and women, but other groups that have been (or are) socially or economically disadvantaged. For instance, the California Public Utilities Commission includes members of the LGBT (lesbian, gay, bisexual, and transgender) community in their Utility Supplier Diversity Program. Illinois' Business Enterprise Program includes individuals with disabilities. Iowa's Targeted Small Business Program includes service-disabled veterans. Virginia's Small, Women-, and Minority-Owned (SWaM) program includes small businesses in addition to minority- and women-owned businesses. However, some states have developed separate preference programs for groups that may otherwise be included in an MBE program. Ohio, unlike Maryland, does not include women-owned businesses (WBEs) in its MBE program. Instead, the state has implemented a program solely for WBEs.

Just as the programmatic designations are diverse in these state programs, so are their approaches to setting goals. Among M/WBE-only programs, Maryland's statewide goal of 29% for MBE participation is the second highest in the country; only New York, with a goal of 30%, is higher. Some states have chosen not to set goals, while others set goals according to the industry/field. Delaware has an Office of Supplier Diversity that certifies eligible minority, women, veteran, service-disabled veteran, and individuals with disabilities-owned business enterprises. Yet, according to the office's website, the state does "not have a preference nor set-asides for diverse or small vendors, as we treat all equitably as businesses and then measure and report our spending." Texas determines its MBE goals by field/industry. For example, there is an MBE goal of 21.1% for commodities contracts and 23.7% for professional service contracts. Virginia's SWaM program has a 42% participation goal for discretionary spending. Washington requires that each state agency set its own MBE goal.

Chapter 3. Setting the Statewide Minority Business Enterprise Participation Goal

Chapter 154 of 2012 reauthorized and extended the Minority Business Enterprise (MBE) program until 2016 and fundamentally changed how the statewide MBE goal is established. Instead of setting the goal in statute, Chapter 154 sought to maximize flexibility and ensure reliance on the best and most recent data, requiring that the Special Secretary of the Governor's Office of Minority Affairs (GOMA) (now Governor's Office of Small, Minority and Women Business Affairs, or GOSBA), in consultation with the Secretary of Transportation and the Attorney General, set the State's overall aspirational goal every two years through the regulatory process. As noted earlier, the original goal was set at 29% and has remained at that level through each subsequent two-year reassessment. Chapter 154 includes the goal-setting factors that must be considered in setting the statewide goal as well as a public participation requirement.

The vendor survey conducted for this study revealed a range of opinions among certified MBEs about the 29% goal. Although many MBEs did not respond to a question about the appropriateness of the goal or did not express a clear opinion about its appropriateness, 268 MBE respondents said that the current goal is fair and/or appropriate, and 246 MBE respondents said that it should be higher (only a handful said it was too high). Those who expressed that it should be higher generally offered a range of suggestions between 35% and 50% (a few went as high as 75%).

To enhance understanding about the statewide goal, this chapter explores how it is set in accordance with current statutory and constitutional requirements. In describing the process, the Office of Program Evaluation and Government Accountability relied extensively on GOSBA's overall goal setting strategy for the original determination of the goal, as published in January 2013. GOSBA advises that the process has not changed substantively since then.

Goal-setting Methodology Involves Two Steps

In evaluating best practices for goal setting, the State determined that the federal laws dealing with the U.S. Department of Transportation's (USDOT) Disadvantaged Business Enterprise (DBE) Program rely upon regulatory provisions that are very similar to those that were ultimately enacted in Chapter 154. The federal DBE rules have been in place (with some modifications) since 1999 and have been upheld as constitutional by every federal circuit court that has reviewed the program since the current rules were promulgated. For this reason, the State's goal-setting methodology relies first and foremost on Maryland law, but also, where appropriate, looks to the relevant federal DBE regulations and guidance (especially 49 C.F.R. § 26.45 and USDOT's *Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program*) for additional support.

The methodology for determining the statewide goal is a two-step process. The first step, as set forth by Maryland's MBE statute, requires that GOSBA evaluate "the relative availability of minority- and women-owned businesses to participate in State procurement as demonstrated by the State's most recent disparity study." The data collected by the disparity study serve as the foundation for the first step.

Step One: Determining Availability of Minority- and Women-owned Businesses

Based on the findings of the 2017 disparity study, **Exhibit 3.1** shows the prevalence of minority- and women-owned businesses in the Maryland market as a percentage of the total number of business establishments in the market. The data are presented based on dollars awarded and dollars paid. Slightly more than one-third of dollars awarded and paid went to businesses that are minority- or women-owned. The 2011 disparity study, which was used to establish the original 29% goal in 2013, found a prevalence rate of 39.6% for minority- and women-owned businesses (not shown).

Exhibit 3.1 Overall Estimated M/WBE Availability in the Maryland Market Area

	<u>African American</u>	<u>Hispanic</u>	<u>Asian</u>	<u>Native American</u>	<u>Total Minority</u>	<u>Nonminority Women</u>	<u>Total Minority- /Women- owned</u>	<u>Non M/WBE</u>
Award								
Dollars	11.6%	3.6%	5.4%	1.0%	21.6%	14.2%	35.9%	64.1%
Paid								
Dollars	11.2%	3.8%	4.7%	1.0%	20.7%	14.0%	34.7%	65.3%

M/WBE: minority- or women-owned business enterprises

Source: Maryland Department of Transportation

The disparity study also found that the availability of MBEs varies by industry, as shown in **Exhibit 3.2**. For example, minority- and women-owned businesses make up 28.7% of architectural and engineering firms and other construction-related businesses, but they make up 46.4% of information technology firms.

Exhibit 3.2
Overall Estimated M/WBE Availability in the Maryland Market Area
By Industry Sector

	<u>African American</u>	<u>Hispanic</u>	<u>Asian</u>	<u>Native American</u>	<u>Total Minority</u>	<u>Nonminority Women</u>	<u>Total Minority- /Women- owned</u>	<u>Non M/WBE</u>
Construction	10.3	5.1	2.7	0.8	18.8	13.7	32.5	67.5
AE-CRS	8.5	2.2	4.8	1.2	16.7	11.9	28.7	71.3
Maintenance	16.2	5.4	3.5	2.2	27.3	13.5	40.8	59.2
Information								
Technology	15.5	3.6	12.7	1.2	33.0	13.4	46.4	53.6
Services	13.9	2.9	4.8	1.2	22.8	18.2	41.0	59.0
Commodities, Supplies, and Equipment	10.8	3.2	6.3	0.8	21.1	13.2	34.3	65.7

AE-CRS: Architectural and Engineering/Construction-related Services

M/WBE: minority- or women-owned business enterprises

Note: Percentages are based on dollars paid.

Source: Business Disparities in the Maryland Market Area 2017, prepared for the Maryland Department of Transportation

Given the statutory and constitutional requirements to consider the availability of MBEs in the market, the disparity study's findings are a major factor in the determination of the statewide goal. However, the current goal of 29% is less than the total 35% availability of MBEs in the market found in the 2017 disparity study and also less than the 39.6% availability of MBEs found in the 2011 disparity study. This is because determining availability of M/WBEs is just the first of two steps in establishing the statewide goal.

Step Two: Evaluating Past Participation

In accordance with State law, the second step in setting the statewide goal is evaluating past MBE participation in State contracting. Similarly, federal regulations state that, during Step 2, one factor that must be considered in determining whether an adjustment to the base figure is necessary is past participation. Both State law and federal regulations also authorize the

consideration of other factors “that contribute to constitutional goal setting” during Step 2, including “[s]tatistical disparities in the ability of DBEs to get the financing, bonding and insurance required to participate in [the State’s DBE] program.”

According to GOSBA’s 2013 goal-setting document, to determine past participation while using the best and most recent available evidence, Maryland’s procurement data as reported to GOMA by State agencies was examined. For its initial determination in 2013, GOSBA calculated a median MBE utilization rate for the prior five years of 18.7%, based on data in the disparity study and its own contract award data. Averaging that figure with the 39.6% MBE availability established by the 2011 disparity study and rounding to the nearest whole number yielded the initial 29% statewide goal. For the 2019 determination, the most recent 2017 disparity study calculated a modest decrease in MBE availability (34.7% based on dollars paid) and an even smaller decrease in median utilization (18.5%, based on dollars paid). Although the average of these two figures is 26.6%, as shown in **Exhibit 3.3**, GOSBA elected to maintain the statewide goal at 29% after considering other constitutionally allowed factors.

Exhibit 3.3

Calculation of Statewide MBE Goal

	<u>2013 Calculation</u>	<u>2019 Calculation</u>
MBE Availability	39.6%	34.7%
Median MBE Utilization	18.7%	18.5%
Average	29.1%	26.6%

MBE: minority business enterprise

Source: Maryland Department of Transportation; Department of Legislative Services

MBE Participation Contract Subgoals

As noted in Chapter 2, State law requires GOSBA to issue guidance to agencies regarding the use of subgoals. Consistent with the statutory requirement, GOSBA issued the following update to the State’s MBE program subgoals, effective August 2020. This guidance replaces initial subgoal guidance issued in 2013 when the original statewide goal was developed.

Once an overall MBE participation goal is set for a contract, each unit must determine the appropriate MBE subgoals using the following MBE subgoal process:

- (1) Determine the expected value of the procurement. The MBE subgoal process must be completed for any procurement expected to equal or exceed \$200,000 in value, regardless

of contract type or procurement category. This includes master contract task order procurements where MBE goals and subgoals are determined at the task order level. For procurements that are not expected to have a value that equals or exceeds \$200,000, completion of the MBE subgoal process is discretionary.

- (2) Identify the major industry category encompassed by the contract.
- (3) The recommended subgoals for each industry category are provided in **Exhibit 3.4**. Use of the recommended subgoals is subject to the parameters set forth in items 4 through 7.
- (4) MBE subgoals are only permissible when the overall goal for the contract is greater than or equal to the sum of the recommended subgoals for all subgroups in the industry category, plus two. If the overall goal for the contract is not greater than or equal to the sum of the subgoals plus two, the unit may not apply any MBE subgoals on that contract.
- (5) A recommended MBE subgoal may not be set if the number of certified firms in the subgroup who are available to perform the work on a contract is less than three. For purposes of determining the number of certified firms in a MBE subgroup, always count dually certified firms as being owned by a member of the relevant racial or ethnic subgroup, not as a woman-owned firm.
- (6) The recommended MBE subgoals should be evaluated for each subgroup. If the subgroup has three or more certified firms who are available to perform the work on a contract, the recommended subgoal for that subgroup should be set unless the unit explains the basis for not applying the recommended subgoal and the explanation relates to something specific in the Procurement Review Group documentation.
- (7) If a bidder or offeror is unable to meet the overall goal and/or any subgoals established for a contract, the bidder or offeror may request a waiver and submit documentation demonstrating that it made good faith efforts to meet the overall goal and subgoals.

Exhibit 3.4
Minority Business Enterprise Subgoals
(Effective August 1, 2020)

Combined Industry Category	<u>Cons</u>	<u>AE-CRS</u>	<u>Main</u>	<u>IT</u>	<u>Serv</u>	<u>CSE</u>
Subgroups						
African American	8%	7%	9%	10%	—	6%
Hispanic American	—	—	3%	—	2%	2%
Asian American	—	—	2%	—	3%	—
Women	11%	10%	—	10%	10%	8%
Subgoal Total	19%	17%	14%	20%	15%	16%
Subgoal Total Plus 2% Margin*	21%	19%	16%	22%	17%	18%

AE-CRS: Architectural and Engineering/Construction-related Services

Cons: Construction

CSE: Commodities, Supplies, and Equipment

IT: Information Technology

Main: Maintenance

Serv: Service

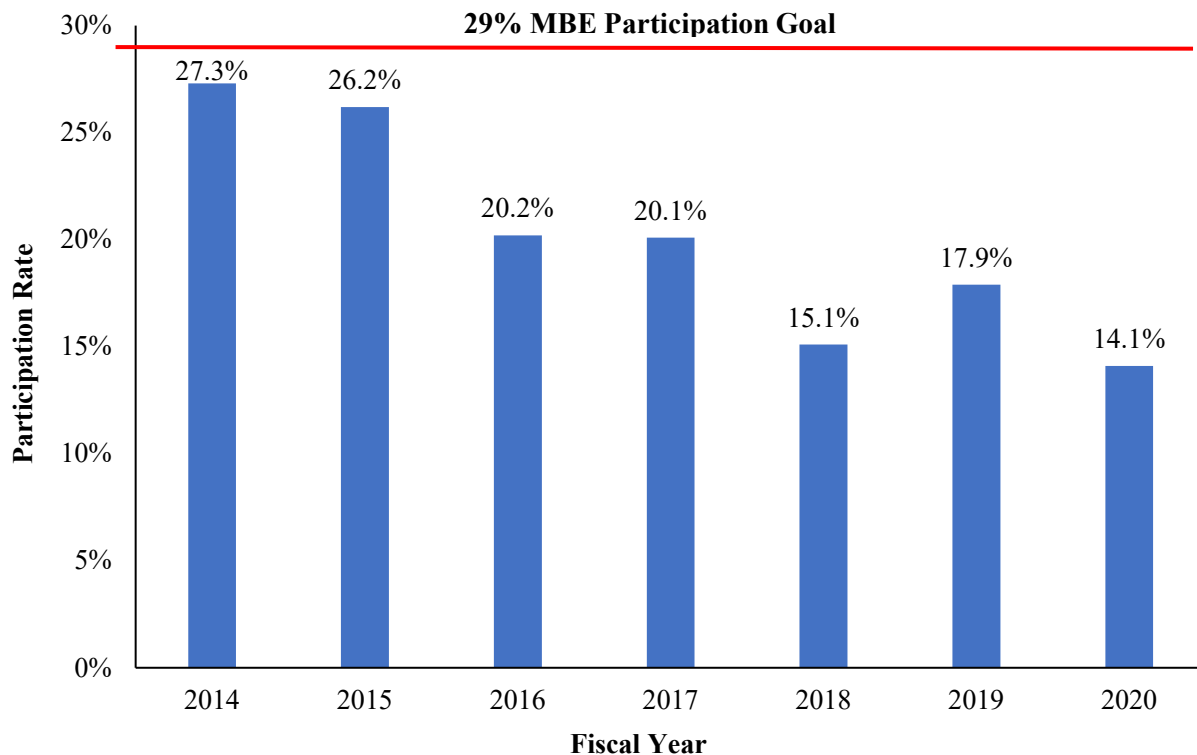
*Sum of the recommended goals plus 2%

Source: Governor's Office of Small, Minority, and Women Business Affairs

MBE Participation Goal of 29% Has Not Been Met

Since the MBE participation goal was set at 29% for fiscal 2014, the State has failed to meet it (see **Exhibit 3.5**). Fiscal 2014 and 2015 were the closest that the State has come to achieving the goal, with participation rates of 27.3% and 26.2%, respectively. In subsequent years, MBE participation decreased, reaching 14.1% in fiscal 2020. These results are based on contract award data. As discussed in Chapter 5, current reporting by GOSBA includes actual payments to MBEs but does not measure MBE compliance based on actual contract payments. Chapter 5 of this report examines the State's MBE performance using actual contract payment data.

Exhibit 3.5
MBE Participation
Fiscal 2014-2020



MBE: minority business enterprise

Source: Governor's Office of Small, Minority & Women Business Affairs Annual Reports

There are several possible explanations for recent declines in MBE participation. The first is a statutory change in how MBE participation is calculated. Chapters 343 and 605 of 2013 removed nonprofit organizations from the definition of MBEs. Previously, more than 30% of the statewide MBE utilization was attributed to nonprofit organizations. Beginning in fiscal 2016, contracts awarded to nonprofit organizations were no longer counted, either as awards to MBEs or in the total value of contracts awarded by the State for the purpose of calculating MBE participation. Even though contracts to nonprofits were excluded from both the numerator and the denominator used in calculating MBE participation, this change was a major factor in the decrease of MBE participation from 26.2% in fiscal 2015 to 20.2% in fiscal 2016. As confirmation that this measurement change affects the calculation of MBE participation, had Chapters 343 and 605 been

in effect one year earlier, in fiscal 2015, the MBE participation rate would have been just 19.0% instead of 26.2%.

The COVID-19 public health emergency had a direct effect on public purchasing in the third and fourth quarters of fiscal 2020 and thereby affected the overall MBE participation rate as well. Discretionary spending was frozen by Governor Lawrence J. Hogan, Jr. in April 2020, and many purchases made during that time were defined as “emergency.” The Department of General Services, which managed more than \$1 billion worth of emergency procurements carried out in response to the public health emergency, confirmed that, due to supply chain shortages and the urgency of finding necessary supplies and equipment, virtually none of those procurements included an MBE goal (as allowed by State procurement law). However, a small number were awarded to MBEs as prime contractors. In fiscal 2020, total qualifying expenditures across the participating agencies/departments decreased 14% from \$7.9 billion to \$6.9 billion. During this period, awards to MBEs totaled \$971 million, representing a 32% decline from \$1.4 billion in fiscal 2019. The overall MBE participation rate therefore declined to 14%. The prevalence of emergency procurements without MBE goals contributed substantially to this decrease.

Despite these challenges, GOSBA advises that the 29% MBE participation goal is reasonable and should not be lowered. In an effort to assist with increasing MBE participation, GOSBA has partnered with the Maryland Department of General Services’ Office of State Procurement (OSP). OSP has launched specialized training programs for procurement officers across multiple levels, the Maryland Procurement Academy. GOSBA is a part of the training curriculum and meets with participants to advise them of the socioeconomic programs the State has available. This provides an opportunity for GOSBA to ensure the successful implementation of the MBE program by assisting in the training of the procurement officers who evaluate the scope of work and set MBE goals.

Chapter 4. Barriers to Expanding Minority Business Enterprise Participation in State Procurement

As noted in the previous chapter, the State has not met its 29% minority business enterprise (MBE) participation goal since it was established in fiscal 2013. Based on the current downward trend in MBE participation, the State is unlikely to meet its goal in the near future. A key purpose of this study is to identify barriers that limit MBE participation in State contracts and to make recommendations to improve the program's effectiveness.

Large Contracts and Lack of Set Asides Viewed as the Biggest Barriers to MBE Participation

For this study, the survey asked MBE respondents to indicate which factors posed barriers to expanding MBE participation rates. As shown in **Exhibit 4.1**, the factor most identified by MBE respondents (87%) as a barrier to expanding MBE participation was "Large contracts are not broken into smaller contracts that MBEs can bid on." Moreover, 46% of MBE respondents strongly agreed that the failure to break up large contracts poses a barrier, the highest level of strong agreement of any factor included in the survey. In addition, 78% of MBE respondents agreed that "There are not enough prime contracting opportunities for MBEs." Based on these two responses, MBE respondents believe that having more opportunities to bid on contracts as prime contractors could increase MBE participation in State procurement. As one respondent wrote:

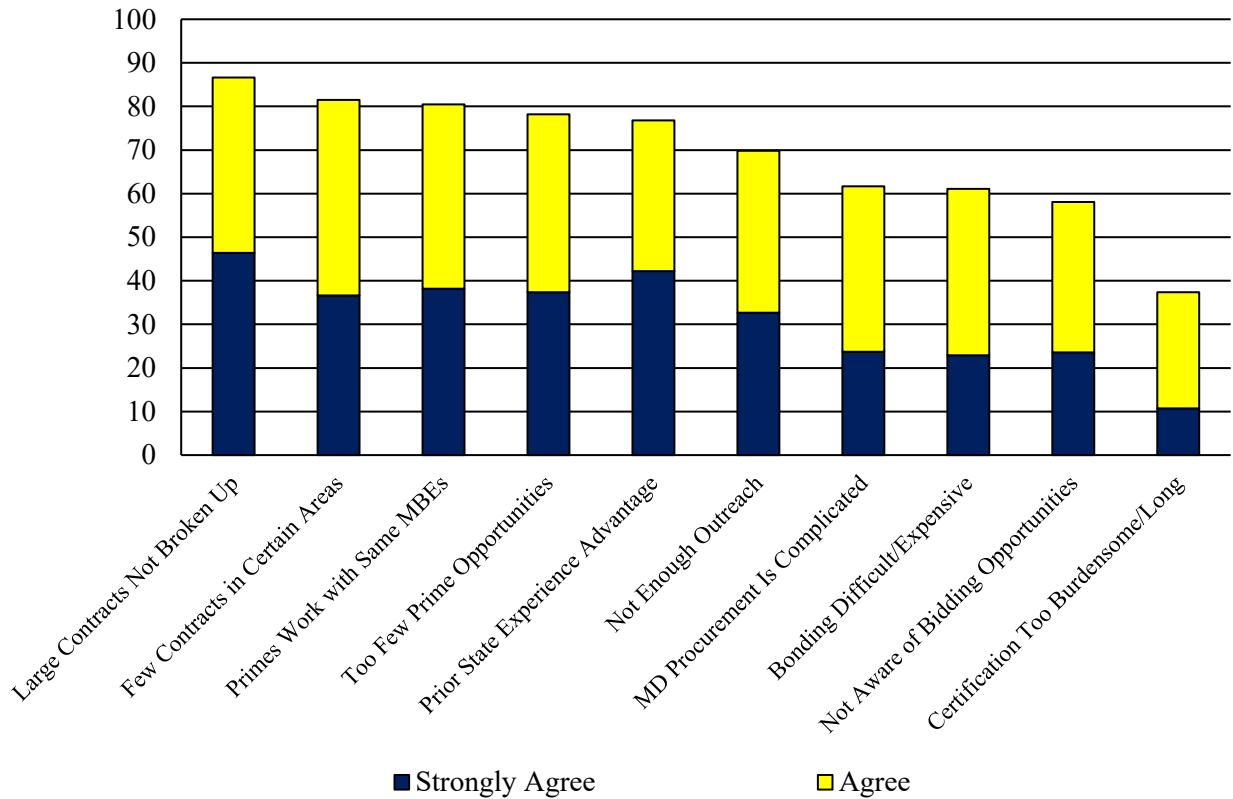
"Provide more priming opportunities (smaller contracts) to allow MBE firms to have more opportunity to work directly with State agencies. That is where the most valuable experience and relationships come from. In the more usual MBE sub role, the MBE rarely has direct contact with agency personnel and therefore cannot build the relationships and connections critical to developing long-term business relationships."

A focus group participant echoed the call for breaking up large contracts:

"The state of Maryland puts a contract...but it's completely statewide. I can't bid statewide because...I'm not big enough to go statewide...If the contract was broken down...smaller companies...could bid on it, then the state of Maryland could take advantage of two things. One, you could increase your minority participation. Two,...you could probably get a lower cost for the services, because you're utilizing local people in those jurisdictions. So that's the biggest thing. Unbundle these contracts and make them smaller [so] smaller companies can bid on them as primes. You know, I can't say that enough. That's been my biggest complaint."

