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May 7, 2015

The Honorable Lawrence J. Hogan, Jr.
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401

RE: House Bill 634, "Prince George's County Board of Education – Authority to Establish a Certified County-Based Business Participation Program"

Dear Governor Hogan:

We have reviewed House Bill 634, "Prince George's County Board of Education – Authority to Establish a Certified County-Based Business Participation Program" for constitutionality and legal sufficiency. While the bill may be signed into law, a severable portion thereof may not be given effect because it is not reflected in the title. As is discussed below, if the title is cured, allowing the implementation of that portion of the bill, certain requirements must be met. It is our view that steps toward meeting these requirements may be taken before the title is cured, so long as the program itself is not put in place.

As introduced, House Bill 634 required the Superintendent of the Prince George's County schools in consultation with the County Board of Education to establish and implement a Certified County-Based Business Participation Program to be used in county board procurement. The bill has been amended to make the program discretionary rather than mandatory and to grant the authorization to the Board of Education in consultation with the Superintendent, rather than the other way around. The amendments also allow the program goals to include minimum goals and incentives for maximizing certified county-based minority business participation. While the first two of these changes are reflected in amendments to the title of the bill, the authority to create race- and gender-based goals and requirements is not.

Article III, § 29 of the Maryland Constitution provides that "every Law enacted by the General Assembly shall embrace but one subject, and that shall be described in its title." This requirement is intended to ensure that the title will inform the members of the legislature and the public about the nature of the bill. *Ogrinz v. James*, 309 Md. 381, 398 (1987). It does not require that the title be an index to all of the details of the bill, *Eutaw Enterprises v. Baltimore City*, 241 Md. 686, 699 (1966); *Calvert County v. Hellen*, 72 Md. 603, 606 (1890), or that it disclose precisely how the purpose of the bill is to be carried out, *Mealey v. Hagerstown*, 92 Md. 741, 746 (1901). The title must, however, reflect material changes in the law, *Quenstedt v. Wilson*, 173 Md. 11, 22 (1937), and "must not be misleading by apparently limiting the enactment to a much narrower scope than the body of the Act is made to compass." *Luman v. Hitchens Bros. Co.*, 90 Md. 14, 23 (1899). Thus, a matter may be related to the subject of the bill, and yet be so material that it must be mentioned separately in the title. An example can be found in the case of *Bell v. Prince George's County*, 195 Md. 21 (1950), where the title to a bill relating to amusement devices was found invalid because the title did not reflect that the bill permitted the use of some amusement devices for gaming.

There is little question that all of the provisions of House Bill 634 relate to a single subject. The expansion of the authorized program from one that would favor county-based businesses generally to one that could also separately favor county-based minority businesses, however, added a material element that should have been reflected in the title. It goes without saying that programs for minority contractors have been controversial in this State and elsewhere and have been the source of much litigation nationwide. Failure to include this portion of the bill in the title has the potential to mislead both legislators and members of the public with respect to the nature of the bill. For that reason, it is our view, as is ordinarily the case where material matters are left out of the title, that the bill must be limited to the matters that are reflected in the title. *Clark's Park v. Hranicka*, 246 Md. 178 (1967) (immunity provision regarding false arrest not given effect where title mentioned only shoplifting and not false arrest); *State v. King*, 124 Md. 491 (1915) (applicability of provision on loans secured by liens limited to liens on dwelling houses when the title was limited to dwelling houses); *State v. Cumb. & Pa. R. Co.*, 105 Md. 478 (1907) (court described provision allowing State's Attorney to move for forfeiture of charter for violation of prohibition on allowing tracks to connect with or be used by B&O as a radical change in current law that was not reflected in the title, and held it could not be given effect); *Steenken & Berkmeier v. State*, 88 Md. 708 (1898) (bonding requirement for stevedores held void because it was not reflected in the title of the bill, which referred only to licensing); *Stiefel v. Md. Institute for the Blind*, 61 Md.

144 (1884) (no effect could be given to new provision in bill when title mentioned only the repeal of the old provision).

Because this title defect can easily be addressed in next year's curative bill, we also address the constitutional requirements that must be met if minority-based measures are to be included in the program authorized by House Bill 634. It is well-settled law that race-based classifications are subject to strict scrutiny under the Equal Protection Clause. *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411, 2419 (2013); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Adarand Contractors, Inc. v. Pena*, 515 U.S. 200, 227 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-494 (1989). As a result, such classifications "are constitutional only if they are narrowly tailored to further compelling governmental interests." *Adarand*, 515 U.S. at 227. The Supreme Court has recognized that "remedying the effects of past or present racial discrimination" is a compelling interest. *Shaw v. Hunt*, 517 U.S. 899, 909 (1996); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989).

To rely on this compelling interest, however, the government must demonstrate "a strong basis in evidence for its conclusion that remedial action [is] necessary." *Croson*, 488 U.S. at 500, citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277-78 (1986) (plurality opinion). The established way to make this showing is an availability and utilization study, that is, a study that shows "a significant statistical disparity between the number of qualified minority contractors ... and the number of such contractors actually engaged by the locality or the locality's prime contractors." *Concrete Works of Colo., Inc. v. City and Cnty. of Denver*, 36 F.3d 1513, 1522 (10th Cir.1994). Anecdotal evidence may be used in combination with statistical evidence to establish a compelling governmental interest. *Croson*, 488 U.S. at 509. It is our understanding that the County has recently hired a contractor to conduct a new disparity study in the County. To the extent that the study, when completed, demonstrates that there is a statistically significant disparity between the availability and utilization of minority contractors in the relevant market in which the County (including the Board of Education) is a participant, that evidence could form the basis for a minority-based program. Anecdotal evidence would also be helpful.

If a disparity is established, it is also necessary that the program be narrowly tailored to accomplish the aims of the program. Any goals that are set must be closely related to the evidence provided in the disparity study. *Grutter*, 539 U.S. at 339; *Fisher*, 133 S. Ct. at 2420; *Croson*, 488 at 507-508. In addition, it is generally necessary to first consider race-neutral alternatives. *Croson*, 488 at 507. Other factors include the

flexibility and duration of the relief including the establishment of contract by contract goals, the availability of waiver provisions and the impact of the relief on the rights of third parties. *United States v. Paradise*, 480 U.S. 149, 171 (1987) (plurality opinion); *Midwest Fence Corp. v. US DOT*, 2015 WL 1396376 (N.D. Ill. March 24, 2015). All of these factors should be considered if a minority-based county business program is to be created. We also note that the requisite link between compelling interest and remedy, coupled with the need for flexibility, including setting goals on a contract by contract basis and making waivers available, would generally make the use of mandatory set-asides inappropriate in a minority- or gender-based program.

In conclusion, while the bill may be signed into law, it is our view that the authority to create a race-based portion of a county-based business program may not be exercised until or unless the title is corrected in future legislation. If such a program is to be established at that time, it must be implemented in a manner that meets the constitutional standards that have been applied to other race-based programs.

Sincerely,

Brian E. Frosh
Attorney General

BEF/KR/kk

cc: The Honorable John C. Wobensmith
Joseph M. Getty
Karl Aro