
**Follow-up to the Department of Legislative
Services Evaluation of the Minority Business
Enterprise Program**

**Department of Legislative Services
Office of Policy Analysis
Annapolis, Maryland**

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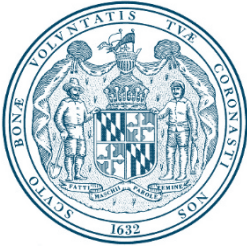
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DEPARTMENT OF LEGISLATIVE SERVICES
OFFICE OF POLICY ANALYSIS
MARYLAND GENERAL ASSEMBLY

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December 2024

The Honorable Guy Guzzone, Chair, Budget and Taxation Committee
The Honorable Josaline A. Peña-Melnyk, Chair, Health and Government Operations Committee
Members, Budget and Taxation Committee
Members, Health and Government Operations Committee

Dear Chair Guzzone, Chair Peña-Melnyk, and Members:

In 2021, the Department of Legislative Services' (DLS) Office of Program Evaluation and Government Accountability (OPEGA) conducted a performance evaluation of the State's Minority Business Enterprise (MBE) program. Chapters 155 and 156 of 2022 implemented many of the statutory recommendations in the DLS report. The legislation also required DLS to conduct a follow-up review on the status of the recommendations included in DLS's evaluation of the MBE program, including an assessment of (1) the effectiveness of changes implemented in response to the recommendations; (2) for any recommendations that were not implemented or only partially implemented, whether DLS reaffirms its 2021 recommendation; and (3) any updated findings and recommendations related to the MBE Program. The required follow-up report is attached.

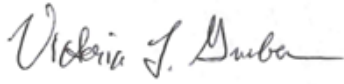
While conducting the follow-up study, DLS reviewed Chapters 155 and 156 and other legislation passed during the 2022 through 2024 sessions pertaining to findings and recommendations in the OPEGA report. The study team also interviewed senior staff from the Governor's Office of Small, Minority, and Women Business Affairs (GOSBA); the Maryland Department of Transportation (MDOT); the Department of General Services (DGS); and the Board of Public Works (BPW) and reviewed relevant reports issued by these entities. 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 study team also interviewed senior staff from the Office of the Attorney General (OAG).

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

Respectfully submitted,



Victoria L. Gruber
Executive Director



Ryan Bishop
Director

VLG:RB/bao

Follow-up to the Department of Legislative Services Evaluation of the Minority Business Enterprise Program

In 2021, the Department of Legislative Services' (DLS) Office of Program Evaluation and Government Accountability (OPEGA) conducted a performance evaluation of the State's Minority Business Enterprise (MBE) program. In its evaluation, OPEGA (1) analyzed MBE payment data from more than 3,000 completed State contracts as of June 2020; (2) received survey responses from more than 2,700 MBE and non-MBE vendors; (3) conducted multiple focus groups with MBE owners; and (4) reviewed relevant federal and State laws, reports, legal decisions, and programs. The report included recommendations for improving the efficiency and effectiveness of the MBE program through a combination of statutory and administrative changes. [A report](#) on the evaluation and findings was issued in January 2022.

Chapters 155 and 156 of 2022 implemented many of the statutory recommendations in the DLS report. The legislation also required DLS to conduct a follow-up review on the status of the recommendations included in DLS's evaluation of the MBE program, including an assessment of (1) the effectiveness of changes implemented in response to the recommendations; (2) for any recommendations that were not implemented or only partially implemented, whether DLS reaffirms its 2021 recommendation; and (3) any updated findings and recommendations related to the MBE program.

All State procurement units must adhere to MBE program requirements, and four agencies generally administer and oversee the program: 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). Their respective roles are described in detail in the evaluation report. In assessing the status of the implementation of prior recommendations, DLS met with individuals responsible for administering and overseeing procurement requirements at each of the four agencies. DLS also met with the Office of Attorney General (OAG) to discuss various legal standards for implementing the State's MBE utilization goals. Chapters 137 and 138 of 2023 extended the deadline for the MBE program's disparity study (conducted by MDOT) to September 30, 2024. As of the date of this report's publication, the mandated disparity study has not been published.

GOSBA, MDOT, DGS, BPW, and OAG were all provided with an advance copy of this report, and they were invited to provide factual corrections and/or a formal written response. OAG, GOSBA, and DGS either provided informal feedback or indicated that they had no comments, and one correction was made in response to the feedback. None of the agencies elected to provide a formal written response.