Another survey respondent advised, “Give MBE firms a true chance to prove themselves, not just court a prime for favor on a contract.”

Exhibit 4.1
Barriers to Expanding MBE Participation, According to Survey Respondents



MBE: minority business enterprise

Source: Department of Legislative Services

Exhibit 4.1 also shows that three other barriers garnered agreement from at least 75% of MBE respondents:

- There are not enough bidding opportunities for certain types of contracts.
- Prime contractors are only willing to work with MBEs they know.
- Firms with prior experience with the State have too much of an advantage.

The latter two responses reflect a strong belief that State procurement heavily favors established businesses, making it difficult for new or smaller businesses to “break through.” Indeed, the statement that firms with prior experience with the State have too much of an advantage garnered the second highest level of “strong” agreement (42%). The comments below from MBE survey respondents about the insularity of the procurement community in Maryland typified these beliefs.

- “We see most MBE contracts going to the same subcontractors. It makes it pointless to even try and bid these projects.”
- “As a new MBE firm, it is very tough to break in with prime...firms when they have their favorite MBE firms...The prime firms need to encourage and give opportunities to new MBE firms to join their teams.”
- “There needs to be a ‘way in.’ You know it’s all about who you know, especially in Maryland.”

A majority of MBE respondents agreed that additional factors pose barriers to expanding MBE participation, but their level of agreement did not exceed 70%. These factors included:

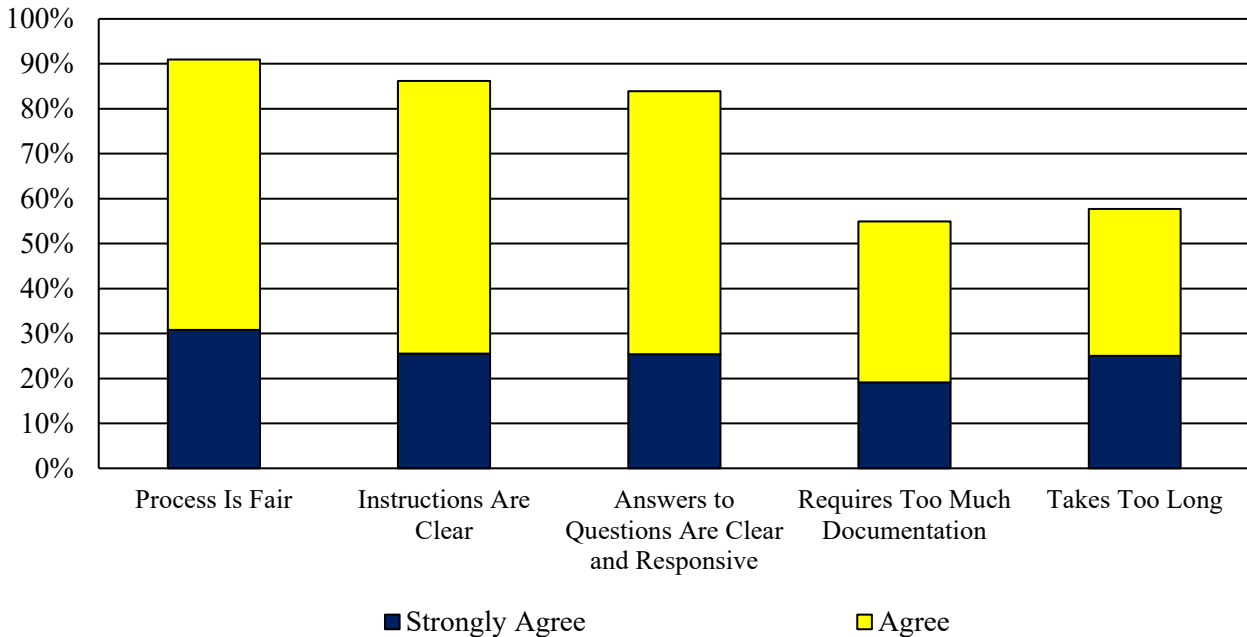
- State agencies do not do enough outreach to MBEs;
- Maryland procurement is too complicated;
- bonding/insurance is difficult or expensive to obtain; and
- it is difficult to find out about bidding opportunities with Maryland agencies.

Certification Process Not Considered a Barrier to MBE Participation

MBE respondents generally did not agree that the MBE certification process is a barrier to participation in State procurement. Only 37% agreed that it is a barrier, and only 11% strongly agreed that it is a barrier.

Overall, at least three-quarters of MBE respondents who expressed an opinion about the certification process described the initial certification process as fair, the instructions as clear, and the certification staff as helpful, but slightly more than half of respondents said that the process requires too much documentation and takes too long, as shown in **Exhibit 4.2**. Attitudes toward the initial certification process did not vary noticeably by category of MBE certification (*i.e.*, women-owned, African American-owned, etc.).

Exhibit 4.2
MBE Attitudes Toward Initial Certification Process



MBE: minority business enterprise

Source: Department of Legislative Services

Among those MBE respondents who say that the certification process takes too long or is too complicated, frequent complaints revolve around the State not recognizing similar certifications from other public or nonprofit entities. One respondent recommended that the State should “reduce onboarding requirements and streamline [the] certification process so that there is reciprocity across federal and state programs.” Another advised that “it would be much easier if Maryland accepted [Women’s Business Enterprise National Council] WBENC [certification] instead of MDOT requirements.” Also, some respondents advise that the certification process can extend well beyond the 240-day limit (including the optional 60-day extension) imposed in State law, and that, in these instances, it can be difficult to get responses from MDOT regarding the reasons for the delay.

Maryland’s certification process, however, compares favorably with other certification processes, according to MBE respondents. Nearly two-thirds (63%) of MBE respondents held certifications from other public or nonprofit entities, including the federal Small Business Administration, other states, and local jurisdictions within Maryland. Of those 667 respondents, 69% said that Maryland’s certification process was either easier (15%) or not more difficult (54%) than other certifications.

Chapter 5. Contract Goals

As outlined in COMAR 21.11.03.01, the total dollar value of all direct or indirect contracts with minority business enterprises (MBE) should account for 29% of each agency's total procurement dollars. Thus, State agencies that engage in procurement must structure their procurement procedures to encourage MBE participation in State contracts.

Consistent with the requirements of the *Croson* decision, State agencies may not apply the Maryland statewide goal of 29% MBE participation directly to individual contracts. Indeed, State procurement law explicitly states that agencies “may not use...any goal-setting process that solely relies on the State's overall numerical goal” in setting goals for individual contracts. Instead, agencies are required to evaluate each procurement contract individually to determine an appropriate MBE participation goal. As a result, individual contracts may have MBE goals above or below the statewide goal.

Agencies Follow Established Procedures to Set MBE Contract Goals

Standard Contract Goal-setting Process

As noted in Chapter 2, a Procurement Review Group (PRG) in each agency is responsible for establishing MBE participation goals for each agency's solicitations. A PRG evaluates the potential for MBE participation in a contract using the draft solicitation written by the procurement officer, which should include:

- a detailed scope of work broken down by project component;
- North American Industry Classification System (NAICS) codes, estimated costs, and estimated timeframes for each project component; and
- any proposed contract requirements (*i.e.*, insurance, licensing, or bidder qualifications)

Once a procurement officer submits a draft solicitation to PRG for review, designated staff members compile information to inform the PRG determination of an appropriate contract MBE participation goal. The MBE liaison officer, procurement officers, or program staff may contribute to the materials for the PRG review.

The MBE goal-setting guidelines published by the Governor's Office of Small, Minority and Women Business Affairs (GOSBA) instruct PRGs to evaluate several topics, as applicable to the solicitation. According to agency staff interviewed for this report, most PRGs determine contract MBE goals by considering the following questions:

- Can certified MBEs competitively bid as prime contractors?
- Can project components feasibly be subcontracted to MBEs?
- Are certified MBEs available? If so, do they have the capacity to perform on the potentially subcontracted project components?

Can Certified MBEs Competitively Bid as Prime Contractors?

For each contract, agency staff determine how many MBEs in the Maryland Department of Transportation (MDOT) Directory have the capability and availability to perform as a prime. If an MBE firm is likely to win the contract as a prime, PRG may consider increasing the contract MBE goal to reflect the potential for MBE participation at the prime level.

The size and income restrictions for firms in the MBE program limit the procurements on which MBEs can perform as prime contractors. Because of this, agency procurement staff note that many currently certified MBEs lack the experience and resources necessary to perform as prime contractors on large-scale and complex projects. Several MBEs confirmed during the focus groups that, as small businesses, they lack the capacity to carry out large or statewide contracts. As one focus group participant explained, “Most of the State work, I only can bid as a sub... I can't bid statewide because I'm not big enough to go statewide.”

To set a contract MBE goal, PRGs also consider the competitiveness of MBEs who could potentially bid as prime contractors. Procurement officers often conduct outreach to registered firms before solicitations are published to gauge availability. If the procurement officer expects several non-MBEs to submit competitive bids, it may not be appropriate to raise the contract MBE goal to reflect the potential for MBE participation as a prime.

Can Project Components Feasibly Be Subcontracted to MBEs?

Agency staff determine what components of the proposed scope of work primes can reasonably subcontract to MBEs. For example, a prime contractor for building security can subcontract uniforms for guards, vehicles, or security camera installation.

Agency staff also consider whether subcontracting specific components of a contract adds value. For example, project technical staff may indicate legitimate reasons for a prime to perform specific contract components that could otherwise be subcontracted to an MBE.

Are Certified MBEs Available to Do the Work? Do They Have the Capacity to Perform on the Subcontracted Project Components?

For each viable subcontracting opportunity identified, agency staff must determine the potential availability of MBEs. This process is managed differently across agencies and

procurements. GOSBA's guidance recommends that agency staff search for the number of MBEs in the MDOT Central Directory certified in each category of work by NAICS code.

Agency staff can search the MDOT Central Directory for certified MBEs by sector, subsector, industry group, or specific industry. GOSBA's MBE Participation Worksheet requires staff to fill out a table with (1) the NAICS code; (2) a description of the work to be subcontracted; and (3) the total number of MBEs in the MDOT Central Directory certified under that code. This process can, however, yield an imprecise profile of available firms, which was noted by agency staff, survey respondents, and focus group participants. As one survey respondent explained:

"The new [MBE] directory only allows NAICS code searches and in the absence of a simultaneous (or any) keyword search to narrow it down, that means that a search for engineering [services] (NAICS 541330) yields 471 results. With the NAICS code the same for everything from structural to acoustical to geophysical to petroleum engineers, we are no longer able to find specifically the type of firm that we need...The directory would be much more supportive of teaming searches and arrangements...if it were searchable by keyword..."

Staff should also note the geographic proximity of MBEs to the work location for each subcontracting opportunity. Industries in some parts of the State have a low concentration of certified MBEs. While many firms are willing to travel to do the work, not all can do so. Some agencies conduct outreach to MBE firms outside the contract's immediate geographic area to gauge their capacity and willingness to travel. For larger contracts, "People are willing to drive for the money," one procurement officer said. But for smaller contracts, firms are less willing to travel and such outreach likely does not occur. In general, agencies only include a subcontracting opportunity in calculating the overall contract MBE goal if a minimum of three MBE firms are available in the work location.

Some agencies also account for previously achieved MBE participation on similar project components in determining a goal. For example, if similar contracts generally surpassed the goal for MBE participation, it may justify increasing the MBE goal. "We look historically," one procurement officer advised. "What's been established and what's been achieved. We try to be a bit aggressive."

MDOT developed a computer program to automate this process for some projects. In 2014, MDOT hired a consultant to develop the program, but the contract expired before the work was completed. As a result, it has been piloted on only a few projects, mainly to calculate MBE goals for video lottery terminal licensees, the Purple Line Project, and the traffic relief public-private partnership (P3). In its current state, staff members enter the number of firms in the MDOT Directory for each potentially subcontracted component. Then, the program calculates an adjusted MBE participation goal for the overall contract using the relative availability of minority-owned firms, as calculated in the most recent disparity study. However, MDOT believes that the program requires several software and security upgrades before being used more widely for standard procurement contracts.

Nonstandard Contracts Pose Unique Challenges (and Opportunities) for Setting MBE Goals

Contracts with Undetermined Overall Costs

Procurement officers use cost-reimbursement contracts when it is impossible to accurately estimate the cost of contract performance in advance. The lack of accurate cost information makes it difficult for PRGs to set an MBE participation goal for a cost-reimbursement contract. Similarly, procurement officers use indefinite-quantity contracts when it is difficult to determine the total amount of specific goods or services required during the performance period (such as computer hardware). While the procurement officer must state an approximate quantity in the solicitation, the Department of General Services advises that indefinite-quantity contracts often do not have strong MBE participation goals in place because the volume and types of purchases are not known in advance.

Master Contracts

In a master contract, agencies award work to prequalified vendors through a secondary competition process. Following the award of the master contract, an agency may then issue a secondary competition solicitation to the prequalified master contractors through individual task orders. Generally, an agency sets an aspirational MBE goal for the master contract, which is not tracked. However, PRG determines official MBE goals for each task order, which are tracked.

Sole-source Procurements

Agencies use sole-source procurements when the required service, equipment, or product is only available from a single source. PRGs review all sole-source contracts expected to exceed \$100,000 to determine if MBE participation is feasible. However, given the nature of sole-source contracts, they often lack subcontracting opportunities. Therefore, they either do not have MBE participation goals or have very low goals. State law allows agencies to exempt sole-source contracts (as well as emergency and expedited contracts) from the MBE goal-setting process if the public interest cannot reasonably accommodate its requirements.

Public-private Partnerships

P3s are a relatively new form of procurement used by State agencies that involve significantly more oversight over the procurement process, including MBE goal setting, than other types of contracts. Before issuing a public notice of solicitation for a P3, agencies must submit a pre-solicitation report to the Comptroller, the State Treasurer, the budget committees, and the Department of Legislative Services. Agencies must also request that the Board of Public Works (BPW) officially designate the public infrastructure asset as a P3 and approve the solicitation method. MBE goals for P3 contracts tend to be more robust due to the strict vetting process for each solicitation.

GOSBA Reviews Solicitations and Task Orders Valued at More Than \$25 Million

For any procurement solicitation or task order valued at more than \$25 million, the using agency must submit the solicitation and PRG documentation to GOSBA for review and approval before publication, in addition to any review and approval required by a control agency.

GOSBA staff largely defer to the subject matter expertise of PRG in setting contract-level goals. As one GOSBA employee described, “At the agency level, goal setting is a process, not an art, not a science.” For each contract, GOSBA has access to the documentation that PRG used in the initial determination of the MBE participation goal. In a written response, GOSBA explained, “GOSBA reviews and may ask for additional information (we often do) and/or suggest changes based on that review.” Upon reviewing the solicitation and goal-setting documentation, GOSBA can request that PRG raise the goal. However, GOSBA’s review of the MBE goal is not binding. Therefore, GOSBA cannot require that PRG change its determination. “The final decision stays at the agency level,” GOSBA explained. However, GOSBA can provide recommendations on how to increase MBE participation in the contract.

For contracts that require BPW approval, BPW sometimes questions the goals approved by control agencies. BPW may also ask for additional documentation (1) when a goal does not seem appropriate for the size or type of contract or (2) if PRG did not set an MBE participation goal but provided insufficient evidence for that decision. As with GOSBA’s review of agency goals, BPW does not track when or how often it has requested additional information about an MBE goal.

Agencies Track Compliance, but Accountability Is Lacking

Contract compliance staff at each agency are responsible for validating the monthly reports received from prime contractors, including payments made to MBE firms. However, given the volume of monthly reports received by compliance staff, agencies cannot thoroughly verify all information. As a result, agency staff members indicate that compliance officers can only conduct “spot checks” on monthly reports in many cases. Additionally, compliance information generally does not get to procurement staff. As one agency procurement officer told us, “I know on a monthly level what the overall compliance is, but I don’t know who’s hitting it and who’s not. If a prime is not complying with a goal, I generally don’t hear about that.”

Staff members at several agencies also suggest that the monthly MBE reporting process is burdensome for agency staff and firms doing business with the State. Agencies use different processes and programs for oversight of the MBE program. For example, some agencies rely heavily on spreadsheets to organize payment information submitted by prime contractors and MBE firms. MDOT collects all relevant information on payments to MBE firms through iFMIS, its financial management system. Staff supporting the MBE program at other agencies point to MDOT as an example of how data collection should be automated to be more accurate and

streamlined. “We need to automate the compliance,” advised one procurement officer. “No one is actually looking at what they are actually saying.” However, the State’s current legacy financial management system does not have the capability to replicate MDOT’s data collection and reporting procedures.

Control agencies and BPW do not have the resources to oversee MBE compliance for every contract. Thus, they only become aware of problems if they are referred by using agencies. MBE liaison officers assist the contract monitor and procurement officers to develop and implement corrective action plans when compliance issues are identified. They also lead mediation meetings between MBEs and prime contractors. If agency staff cannot resolve the dispute, they can elevate it to the appropriate control agency, BPW, or GOSBA.

With only two compliance officers on staff, GOSBA is limited in the day-to-day support it can provide to the 70 agencies for monitoring and enforcing MBE compliance. In an effort to maintain ongoing and open communication, GOSBA publishes a monthly Compliance Bulletin, hosts quarterly training seminars and compliance calls, and conducts one-on-one training (upon request) for agency-level MBE liaisons and procurement staff.

BPW does not have staff dedicated to MBE monitoring and compliance. One employee explained that the only compliance data BPW receives is when a contract option or modification comes up for review. If compliance has been low, BPW may ask for additional documentation and request that the agency develop a remediation plan with the prime contractor.

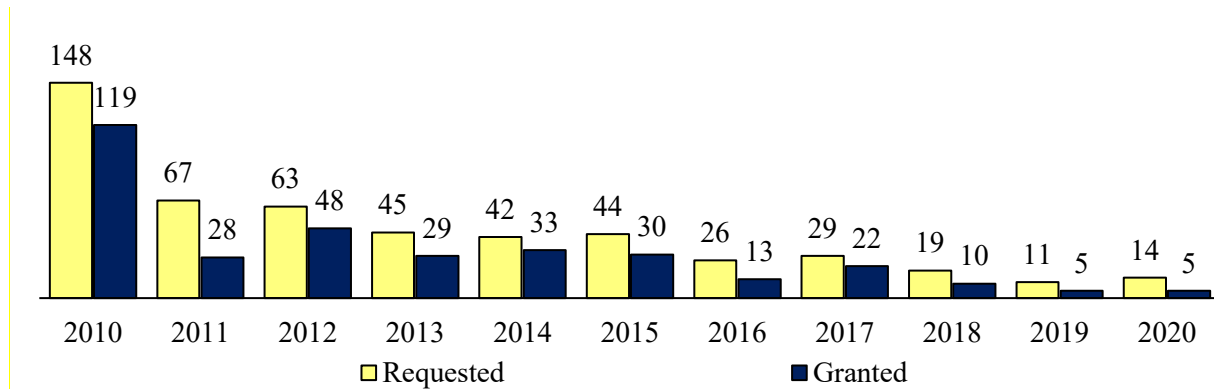
At the end of the contract term, the contract manager and the procurement office conduct a full review of the work documentation and payment data, including payments to MBEs and overall contract MBE compliance. This data is used internally for future contracting to inform contract structure, scope, and future MBE goals. However, agency staff advise that it is typically not used for accountability.

Prime Contractors Rarely Request Waivers from MBE Participation Goals

According to BPW’s annual waiver reports, waiver requests for MBE participation goals are uncommon. As shown in **Exhibit 5.1**, between fiscal 2010 and 2020, State agencies received a total of 508 requests to waive contract MBE participation requirements and granted 342 of those requests. The largest number of waivers were requested and granted in fiscal 2010. In that year, the Public School Construction Program alone received and granted 96 waiver requests. Since fiscal 2010, the total number of waivers requested and granted each year has generally declined.

Fewer than 30 waiver requests have been requested across agencies each year since fiscal 2016. This may indicate that the current goal-setting processes do not capture all opportunities for MBE participation. As one procurement officer shared, “I don’t think we’re being aggressive enough. There are not very many waiver requests.... If we’re not getting waiver requests, we’re not capturing what’s out there.”

Exhibit 5.1
Total Waivers Requested and Granted
Fiscal 2010-2020



Source: Board of Public Works

On the other hand, prime contractors are reluctant to submit waiver requests during the bidding process. The waiver request process is time consuming and puts the onus on the prime contractor to prove that MBEs are unavailable. The prime contractor must complete a five-page document, including an unavailability certificate, and provide phone and email records documenting an effort to subcontract MBEs.

Additionally, some prime contractors believe that submitting a waiver request hurts their chances of winning an award. As one prime contractor described, “We requested a waiver for one of our bids and were treated like we didn’t try hard enough.” Another prime contractor shared, “Contractors are forced not to bid or cheat the system.”

For this reason, many prime contractors submit the MBE participation schedule without thoroughly vetting the firms listed. In most cases, they have less than a month, and sometimes only about 10 days, to complete a bid, including vetting any subcontractors that they propose to use on the contract. This frustrates prime contractors if they discover later that an MBE cannot meet the project requirements. In their survey responses, several non-MBE prime contractors shared that they had included an MBE in their bid but learned later that the firm was not qualified to do the work.

“The MBE did not have the required designations nor experience to perform the work.”

“The MBE started the work but did not have the skillset to finish the work as the job progressed.”

Prime contractors may also avoid submitting a waiver request by inflating estimates for the work that MBEs can perform on the MBE participation schedule. For example, several MBE firms shared that a prime included them in a bid but never called on them to do the work.

“I was a sub to a prime who at the time was also a WBE. They put me on several contracts and never used me. They put me on their team to look good, but kept all the work for themselves.”

“These people have no one to answer to... the [general contractor] told me straight up, ‘I don't care if you go to the Pope, you're not [going to] be on this job anymore’... So they kick me off the job, hire all my people the next day, and move on with the contract. And I'm just out in the cold now.”

Contract-level Data Reviewed by the Office of Program Evaluation and Government Accountability

As noted in Chapter 1, the Office of Program Evaluation and Government Accountability (OPEGA) received contract-level data from both MDOT and GOSBA. OPEGA combined the data submitted from both sources to evaluate contract-level MBE goals and compliance with those goals. In total, OPEGA received data on 6,820 State contracts. Only 3,099 of those contracts are used in this analysis, with a total value of \$11.37 billion. OPEGA did not use data on the following:

- contracts that had not expired by December 31, 2020 (2,719 observations);
- contracts with missing prime payment data (117 observations);
- contracts with no payments made to primes (48 observations);
- contracts with less than 25% of the original award disbursed (314 observations);
- MDOT contracts that also appeared in GOSBA's dataset (503 observations);
- contracts with an MBE goal greater than 100% (2 observations);
- contracts with award values of \$0 (6 observations);
- contracts on which subcontractors were shown to have been paid more than the State disbursed to prime contractors (10 observations); and
- duplicate entries (2 observations).

