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May 4, 2010

The Honorable Martin O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

RE: Senate Bill 171 and House Bill 359

Dear Governor O'Malley:

We have reviewed and hereby approve Senate Bill 171 and House Bill 359, identical bills entitled "Procurement - Veteran-Owned Small Business Enterprise Participation," for constitutionality and legal sufficiency. While we approve the bills, we write to address an interpretive issue concerning their effect on existing procurement law.

Senate Bill 171 and House Bill 359 add a new Title 14, Subtitle 6 of the State Finance and Procurement Article to require units of State government to structure their procurement procedures to try to achieve an overall minimum of 0.5% of the unit's total value of procurement contracts to be made directly or indirectly with veteran-owned small business enterprises. Section 14-603 of the bill provides:

A unit shall award the contract to the responsible bidder that submits the lowest responsive bid, or responsible offeror proposing the most advantageous offer, that meets or makes a good faith effort to meet, any applicable goal established under this subtitle.

This provision does not reflect the practice under current law, which provides that a unit conducting procurement by competitive sealed bids shall award the contract to the responsible bidder who submits the responsive bid that:

- (i) is the lowest bid price;
- (ii) if the invitation for bids so provides, is the lowest evaluated bid price; or

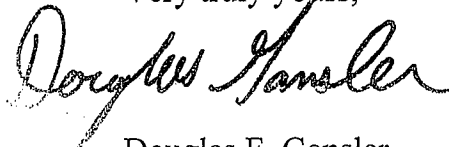
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(iii) for procurement subject to § 11-202(3) of this article, is the bid most favorable to the State.

State Finance and Procurement Article § 13-103(e)(1)

The question arises, then, whether the effect of the bills is to eliminate the option of taking the lowest evaluated bid price, and to permit awards based on the bid most favorable (or advantageous) to the State in all cases, rather than limiting that option to procurement subject to State Finance and Procurement Article § 11-202(3). It is our view that it was not the intention of the bills to eliminate or alter the current standard methods of awarding procurement contracts, but to continue to apply those methods while also giving consideration to the efforts of the contractor to achieve the desired level of participation by veterans. This conclusion is based on the title of the bills, and also materials in the legislative files, none of which reflect the intent to alter the bases on which contracts are generally awarded. The title of the bills does not reflect any change the bases for the award of contracts, but instead is generally limited to the changes necessary to implement the program of preferences for veteran-owned small business enterprises. Furthermore, neither the Fiscal and Policy Note, the Floor Reports on the bills, nor the testimony of the sponsors reflects any intention or even contemplation of change to the basic procurement law as set out in § 13-103(e). As a result, it is our view that this was not the intent of the bill. We would, however, recommend that the section be amended to clarify this point before the starting date of the requirement, which is July 1, 2012.

Very truly yours,



Douglas F. Gansler
Attorney General

DFG/KMR/kk

cc: The Honorable Mary-Dulany James
The Honorable Douglas J.J. Peters
The Honorable John P. McDonough
Joseph Bryce
Karl Aro