2022 Report Recommendations

The 2022 report made 19 recommendations regarding the State's MBE program. The recommendations covered five main policy areas addressing contractor accountability, support for the growth of minority- and women-owned businesses, limited State resources to address contract disputes, program transparency, and program outreach efforts. A number of the recommendations were implemented or partially implemented under Chapters 155 and 156. Other recommendations were covered in legislation passed in the 2023 and 2024 sessions. Some of the recommendations did not require legislation to implement. A number of the enacted recommendations are still being implemented or are too recent to have generated meaningful data to analyze their impact.

Recommendations Enacted Under Chapters 155 and 156

In response to the report, the General Assembly enacted statutory changes under Chapters 155 and 156 that address some of the report's recommendations. Specifically, Chapters 155 and 156:

- establish the position of MBE Ombudsman in GOSBA to assist procurement officers to (1) resolve disputes between MBEs and prime contractors; (2) serve as a resource to MBE liaisons, procurement officers, prime contractors, and MBEs; and (3) conduct trainings for State procurement officers;
- 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 under the Small Business Reserve (SBR) program;
- require GOSBA to adopt by regulation criteria to determine that a prime contractor, in the absence of mitigating factors, has persistently failed to meet MBE participation goals on their contracts and to refer prime contractors identified under the criteria to OAG for debarment for up to three years under procedures specified in current law;
- require each State agency to report annually to GOSBA the results of each compliance assessment required to be conducted for each contract completed that year, including the total dollar value of payments under the contract and the total dollar value of payments to each subcontractor. GOSBA must then summarize the results of the assessments in its annual report;
- require agencies to annually report to GOSBA their contract awards and payments by industry type, and, if applicable, GOSBA must annually summarize data reported by agencies by industry type;

- require each solicitation for bids or proposals that includes an expected degree of MBE participation to include a summary of the factors used to determine the MBE participation goal, including subcontracting opportunities identified for the project, any applicable industry codes linked to those opportunities, and the number of certified MBEs identified for those opportunities;
- expand the State's prompt payment requirements to all contracts instead of just construction contracts;
- require GOSBA to study the use of liquidated damages to enforce the requirements of the MBE program; and
- allow a business that qualifies as a small business under State law to register to participate in the SBR program without the need to file any additional paperwork.

Recommendations Addressed in Subsequent Legislation

The recommendation in the report to repeal the use of liquidated damages when contractors fail to comply in good faith with the MBE program was not included in Chapters 155 and 156. Instead, Chapters 155 and 156 require GOSBA to study the use of liquidated damages by procurement officers in enforcing compliance with MBE program requirements. Additionally, Chapter 206 of 2023 required BPW to publish a model policy concerning the inclusion and use of liquidated damages provisions in procurement contracts by January 1, 2024. Chapter 206 further required each unit of State government, including a unit otherwise exempt from State procurement law, to adopt a written policy that is substantially similar to the model policy by July 1, 2024. Each procurement unit must also obtain specified approval related to decisions either not to include liquidated damages provisions in contracts or not to pursue damages in the event of a breach of contract.

Chapters 580 and 581 of 2024 require the Office of the Comptroller to develop and maintain on BPW's website a procurement transparency dashboard that includes information regarding State procurement preference programs, including information on the MBE program.

Chapters 582 and 583 of 2024 raise the goal from 15% to 20% for the percentage of the total dollar value of contract awards made to small businesses under the SBR program. The legislation also allows all contract awards made to small businesses to count toward achievement of the goal, not just those designated as SBR contracts. Finally, MDOT must, in consultation with GOSBA, develop an outreach program to increase the participation of small businesses in the SBR program that are owned by economically disadvantaged individuals (*i.e.*, businesses that could be eligible for MBE certification).

Nonstatutory Recommendations

The 2022 report also made the following nonstatutory recommendations:

- agencies should, when practical, give due consideration to breaking up large contracts into smaller components that can be set aside for small businesses;
- MDOT’s Office of Minority Business Enterprise should consider adopting additional MBE graduation criteria to facilitate graduation of established firms;
- 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;
- agencies should consider piloting a requirement or preference for joint ventures for large contracts;
- the State should prioritize a full upgrade to its Financial Management Information System (FMIS), which can enhance MBE program compliance and accountability;
- MDOT should work with DGS and the Department of Information Technology (DoIT) to complete the development of its contract goal-setting system for use by other agencies;
- MDOT should upgrade the search function for the MBE database to allow users to narrow their search using keyword searches;
- 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; and
- 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.