Exhibit 5.2 shows data from 2,564 contracts submitted by MDOT, and 535 contracts submitted by GOSBA are included in this analysis. Two thirds of the observations are from the State Highway Administration. As noted in Chapter 1, compliance data from GOSBA remains incomplete, so not all agencies are represented in the analysis. As a result, this analysis does not present agency-level results.

Exhibit 5.2
Contracts from Each Agency
By Data Source

GOSBA		MDOT	
Agency	Contracts	Agency	Contracts
Attorney General	1	Aviation Administration	115
Bowie State University	2	Office of the Secretary	14
Commerce	1	Motor Vehicle Administration	108
Comptroller of Maryland	9	Port Administration	89
Coppin State University	3	State Highway Administration	2058
Department of Budget and Management	2	Transit Administration	180
Department of General Services	55	Total	2,564
Department of Housing and Community Dev	3		
Department of Information Technology	4		
Department of Juvenile Services	4		
Department of the Environment	1		
Health	11		
Labor	5		
Lottery and Gaming Control	4		
Maryland Environmental Services	101		
Maryland Food Center Authority	7		
Maryland Stadium Authority	24		
Morgan State University	7		
Public School Construction – Local Contracts	192		
Saint Mary’s College of Maryland	5		
State Board of Elections	2		
State Police	5		
State Retirement Agency	1		
Towson University	29		
Treasurer	4		
University of Maryland Baltimore County	32		
University of Maryland, College Park Campus	12		
University of Maryland, Eastern Shore	1		
University of Maryland Global Campus	5		
Workers’ Compensation Commission	3		
Total	535		

GOSBA: Governor’s Office of Small, Minority and Women Business Affairs

MDOT: Maryland Department of Transportation

Source: Maryland Department of Transportation; Governor’s Office of Small, Minority, and Women Business Affairs

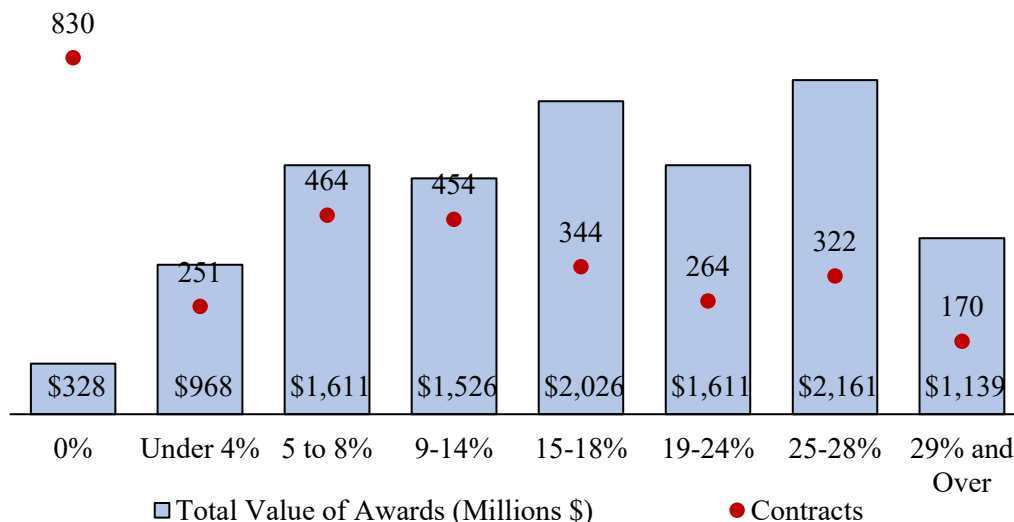
Data on goals by industry category is available only from the MDOT data set; the GOSBA data does not track contracts by industry category.

OPEGA also received additional payment data from GOSBA that listed all payments made to MBE firms between fiscal 2017 and 2020. These data do not have information about the contracts for which these payments were made, but they do provide information on the type of MBE certification held by the payee and whether the payee acted as a prime contractor or a subcontractor.

Contract-level MBE Participation Goals Are Well Below the Statewide Goal

The average MBE participation goal for the contracts in OPEGA's dataset is 11.1%, markedly below the statewide goal of 29% MBE participation. Additionally, most State procurement dollars captured in these data were awarded to contracts with MBE participation goals below 29%. As shown in **Exhibit 5.3**, only \$1.14 billion, or 10%, of the approximately \$11.37 billion in awards represented in these data were awarded to contracts with MBE goals that met or exceeded the statewide goal.

Exhibit 5.3
Number and Total Value of Contracts
By MBE Goal



MBE: minority business enterprise

Source: Maryland Department of Transportation; Governor's Office of Small, Minority, and Women Business Affairs; Department of Legislative Services

More than one-quarter of contracts analyzed by OPEGA did not set MBE participation goals. However, these contracts represent less than 3% of the total value of contract awards, with a combined value of \$328 million. Contracts with no MBE goals tend to have significantly smaller awards and shorter periods of performance compared to contracts with established MBE goals.¹

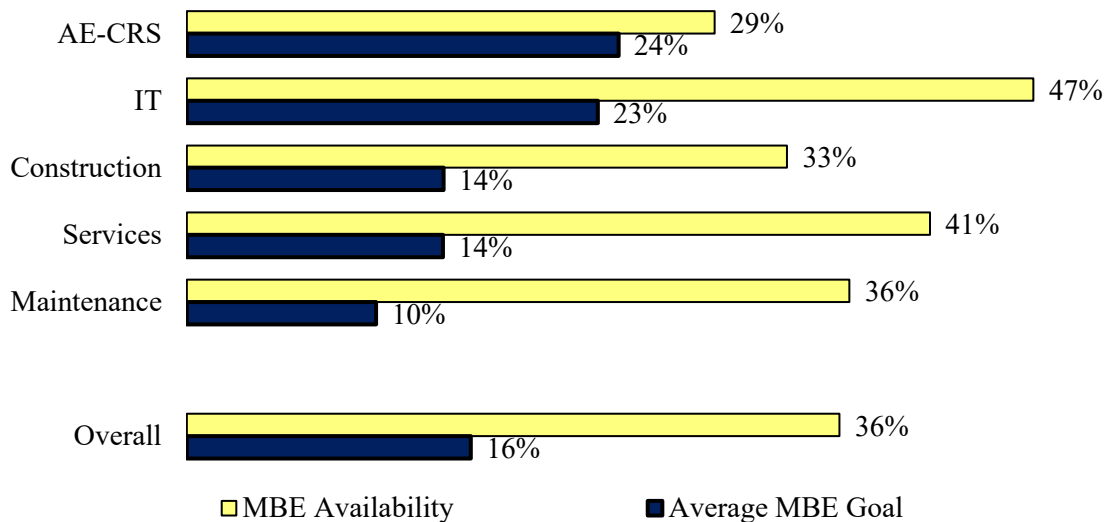
This trend is partially driven by the rules guiding MBE participation on small procurements (*i.e.*, procurements valued at \$50,000 or less or construction procurements valued at \$100,000 or less). As outlined in Chapter 2, for small procurements, agencies must solicit bids or offers from certified MBEs listed in the MDOT Directory but are not required to set an MBE participation goal. In total, 330 (86%) of the 383 small procurements included in these data did not set MBE participation goals.

Exhibit 5.4 shows that, for MDOT contracts, goals varied tremendously by industry category, and generally were well below the availability of firms in those areas according to the 2017 disparity study.² As explained above, there are legitimate reasons for goals to fall below total market availability, including regional differences in the availability of MBEs, diverse contract types that may not lend themselves to subcontracting opportunities, and other similar factors. Nevertheless, the gaps between goals and overall availability indicate that there may be opportunities to expand MBE participation with more aggressive goal setting.

¹ Both are statistically significant at the 1% level, or $p < 0.001$.

² The MDOT data included only one completed contract for supplies/commodities, so that industry category is not included in this analysis.

Exhibit 5.4
Average MBE Goals and Availability by Industry
MDOT Contracts Only*



AE-CRS: architectural and engineering/other construction-related services

IT: information technology

MBE: minority business enterprise

MDOT: Maryland Department of Transportation

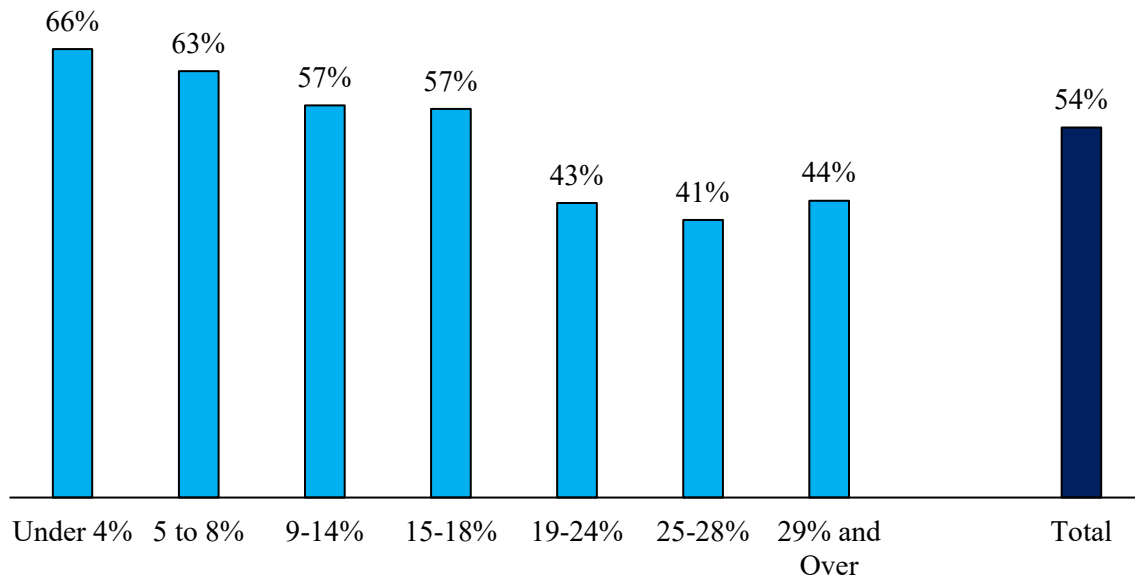
*Weighted average based on total award dollar value.

Source: Maryland Department of Transportation; Department of Legislative Services

Only About Half of State Contracts Complied with Their Contractual MBE Participation Obligations

For each completed contract for which an MBE goal was set, OPEGA calculated contract MBE compliance. Contract compliance measures *actual* MBE contract participation (in terms of payments received by MBEs) as a percent of total dollars actually spent on a contract (not necessarily the original contract amount). In cases where an MBE acted as a prime, payments to MBE primes account for a maximum of 50% of the total MBE goal, as outlined in MBE program regulations. **In total, 54% of completed contracts in the OPEGA dataset achieved their MBE participation obligation in terms of total payments made to MBEs, as shown in Exhibit 5.5.** The rate of compliance with MBE contract goals generally declined as MBE goals increased.

Exhibit 5.5
Percent of Contracts That Achieved Contractual MBE Obligation
By Initial MBE Goal



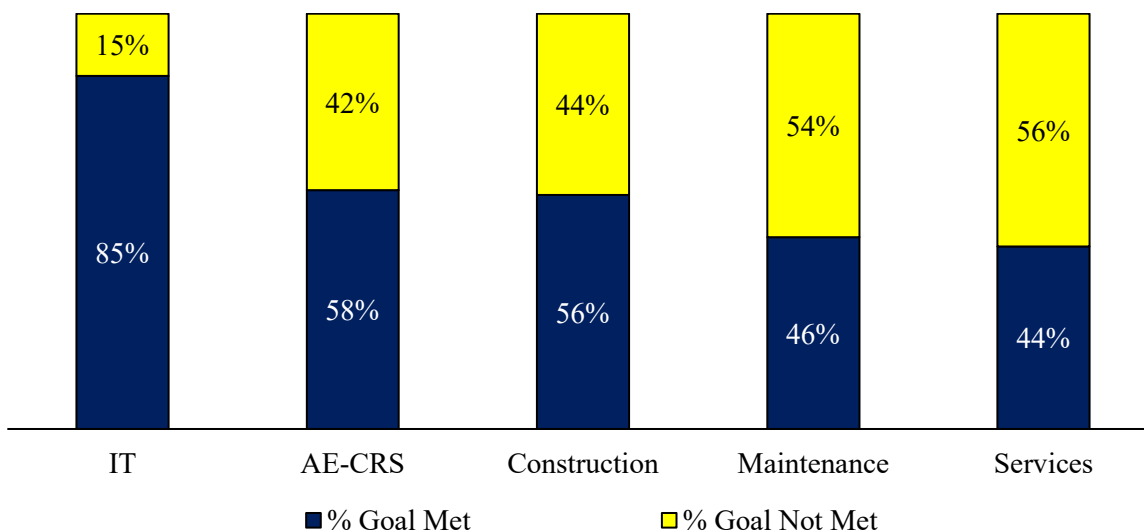
MBE: minority business enterprise

Source: Maryland Department of Transportation; Governor's Office of Small, Minority, and Women Business Affairs; Department of Legislative Services

For MDOT contracts specifically, OPEGA was able to review compliance by industry category. **As shown in Exhibit 5.6, compliance on MDOT information technology (IT) contracts is significantly higher than compliance for MDOT contracts in all other industries.³** This may be due to the relatively high availability of minority firms in the IT industry, as presented in the most recent disparity study. MDOT IT contracts also are more likely to have MBEs perform as prime contractors than MDOT contracts in all other industries. While more than 30% of IT contracts have MBE prime contractors, less than 10% of contracts in other industries have MBE prime contractors.

³ Statistically significant at 1%, or $p = 0.003$.

Exhibit 5.6
Percent of MDOT Contracts That Achieved Contractual MBE Obligation
By Industry Category



AE-CRS: architectural and engineering/other construction-related services

IT: information technology

MBE: minority business enterprise

MDOT: Maryland Department of Transportation

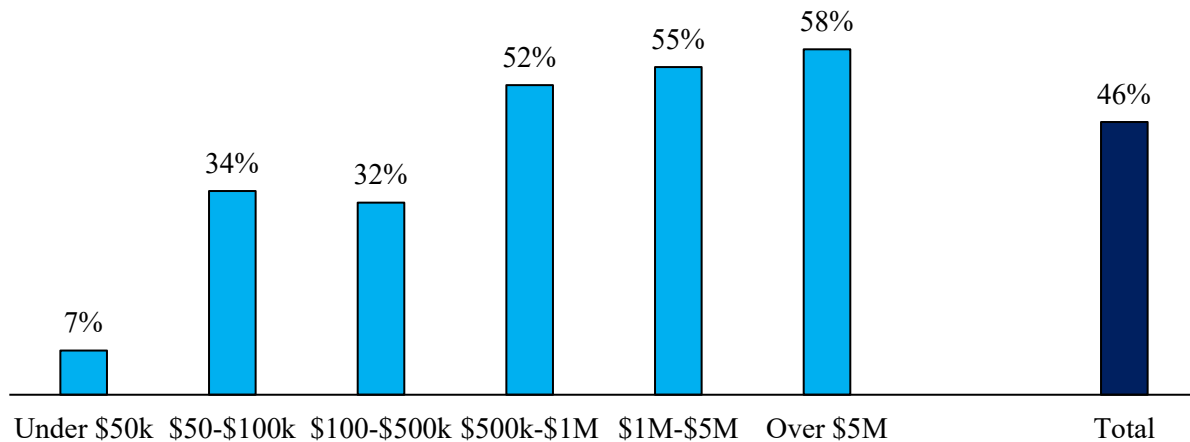
Source: Maryland Department of Transportation; Department of Legislative Services

Compliance rates generally did not vary meaningfully by MDOT business units, MBE status of the prime contractor, or the value of the contract award.

For each contract with an MBE participation goal, OPEGA calculated the difference between the expected payments to MBEs and the actual payments made to MBEs. **Actual payments to MBEs were lower than expected payments for 46% of contracts, as shown in Exhibit 5.7.**⁴ This is largely driven by gaps between expected and actual payments to MBEs on larger contracts. Only 7% of contracts valued at less than \$50,000 did not achieve expected payments to MBEs compared to more than 50% of contracts above \$500,000. In total, MBEs were paid \$164.0 million less than expected across all contracts for which an MBE goal was established.

⁴ Taking into account the percent of the initial award that was disbursed by the State.

Exhibit 5.7
Percent of Contracts with Lower MBE Payments Than Expected
By Award Size



MBE: minority business enterprise

Source: Maryland Department of Transportation; Department of Legislative Services

Overall Payments to MBE Firms

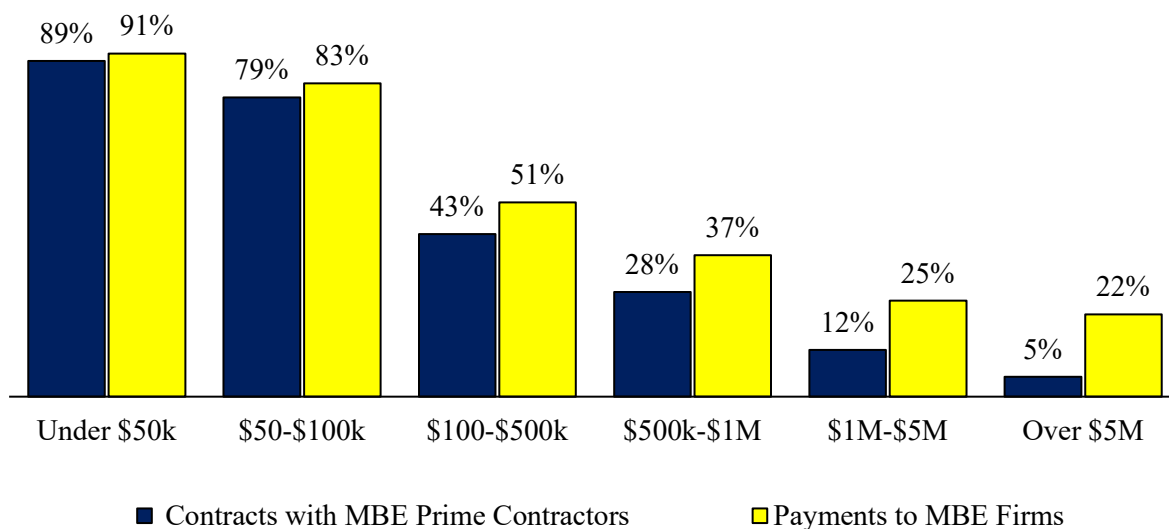
For all contracts in the dataset, OPEGA calculated the total payments to MBE firms. This includes *all* payments made to MBE prime contractors and subcontractors, not just those that count toward MBE compliance.⁵ **In total, 21.8% of contract dollars represented in these data were paid to MBE firms, either directly as prime contractors or indirectly as subcontractors.** MBE firms received a total of \$2.23 billion out of the \$10.23 billion disbursed by the State. Overall payments to MBE firms are largely driven by MBE participation on large contracts. More than 93% of all payments to MBE firms were for work on contracts of \$1 million and higher. By comparison, only 3% of all payments to MBE firms were for work on contracts valued at less than \$500,000.

As shown in Exhibit 5.8, for contracts valued at less than \$100,000, the vast majority of payments go to MBE firms. This is directly related to the higher volume of contracts below \$100,000 on which MBEs perform as prime contractors. As noted above, for small procurements, agencies must solicit bids directly from “a sufficient number” of certified MBEs. However, the

⁵ As noted above, to measure compliance with MBE participation goals, payments to MBE primes may only account for a maximum of 50% of the total MBE goal, as outlined in MBE program regulations.

percentage of payments that go to MBE firms is not directly tied to the MBE status of the prime contractor. While only 5% of contracts over \$5 million have MBE primes, nearly a quarter of contract payments go to MBE firms. This indicates that MBE goals on larger contracts can facilitate participation by minority- and women-owned firms.

Exhibit 5.8
Payments to MBEs and MBE Prime Contractors
By Contract Size

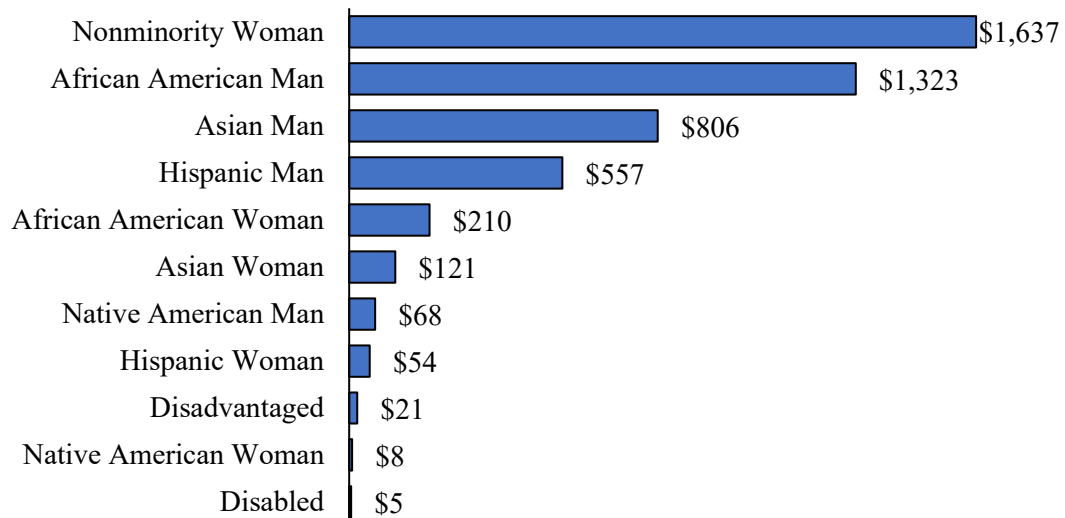


MBE: minority business enterprise

Source: Maryland Department of Transportation; Department of Legislative Services

Exhibit 5.9 shows that most payments to MBE firms between fiscal 2017 and 2020 went to firms owned by nonminority women and African American men. Nearly 35% of the \$4.8 billion in payments made to MBE firms during that period went to firms owned by nonminority women. MBE firms owned by African American men received approximately 28% of all payments made to MBEs. This trend is aligned with the results of the most recent disparity study, which showed that nonminority female-owned firms had the highest rates of availability (see Exhibit 3.1) and utilization of all MBE categories.

