

Department of Legislative Services
Maryland General Assembly
2005 Session

FISCAL AND POLICY NOTE

House Bill 919 (Delegate Branch, *et al.*)
Health and Government Operations

Procurement - Commercial Nondiscrimination Policy

This bill establishes a commercial nondiscrimination policy that prohibits the State from entering into a procurement contract with a business entity that has discriminated against subcontractors, suppliers, vendors, or commercial customers on the basis of race, age, sex, color, creed, disability, or national origin. The bill also establishes a process to adjudicate findings of discrimination, as well as penalty provisions for violations of the commercial nondiscrimination policy. The bill specifies certain clauses that must be included in certain State contracts relating to nondiscrimination.

The bill takes effect July 1, 2005.

Fiscal Summary

State Effect: The requirements of the bill could be handled with existing budgeted resources of the Office of Minority Affairs (OMA). Minimal increase in general fund revenues for any monetary sanctions issued under the bill.

Local Effect: None.

Small Business Effect: Meaningful.

Analysis

Bill Summary: An individual or business entity may file a complaint with the Special Secretary for the Governor's Office of Minority Affairs for discriminatory actions within the preceding three years by a business entity, including subcontractors. OMA is charged with investigating any such complaints. While investigating complaints, OMA may

consider evidence showing: an intent to discriminate; a pattern or practice of discrimination; any actions taken by the accused entity to remedy the alleged discrimination; and prior business dealing with persons of the same protected class as the victim, sufficient to show that the accused entity has not discriminated against the class of the victim in the overall context of its business. After OMA issues a finding, the Special Secretary may issue sanctions or remedies.

A business entity may submit any findings by the Special Secretary to the Office of Administrative Hearings (OAH) for a contested case hearing. OAH must assign a presiding officer to conduct a hearing. After the presiding officer completes the hearing, the individual may affirm the initial findings, make new recommendations, or refer the case back to the Special Secretary for further review. The decision of the presiding officer is subject to judicial review, but may be appealed no further than the circuit court.

Contracts for economic development projects must include a clause whereby a business warrants that it will comply with the State's commercial nondiscrimination policy. All requests for bids or proposals for State contracts must include a certification by the bidder that it has not engaged in discrimination in bidding on the contract. Violation of the commercial nondiscrimination policy is grounds for debarment from State procurement participation.

Current Law: There is no existing statute addressing discrimination by a contractor or subcontractor in a State procurement contract. State law provides that a person may be debarred from entering into a contract with the State on several grounds, including conviction for a variety of specified offenses, an admission in writing or under oath of an act that constitutes grounds for conviction of certain offenses, being a successor, assignee, subsidiary, or affiliate of a debarred person, or operating in a manner designed to evade or defeat the purpose of the State Finance and Procurement Article. A person may also be debarred from entering into a contract with the State for any cause the Board of Public Works determines to be so serious as to affect the integrity of the procurement process.

In the landmark U. S. Supreme Court case, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), the court found that state and local minority business contract set-aside programs are permissible devices, but must be evaluated under the strict-scrutiny standard. The analysis required a program to be narrowly tailored to meet a compelling governmental interest. The court reiterated the same strict-scrutiny standard in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) for federal contract set-asides based on race.

Background: The Minority Business Enterprise (MBE) program aims for 25% of all State procurement dollars to go to certified MBEs, including a goal of 7% to African-

American owned businesses and 10% to women-owned businesses. OMA has published statistics pertaining to MBE participation levels in State procurement spending. **Exhibit 1** shows participation levels for fiscal 1998 through 2003, the most recent data available.

Exhibit 1
MBE Participation Levels in Procurement Spending

<u>FY</u>	<u>Total State Procurement Spending</u>	<u>Total Minority Business Participation</u>	<u>Total Minority Business Participation</u>	<u>African-American-owned Business Participation</u>	<u>Women-owned Business Participation</u>
1998	\$2,813,739,071	\$570,556,854	20.28%	3.60%	3.51%
1999	3,398,761,724	686,848,909	20.21%	5.52%	3.96%
2000	3,131,160,829	461,610,516	14.74%	Not Available	Not Available
2001	4,350,069,637	833,072,071	19.15%	Not Available	Not Available
2002	4,263,166,146	704,186,039	16.52%	4.50%	5.20%
2003	3,690,826,714	576,863,620	15.63%	5.36%	4.95%

Source: Governor's Office of Minority Affairs, Department of Legislative Services

State Fiscal Effect: The City of Charlotte, North Carolina has implemented a commercial nondiscrimination policy similar to the policy proposed in the bill. The city noted at the time of its program implementation in 2002, that cities with similar policies have not experienced a great number of claims, and the claims have been found to have but a nominal impact on staffing.

For preliminary investigations that do not proceed to hearing/arbitration, cost in staff resources for the City of Charlotte was estimated to be under \$5,000 per investigation. For complaints that proceed to hearing/arbitration, the cost in staff resources was estimated to be within a range of \$10,000 and \$20,000 per complaint. The increased cost is due primarily to higher legal expenses.

While the number of complaints that will be filed with OMA is not known at this time, it is anticipated that OMA can handle the requirements of the bill with existing resources. It is also anticipated that OAH could handle with existing resources any cases that are appealed past the Special Secretary for additional administrative adjudicatory action. However, if a significant number of complaints are filed with OMA, State expenditures would increase accordingly.

Small Business Effect: Meaningful impact on a small business brought up on charges of violating the commercial nondiscrimination policy. However, small businesses that have

been the recipient of discrimination could experience increased economic opportunity by the weakening of discriminatory practices and patterns by other business entities.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Department of General Services, Board of Public Works, Governor's Office, University System of Maryland, Maryland Department of Transportation, Department of Budget and Management, Department of Legislative Services

Fiscal Note History: First Reader - March 7, 2005
mp/hlb

Analysis by: Martin L. Levine

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