Implementation Progress

MBE Ombudsman

GOSBA filled the position of MBE Ombudsman in January 2024. As the ombudsman has held the position for less than one year, it is too early to assess the office’s progress and effectiveness. Anecdotally, the agency staff interviewed for this report expressed general satisfaction with the services it is providing.

Accountability

Chapters 155 and 156 require GOSBA to adopt criteria in regulations to determine whether a prime contractor has persistently failed to meet contract goals for MBE participation. Although the recommendation was for GOSBA to publish a list of prime contractors identified under the criteria, the legislation instead required GOSBA to refer identified contractors to OAG for possible debarment for up to three years. GOSBA notes that regulations are still being developed in collaboration with stakeholders, and further advises that any such criteria must be flexible to comply with statutory and Constitutional requirements.

Chapters 213 and 214 of 2023 address the issue of accountability in a different manner. They require GOSBA to develop a scorecard to evaluate State agencies on their performance toward meeting the State's MBE participation goal and the veteran-owned small business enterprise (VSBE) goal. The scorecard must include a grading scale developed by GOSBA as a weighted system that includes each agency's contribution toward meeting each of the two participation goals. GOSBA has noted challenges implementing Chapters 213 and 214, specifically with developing scorecard metrics for a rating scale pertaining to agency contributions to statewide goals that is consistent with constitutional requirements.

Agencies reported the results of their compliance assessments to GOSBA for fiscal 2023; GOSBA included an exhibit summarizing the results in its fiscal 2023 annual report. Consistent with the findings of the DLS evaluation, the assessments showed that approximately 50% of prime contractors met their MBE contract goals.

Liquidated Damages

In interviews conducted for this report, BPW staff noted that existing law and regulation require all contracts containing certified MBE participation goals to contain a liquidated damages provision that applies if the contractor fails to comply in good faith with the provisions of the contract, including the requirements of the MBE program. As was also noted in the original evaluation, BPW staff added that agencies have been reluctant to pursue liquidated damages out of concern for the future of relationships with certain contractors. However, staff at DGS, MDOT, and GOSBA also noted that the presence of a liquidated damages clause can motivate vendors to address and resolve contract compliance issues before more serious remedies like liquidated damages are utilized. For this reason, the recommendation to repeal the liquidated damages provision in statute was not included in Chapters 155 and 156.

According to BPW staff, the model policy established in accordance with Chapter 206 has been well received by State agencies who are in the process of incorporating the provisions relevant to their procurement operations. However, it is too early to gauge whether it has had a measurable effect on the use of liquidated damages to hold vendors accountable for contract compliance.

SBR Codification

As noted above, Chapters 155 and 156 codified the requirements of Executive Order 01.01.2021.01, consistent with the recommendation in the DLS evaluation. BPW has noted concerns that the growth of the SBR program may be causing an increase in single-bid procurement awards, as the program limits bids or proposals for designated procurements only to small businesses. GOSBA noted that as of September 2024, there were 5,257 vendors registered as small businesses in *eMaryland Marketplace Advantage* (eMMA), an increase of 1,000 since January 2024. GOSBA indicates that more than one-quarter of all procurements in eMMA are now coded as SBR.

The DLS evaluation also recommended that the General Assembly, in consultation with GOSBA and other stakeholders, study the advantages and disadvantages of merging the MBE program with the SBR program. Due to the incompatibility of programmatic configuration and constitutional constraints, DLS, in consultation with OAG and GOSBA, has determined that merging the MBE program with the SBR program is not advisable at this time.

Agency staff interviewed for this report also noted that the self-certification process for participation in SBR may enable businesses that could qualify for MBE certification (but have not done so) to participate in State procurements without engaging in the more rigorous MBE certification process.

DLS continues to recommend that, when practical, agencies consider 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.

DLS recommends continued monitoring of SBR designation of contracts to determine the adequacy of the \$500,000 contract value threshold. If fewer contracts become available under the value threshold, the General Assembly could consider increasing the threshold, indexing the threshold to inflation, or a combination of both.

MBE Outreach

GOSBA conducts in-person and virtual forums for MBE vendors to network and gather information about the program, including twice-monthly webinars. The office reports that nearly 240 people attended an in-person “match making” event in August 2024, and GOSBA events had attracted over 11,000 participants in the first nine months of 2024. The ombudsman will host a virtual vendor training in December 2024. GOSBA hosts events at the Maryland casinos called “Doing Business With the Casinos” and conducts joint events, including one with the Judiciary and a “Governor’s Event” in collaboration with multiple State agencies in Howard County and Baltimore City in late 2024.