Exhibit 5.9
Total Payments to MBE Firms
Fiscal 2017-2020
(\$ in Millions)



MBE: minority business enterprise

Source: Governor's Office of Small, Minority and Women Business Affairs; Department of Legislative Services

Chapter 6. Experience of Minority Business Enterprises

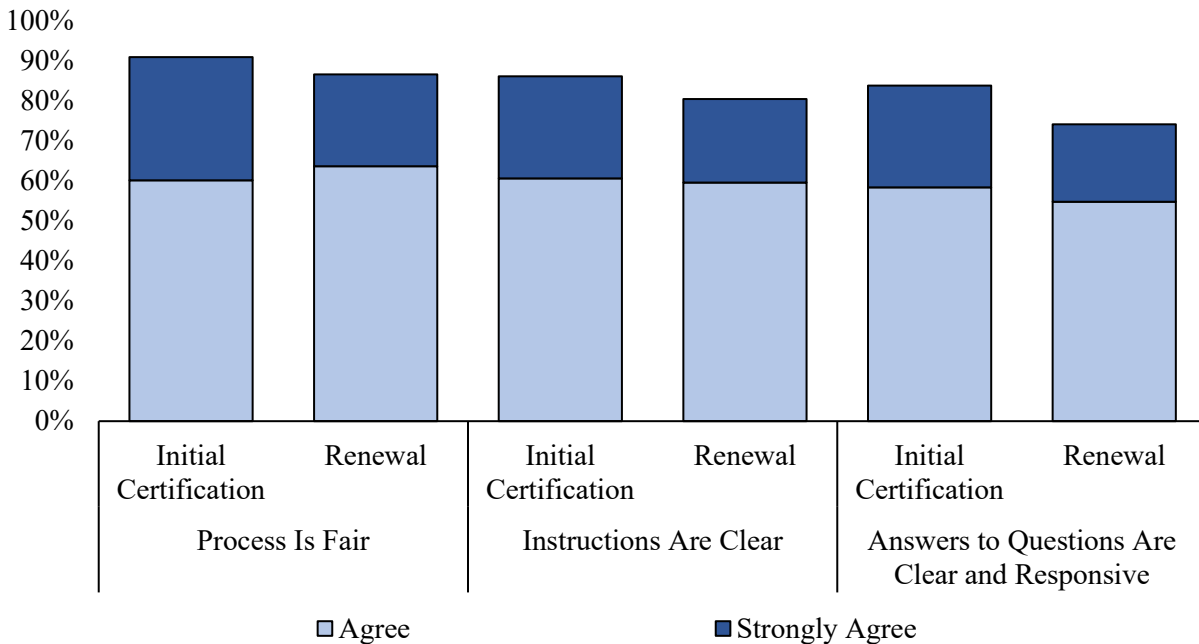
A key goal of this study is to understand the experiences, both positive and negative, of the businesses that participate in the Minority Business Enterprise (MBE) program. To this end, the Department of Legislative Services (DLS) survey asked current and former MBE respondents a series of questions related to their experiences with the MBE certification process, working with prime contractors and subcontractors, and the State procurement process more generally. This chapter summarizes those responses and related observations made by MBE professionals during focus groups sessions with DLS.

Less Favorable Views of Certification Renewal Than Initial Certification

A series of survey questions asked MBE or former MBE respondents to rate their experience both with the initial MBE certification process and the annual certification renewal. Slightly more than 1,000 of the survey respondents answered these questions. As noted in Chapter 4, the overwhelming majority of respondents who expressed an opinion agreed or strongly agreed that the certification process is fair (91%) and that the application instructions were clear (86%). A strong majority also agreed that it was easy to get certification questions answered (76%) and that the answers were clear and responsive (84%). Still, many respondents who expressed an opinion generally felt certification required too much documentation (55%) and takes too long (58%).

Fewer MBE or former MBE respondents expressed an opinion about the annual renewal of their MBE certification, and their responses were slightly less enthusiastic than their attitudes toward initial certification. Whereas between 3% and 12% of respondents said they had no opinion about the initial certification or the questions did not apply to them, between 14% and 25% of respondents said that about questions related to the annual renewal process. As with the initial certification process, those expressing an opinion about the renewal process generally had favorable impressions, as shown in **Exhibit 6.1**. Overwhelming majorities of those expressing an opinion agreed or strongly agreed that the annual renewal process is fair (87%), instructions are clear (80%), and the answers to their questions were clear and responsive (74%).

Exhibit 6.1
MBE Respondents' Attitudes About Initial and
Renewal Certification Processes



MBE: minority business enterprise

Source: Department of Legislative Services

Although support for the renewal process is almost as strong as that for the initial certification process, several focus group participants raised concerns about the perceived redundancy of renewal requirements. Their concerns were related to instances where no major business change (such as a change in ownership) had occurred:

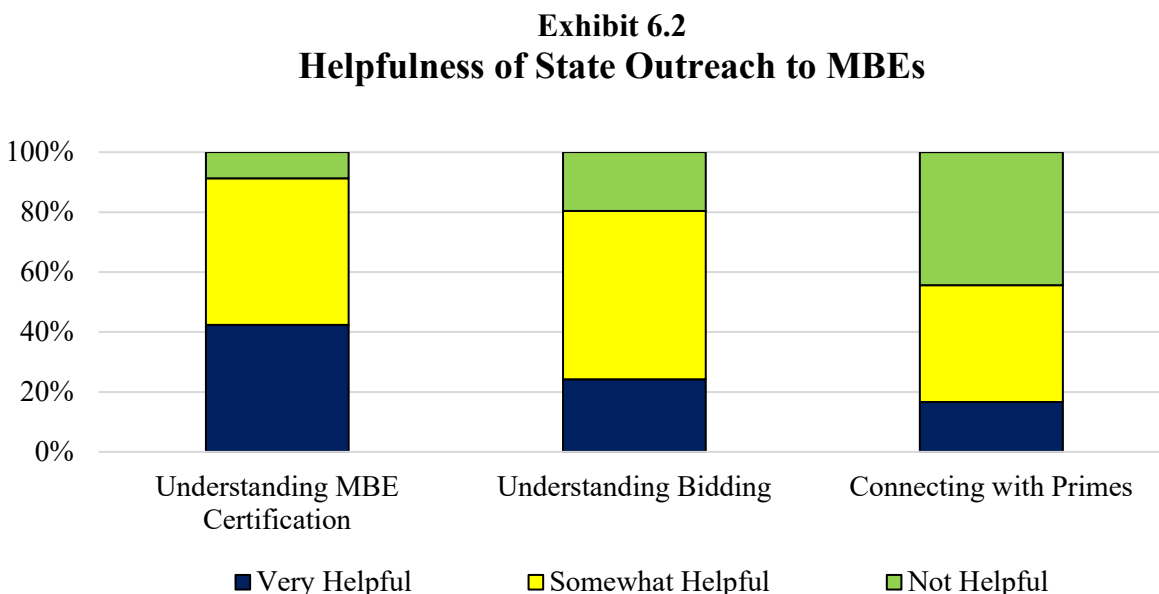
“[The renewal process] is a burden, that as a business, you have to eat because you got to pay your accountants, you got to, you know, our accountants charge us for every time we ask them for something. That’s a tack-on fee, you know, so you’re constantly paying to be certified. When once you pass the initial smell test, if nothing has changed, if your location [hasn’t] even changed, then pretty much how can you not be, you know, still be certified?”

Or, as another participant put it, “The only thing I don’t like about [the renewal process] is why do I need to prove I’m Black this year when you approved me as Black two years ago? I didn’t change. So that type of redundancy is a little crazy.”

State Outreach Helps with Understanding, but MBEs Want More Networking Opportunities

Current and former MBE respondents were asked whether they had attended any State-sponsored MBE-related workshops or training opportunities. Of the 1,051 responses, 690 people indicated that they had attended a workshop or training. Of these, 91% indicated the program was either very helpful or somewhat helpful in understanding the MBE certification process, and 80% said that it was very helpful or somewhat helpful in understanding how to bid on State contracts.

Exhibit 6.2 shows that responses from MBEs indicated a desire for workshops and trainings to have a greater focus on connecting MBEs with prime contractors, with 44% of respondents indicating that the event was not helpful in this area and 39% responding that it was only somewhat helpful. When asked what types of information or outreach would be most useful, the highest percentage of respondents answered that they are looking for opportunities to connect with prime contractors (70%) and notifications of solicitations from Maryland agencies in the respondent’s area of business (68%).



MBE: minority business enterprise

Source: Department of Legislative Services

The Office of Program Evaluation and Government Accountability notes that eMaryland Marketplace Advantage (eMMA), the State's procurement portal, provides customized notifications of available solicitations based on commodity codes they select when they register for the system. However, survey respondents and some focus group participants found this system lacking:

"In the past I used to receive emails about solicitations that matched my [North American Industry Classification System] NAICS code. I haven't received any emails about solicitations in at least 2 years"

"Fix eMMA so that firms are getting information on contracts related to what they actually do. Use NAICS codes for all procurement, not that crazy classification system."

"Send emails specifically for the NAICS code."

"It doesn't matter how good my vendor profile is or how complete my selected commodity codes are if the procurement officer doesn't similarly understand what the correct commodity code is for the solicitation they are posting."

Survey respondents were also interested in learning more about the State's procurement process (46%) and receiving mentoring from experienced MBEs (44%). The respondents indicated a general comfort with understanding the requirements and process for MBE certification, with only 19% indicating this information or outreach would be useful (given that most respondents to this item are already certified MBEs, this is not surprising).

Of those MBE respondents who had not attended a workshop or training sponsored by State agencies, relatively equal numbers responded that they were unaware of the opportunity (31%), did not need help with MBE certification or bidding (27%), and that the timing or location was inconvenient (37%). Of those that filled in another reason for not attending, several cited reasons that could have also fallen under the category of inconvenient time or location, such as the respondent being located out of State or the workshop falling during work hours. As one focus group participant noted:

"I personally would suggest that ... those [MBE workshops] are pretty difficult – I can speak for myself – for me to attend. I got a business to run here. So yeah, it's awful nice to think of those things as opportunities to educate and to develop as a business. But you're also then asking us to take a day off of work or, you know, whatever the case might be, to participate. And I can speak for myself as a growing business – taking off a day, I wish I could take off a day just to read a book. It's impossible."

Only a handful of respondents indicated that the COVID-19 pandemic was a barrier to attendance. For those that noted the inconvenience of workshops and trainings or public health

concerns, the more recent prevalence of online trainings that can be attended remotely or recorded and viewed at a later date should make trainings more accessible.

Existing Relationships with Prime Contractors Is Key to Success

Among current and former MBEs who responded to the survey, 618 indicated that they had participated in a State procurement as a prime contractor, and 674 indicated that they participated as a subcontractor.¹ The respondents were then asked a series of questions about the most recent bid or proposal in which they had participated, with 394 (46%) of respondents having acted as the prime contractor and 458 (54%) as the subcontractor.

Existing relationships with prime contractors was by far the primary means by which responding MBE subcontractors were selected to participate in their most recent bid or proposal. Respondents who indicated that they participated as a subcontractor on their most recent bid or proposal largely indicated that they connected with the prime contractor either because they had a prior relationship (58%) or because the contractor contacted their business (23%). Just 6% of subcontractor respondents cold called the prime contractor to offer services, 5% were referred by a third party, and 4% met the prime contractor at a pre-bid conference. As may be expected as a result of building working relationships, the frequency with which subcontractors cited connecting to prime contractors through a prior relationship increased in relation to the number of State bids over the prior two years in which the respondent indicated having participated. While 51% of respondents who had not participated in a bid in the past two years connected to a prime contractor through an existing relationship for their most recent bid or proposal, this figure increased to 65% of respondents who participated in more than five bids during that time.²

Among respondents that were prime contractors and whose most recent contract included an MBE participation goal, the most frequently used means of recruiting MBEs to participate in a bid or proposal was to contact MBEs that they have worked with in the past (63%), followed by finding MBEs on the State's MBE directory (42%), while options like referrals from other firms (33%) and recruiting at pre-bid conferences (17%) were less frequently used options. (Respondents were asked to select all methods that applied.) When asked to choose the *one* most common method used to recruit MBEs to participate on a bid or proposal, the majority of prime contractors favored contacting MBEs that they have worked with in the past (51%). The importance of existing relationships between MBEs and non-MBE prime contractors likely contributes to the insularity of Maryland procurement discussed in Chapter 4.

¹ Those that have done both could check both responses.

² 53% of respondents who participated in one to two bids and 58% of respondents who participated in three to five bids cited prior relationship as a means of connecting with the prime contractor.

Two-thirds of MBE Respondents Say MBE Participation Schedules Were Honored, but Improper Changes Do Occur, Without Consequences

A bidder or offeror must submit with its bid or proposal a form that lists the expected degree of MBE participation, identifying the specific certified minority businesses, and the extent of their participation. This is known as the “MBE participation schedule;” for successful bids or proposals, the MBE participation schedule becomes part of the contract, and thus a binding commitment by the prime contractor to fulfill its terms. After a contract has been awarded, changes to the MBE participation schedule may only be made (1) by showing good cause why the contract with a certified MBE should be terminated or canceled; (2) obtaining prior written consent of the MBE liaison and approval of the agency head; and (3) amending the contract. “Good cause” includes documented nonperformance by the certified MBE or election by the MBE to cease work on the contract.

Several focus group participants raised concerns about changes to the participation schedule, both with and without the consent of affected MBEs, that may go unenforced by State agencies. One participant shared the following anecdote:

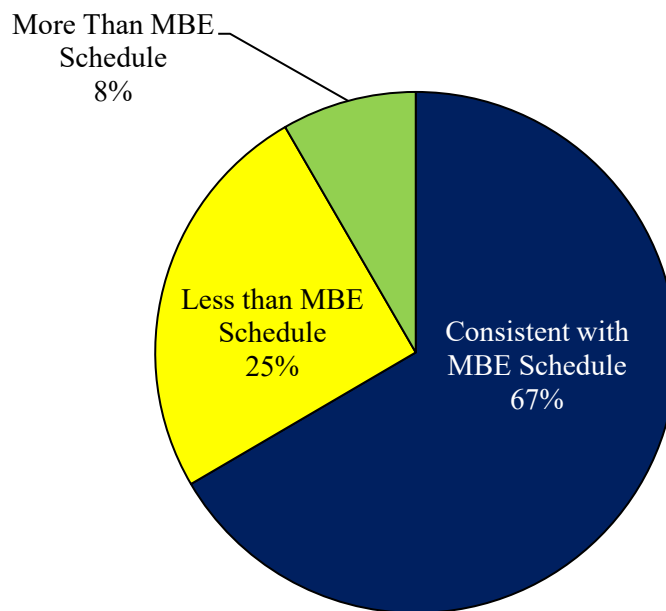
“[I’ve had] contractors take my pricing for the job, use me as the MBE [on the schedule] and then call me back and say, ‘Oh, well, we won this job, now we need to talk about pricing.’ Well, you already had my pricing. So why are you calling me back after you won the job to negotiate the pricing? And they do that because they know when they go back to the [State contracting] body and say, oh, this, this company is uncooperative or not working with us, then the body doesn’t have any strength to do anything.”

In light of these concerns, the survey asked MBE respondents about their experiences with MBE participation schedules. Among the 458 MBEs who said they were a subcontractor on their most recent bid or proposal, 347 indicated those bids or proposals were successful. Of those, two-thirds (67%) answered that the amount of work their business performed was consistent with the MBE participation schedule submitted with the bid or proposal, as shown in **Exhibit 6.3**. Nonetheless, 25% of these MBE respondents indicated that their business did less work than was reflected on the MBE participation schedule, while 8% indicated their business did more work than what was reflected on the MBE participation schedule. Of the 83 respondents who answered a question as to why their firm did less work than was indicated, 31% indicated that their firm’s role on the contract was less than was anticipated at the beginning of the contract, and 29% felt that the prime contractor did not treat their firm fairly. Just 12% of respondents reported that the scope of the contract was changed, reducing their firm’s role, while 28% indicated some other reason for the change. Some of these “other” responses also reflect unfair treatment by the prime contractor:

“I was recruited by a prime contractor for a moving contract they were awarded last year. I was asked to sign the required forms....however, they never contacted my company for any subcontract work.”

“The prime simply did not use us much. Not close to the MBE participation schedule.”

Exhibit 6.3
MBE Respondents' Contract Participation Compared with MBE Schedule



Note: Responses are based on most recent subcontracting experience.

Source: Department of Legislative Services

When asked whether their firm has ever been removed from an MBE participation schedule or otherwise not been used by a prime contractor after a contract was awarded by a Maryland agency, 67% of 425 total respondents answering the question said that they had not been removed or not used on a contract, and 20% did not know. Just 13% of respondents indicated that they have ever been removed or not used after a contract was awarded. MBE respondents that reported having been removed from or not used on a contract were also asked to report whether they had consented to being removed from the MBE participation schedule. In most or all instances, 52% of respondents did not consent to the removal, while 23% of respondents consented in most but

not all instances. Twelve, or 25%, of respondents indicated that they had consented to the removal in every instance.

When asked whether it is too easy for prime contractors to remove MBEs from MBE participation schedules, 40% of MBE respondents agreed or strongly agreed, while 39% had no opinion. Similar proportions of MBE respondents agreed or strongly agreed that requirements for making changes to MBE participation schedules are monitored and enforced by State agencies (40%) or had no opinion on the subject (34%).

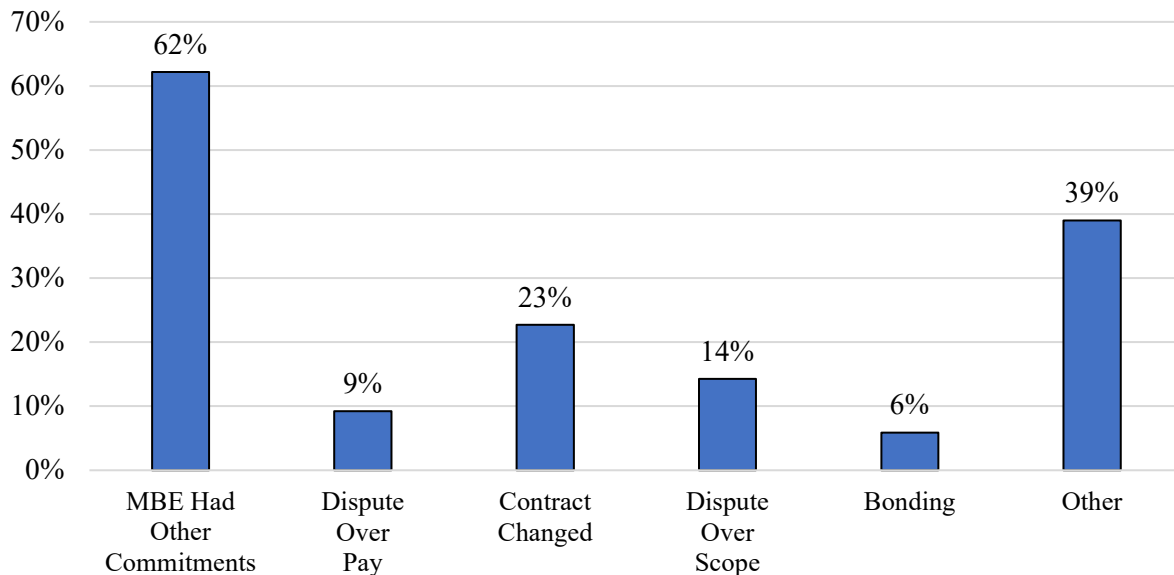
When MBE prime contractors were asked about the most recent bid or contract in which they participated, 95% of respondents reported that they did not make a change to the MBE participation schedule. Of the 10 MBE prime contractors who provided reasons for making changes to the MBE participation schedule, 7 indicated that the MBE was no longer able to do the work due to other commitments, while 2 reported that the MBE could not secure the necessary bonding, 1 had a dispute with the MBE over the scope of work, and 1 had a change to the contract that meant the MBE was no longer needed.³

In a separate question, 589 non-MBE prime contractors responded to a question as to whether they had ever made changes to an MBE participation schedule after contract award or removed an MBE from a contract on which they were the prime contractor. The vast majority of respondents, 80%, had never made a change, while 20% indicated that they had done so. Of the 119 respondents who provided reasons for making changes to the MBE participation schedule, 62% reported that the MBE was no longer able to do the work due to other commitments, while 23% indicated that changes to the contract meant that the MBE was no longer needed, as shown in **Exhibit 6.4**. Less frequently, the respondent's firm had a dispute with the MBE over the scope of work (14%), a dispute over compensation (9%), or the MBE could not secure necessary bonding (6%).⁴ Additionally, 39% of respondents provided some other reason for the change, including poor performance by the MBE, loss of MBE certification by the subcontractor, or, in a few instances, that the change was to increase the MBE's participation in the contract.

³ Respondents were allowed to select multiple applicable responses.

⁴ Respondents were allowed to indicate multiple reasons for making a change to the MBE participation schedule.

Exhibit 6.4
Reasons for Changes to MBE Schedules
According to MBE Respondents



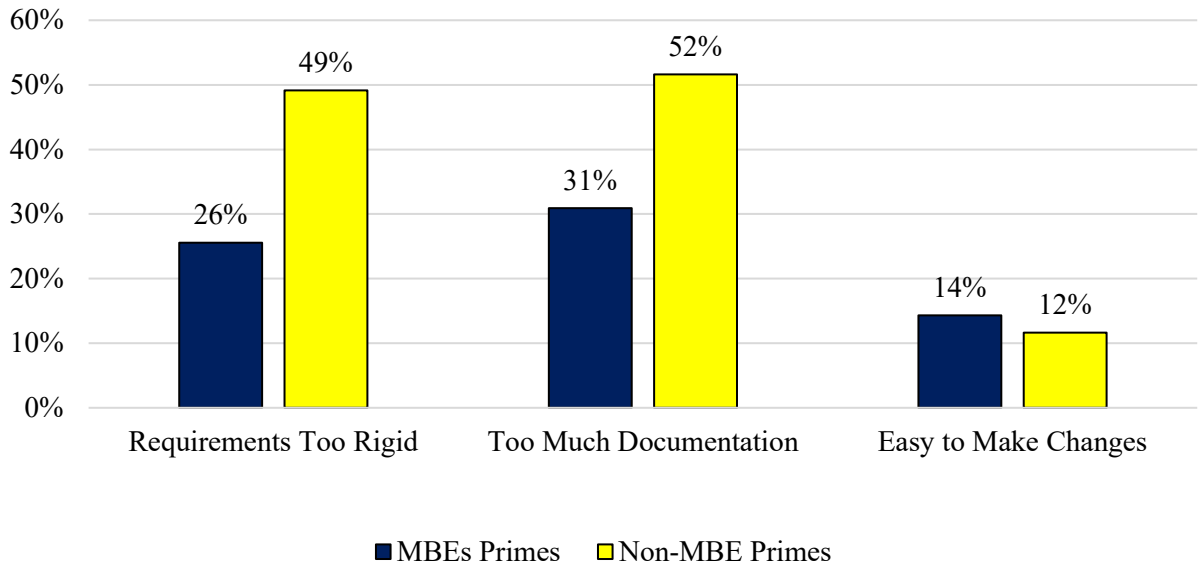
MBE: minority business enterprise

Note: Respondents could select multiple reasons for changing MBE participation schedules.

Source: Department of Legislative Services

Exhibit 6.5 shows that, when non-MBE prime contractors were asked the extent to which they agreed with statements relating to MBE participation in contracts, the non-MBE prime contractors were far more likely to agree that (1) the requirements for making changes to the MBE participation schedule are too rigid and (2) that too much documentation is required to make changes to the MBE participation schedules. More than half of non-MBE prime contractors who responded (52%) do not agree that MBE goals on State procurements are appropriate given the availability of MBEs to perform the work (not shown).

Exhibit 6.5
Respondent Attitudes About Making Changes to
MBE Participation Schedules



MBE: minority business enterprise

Note: Exhibit shows the percentage of respondents who “agree” or “strongly agree.”

Source: Department of Legislative Services

Twenty Percent of MBE Respondents Say Payments from Prime Contractors Are Not Paid Timely

It is the policy of the State to make payments under a procurement contract within 30 days of (1) when the payment is due under the contract or (2) if later, the day on which it receives an invoice. State procurement regulations further require that prime contractors pay their subcontractors any undisputed amount within 10 calendar days of receiving a payment from the State.

Discussions with representatives of professional organizations and MBE focus groups revealed concerns about the timeliness of payments by prime contractors. The survey responses indicate that late payments, while not frequent, do occur more often than is desired or expected. Of 420 responses on the subject, 10% of MBE respondents indicated that most payments from

prime contractors are not paid timely or are held up by disputes, while another 10% indicated that payments from prime contractors are never or almost never paid timely. These delays can seriously impact the cashflow of small businesses. One focus group participant noted:

“I would offer that the State in this case needs to make sure, or solicit from the prime, that they’re paying the subs in a timely manner... We’re talking about small diverse businesses, oftentimes. So if, you know, they’re holding our, our pay ... for any duration of time, it really puts us in a hardship situation.”

MBE Program Helps Minority- and Women-owned Firms, but May Discourage Primes

More than half (58%) of MBE respondents agreed that the State’s MBE program has benefitted their company, and almost all MBE respondents (90%) agreed that the MBE program is important to the growth of minority- and women-owned businesses in the State. These sentiments were largely reflected by the focus group participants. While many had complaints about the MBE program and suggestions for how it could be improved, the majority saw the program as vital for helping minority-owned businesses – particularly smaller or newer businesses – participate in State procurement. One participant relayed the following:

“Keep in mind, if you’re a minority business, and you create a company, and you don’t have these relationships [with prime contractors] already built – really, the minority participation is the only thing [that] is going to get you in the door... When we formed out because that’s one of the first things we had to do, because, you know, I would try to bid to contractors, and they would say, ‘Well ... you’re not certified, we need certified contractors.’ In other words, they were not even going to consider me as a new company to work for them, regardless of price, because they’ve got people that they’ve been working with already, that they know. So they’re not ready to take a chance on a new entity. But of course, if you’re certified ... now they need you, right, or you can help them to achieve their goals. So I mean, I think it’s almost like imperative that you get certified as an MBE, because if you don’t, you know, your growth is just [going to] be stagnated.”

Non-MBE respondents also view the program as benefiting minority-owned businesses, with three-quarters (75%) of non-MBE respondents agreeing that the MBE program benefits those businesses. Non-MBE primes were also asked, however, whether the requirements of the MBE program discourage prime contractors from participating in State procurements, and 58% agreed that it may dissuade prime contractors from participating in State procurement.

Chapter 7. Observations and Recommendations

Contract Minority Business Enterprise Participation Goals Are Not Consistently Being Met

Analysis of contract performance data in Chapter 5 found that approximately one-half of completed contracts in recent years did not meet the minority business enterprise (MBE) participation goal established at contract award. This is true even though the vast majority of contract goals are below the statewide goal of 29%.

Prime Contractors Are Not Held Accountable for Failing to Achieve MBE Contract Goals

State law specifies that solicitation documents completed and submitted by a prime contractor in connection with its MBE participation commitment (*e.g.*, the MBE participations schedule) must be attached to and made part of the resulting contract. State law also specifies that any change to the MBE participation schedule after contract execution requires that the contract be amended. Thus, in the absence of an amendment to the contract, failure to meet the MBE participation goal during performance of the contract constitutes a breach of the contract. State law authorizes agencies to apply two remedies – cancellation of the contract and/or the assessment of liquidated damages. Neither of these remedies is utilized by agencies for failure to meet MBE contract goals. Authorization to cancel a contract is impractical for two reasons: (1) depending on the terms and timing of the contract, agencies may not be able to reasonably assess inclusion of MBEs until the latter stages of contract performance; and (2) agencies may be dependent on timely performance of the contract to carry out vital functions. With respect to the assessment of liquidated damages, State procurement staff consulted for this study could not recall if or when any such damages had actually been assessed.

As noted in Chapter 2, State agencies must assess MBE participation for each completed contract based on actual payments made. MBE liaisons in several agencies confirmed that agencies do perform such assessments, but the results are not tracked for compliance purposes, nor are they reported publicly by the agencies or by the Governor’s Office of Small, Minority, and Women Business Affairs (GOSBA). Neither State law nor regulations explicitly authorize GOSBA to collect compliance data, although State law does give GOSBA broad authority to collect relevant data with the approval of the Board of Public Works. GOSBA has, in recent years, begun requesting compliance data from agencies, but advises that the absence of explicit authority to do so has resulted in uneven compliance with its requests. As noted in other parts of this report, the Maryland Department of Transportation (MDOT) does systematically collect compliance data to comply with federal reporting requirements, but it also does not report the results publicly.

Recommendation: Amend statute to require agencies to provide the results of their compliance assessments of completed contracts to GOSBA and require GOSBA to summarize the

results of those assessments in its annual report, by agency. Data reported by agencies to GOSBA should include at a minimum, for each contract completed during the prior fiscal year:

- the names of the prime contractor and of each MBE that participated in the contract;
- the type of good or service provided by the contract;
- the MBE participation goal for the contract and whether a waiver was given;
- total actual payments made to the prime contractor and to each subcontractor during the contract term (each subcontractor should be identified as MBE or non-MBE); and
- if relevant, a description of factors that may have contributed to failure to achieve the MBE participation goal for the contract (including, but not limited to, documented nonperformance or unavailability of an MBE).

GOSBA may require one contractual position to manage the collection and reporting of this data until it can standardize and/or automate the data collection process.

Recommendation: Amend statute to require GOSBA, based on its analysis of MBE compliance data provided by agencies, to maintain and publish on its website a list of prime contractors that are persistently at-fault for failing to meet MBE participation goals. Prior to adding a business to the list, GOSBA should notify the business of its intention to add it to the list and provide the business with an opportunity to appeal its inclusion to the Special Secretary.

The list should include only those prime contractors that persistently fail to meet contract goals. Moreover, only firms that fail to meet the goals in the absence of mitigating factors (such as documented nonperformance or unavailability of designated MBEs) should be included on the list. GOSBA should be authorized to develop regulations to establish the criteria and process for inclusion of firms on the list.

Recommendation: Amend statute to require agencies to consider a prime contractor's past performance with respect to MBE contract goals and/or presence on the list maintained by GOSBA in assessing the responsibility of the bidder or offeror on State procurements.

Focus group participants and agency procurement staff indicated that they are aware of firms that, as a matter of habit, do not fulfill their obligations to MBEs, yet they continue to be awarded State contracts. State law requires that State contracts be awarded only to responsible bidders or offerors. A responsible bidder or offeror is defined in § 11-101 of the State Finance and Procurement Article as "a person who (1) has the capability in all respects to perform fully the requirements for a procurement contract; and (2) possesses the integrity and reliability that will ensure good faith performance." Persistent at-fault failure to meet MBE contract goals may be viewed as an indication of lack of integrity and/or good faith.

Recommendation: Amend statute to repeal authorization to assess liquidated damages against contractors that fail to comply in good faith with MBE program requirements.

Assessment of liquidated damages is currently at the discretion of contracting agencies because mandating assessment of damages for MBE underperformance is likely a violation of the *Croson* requirements. Agencies do not assess liquidated damages because it is impractical to do so, making the authorization largely obsolete.

The MBE Program Does Not Facilitate Growth and Self-sufficiency of Minority- and Women-owned Firms

A common refrain among survey respondents and focus group participants, and even one agency head, is that the MBE Program does not help businesses grow and become self-sufficient. A comment from a focus group participant captured this overwhelmingly common belief:

“I would say one of the biggest problems with the minority business program [is that] it's not created primes. We should be trying to create primes, not subcontractors. And I would say that's the biggest failure I'd see. The fact that we haven't brought more primes to come out of this program.”

This sentiment is supported by the data about graduation from the MBE program. Although MDOT's MBE database lists more than 7,000 certified MBEs, the Office of Minority Business Enterprises advises that there are only 29 fully graduated MBEs. This lack of turnover in the MBE community likely fosters the insularity of State procurement discussed in Chapters 4 and 6 of this report, making it difficult for new MBEs to “break through” and benefit from the opportunities to participate in State procurement.

Recommendation: Amend statute to codify Executive Order 01.01.2021.01, which generally requires qualifying State procurements with a value between \$50,000 and \$500,000 to be automatically set aside for small businesses by designation to the Small Business Reserve (SBR) program.

As discussed in Chapter 4, a key barrier to both expanding the participation and supporting the growth of MBEs is the lack of contract set-asides, which are not permissible under the framework of the *Croson* decision. However, set-asides for small businesses are not subject to constitutional limits, and expanding their use can benefit MBEs as well. An analysis of MBE certification data conducted by GOSBA in 2020 reveals that approximately 14% of certified MBEs are also registered for the SBR program. Codifying the Executive Order may provide motivation for MBEs to self-certify for SBR so they can take advantage of more set-aside opportunities, a preference that many MBE respondents indicated in their survey responses.

The Governor's executive order, issued in January 2021, has the potential, therefore, to substantially expand opportunities for MBEs to participate as prime contractors on contracts that

are of a size and nature suitable to them. Codifying it in statute would make those benefits permanent.

Recommendation: Agencies should, when practical, give due consideration to breaking up large contracts into smaller components that can be set aside for small businesses. This includes contracts that require statewide services that may be broken down into smaller, regional contracts.

Although breaking up large contracts may, in some instances, forego economies of scale and increase risk, doing so yields additional benefits for Maryland's small, minority-, and women-owned businesses. As shown in Chapter 5, more than 90% of payments on small contracts in the Office of Program Evaluation and Government Accountability (OPEGA) contract data set went to MBEs.

Recommendation: MDOT's Office of Minority Business Enterprise should consider adopting additional MBE graduation criteria to facilitate graduation of established firms, including criteria related to participation in State procurement. For instance, MBEs that surpass lifetime caps on (1) the number of contracts on which they participate or (2) total payments from State contracts would graduate from the program.

As noted above, current graduation criteria generally allow established MBEs to remain certified almost indefinitely, making it difficult for new MBEs to secure subcontracting opportunities. Developing graduation criteria linked to participation in State contracts would increase graduation rates for firms that have used State contracting to grow their businesses, opening up opportunities for newer firms to have the same opportunities. With the codification of the Governor's Executive Order, graduated firms would still have the opportunity to bid on small State contracts as prime contractors.

Recommendation: The General Assembly, in consultation with GOSBA and other stakeholders, should study the advantages and disadvantages of merging the MBE program with the SBR program. As shown in Appendix F, several states, most notably Virginia, use this approach to create greater flexibility than that allowed by the constitutional framework for preference programs that are solely race-based. Virginia's Small, Women-, and Minority-Owned program includes small business set-asides and an overall goal of 42%, which includes both prime and subcontracting opportunities. The implications of such a move for MBE participation in State procurement require further study, but a merger would carry notable advantages, including more rapid certification.

Recommendation: Agencies should consider piloting a requirement or preference for joint ventures for large contracts.

State law already authorizes the use of joint ventures between non-MBEs and certified MBEs, with bidders or offerors getting credit for the portion of the contract to be performed by the MBE. One key advantage of joint ventures is that MBEs are on equal footing with the non-MBE in that the State has a contractual relationship with both (or multiple) entities instead of the MBE relying on the prime contractor to honor its commitment. Also, joint ventures are more likely to

involve MBEs in performing core functions of the contract instead of, in some cases, providing only ancillary subcontracting services. In this way, they can help MBEs grow, develop valuable experience, and become more independent.

Although joint ventures are not suitable for all contracts, they may be suitable in some cases for larger projects that likely require multiple vendors with varied areas of expertise. In these instances, agencies may consider (1) requiring that bidders or offerors form joint ventures or (2) including a preference for joint ventures in the assessment of bids or proposals.

The State Has Limited Resources and Authority to Resolve Frequent Disputes Between MBEs and Prime Contractors

Survey and contract data indicate that disputes between MBEs and prime contractors occur frequently. As noted in Chapter 6, 20% of MBE respondents indicate that most or all payments from primes are not paid timely. As many MBEs are small businesses that rely on steady streams of income, delayed payments can be very disruptive to their operations. The contract data, showing that only about half of prime contractors fulfill their MBE goals, confirms that, in many instances, commitments to MBEs are not being honored.

The State has limited means and authority to resolve these disputes, which impacts the effectiveness of the MBE program. The State's contractual relationship is with the prime contractor, so it cannot, for example, compensate subcontractors directly for unpaid invoices by the prime contractor. For construction contracts only, § 15-226 of the State Finance and Procurement Article does authorize agencies to withhold progress payments to prime contractors after determining that the prime contractor is delinquent in making payments to subcontractors, but no similar authority exists for other types of State contracts. As noted earlier, other penalties available to agencies (contract cancellation and liquidated damages) are not used because they are often impractical.

Procurement staff and MBE liaisons indicate that, when they become aware of a dispute between a prime contractor and an MBE, they often make an effort to resolve the dispute through informal mediation. As one senior procurement staff person said, "Sometimes we put them in a room together and have an open discussion." These efforts, though, are insufficient to address the frequency of such disputes. The same procurement staff person acknowledged as much, "I like to visit these projects and see who is on the job. But I don't have the staff to go out and do that as much as we should." In a focus group, two established, well-connected MBEs highlighted the absence of a clear process to resolve disputes. Each of the two MBEs recounted being terminated by a prime contractor during contract performance and without their consent:

"So I went to [Special Secretary] Rhee and I went to the Lieutenant Governor and talked to them, and they were supposed to help me look into this thing. Because [prime contractors] have no one to answer to. The [general contractor] told me

straight up, ‘I don’t care if you go to the Pope, you’re not going to be on this job anymore.’ Because I told him I was friends with the Lieutenant Governor...”

“When there is a problem, you really don’t get much help. There is no kind of resolution office where you can resort to....I called the Secretary at the time and asked [for help]. [The Secretary] was helpful....I had a personal relationship with the Secretary and I was able to reach out to get it done. I can tell you, 9 out of 10 companies don’t have that kind of influence or resources.”

These stories highlight what OPEGA heard from many survey respondents: They do not know where to go to get help with resolving their disputes with prime contractors. In the two instances recounted above, these established and well-connected firms did not know how to seek redress for their grievances without drawing on their connections to top officials in State government. As the latter participant noted, most MBEs do not have such connections on which they can rely.

Recommendation: Amend statute to create the full-time position of MBE Ombudsman within GOSBA to advocate on behalf of MBEs involved in disputes with prime contractors and/or mediate resolutions to those disputes. The office of the MBE Ombudsman should have sufficient staff and resources to address the range of disputes referred to it. It should have the authority to (1) compel prime contractors and MBEs to provide documentation related to contract performance and payments; (2) order any relevant payments to be made in conjunction with a dispute resolution; and (3) provide guidance to agency procurement staff and MBE liaisons on resolving disputes between prime contractors and MBEs.

Agency staff, most notably MBE liaisons, will continue to play a role in helping MBEs involved in disputes on agency contracts. The office of the MBE Ombudsman, however, can help coordinate efforts across agencies to resolve disputes in addition to providing direct services to MBEs in some instances. Most importantly, however, it can provide a clear place to which MBEs can turn for help.

Recommendation: Amend statute to extend the State’s authority to withhold progress payments to prime contractors that do not pay subcontractors in a timely fashion to all types of State contracts, not just construction contracts.

Providing this authority to all State agencies, as well as the recommended MBE Ombudsman, gives them another tool in working with prime contractors to resolve payment disputes with MBEs.

Agency Accountability Is Not Linked to Actual Spending

State law currently requires each State agency to structure procurement procedures to try to achieve the State’s overall percentage goal established by GOSBA. Current reporting by

GOSBA also includes MBE participation rates for each agency against the statewide goal. Constitutionally, the goal cannot be construed to be a quota or requirement, so there are no specific penalties for agencies that fail to meet the goal each year. Nevertheless, public reporting of MBE participation levels shines a light on agencies that fall short each year.

However, the statewide MBE participation goal may not be the best measure against which to measure agency performance. As noted in Chapter 3, both MBE availability and utilization vary by industry; the statewide goal is an aggregate measure of MBE availability and utilization across industry types. For instance, construction and construction-related services are a major component of the statewide goal (making up 18% of total contract awards in fiscal 2020), but many agencies do not procure construction or related services on a regular basis. Similarly, information technology (IT) has high levels of MBE availability and utilization, but many agencies do not have large IT procurements on a regular basis.

Recommendation: Amend statute to require GOSBA to establish statewide goals by industry type (e.g., construction, services) for the purpose of agency-level reporting. GOSBA should continue to establish a single statewide goal for MBE participation but use the same methodology to establish industry-level goals, with consideration given to both MBE availability and utilization in those areas. GOSBA may give consideration to setting a spending threshold for each industry type below which agency-level MBE participation is not reported due to insufficient data.

Given the variability in agencies' spending patterns, reporting MBE participation according to their actual spending by industry type provides a more accurate picture of each agency's MBE participation levels. Data on agency performance related to industry goals would be reported for contract awards (as is currently done for the statewide goal) and for total payments on completed contracts.

Outdated Technology Hampers the Efficiency and Effectiveness of the MBE Program

Most State agencies rely on the State's legacy Financial Management Information System (FMIS), which was put in place nearly 30 years ago, to record and manage financial transactions with vendors. MDOT operates its own financial management system, known as iFMIS, which was upgraded recently and accommodates more sophisticated financial tracking and compliance reporting. As noted in Chapter 3, procurement staff at the Department of General Services (DGS) are aware of the capabilities available with iFMIS and want to replicate them statewide, but FMIS does not accommodate those features.

Further, although GOSBA provides guidance for Procurement Review Groups (PRG) to use when setting the MBE contract goal for contracts, this process is subjective. To ensure greater transparency and consistency, the goal-setting process should be standardized, which can be accomplished through the use of goal-setting software. MDOT initiated an effort to automate the

contract goal process, which was partially successful, but funding ran out before it was completed, so the system has only limited functionality. Although contract goal setting is a complicated process that cannot be fully automated, a fully functional IT system can make the process more efficient and impartial.

Recommendation: The State should prioritize a full upgrade to FMIS, which can enhance MBE program compliance and accountability. Automating the data collection process within a modern financial management system will reduce errors and increase the reliability of the data that are reported.

A feasibility study for the first phase of a plan to replace FMIS is currently underway and scheduled to be completed in June 2022.

Recommendation: MDOT should work with DGS and the Department of Information Technology to complete the development of its contract goal-setting system for use by other agencies. The software should not circumvent the authority of PRGs; they should still be required to review, adjust if needed, and approve the MBE participation goal for each procurement.

Recommendation: MDOT should upgrade the search function for the MBE database to allow users to narrow their search using keyword searches. This will allow agencies to develop more precise MBE contract goals based on actual availability and also enable prime contractors to narrow their searches to firms with specific expertise.

Key Aspects of the MBE Program Lack Transparency

As described in Chapters 2 and 3, since 2012, GOSBA has had primary responsibility for establishing the State's aspirational MBE participation goal every two years. In conjunction with MDOT and the Attorney General, GOSBA reviews the existing goal every two years to determine whether it should be changed, and each time since it was initially set at 29%, it has decided to leave it unchanged.

At our request, GOSBA provided its goal methodology document from 2013. However, GOSBA indicated that subsequent goal-setting documents, which have reaffirmed the original goal of 29%, are not available. This makes it nearly impossible for the public, including the vendor community, to understand the rationale and methodology used for setting the statewide goal.

Recommendation: GOSBA should make its goal-setting document/methodology available to the public on its website following each biennial review of the statewide MBE participation goal.

Solicitation documents do not describe the factors that were used in determining the MBE participation goals for individual procurements. Vendors commented that sometimes contract

goals appear to be inconsistent with the availability of MBEs, but they cannot determine how the goals were calculated.

Recommendation: Amend statute to require solicitation documents to include a brief summary of the factors used to determine the procurement’s MBE participation goal, including subcontracting opportunities identified for the project, North American Industry Classification System codes linked to those opportunities, and a count of available MBEs in those areas. Any automated goal-setting system used to calculate contract goals should be programmed to provide relevant information to the PRG.

State Outreach Efforts Provide Insufficient Opportunities for MBEs to Meet Prime Contractors and Be Mentored

Opportunities to connect with prime contractors was identified by survey respondents as the greatest deficiency in current outreach efforts by the State. The recommendation to increase graduation rates may heighten the need for prime contractors to form relationships with more MBEs, as more established MBEs may not be available due to graduation. Even if the recommendation is not implemented, expanding and strengthening MBE’s relationships with prime contractors should enhance participation of MBEs in State procurement. It can also help prime contractors increase competition (and hence reduce pricing) for subcontracts on State projects.

Recommendation: GOSBA and MDOT, in conjunction with high-spend agencies, should offer more frequent “meet-and-greet” opportunities for MBEs to network with prime contractors in their respective fields.

Chapter 258 of 2021 requires GOSBA to establish a mentorship program for small and startup MBEs. GOSBA has advised that previous efforts to establish mentoring programs have found it difficult to recruit established MBEs to serve as mentors.

Recommendation: Amend statute to allow graduated MBEs to maintain their MBE certification for a specified amount of time if they serve as effective mentors to new MBEs.

If GOSBA makes it easier for MBEs to graduate from the program, as recommended earlier, it can offer as an incentive the opportunity to maintain MBE certification for a specified period of time if the firm serves as a mentor. Retention of MBE certification should be contingent on positive reviews from the proteges who are mentored by the graduated MBE.