MDOT's Office of Small and Minority Business Policy (OSMBP) regularly attends GOSBA's Ready, Set, GROW events to provide information to attendees regarding certification and potential upcoming procurement information. MDOT notes that these all-day, in-person events provide firms opportunities to network. Likewise, GOSBA regularly attends OSMBP's monthly application assistance workshops to provide information on its SBR, VSBE, and other resources and training programs for registrants seeking certification.

MDOT, in consultation with GOSBA, is required to provide its initial report on the outreach efforts to small businesses owned by economically disadvantaged individuals by December 31, 2024.

DLS reaffirms its recommendations that agencies consider piloting joint ventures for large contracts and that MDOT consider additional criteria for graduation from the MBE program. Both of these recommendations could facilitate greater participation in State procurement for MBEs, particularly new MBEs seeking to establish themselves.

Transparency and Goal Setting

The due date for the mandated disparity study has been delayed at least twice by statute. Moreover, as noted above, as of the publication of this report, the September 30, 2024 due date has not been met. As a result, GOSBA has not revisited the MBE goals in place at the time of the original evaluation. Thus, DLS cannot make any determination or assessment regarding efforts to enhance the transparency of the MBE goal-setting process, as recommended by the original evaluation.

Technology and Personnel Needs

Agencies consistently noted that, given the importance of State procurement, more staff and better technology can facilitate enhanced monitoring of vendor performance. In particular, GOSBA advised that all State agencies need additional staffing devoted to monitoring all aspects of contract compliance, including MBE compliance. DGS employs 45 to 60 procurement officers, but only 5 compliance officers. DGS reports that the number of contracts has increased considerably as a result of the 2017 reorganization of State procurement enacted by Chapter 590, which transferred procurement control authority from the Department of Budget and Management, the Department of Public Safety and Correctional Services, and DoIT to DGS. According to DGS, each procurement officer is responsible for at least 40 procurements, from task orders to secondary competitions. DGS notes that it averages 40 items on a typical BPW meeting agenda, compared with fewer than 10 items from the University System of Maryland (USM) and other units not under DGS purview. GOSBA itself cites the need for 5 additional staff to support the newly created ombudsman.

MDOT also indicated concerns about staffing levels impacting the efficiency of MBE certification. As the State's certification agency, MDOT also certifies businesses for the federal

Disadvantaged Business Enterprise program and has raised concerns that changes in federal certification timelines will put additional stress on its certification functions.

The agency staff interviewed for this report also repeatedly cited challenges with FMIS, the integrated database system that supports individual agency and statewide purchasing and accounting operations. All Executive Branch agencies, except USM and MDOT, use FMIS's purchasing and accounting components. Because of unique requirements, USM and the Judiciary process procurement, disbursement, and financial information on in-house computer systems, while MDOT operates its own customized version of FMIS. Efforts have begun to modernize FMIS, which dates back to the 1990s, but will likely take several years to complete. Chapters 22 and 23 of 2023 require specified State agencies, in consultation with the Modernize Maryland Oversight Commission, to generally oversee the transformation of FMIS into the 21st Century Financial Systems Enterprise. DGS advises that the Office of the Comptroller, which manages FMIS, is on the verge of hiring a program manager to oversee the procurement of a new financial management system.

DGS and DoIT are currently assessing the latest version of eMMA to determine what, if any, additional enhancements may be needed to move the State closer to a fully operational procure-to-pay system. Together with a modernized FMIS, an upgraded eMMA system would further facilitate monitoring of contract compliance, including MBE compliance.

Recommendation

Based on feedback from agency staff interviewed for this report, the State needs to significantly enhance its capacity to monitor vendor compliance in all aspects of contract management, not just compliance with MBE goals. The threat of liquidated damages and debarment may provide incentives for vendors to comply with contract requirements, but those incentives are only effective if those consequences are applied consistently, and all indications are that they are not or will not. Moreover, compliance issues, including compliance with MBE contract goals, need to be identified during contract performance, not at the conclusion of the contract. Unfortunately, the State lacks the personnel and technological tools necessary to adequately identify and remedy contract compliance issues in real time, often resulting in substandard contract performance (including failure to meet MBE contract goals).

DLS recommends that the General Assembly request from the Administration, through the budget process, a detailed plan for improving contract management, including compliance with MBE requirements. The plan should incorporate additions or changes to agency staffing and technology needed to effectively manage the current volume of State contracts. Specifically, the plan should provide:

- **a detailed list of additional staff needed, by agency; and**

- **specific enhancements to FMIS and eMMA that would facilitate improved contract management.**