Appendix A. Response from the Minority Business Enterprise Program

MEMORANDUM

January 21, 2022

To: Michael Rubenstein, Principal Analyst
Department of Legislative Services

From: Jimmy Rhee, Special Secretary
Governor's Office of Small, Minority & Women Business Affairs

Re: Evaluation of the Minority Business Enterprise

Maryland has a long history of being inclusive when it comes to spending taxpayer dollars. Throughout the 43-year history of our Minority Business Enterprise (MBE) Program, the statutes and regulations governing it have been modified many times, adapting to changing procurement practices and enhancing protections of certified MBEs.

We applaud the work of the Department of Legislative Services' Office of Program Evaluation and Government Accountability in development of the Evaluation of the Minority Business Enterprise Program and submit the following comments to Chapter 7. Observations and Recommendations.

Prime Contractors Are Not Held Accountable for Failing to Achieve MBE Contract Goals

Recommendation – Amend statute to require agencies to provide the results of their compliance assessments of completed contracts to GOSBA and require GOSBA to summarize the results of those assessments in its annual report, by agency.

Comment – Data is always valuable. To our knowledge, contract compliance data at this level is currently not being collected. A mechanism for capturing this data would have to be created.

This would make annual reports incredibly voluminous with closeout summaries for every completed State contract. Each of the 70 agencies presumably close out dozens of contracts per year. It may be more beneficial to have each agency keep a public repository of contract compliance at closeout rather than housing all this information in GOSBA's annual report.

Recommendation – Require GOSBA to publish a list of prime contractors that repeatedly are at fault for failing to fulfill contractual MBE obligations.

Comment – Full legal analysis should be conducted to ensure there is no risk of defamation of character to the named firms. If this recommendation were to be adopted, GOSBA would like the authority, in consultation with the Office of Attorney General & Office of State Procurement, to define the applicable terms in a manner that does not put the State at risk of litigation.

Recommendation – Amend statute to require agencies to consider a prime contractor's past performance with respect to MBE contract goals and/or presence on the list maintained by GOSBA in assessing the responsibility of the bidder or offeror on State procurements.

Comment – It is our understanding that some evaluation of past performance is included in the overall bidder or offeror evaluation process. The determination of responsibility of the bidder or offeror should not rely solely on the basis of being named on the list of prime contractors that are persistently at-fault for failing to meet MBE participation goals.

Recommendation – Amend statute to repeal authorization to assess liquidated damages against contractors that fail to comply in good faith with MBE program requirements.

Comment – GOSBA was and still is a proponent of this legislation as a deterrent for non-compliance with established MBE contract goals. It is one of the few program enforcements safeguards available to the State. Prime contractors who do not perform in good faith after winning an award are in violation of the contract. This provision gives the State a way to respond to such violations. Hesitancy to use this provision is likely due to inadequate understanding of how-to assess liquidated damages. This could be resolved with more training and/or support from the MBE Ombudsman (if such a position is created). We are not in favor of removing the liquidated damages provision.

The MBE Program Does Not Facilitate Growth and Self-sufficiency of Minority- and Women-owned Firms

GOSBA has heard from many small business owners that the MBE Program has helped their business grow and thrive. While some firms may desire to grow to the prime contractor role, this is not the goal of all. In fact, firms operating in the trades are positioned to perform in the subcontracting role exclusively. Graduation out of the MBE Program is not an inherent goal among all certified firms. Many will never reach the size standards or personal net worth cap, but that does not mean the business is unsuccessful. MBEs that build relationships with prime contractors and win work with greater frequency demonstrate their ability to compete and win in a tough environment. New firms that join the program must be prepared to compete. Competition is a cornerstone of business in both the public and private sectors. MBEs who do not learn to compete in this arena, as a prime contractor or a subcontractor, will find it very hard to be successful.

Recommendation – Amend statute to codify Executive Order 01.01.2021.01, which generally requires qualifying State procurements with a value between \$50,000 and \$500,000 to be automatically set aside for small businesses by designation to the Small Business Reserve (SBR) program.

Comment – The SBR Program is an excellent way for small businesses to perform in the prime contracting role. Most, if not all, MBEs would likely qualify for this race- and gender-neutral program. We support this recommendation fully.

Recommendation - Agencies should, when practical, give due consideration to breaking up large contracts into smaller components that can be set aside for small businesses. This includes contracts that require statewide services that may be broken down into smaller, regional contracts.

Comment – Dividing large procurements into several smaller procurements, when feasible, is one of the longstanding race-neutral measures utilized in the PRG process and is enumerated in

BPW Advisory 2001-1: Procurement Review Groups: SBR Designation, MBE and VSBE Determinations.

For clarification, a statistic used in this section cites the number of firms in MDOT's directory that are certified in the federal Small Business Enterprise (SBE) Program. The SBE Program is not under the SBR Program, which exclusively applies to state-funded contracts. In November of 2020, GOSBA, using data provided by MDOT's Office of Minority Business Enterprise (OMBE), determined that 14% of MBE firms hold certifications in both the MBE and SBR Programs. GOSBA proactively works to grow participation in the SBR Program.

Following the Governor's executive order to enhance the SBR Program, GOSBA and OSP worked together to modify policies and procedures allowing for SBR designation of statewide procurements. Guidance was issued to the procurement community in November 2020.

Recommendation – MDOT's Office of Minority Business Enterprise should consider adopting additional MBE graduation criteria to facilitate graduation of established firms, including criteria related to participation in State procurement. For instance, MBEs that surpass lifetime caps on (1) the number of contracts on which they participate or (2) total payments from State contracts would graduate from the program.

Comment – We believe the current regulations regarding graduation from the MBE Program are sufficient as they remove firms (by NAICS) when they no longer meet the threshold for social and economic disadvantage. Developing graduation criteria linked to participation in State contracts puts performing MBEs at a competitive disadvantage and minimizes their opportunities. MBE subcontractors are competing in the private sector where relationships matter. Those who perform well and build relationships should not have those relationships compromised by imposing boundaries on their ability to perform on contracts with MBE goals. In addition, this would make it harder for prime contractors to build long-term relationships with MBEs who have proven themselves.

Recommendation – The General Assembly, in consultation with GOSBA and other stakeholders, should study the advantages and disadvantages of merging the MBE program with the SBR program. As shown in Appendix F, several states, most notably Virginia, use this approach to create greater flexibility than that allowed by the constitutional framework for preference programs that are solely race-based. Virginia's SWaM program includes small business set-asides and an overall goal of 42%, which includes both prime and subcontracting opportunities. The implications of such a move for MBE participation in State procurement require further study, but a merger would carry notable advantages, including more rapid certification.

Comment – Each procurement unit is strongly encouraged to maximize inclusion by employing race-neutral measures such as the SBR Program. Race-neutral measures are methods that assist businesses without regard to their social, economic, racial, or sexual composition. State Finance and Procurement Article § 14-301.1(9), Annotated Code of Maryland, provides that race-neutral measures will be employed to the maximum extent practicable to drive inclusion **prior to** the employment of race-conscious measures such as the MBE Program. Combining these programs would run afoul of this key constitutional consideration.

The State Has Limited Resources and Authority to Resolve Frequent Disputes Between MBEs and Prime Contractors

Recommendation – Amend statute to create the full-time position of MBE Ombudsman within GOSBA to advocate on behalf of MBEs involved in disputes with prime contractors and/or mediate resolutions to those disputes. The office of the MBE Ombudsman should have sufficient staff and resources to address the range of disputes referred to it. It should have the authority to (1) compel prime contractors and MBEs to provide documentation related to contract performance and payments; (2) order any relevant payments to be made in conjunction with a dispute resolution; and (3) provide guidance to agency procurement staff and MBE liaisons on resolving disputes between prime contractors and MBEs.

Comment – The creation of an MBE Ombudsman would have a positive impact on the MBE Program. Success, however, would be contingent upon providing sufficient staff and resources to work with all 70 participating agencies and departments.

Agency Accountability Is Not Linked to Actual Spending

Recommendation - Amend statute to require GOSBA to establish statewide goals by industry type (e.g., construction, services) for the purpose of agency-level reporting. GOSBA should continue to establish a single statewide goal for MBE participation but use the same methodology to establish industry-level goals, with consideration given to both MBE availability and utilization in those areas. GOSBA may give consideration to setting a spending threshold for each industry type below which agency-level MBE participation is not reported due to insufficient data.

Comment – Maintaining a single statewide goal is the optimal way to report agency performance of the MBE Program. Because agencies purchase services and goods that are unique to their specific needs, not all contribute to the overarching goal at the same level. As a result, we do not expect each agency to achieve 29%. Setting additional goals by industry is likely to result in confusion by both the vendor community and the procurement community. Agencies currently report MBE award data by industry. (Note: Payment data by industry is currently not being collected.) Industry award data is reported in the aggregate in GOSBA's annual report. Utilization of subgoals, for which there are defined methodologies and worksheets, is the way we address underutilization by industry.

Outdated Technology Hampers the Efficiency and Effectiveness of the MBE Program

Recommendation – The State should prioritize a full upgrade to FMIS, which can enhance MBE program compliance and accountability. Automating the data collection process within a modern financial management system will reduce errors and increase the reliability of the data that are reported.

Comment – We fully support an upgrade of FMIS with the expectation that it would improve both reporting and compliance of the MBE Program. Having all participating agencies and departments operating from the same financial management system would be ideal.

Recommendation – MDOT should work with DGS and the Department of Information Technology to complete the development of its contract goal setting system for use by other agencies. The software should not circumvent the authority of PRGs; they should still be required to review, adjust if needed, and approve the MBE participation goal for each procurement.

Comment – We strongly support automating the PRG process to the fullest extent possible.

Key Aspects of the MBE Program Lack Transparency

Recommendation – GOSBA should make its goal-setting document/methodology available to the public on its website following each biennial review of the statewide MBE participation goal.

Comment – The statement that GOSBA indicated the goal methodology is “not available” is misleading. Determining the State’s aspirational MBE participation goal is the result of a legal work product and thus proprietary. In terms of managing risk, making this information public has the potential for misinterpretation that could lead to adverse legal actions against the State. To the best of our knowledge, the vendor community has not expressed any interest in the methodology behind setting the statewide MBE goal.

Recommendation - Amend statute to require solicitation documents to include a brief summary of the factors used to determine the procurement’s MBE participation goal, including subcontracting opportunities identified for the project, NAICS codes linked to those opportunities, and a count of available MBEs in those areas. Any automated goal-setting system used to calculate contract goals should be programmed to provide relevant information to the PRG.

Comment – Based on our understanding of procurement practices, bidders/offers may ask questions about the solicitation while it is open. This includes questioning the MBE goal. We also believe vendors may request PRG documents. The factors used to establish MBE goals are static and are [publicly available](#); however, they are uniquely applied based on the considerations surrounding each contract (e.g., project location, potential liabilities, MBE availability in relevant trades).

State Outreach Efforts Provide Insufficient Opportunities for MBEs to Meet Prime Contractors and Be Mentored

We believe there is a conflict of interest when a state agency mentors a small business that is competing for a state contract. The potential for a protest by any bidders/offers that do not engage in mentoring would likely be very high. Fortunately, Maryland has many small business organizations that provide free business mentoring, counseling, and coaching services. Several even focus on the government contracting arena.

Although we don’t fit into the mentoring role, we are well positioned to share general insights that can help businesses compete with confidence. We provide monthly training webinars to help small, minority, women, and veteran business owners learn how to navigate State procurement processes, access procurement pipelines, and mine public information for business intelligence data.

Recommendation – GOSBA and MDOT, in conjunction with high-spend agencies, should offer more frequent “meet-and-greet” opportunities for MBEs to network with prime contractors in their respective fields.

Comment – Regulations currently require all agencies to conduct outreach. In addition, every solicitation with an MBE goal requires a pre-bid meeting where potential subcontractors can meet potential prime contractors. Generally speaking, we believe more events designed to bring prime contractors and subcontractors together would benefit everyone.

**RESPONSE OF MARYLAND DEPARTMENT OF TRANSPORTATION
TO THE DEPARTMENT OF LEGISLATIVE SERVICES
OFFICE OF PROGRAM EVALUATION AND GOVERNMENT ACCOUNTABILITY
EVALUATION OF THE MINORITY BUSINESS ENTERPRISE PROGRAM**

January 21, 2022

This is the Response of the Maryland Department of Transportation (MDOT) to the Evaluation of the Minority Business Enterprise Program issued by the Department of Legislative Services (DLS) Office of Program Evaluation and Government Accountability (OPEGA) in January 2022 (Report). This Response is broken down into two sections. Section I includes general comments regarding specific items in the Report. Section II includes responses to the OPEGA recommendations made in the Report.

Of Note

On November 30, 2021, to further improve customer service, then Secretary Greg Slater directed the MDOT Audit Department to engage with an outside firm to review the business processes of the MBE program. This review will focus on the workflow of incoming applications, annual reviews and pending applications. The firm has scheduled a kick-off conference with the appropriate parties.

I. GENERAL COMMENTS

MBE Participation Goal - Shortfall

Beginning at the bottom of page 31, several reasons are offered as possible explanations for recent declines in MBE participation across the State. Notwithstanding the practical explanations provided in the Report, an underlying reason that the State has had difficulty in meeting the MBE goal is the present-day impact of past racial and gender discrimination, which makes it difficult for minority- and women-owned firms to form, grow, compete, and succeed in the Maryland marketplace particularly during difficult times. The ongoing existence of this discrimination is well-documented in the 2017 Study.

Public-private Partnerships

The last sentence of the last paragraph on page 40 states that “MBE goals for P3 contracts tend to be more robust due to the strict vetting process for each solicitation.” However, given the current phase of each MDOT P3 project (Purple Line and TRP Toll Road), these P3s are currently federally funded. Therefore, these P3s are subject to DBE goals – not MBE goals. In addition, the reference to the “robust” nature and the use of an undefined “vetting process” is misleading. MDOT is unaware of any “vetting process,” and submits that the DBE goals on these P3s may be more robust because they were set using the more narrowly tailored and less subjective goal-setting process developed by MDOT.

MBE Certification – Annual Review

Beginning on page 56, the Report provides anecdotal comments regarding the annual review process for MBE certification that suggests a possible need to clarify the scope of the annual review. The annual review process is necessary to ensure that previously certified firms continue to meet the small business size standards and good standing requirements of the MBE Program. The requirements are generally limited to the submission of the following documents: No Change Affidavit, most recently filed business tax return, and proof of good standing with the Department of Assessment and Taxation (DAT) (which may be in the form of a screen shot from the DAT website). The annual review process does not require annual proof of group membership for the presumptively disadvantaged owner. Unless there is a change in ownership or substantial change in the organization of the business, no other information or documents are required.

II. COMMENTS REGARDING RECOMMENDATIONS

Item #1

OPEGA Recommendation: Amend statute to require agencies to provide the results of their compliance assessments of completed contracts to GOSBA and require GOSBA to summarize the results of those assessments in its annual report, by agency. Data reported by agencies to GOSBA should include at a minimum, for each contract completed during the prior fiscal year: (i) the names of the prime contractor and of each MBE that participated in the contract; (ii) the type of good or service provided by the contract; (iii) the MBE participation goal for the contract and whether a waiver was given; (iv) total actual payments made to the prime contractor and to each subcontractor during the contract term (each subcontractor should be identified as MBE or non-MBE); and (v) if relevant, a description of factors that may have contributed to failure to achieve the MBE participation goal for the contract (including, but not limited to, documented nonperformance or unavailability of an MBE).

MDOT Response: MDOT already provides the GOSBA with much of the data listed in OPEGA's recommendation. However, to facilitate the collection of data for the disparity study and other initiatives, as well as be consistent with item (iv) in the list, the State may want to consider modifying item (i) to require the names of both the MBE and non-MBE subcontractors.

Item #2

OPEGA Recommendation: Amend statute to require GOSBA, based on its analysis of MBE compliance data provided by agencies, to maintain and publish on its website a list of prime contractors that are persistently at-fault for failing to meet MBE participation goals. Prior to adding a business to the list, GOSBA should notify the business of its intention to add it to the list and provide the business with an opportunity to appeal its inclusion to the Special Secretary. The list should only include those prime contractors that (1) persistently fail to meet contract goals, and (2) the failures are not excused by mitigating factors (such as documented nonperformance or unavailability of designated MBEs). GOSBA should be authorized to develop regulations to establish the criteria and process for inclusion of firms on the list.

MDOT Response: Although this item provides that GOSBA will be responsible developing the pertinent regulations and maintaining and publishing the list, it is unclear how the underlying information needed to compile such a list will be maintained and reported to GOSBA.

Item #3

OPEGA Recommendation: Amend statute to require agencies to consider a prime contractor's past performance with respect to MBE contract goals and/or presence on the list maintained by GOSBA (see Recommendation #2) in assessing the responsibility of the bidder or offeror on State procurements.

MDOT Response: Although past performance of a contractor may be a factor in awarding a contract, it is not and should not be the only factor. In addition, it could be problematic if the factor related to MBE compliance carries more weight than other factors used to evaluate a firm.

Item #4

OPEGA Recommendation: Amend statute to repeal authorization to assess liquidated damages against contractors that fail to comply in good faith with MBE program requirements.

MDOT Response: MDOT does not agree that the statutory authority to impose liquidated damages should be repealed. Regardless of the frequency of the use of liquidated damages, having the ability to impose such damages under the appropriate circumstances is important to ensuring compliance, and the fact that liquidated damages could be imposed may act as a deterrent. Rather than simply dismiss the potential benefits of liquidated damages, MDOT suggests that an analysis of contracts be performed to determine why the goal was not achieved, what documentation the agency obtained to monitor and ensure contract compliance, whether liquidated damages was considered, and if so, why liquidated damages were not imposed. This would enable the State to make a better assessment of the usefulness of liquidated damages and why they are not being imposed. As to the reference to complying with *Croson*, MDOT is not aware of an equal protection issue related to liquidated damages but suggests that we seek input from the Office of the Attorney General.

Item #5

OPEGA Recommendation: Amend statute to codify Executive Order 01.01.2021.01, which generally requires qualifying State procurements with a value between \$50,000 and \$500,000 to be automatically set aside for small businesses by designation to the Small Business Reserve (SBR) program. An analysis of MBE certification data provided by MDOT reveals that 93% of certified MBEs (7,167 firms as of summer 2021) are also certified as small business enterprises (SBEs) under the SBR program.

MDOT Response: This Recommendation references OMBE certification data, indicating that “93% of certified MBEs (7,167 firms as of summer 2021) are also certified as small business enterprises (SBEs) *under the SBR program.*” (Emphasis added.) However, the SBE and SBR Programs are separate and distinct contracting programs with different certification and registration processes. The SBE Program is a race-neutral component of the federal Disadvantaged Business Enterprise (DBE) Program, and it applies to USDOT-funded projects. To participate on projects set-aside for the federal SBE Program, a firm must meet personal net worth and SBA small business size standards and be certified by the MDOT Office of MBE. Maryland's SBR Program is also a race-neutral program, but it applies to State-funded projects. To participate on projects set-aside for the SBR Program, firms must self-register with DGS via eMMA. Under current law, firms that are certified as MBEs, DBEs and SBEs are not eligible to participate on SBR projects unless they go through the additional self-registration process for the SBR Program. Given the separate certification/registration processes for participation in the various programs, codifying the Executive Order is not enough to enable the more than 7,000 firms certified by the Office of MBE to participate on SBR projects. However, all certified MBE, DBE, and SBE firms have been through a process wherein they have demonstrated that they meet SBA small businesses size standards. Therefore, the State could facilitate the participation of MBEs, DBEs, and SBEs by changing

the statute to allow them to participate on SBR projects without going through a separate registration process.

Item #6

OPEGA Recommendation: Agencies should, when practical, give due consideration to breaking up large contracts into smaller components that can be set aside for small businesses. This includes contracts that require statewide services that may be broken down into smaller, regional contracts.

MDOT Response: MDOT has no comments regarding this Recommendation.

Item #7

OPEGA Recommendation: MDOT's Office of Minority Business Enterprise should consider adopting additional MBE graduation criteria to facilitate graduation of established firms, including criteria related to participation in State procurement. For instance, MBEs that surpass lifetime caps on (1) the number of contracts on which they participate or (2) total payments from State contracts would graduate from the program.

MDOT Response: MDOT has concerns about a lifetime cap on the total number of contracts or total value of contracts awarded to MBEs. One of the reasons that graduated MBE firms generally become eligible to remain in the MBE Program is because once a firm graduates or loses its certification, prime contractors no longer solicit that firm to participate on a contract. This means that the gross receipts of a graduated firm go down, making the firm eligible to be taken out of graduated status or re-apply for certification. On its face, barring a firm from the MBE Program based on lifetime caps penalizes the MBE for its success.

Item #8

OPEGA Recommendation: The General Assembly, in consultation with GOSBA and other stakeholders, should study the advantages and disadvantages of merging the MBE program with the SBR program.

MDOT Response: MDOT has no comments regarding this Recommendation.

Item #9

OPEGA Recommendation: Agencies should consider piloting a requirement or preference for joint ventures for large contracts.

MDOT Response: Before establishing a requirement or preference for joint ventures on larger contracts, MDOT believes that the State should evaluate the advantages and disadvantages, including the legal implications, of establishing such a requirement or preference.

Item #10

OPEGA Recommendation: Amend statute to create the full-time position of MBE Ombudsman within GOSBA to advocate on behalf of MBEs involved in disputes with prime contractors and/or mediate resolutions to those disputes. The office of the MBE Ombudsman should have sufficient staff and resources to address the range of disputes referred to it. It should have the authority to (1) compel prime contractors and MBEs to provide documentation related to contract performance and payments; (2) order any relevant payments to be made in conjunction with a dispute resolution; and (3) provide guidance to agency procurement staff and MBE liaisons on resolving disputes between prime contractors and MBEs. Agency staff, most notably MBE liaisons, will continue to play a role in helping MBEs involved in disputes on agency contracts.

MDOT Response: MDOT has no comments regarding this Recommendation.

Item #11

OPEGA Recommendation: Amend statute to extend the State's authority to withhold progress payments to prime contractors that do not pay subcontractors in a timely fashion to all types of State contracts, not just construction contracts. This authority would be provided to all State agencies as well as the recommended MBE Ombudsman.

MDOT Response: MDOT agrees with this Recommendation to the extent it is to be carried out at the agency level. However, to the extent the MBE Ombudsman is given the authority to direct any withholding, the directive would be carried out at the agency level. Therefore, this Recommendation should also provide that the MBE Ombudsman must consult with the pertinent State agency before imposing any such requirement on a specific contract.

Item #12

OPEGA Recommendation: Amend statute to require GOSBA to establish statewide goals by industry type (e.g., construction, services) for the purpose of agency-level reporting. GOSBA should continue to establish a single statewide goal for MBE participation but use the same methodology to establish industry-level goals, with consideration given to both MBE availability and utilization in those areas. GOSBA may give consideration to setting a spending threshold for each industry type below which agency-level MBE participation is not reported due to insufficient data. Given the variability in agencies' spending patterns, reporting MBE participation according to their actual spending by industry type provides a more accurate picture of each agency's MBE participation levels.

MDOT Response: To the extent that the purpose of this amendment is to track spending by industry type, this can be done without setting industry specific goals. In addition, industry specific goals would add and unnecessary complication to the procurement process and be difficult to administer. Notably, the MWBE availability of 34.7% in the 2017 Study, which is used for purposes of setting the overall MBE goal for the State, is weighted by the spend of the various State agencies across all procurement categories. Therefore, the overall MBE goal is appropriate, and every agency should be required to attempt to achieve that goal. A more practical and efficient approach to tracking spend patterns would be to track the MBE participation in the various industries before making any changes to the overall goals and subgoals.

Item #13

OPEGA Recommendation: The State should prioritize a full upgrade to FMIS, which can enhance MBE program compliance and accountability. Automating the data collection process within a modern financial management system will reduce errors and increase the reliability of the data that are reported.

MDOT Response: MDOT has no comments regarding this Recommendation.

Item #14

OPEGA Recommendation: MDOT should work with DGS and the Department of Information Technology to complete the development of its contract goal setting system for use by other agencies. The software should not circumvent the authority of PRGs; they should still be required to review, adjust if needed, and approve the MBE participation goal for each procurement.

MDOT Response: MDOT has no comments regarding this Recommendation and defers to GOSBA, who is statutorily responsible for developing goal-setting guidelines for the State. MDOT will provide advice and assistance as needed.

Item #15

OPEGA Recommendation: MDOT should upgrade the search function for the MBE database to allow users to narrow their search using keyword searches. This will allow agencies to develop more precise MBE contract goals based on actual availability and enable prime contractors to narrow their searches to firms with specific expertise.

MDOT Response: The search function for the MDOT Directory of Certified Firms already allows users to narrow their search using keyword searches. Therefore, notwithstanding comments to the contrary, agency staff can search the MDOT Directory for certified MBEs by, among other things, industry group, specific industry (or NAICS Code) and/or keyword. However, depending on the experience and training of the user, this process can have varying results. Therefore, MDOT recommends that training be established for internal and external users.

Item #16

OPEGA Recommendation: GOSBA should make its goal-setting document/methodology available to the public on its website following each biennial review of the statewide MBE participation goal.

MDOT Response: MDOT has no comments regarding this Recommendation.

Item #17

OPEGA Recommendation: Amend statute to require solicitation documents to include a brief summary of the factors used to determine the procurement’s MBE participation goal, including subcontracting opportunities identified for the project, NAICS codes linked to those opportunities, and a count of available MBEs in those areas. Any automated goal-setting system used to calculate contract goals should be programmed to provide relevant information to the PRG.

MDOT Response: MDOT supports transparency and providing the items of work, the applicable NAICS Codes, and the number of available MBEs to perform those items of work that were identified for purposes of goal setting. However, rather than add this detailed information to every solicitation document, MDOT suggests that the information be made available on request and include a link to the MDOT Directory of Certified firms.

Item #18

OPEGA Recommendation: GOSBA and MDOT, in conjunction with high-spend agencies, should offer more frequent “meet-and-greet” opportunities for MBEs to network with prime contractors in their respective fields.

MDOT Response: MDOT supports partnering with GOSBA and other state agencies on outreach events to connect prime and MBE firms.

Item #19

OPEGA Recommendation: Amend statute to allow graduated MBEs to maintain their MBE certification for a specified amount of time if they serve as effective mentors to new MBEs.

MDOT Response: MDOT does not agree with this Recommendation. Allowing ineligible firms to remain certified as MBEs is not consistent with the narrow tailoring requirements for the implementation of the MBE Programs. Specifically, including firms that do not meet the eligibility requirements in the MBE Program makes the Program overinclusive. Therefore, a firm should not be allowed to remain MBE-certified if, based on the SBA size standards, it is no longer a small business.

Larry Hogan
Governor

Boyd K. Rutherford
Lt Governor



Ellington E. Churchill, Jr.
Secretary

Nelson E. Reichart
Deputy Secretary

OFFICE OF THE SECRETARY

January 21, 2022

Michael Powell, Director
Office of Program Evaluation and Government Accountability
Department of Legislative Services
90 State Circle
Annapolis, Maryland 21401

Dear Mr. Powell:

Please accept this correspondence as The Department of General Services Office of State Procurement response to the recommendations provided by the Office of Program Evaluation and Government Accountability in the January 2022 Department of Legislative Services *Evaluation of the Minority Business Enterprise Program*.

Should you have any additional questions or concerns, do not hesitate to contact me at 410-260-3910 or Michael.Zimmerman@maryland.gov.

Sincerely,

A handwritten signature in blue ink, appearing to read "M. C. Zimmerman".

Michael Zimmerman
Chief Procurement Officer

c: Ellington E. Churchill, Jr., DGS

**Department of General Services Office of State Procurement (DGS OSP)
Response to the DLS Evaluation of the Minority Business Enterprise (MBE) Program**

Below are the Observations and Recommendations made by DLS in its evaluation:

Prime Contractors Are Not Held Accountable for Failing to Achieve MBE Contract Goals

Recommendation: Amend statute to require agencies to provide the results of their compliance assessments of completed contracts to GOSBA and require GOSBA to summarize the results of those assessments in its annual report, by agency. Data reported by agencies to GOSBA should include at a minimum, for each contract completed during the prior fiscal year:

- the names of the prime contractor and of each MBE [subcontractor] that participated in the contract;
- the type of good or service provided by the contract;
- the MBE participation goal for the contract and whether a waiver was given;
- total actual payments made to the prime contractor and to each subcontractor during the contract term (each subcontractor should be identified as MBE or non-MBE); and
- if relevant, a description of factors that may have contributed to failure to achieve the MBE participation goal for the contract (including, but not limited to, documented nonperformance or unavailability of an MBE).

GOSBA may require one contractual position to manage the collection and reporting of this data until it can standardize and/or automate the data collection process.

DGS OSP Response: We do not see the value in adding another report. Standardizing the process of how to monitor compliance would provide consistency in how agencies ensure compliance rather than submitting another report that doesn't necessarily show that actual monitoring of contracts is being done.

Recommendation: Amend statute to require GOSBA, based on its analysis of MBE compliance data provided by agencies, to maintain and publish on its website a list of prime contractors that are persistently at-fault for failing to meet MBE participation goals. Prior to adding a business to the list, GOSBA should notify the business of its intention to add it to the list and provide the business with an opportunity to appeal its inclusion to the Special Secretary.

The list should include only those prime contractors that persistently fail to meet contract goals. Moreover, only firms that fail to meet the goals in the absence of mitigating factors (such as documented nonperformance or unavailability of designated MBEs) should be included on the list. GOSBA should be authorized to develop regulations to establish the criteria and process for inclusion of firms on the list.

DGS OSP Response: *This sounds like an ad hoc debarment and we are concerned about the impact on vendor participation and competition and therefore, delaying and/or jeopardizing the award of a contract.*

Recommendation: Amend statute to repeal authorization to assess liquidated damages against contractors that fail to comply in good faith with MBE program requirements.

Assessment of liquidated damages is currently at the discretion of contracting agencies because mandating assessment of damages for MBE underperformance is likely a violation of the *Croson* requirements. Agencies do not assess liquidated damages because it is impractical to do so, making the authorization largely obsolete.

DGS OSP Response: *We agree with the recommendation or with amending the current statute to define exact circumstance when liquidated damages are applied.*

The MBE Program Does Not Facilitate Growth and Self-sufficiency of Minority- and Women-owned Firms

Recommendation: Amend statute to codify Executive Order 01.01.2021.01, which generally requires qualifying State procurements with a value between \$50,000 and \$500,000 to be automatically set aside for small businesses by designation to the Small Business Reserve (SBR) program.

As discussed in Chapter 4, a key barrier to both expanding the participation and supporting the growth of MBEs is the lack of contract set-asides, which are not permissible under the framework of the *Croson* decision. However, set-asides for small businesses are not subject to constitutional limits, and expanding their use substantially benefits MBEs as well. An analysis of MBE certification data provided by MDOT reveals that 93% of certified MBEs (7,167 firms as of summer 2021) are also certified as small business enterprises (SBEs) under the SBR program.

The Governor's executive order, issued in January 2021, has the potential, therefore, to substantially expand opportunities for MBEs to participate as prime contractors on contracts that are of a size and nature suitable to them. Codifying it in statute would make those benefits permanent.

DGS OSP Response: We would support statutory changes to increase the efficacy of the SBR program. However, it is our understanding that MBE program certification is a rigorous process that largely follows guidance from the federal DBE program, whereas Maryland's SBR program allows vendors to self-certify, and does not currently have the resources to verify the certification is valid.

Recommendation: Agencies should, when practical, give due consideration to breaking up large contracts into smaller components that can be set aside for small businesses. This includes contracts that require statewide services that may be broken down into smaller, regional contracts.

Although breaking up large contracts may, in some instances, forego economies of scale and increase risk, doing so yields additional benefits for Maryland's small, minority-, and women-owned businesses. As shown in Chapter 5, more than 90% of payments on small contracts in the Office of Program Evaluation and Government Accountability (OPEGA) contract data set went to MBEs.

DGS OSP Response: Agencies have a fiduciary responsibility to make the most advantageous contracting decisions for the State. Total cost analysis should be done for large contracts being considered as potentially subject to being broken up. The only caveat being that we would be less concerned about the disaggregation of certain contracts, i.e., where the same service offered in multiple locations, could be bid by location. This approach would be detrimental if a contract were to be "artificially" broken up for the purpose of creating a separate procurement i.e., pulling out some subcontracting opportunities in a large construction contract, and bidding them out as a separate procurement.

Recommendation: The General Assembly, in consultation with GOSBA and other stakeholders, should study the advantages and disadvantages of merging the MBE program with the SBR program. As shown in Appendix F, several states, most notably Virginia, use this approach to create greater flexibility than that allowed by the constitutional framework for preference programs that are solely race-based. Virginia's SWaM program includes small business set-asides and an overall goal of 42%, which includes both prime and subcontracting opportunities. The implications of such a move for MBE participation in State procurement require further study, but a merger would carry notable advantages, including more rapid certification.

DGS OSP Response: *We would be supportive of merging the programs to increase small business participation; however, a study would be needed to determine an appropriate goal.*

Recommendation: Agencies should consider piloting a requirement or preference for joint ventures for large contracts.

State law already authorizes the use of joint ventures between non-MBEs and certified MBEs, with bidders or offerors getting credit for the portion of the contract to be performed by the MBE. One key advantage of joint ventures is that MBEs are on equal footing with the non-MBE in that the State has a contractual relationship with both (or multiple) entities instead of the MBE relying on the prime contractor to honor its commitment. Also, joint ventures are more likely to involve MBEs in performing core functions of the contract instead of, in some cases, providing only ancillary subcontracting services. In this way, they can help MBEs grow, develop valuable experience, and become more independent.

Although joint ventures are not suitable for all contracts, they may be suitable in some cases for larger projects that likely require multiple vendors with varied areas of expertise. In these instances, agencies may consider (1) requiring that bidders or offerors form joint ventures or (2) including a preference for joint ventures in the assessment of bids or proposals.

DGS OSP Response: *The State should not want to position themselves where they are telling vendors how to do their business.*

Outdated Technology Hampers the Efficiency and Effectiveness of the MBE Program

Recommendation: MDOT should work with DGS and the Department of Information Technology to complete the development of its contract goal setting system for use by other agencies. The software should not circumvent the authority of PRGs; they should still be required to review, adjust if needed, and approve the MBE participation goal for each procurement.

DGS OSP Response: *We are not aware of imminent progress in the development of this system and await further information before commenting.*

Key Aspects of the MBE Program Lack Transparency

Recommendation: Amend statute to require solicitation documents to include a brief summary of the factors used to determine the procurement's MBE participation goal, including subcontracting opportunities identified for the project, NAICS codes linked to those opportunities, and a count of available MBEs in those areas. Any automated goal-setting system used to calculate contract goals should be programmed to provide relevant information to the PRG.

DGS OSP Response: *This practice could limit the subcontracting opportunities that a prime contractor may consider when preparing its bid or proposal. We do not want to tell a vendor how to run its business.*

**Appendix B. Major Legislative Changes Affecting the
Minority Business Enterprise Program
2010-2021**

<u>Year</u>	<u>Chapter</u>	<u>Change</u>
2010	229/230	Required that regulations governing the program include provisions that promote and facilitate certification of minority business enterprises (MBE) certified by the U.S. Small Business Administration or a county that uses a certification process that is substantially similar to the process used by the Maryland Department of Transportation (MDOT).
2010	231/232	Required that regulations governing the program include provisions that promote and facilitate the electronic submission of some or all of an application seeking certification as an MBE.
2010	578/579	Required that MDOT complete its review of an application for MBE certification and notify the applicant within 90 days of receiving a complete application that includes all information needed to make a decision. The measures further authorized MDOT to extend only once the notification requirement by not more than 60 days after providing the applicant with a written notice and explanation of the extension.
2010	619	Required that annual reports submitted by each State procurement unit to the Governor's Office of Minority Affairs (GOMA, now the Governor's Office of Small, Minority, and Women Business Affairs (GOSBA)) include (1) the number and names of certified MBEs that participated as prime contractors or as subcontractors on procurement contracts awarded by the unit and (2) a list and description of contracts awarded to each MBE named in the reports.
2011	252/253	Extended the termination date of the program for one year, until July 1, 2012. Maintained the current overall goal of 25% but eliminated the statutory subgoals for women- and African American-owned businesses of 10% and 7%, respectively. Instead, it authorized GOMA, in consultation with MDOT and the Office of the Attorney General, to establish guidelines for each unit to consider while determining whether to set subgoals for individual procurements based on existing categories for minority groups. Repealed the exemption from MBE provisions for MDOT construction contracts valued at \$50,000 or less. Established procedures for granting waivers from MBE contract goals based on good-faith efforts by bidders or offerors.
2011	254	Required that an MBE participation schedule with specified information be included with the submission of a bid or proposal. After submitting a bid or proposal and before contract execution, a bidder or offeror on a State procurement contract must submit a written request to amend the MBE participation schedule submitted with the bid or offer if an MBE listed on the schedule has become or will become unavailable, or is

<u>Year</u>	<u>Chapter</u>	<u>Change</u>
		ineligible to perform the work required by the contract, before a schedule may be amended.
2012	154	Extended the termination date of the program for four years, until July 1, 2016, and required the completion of a new disparity study. It repealed the codified statewide goal of having at least 25% of the total dollar value of each agency's procurement contracts be awarded to MBEs and instead required that a statewide goal be established biennially through the regulatory process under the Administrative Procedure Act. Required State agencies to institute corrective actions when prime contractors do not make good-faith efforts to comply with contract goals. Authorized the assessment of liquidated damages for contractors that fail to comply in good faith with MBE program requirements.
2013	138	Required State procurement units to disaggregate data on MBE procurements for architectural services and for engineering services that they report annually to GOMA, MDOT, and the Joint Committee on Fair Practices and State Personnel Oversight.
2013	200/201	Extended the termination date of the program by one year, until July 1, 2017, and deferred the completion date of a new disparity study. Required the Special Secretary of Minority Affairs, in consultation with the Secretary of Transportation and the Attorney General, to establish guidelines for each procurement unit to consider when determining the appropriate MBE participation goals for a procurement contract.
2013	343/605	Removed not-for-profit entities that promote the interests of physically and mentally disabled individuals from the definition of MBE and exempted contracts entered into on or after July 1, 2015, with them from the calculation of MBE participation rates.
2017	340	Extended the termination date of the program by five years, to July 1, 2022, and required MDOT to complete a new disparity study. Required each MBE serving as a subcontractor on an awarded contract to submit a document to both the prime contractor and the procurement officer – within 10 days of notification of the contract award by the prime contractor – specifying the percentage and type of work that is assigned to the MBE.
2017	438	Established expectations related to offshore wind projects complying with the program; required the 2017 disparity study to be analyzed for its relevance to the type of work likely to be performed by such projects. Clarified the circumstances under which an MBE may be removed from a project for good cause after contract execution. Limited the extent to

<u>Year</u>	<u>Chapter</u>	<u>Change</u>
		which materials provided by a “regular dealer” may be counted toward MBE participation.
2017	633/634	Changed the name of the Governor’s Office of Minority Affairs to the Governor’s Office of Small, Minority, and Women Business Affairs.
2018	481/482	Required that regulations governing the MBE program prohibit a State agency from assessing liquidated damages against contractors on indefinite delivery or indefinite performance contracts.
2019	315/316	Required that regulations governing the MBE program allow for the certification of a business as an MBE if the business has obtained certification under the federal Disadvantaged Business Enterprise Program and meets the eligibility requirements of the State’s MBE program.
2021	322	Allowed a business that is certified as a woman-owned business and as a business owned by a member of an ethnic or racial minority to be counted, for the purpose of achieving goals under the MBE program, as a business owned by both (1) a woman (or women) and (2) a member (or members) of an ethnic or racial minority.
2021	258	Required GOSBA to (1) establish a mentorship program for startup and small MBEs; (2) conduct a feasibility study for a technical assistance program that provides one-on-one assistance to MBEs; (3) provide specified training to nonminority contractors; and (4) establish an annual awards program that recognizes localities that demonstrate excellence in MBE support.

**Appendix C. Major Regulatory Changes Affecting the
Minority Business Enterprise Program
2012-2021**

<u>Effective Year</u>	<u>MD Register Notice of Final Action</u>	<u>MBE Program Regulatory Change</u>
2013	40:9 Md. R. 789	<p>Implemented Chapter 539 of 2012. Repealed a provision that stated that minority business enterprise (MBE) guidelines only apply to construction contracts in excess of \$50,000. Required procurement agencies to use the forms and affidavits developed by the Board of Public Works for certain certification and reporting procedures. Required procurement agencies to consider the practical severability of all contracts and prohibits procurement agencies from bundling contracts for certain purposes. Prohibited procurement agencies from using quotas or project goal-setting processes that rely solely on the State's or any other jurisdiction's overall percentage goal or fail to incorporate an analysis of certain factors. Provided that solicitation documents submitted by a bidder or offeror in connection with its certified MBE participation commitment be made part of the procurement contract and required that all contracts containing certified MBE participation goals contain a liquidated damages provision that applies if the contractor fails to comply in good faith with the provisions of State MBE laws or the pertinent terms of the contract.</p> <p>Required that a request to amend an MBE participation schedule must include an explanation of the reason for inclusion of the unavailable or ineligible firm on the original MBE participation schedule. Prohibited a contractor from terminating or cancelling the contract of a certified MBE listed on the participation schedule without showing good cause why the contract should be terminated, obtaining written consent of the MBE liaison, obtaining approval of the head of the unit, and amending the contract. Also must send a copy of the MBE liaison written consent to the Governor's Office of Minority Affairs.</p> <p>Required the procurement agency to monitor and collect data on contractor compliance with contract MBE participation goals. Also required that when a procurement agency determines that a contractor did not make good faith efforts to comply with contract MBE participation goals, the procurement agency must notify the contractor in writing of its findings and specify what corrective action is required.</p>

<u>Effective Year</u>	<u>MD Register Notice of Final Action</u>	<u>MBE Program Regulatory Change</u>
2013	40:16 Md. R. 1345	Implemented Chapter 154 of 2012. Established that the Special Secretary of Minority Affairs, in consultation with the Secretary of Transportation and the Attorney General, shall establish the overall percentage certified MBE participation goal through regulation on a biennial basis. Provided that each procurement agency must structure its procurement procedures to try to achieve an overall goal of 29% of the unit's total dollar value of all procurement contracts made from certified MBEs and apply the guidelines established by the Special Secretary of Minority Affairs for determining subgoals to be set for certain groups. Repealed a provision limiting the application of the MBE goals to construction contracts over \$50,000.
2014	41:11 Md. R. 605	Allowed a procurement agency to count the portion of the work that the certified MBE prime contractor performs with its own workforce toward fulfilling up to 50% of the MBE participation goal and up to 100% of not more than one of the MBE participation subgoals established for the contract, if the certified MBE prime contractor is listed on the MBE participation schedule and is certified by the certification agency to provide the services, materials, or supplies that it has committed itself to self-perform on the MBE participation schedule.
2014	41:8 Md. R. 473	Technical changes to the annual MBE reporting requirements.
2017	43:26 Md. R. 1449	Amended the standard clause to be included in solicitations containing an MBE subcontract participation goal to include language regarding contract renewal option terms and the overall MBE subcontract participation goal and subgoals established for the procurement. If a contract contains both an MBE goal and a Veteran-owned Small Business Enterprise (VSBE) goal, participation by a contractor or subcontractor that is dually certified as an MBE and VSBE may be counted toward meeting both the MBE and VSBE goals under certain circumstances.

<u>Effective Year</u>	<u>MD Register Notice of Final Action</u>	<u>MBE Program Regulatory Change</u>
2019	46:5 Md. R. 310	<p>Authorized rather than required, an offeror or bidder to make a written request to a procurement officer to amend the MBE participation schedule under certain circumstances and in a certain manner, consistent with § 14-302(a)(10) of the State Finance and Procurement Article.</p> <p>Defined “good cause” for the purposes of the provision governing when a contractor may terminate or cancel the contract of a certified MBE listed on the MBE participation schedule consistent with Chapter 438 of 2017.</p> <p>Added regular dealer provisions to the regulations governing MBE participation consistent with Chapter 438 of 2017.</p>
2019	46:14 Md. R. 623	<p>Added a caveat that a contractor filling out the MBE form which results in an inaccuracy determined to be the result of a minor irregularity does not result in a nonresponse by the contractor. Further, an irregularity resulting from a minor inaccuracy does not disqualify the contract from selection.</p> <p>Required a successful bidder to submit documentation for a waiver if they could not meet the MBE goal.</p>
2019	46:14 Md. R. 623/46:5 Md. R. 310	<p>Changed the assumption that if a successful contract bidder submits a bid without committing to an MBE goal is implied to request a waiver and shall submit a waiver as part of their proposal.</p> <p>Required each MBE serving as a subcontractor on an awarded contract to submit a document to both the prime contractor and the procurement officer – within 10 days of notification of the contract award by the prime contractor – specifying the percentage and type of work that is assigned to the MBE, consistent with Chapter 340 of 2017.</p>
2020	47:13 Md. R. 643	<p>Required that the Department of General Services and the Department of Budget and Management, when delegating procurement authority, must condition delegation on compliance with MBE.</p> <p>Required that a business that has received certification from a federal or county minority business enterprise program that uses a certification process substantially similar to the process established in current regulations be eligible for certification by the Department of Transportation as a State-certified minority business enterprise under certain circumstances.</p>

**Appendix D. Aggregate Minority Business Enterprise
Participation, Based on Contract Awards
Fiscal 2015-2020**

<u>Agency</u>	<u>MBE %</u>	<u>Agency</u>	<u>MBE %</u>	<u>Agency</u>	<u>MBE %</u>
Health	34.66%	Bowie State University	28.57%	State Retirement Agency	43.39%
Housing and Community Development	32.23%	Morgan State University	28.26%	Stadium Authority	29.04%
Transportation (TSO)	29.44%	Coppin State University	23.14%	Public School Construction	28.10%
Motor Vehicle Administration	28.64%	U of MD, Baltimore Campus	22.72%	Environmental Services	25.05%
Public Safety and Correctional Services	24.86%	U of MD, College Park Campus	18.35%	Food Center Authority	20.68%
Aviation Administration	23.60%	Towson University	15.81%	Maryland State Library	19.38%
State Highway Administration	20.42%	U of MD Baltimore County	14.64%	State Board of Elections	17.76%
Environment	19.36%	St, Mary's College of Maryland	11.57%	Comptroller	16.05%
Labor	18.05%	Salisbury State University	10.53%	Military Department	14.30%
General Services	17.82%	University of Baltimore	9.75%	Assessments and Taxation	14.30%
Port Administration	17.08%	Frostburg State University	9.56%	Insurance Administration	11.62%
State Police	17.01%	U of MD, Eastern Shore	9.50%	Public Defender	10.75%
Transit Administration	16.88%	Baltimore City Community College	7.52%	Public Service Commission	9.73%
Transportation Authority	16.51%	School for the Deaf	7.02%	Executive Department	7.70%
Education	10.61%	U of MD Global Campus	5.29%	Treasurer	7.65%
Human Services	8.95%			Public Broadcasting Commission	1.83%
Juvenile Services	8.32%				
Planning	6.29%				
Information Technology	6.29%				
Veterans Affairs	6.22%				
Natural Resources	5.60%				
Agriculture	5.28%				
Commerce	3.91%				
Aging	3.28%				
Budget and Management	2.78%				

Appendix E. Resources for Minority Business Enterprises

State Resources

- Governor's Office of Small, Minority, and Women Business Affairs (GOSBA) – <https://gomdsmallbiz.maryland.gov/>
 - The mission of GOSBA is to connect the small business community to greater economic opportunities in both the public and private sectors, while implementing and monitoring small, minority, women, and veteran procurement programs across 70 State agencies.
- Maryland Department of Transportation (MDOT) – <https://www.mdot.maryland.gov/tso/pages/index.aspx?pageid=90>
 - As the official certification agency for the State, MDOT is responsible for administering the following certifications:
 - Minority Business Enterprise (MBE);
 - Disadvantaged Business Enterprise;
 - Airport Concessions Disadvantaged Business Enterprise; and
 - Small Business Enterprise.
 - The MDOT website includes information about certification programs and a directory of certified firms (<https://mbe.mdot.maryland.gov/directory/>)
- MBE liaisons – <https://gomdsmallbiz.maryland.gov/Pages/MBE-Liaison-Directory.aspx>
 - MBE liaisons are individuals within State agencies
- Department of Commerce – <https://commerce.maryland.gov/fund>
 - The Department of Commerce oversees two financial incentive programs specifically targeted at small, minority, and women-owned businesses:
 - the Small, Minority and Women-Owned Business Account – Video Lottery Terminal Fund (<https://commerce.maryland.gov/fund/programs-for-businesses/vlt>), which makes grants to eligible fund managers to provide investment capital and loans to small, minority, and women-owned businesses in the State, of which at least 50% must be allocated to businesses in the jurisdictions and communities surrounding a video lottery facility; and

- the Maryland Small Business Development Financing Authority, whose mission is to promote the viability and expansion of businesses owned by economically and socially disadvantaged entrepreneurs (<https://commerce.maryland.gov/fund/programs-for-businesses/msbdfa>).
- Department of Housing and Community Development (DHCD) – <https://dhcd.maryland.gov/Business/Pages/SmallBusinesses.aspx>
 - DHCD offers loans and business growth tools to new and expanding small businesses and nonprofit organizations whose efforts help improve and revitalize existing commercial districts and town centers. Core programs include:
 - the Neighborhood BusinessWorks Program, which provides flexible financing to new or expanding small businesses and nonprofit organizations in Sustainable Communities and Priority Funding Areas throughout the State (<https://dhcd.maryland.gov/Business/Pages/NBW.aspx>); and
 - the Microenterprise Loan Program, which provides flexible financing for microenterprise start-ups and expansions within designated Sustainable Communities and Priority Funding Areas throughout the State (<https://dhcd.maryland.gov/Business/Pages/microenterprise.aspx>).
- Maryland Technology Development Corporation (TEDCO)
 - TEDCO is an independent instrumentality of the State that serves as a leading source of funding for early-stage, technology-based businesses.
 - TEDCO's Builder Fund invests in and provides executive support to Maryland-based technology companies run by entrepreneurs who demonstrate economic disadvantage (<https://www.tedcomd.com/funding/builder-fund>).
- Maryland Business Express – <https://businessexpress.maryland.gov/>
 - This State website aggregates information and resources for Maryland businesses.
 - The website includes links to State programs that support small, minority, and women-owned businesses (<https://businessexpress.maryland.gov/grow/minority-and-women-owned>).

Federal Resources

- U.S. Department of Commerce, Minority Business Development Agency (MBDA) – <https://www.mbda.gov/>

- MBDA is the only federal agency solely dedicated to the growth and global competitiveness of minority business enterprises.
- MBDA invests in a national network of MBDA Business Centers, Specialty Centers, and Grantees. Programs are intended to offer customized business development and industry-focused services to provide greater access to capital, contracts, and markets. MBDA centers serving Maryland include:
 - The Baltimore MBDA Business Center – <https://baltimorembdacenter.com/>
 - The Capital Region MBDA Business Center – <http://www.mbdadc.com/>; and
 - The Baltimore MBDA Advanced Manufacturing Center – <https://www.mbda.gov/business-center/baltimore-mbda-advanced-manufacturing-center>
- U.S. Small Business Administration (SBA) – <https://www.sba.gov/business-guide/grow-your-business/minority-owned-businesses>
 - Among other initiatives, SBA works with a resource partner network that includes SCORE business mentors, small business development centers, women’s business centers, and veterans’ business opportunity centers, to provide counseling and training to small business owners.
 - SBA provides several contracting assistance programs to help small businesses win federal contracts. Programs that target minority– and women-owned businesses include:
 - the Small Disadvantaged Business Program;
 - the Women-Owned Small Business Federal Contracting Program;
 - the 8(a) Business Development Program;
 - the 7(j) Management and Technical Assistance Program; and
 - the HUBZone Program.

County MBE Programs

- Anne Arundel County

- Administered by the county's Office of Central Services
- <https://www.aacounty.org/departments/central-services/minority-business/>
- This program is not mandated by county law or executive order
- Baltimore City
 - Administered by the Mayor's Office of Minority and Women-Owned Business Development
 - <https://mwbd.baltimorecity.gov/>
 - Codified under Baltimore City Code, Article 5, Subtitle 28
- Baltimore County
 - Administered by the county's Office of Budget and Finance
 - <https://www.baltimorecountymd.gov/departments/budfin/purchasing/supplierdiversity/minority-women.html>
 - Mandated by County Executive Order 2017-003
- Charles County
 - Administered by the Charles County Economic Development Department
 - <https://www.meetcharlescounty.com/local-minority-business-programs/>
 - Codified under Charles County Code, § 203-7
- Howard County
 - Administered by the County Purchasing Agent
 - <https://www.howardcountymd.gov/procurement-contract-administration/equal-business-opportunity>
 - Codified under Howard County Code, § 4-122 (Equal Business Opportunity Program) and Title 4, Subtitle 6 (Equal Business Opportunity Commission)
- Montgomery County

- Administered by the Office of Procurement
- <https://www.montgomerycountymd.gov/PRO/DBRC/MFD.html>
- Codified under Code of Montgomery County Regulations (COMCOR) 11B.00.01.07 and 11B.04.01.07
- Prince George's County
 - Administered by the Supplier Development and Diversity Division
 - <https://www.princegeorgescountymd.gov/2309/Supplier-Development-Diversity>
 - Codified under Prince George's County Code: Subtitle 10A, Division 6 - Minority Business Opportunities Program; Subtitle 2, Division 34 - Minority Business Opportunities Commission and Prince George's County Charter: Article VI, § 607

Private/Nonprofit Resources

- Calvert County Minority Business Alliance – <https://ccmba.org/>
 - Goal is to establish policies and programs to support not only the business growth of minority businesses in Calvert County, Southern Maryland, and the State of Maryland, but all businesses.
- Capital Region Minority Supplier Development Council – <http://www.crmsdc.org/>
 - The Capital Region Minority Supplier Development Council is one of 24 regional affiliates of the National Minority Supplier Development Council.
 - Mission is to assist corporate members in improving the diversification and innovation of their supply chains by connecting them to well developed, certified minority business enterprises.
- Maryland Black Chamber of Commerce – <https://www.marylandbcc.org/>
 - Mission is to educate, connect, and advocate for black businesses in Maryland by offering networking opportunities, affinity groups, resources and partnerships with organizations which provide training, workshops, coaching and funding assistance.
- Maryland Hispanic Chamber of Commerce – <https://maryland-hispanic-chamber-of-commerce.org/>

- Mission is to promote the establishment, growth, prosperity and retention of Hispanic businesses, and those entities, and persons that support them in the State of Maryland.
- Maryland Minority Contractors Association – <https://mmcainc.org/contractors/>
- Mission is to provide assistance to minority– and women–owned businesses, including reviewing legislation that impacts minority– and women–owned businesses.
- Maryland Washington Minority Companies Association – <https://mwmca.org/home>
- In 2002, Md. Washington Minority Contractors Association, Inc. (MWMCA) originated to advocate for minority and women construction trade contractors. In 2013, MWMCA expanded its scope of work to include all types of companies (trade contractors, suppliers, and service providers) and changed its name to Maryland Washington Minority Companies Association.
- Work includes hosting events to bring recognition and work opportunities to the minority and women business community, providing compliance and workforce development services, lobbying in Congress and in the Maryland General Assembly, assisting with creating policy for public utilities, serving as Exelon/BGE’s consultant to supplier diversity, working with gaming facilities, encouraging joint ventures on projects to help smaller contracting firms gain opportunities, and monitoring major transportation projects.
- Maryland Women’s Business Center – <https://marylandwbc.org/>
- Mission is to empower small businesses and women entrepreneurs to launch and grow in Maryland’s Capital Region.
- Morgan State University’s Entrepreneurial Development and Assistance Center – <http://www.edacmorgan.com/>
- Mission is to connect budding and existing entrepreneurs to resources for venture management and growth.
- Southern Maryland Minority Chamber of Commerce – <https://www.smmcoc.org/>
- Focuses on policy and legislation that has an impact on small businesses by lobbying and developing and submitting proposed legislation.

- Facebook Groups:
 - Del Marva Minority Business Coalition
 - Mission is to increase the visibility, sustainability, and cohesion of minority-owned and -operated businesses in Dorchester County and Maryland's Eastern Shore.
 - Black Small Business Coalition
 - Mission is to use community and business engagement to educate residents about social, economic, and racial inclusion and work to fight injustices and advocate solutions through collaboration with the community and government officials.
 - DMV Black Owned Businesses
 - Mission is to be a place where black owned business owners can promote their products and services and a place where consumers can support and buy from a black business owner.
- Private groups not focused on MBEs:
 - Maryland Small Business Development Center Southern Region – <https://www.marylandsbdc.org/locations/southern-region>
 - Provides training and business consultation for new and existing businesses

Appendix F. Preference Programs in Other States

<u>State</u>	<u>Administering Agency</u>	<u>Title of Program</u>	<u>Eligible Businesses</u>	<u>Procurement Goals</u>	<u>Program Notes</u>
Maryland	Governor's Office of Small, Minority and Women Business Affairs	Minority Business Enterprise Program	MBE, WBE	Overall – 29%	Subgoals apply under specified circumstances for procurements with an estimated award value of \$200,000 or more.
Alabama	Alabama Department of Economic and Community Affairs, Office of Minority Business Enterprise		MBE	N/A	The agency provides certification only.
Arkansas	Arkansas Inc., Arkansas Economic Development Commission	Minority and Women-owned Business Enterprise	MBE, SDVBE, WBE	Overall – 15% – Total amount expended in state-funded and state-directed public construction programs and in the purchase of goods and services for the state each fiscal year is paid to minority businesses. MBE – 10% Service-disabled veteran-owned – 2% Other minority business enterprises – 8% Women-owned business enterprises – 5%	
California	California Public Utilities Commission (CPUC)	Utility Supplier Diversity Program	MBE, LGBT, DVBE	Overall – 21.5% (The CPUC encourages investor-owned utilities to purchase 21.5% of its goods and services from diverse firms.) Minority-owned–15% Women-owned– 5% Disabled veteran-owned– 1.5% Includes LGBT-owned firms	Proposition 209 of 1996 successfully amended the state constitution to ban race-based preference programs in the state.

<u>State</u>	<u>Administering Agency</u>	<u>Title of Program</u>	<u>Eligible Businesses</u>	<u>Procurement Goals</u>	<u>Program Notes</u>
Colorado	Colorado Office of Economic Development and International Trade, Minority Business Office of Colorado		MBE	None	
Connecticut	Department of Administrative Services	Supplier Diversity Program	MBE, SBE	25% (set-aside)	
Delaware	Office of Management and Budget, Office of Supplier Diversity		MBE, WBE, VBE, SDVBE, DOBE	None	Does not have a preference program or set-asides for diverse or small vendors. However, it does report annual spending to small and diverse vendors.

<u>State</u>	<u>Administering Agency</u>	<u>Title of Program</u>	<u>Eligible Businesses</u>	<u>Procurement Goals</u>	<u>Program Notes</u>
Florida	Department of Management Services, Office of Supplier Diversity (OSD)		MBE, WBE, VBE	Construction – 21% Black Americans – 4% Hispanic–Americans – 6% American Women – 11% Architectural and Engineering – 25% Hispanic–Americans – 9% Asian–Americans – 1% American Women – 15% Commodities – 24% Black Americans – 2% Hispanic–Americans – 4% Asian–Americans – 0.5% Native Americans – 0.5% American Women – 17% Contractual Services – 50.5% Black Americans – 6% Hispanic–Americans – 7% Asian–Americans – 1% Native Americans – 0.5% American Women – 36%	“Each year, state agencies complete their Business Participation Plans and submit them to OSD for posting. These plans outline the activities that the agency strives to implement to promote an increased use of certified woman–, veteran– and minority-owned Florida–based small businesses in their procurement activities for the fiscal year.”
Georgia	Department of Administrative Services/Department of Transportation	Minority Business Enterprise Certification	MBE	None.	The agency provides certification only.
Illinois	Illinois Department of Central Management Services	Business Enterprise Program	MBE, WBE, DOBE, VBE	Overall – 20% FBE – 7% MBE – 11% PBE – 2%	

<u>State</u>	<u>Administering Agency</u>	<u>Title of Program</u>	<u>Eligible Businesses</u>	<u>Procurement Goals</u>	<u>Program Notes</u>
Indiana	Department of Administration, Division of Supplier Diversity		MBE, WBE, VBE	Construction Minority – 7% Women – 5% Veteran – 3% Goods and Services Minority – 8% Women – 13% Veteran – 3% Professional Services Minority – 8% Women – 11% Veteran – 3% Weighted Average Goal Minority – 8% Women – 10% Veteran – 3%	
Iowa	Iowa Department of Administrative Services	Targeted Small Business Program	MBE, SDVBE, WBE	State agencies – 40% Community colleges, area education agencies, school districts –10% Goods and services include construction but exclude utility services.	State agencies develop annual TSB spending projections and quarterly performance reports toward the projected goals. State law requires procurement goals to be (1) stated in terms of a dollar amount of certified purchases and (2) exceed the procurement levels from certified TSBs during the previous fiscal year.

<u>State</u>	<u>Administering Agency</u>	<u>Title of Program</u>	<u>Eligible Businesses</u>	<u>Procurement Goals</u>	<u>Program Notes</u>
					<p>The benefits of becoming a Certified Targeted Small Business include:</p> <ul style="list-style-type: none"> – Access low-interest business loans of up to \$50,000. – Access to the 48-hour TSB Procurement website, which features all state agencies' buying needs 48 hours BEFORE the public sees them. – Exemption from the competitive bidding process for purchases up to \$25,000
Kansas	Kansas Department of Commerce, Office of Minority and Women Business Development		MBE, WBE	None	The agency provides certification only.
Kentucky	Finance and Administration Cabinet, Office of EEO and Contract Compliance	Minority and Women Business Certification Program	MWBE	N/A	State law authorizes set-asides for small and minority-owned businesses, but there are no statewide goals for the set-asides.

<u>State</u>	<u>Administering Agency</u>	<u>Title of Program</u>	<u>Eligible Businesses</u>	<u>Procurement Goals</u>	<u>Program Notes</u>
Massachusetts	Executive office for Administration and Finance, Supplier Diversity Office	Supplier Diversity Program	MBE, WBE, SDVBE, LGBT, DOBE	Discretionary spending only MBE – 8% WBE – 14% VBE/SDVBE – 3% DOBE/SDVBE – No benchmark LGBTBE – No benchmark	Nondiscretionary expenditures include pension and insurance-related expenditures; awards, grants and subsidies; entitlement programs; and loans and special payments.
Minnesota	Minnesota Department of Administration, Office of State Procurement	Targeted Group/Economically Disadvantaged/Veteran-owned (TG/ED/VO) Small Business Procurement Program	SBE, Economically Disadvantaged	None	
Mississippi	Mississippi Development Authority: Minority and Small Business Development Division	Mississippi Minority and Small Businesses	MBE, WBE, SBE	None	
Missouri	Missouri Office of Equal Opportunity	Supplier Diversity Program	M/WBE	MBEs – 10% WBEs – 5%	
New York	New York State Empire State Development, Division of Minority and Women-owned Business Development		MWBE, DVB	MWBE – 30% DVBE – 6%	

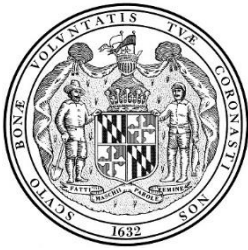
<u>State</u>	<u>Administering Agency</u>	<u>Title of Program</u>	<u>Eligible Businesses</u>	<u>Procurement Goals</u>	<u>Program Notes</u>
North Carolina	Department of Administration, Office for Historically Underutilized Businesses (HUB)	HUB	MBE, SBE	10%	With some exceptions the 10% goal only applies to building projects costing \$300,000 or more.
Ohio	Department of Development, Equal Opportunity Division	Minority Business Enterprise Program	MBE	Overall – 15%	
Pennsylvania	Department of General Services, Bureau of Diversity, Inclusion and Small Business Opportunities		MBE, WBE, VBE, SDVBE, LGBT, and DOBE	Overall – 26.3% VBE – 4.6% Small Business Reserve Program – 15%	
Rhode Island	Department of Administration, Office of Diversity, Equity & Opportunity		MBE, WBE	Overall – 10%	
South Carolina	Department of Administration, South Carolina Division of Small and Minority Business Contracting and Certification		MBE, WBE	Overall – 10%	

<u>State</u>	<u>Administering Agency</u>	<u>Title of Program</u>	<u>Eligible Businesses</u>	<u>Procurement Goals</u>	<u>Program Notes</u>
Tennessee	Department of General Services, Governor's Office of Diversity Business Enterprise (GoDBE)	GoDBE Program	MBE, WBE, SDVBE, SBE	Each agency has a category and state agency goal	GoDBE uses spend history from each State agency to establish customized certified business transaction goals for the following fiscal year. GoDBE gives each agency a certified business transaction goal by category: MBE, WBE, DSBE, SDVBE and SBE.
Texas	Department of General Services	Historically Underutilized Businesses Program	MBE, WBE, SDVBE	Heavy construction other than building contracts – 11.2% All building construction, including general contractors and operative builders' contracts – 21.1% All special trade construction contracts – 32.9% Professional services contracts – 23.7% All other services contracts – 26.0% Commodities contracts – 21.1%	
Virginia	Department of Small Business and Supplier Diversity (https://www.sbsd.virginia.gov/)		SBE, WBE, MBE	SWaM – 42% (Discretionary spending)	

<u>State</u>	<u>Administering Agency</u>	<u>Title of Program</u>	<u>Eligible Businesses</u>	<u>Procurement Goals</u>	<u>Program Notes</u>
Washington	Office of Minority and Women's Business Enterprises (MBE, WBE, MWBE	Each agency has a state agency goal	Initiative 200, passed by voters in 1998, prohibits discrimination against, or the granting of preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.
Wisconsin	Department of Administration, Division of Enterprise Operations	Wisconsin Supplier Diversity Program	MBE, DVB, WBE	5% (MBE) 1% (DVB)	Certified MBEs and DVBs may receive a permissive 5% preference when bidding on state contracts.

DOBE: Disabled Person-owned Business Enterprise
 DVB: Disabled Veteran-owned Business
 LGBT: Lesbian, Gay, Bisexual, Transgender-owned
 MBE: Minority Business Enterprise
 MWBE: Minority/Woman-owned Business
 SBE: Small Business Enterprise
 SDVBE: Service-disabled Veteran-owned Enterprise
 VBE: Veteran-owned Business Enterprise
 WBE: Women-owned Business Enterprise

Appendix G. Evaluation Request Letter



DEPARTMENT OF LEGISLATIVE SERVICES
OFFICE OF THE EXECUTIVE DIRECTOR
MARYLAND GENERAL ASSEMBLY

Victoria L. Gruber
Executive Director

June 3, 2021

Michael Powell, Director
Office of Program Evaluation and Government Accountability
Department of Legislative Services
90 State Circle
Annapolis, Maryland 21401

Dear Mr. Powell:

Consistent with § 2-1234 of the State Government Article, I am directing that the Office of Program Evaluation and Government Accountability conduct a performance evaluation of the Minority Business Enterprise Program, which is overseen and administered by the Governor's Office of Small, Minority, and Women Business Affairs.

Thank you for your attention to this matter, and please let me know if you have any questions.

Sincerely,

Victoria L. Gruber
Executive Director

VLG/mpd

cc: Senate President Bill Ferguson
House Speaker Adrienne A. Jones
Senator Clarence K. Lam
Delegate Carol L. Krimm
Ms. Elizabeth Allison