

Department of Legislative Services
Maryland General Assembly
2018 Session

FISCAL AND POLICY NOTE
Third Reader

Senate Bill 251

(Senator Conway)

Education, Health, and Environmental Affairs

Health and Government Operations

Minority Business Enterprises - Required Regulations - Liquidated Damages Prohibition

This bill requires that regulations governing the State's Minority Business Enterprise (MBE) program prohibit a State agency from assessing liquidated damages against contractors under specified conditions. The bill does not impair any existing obligation or contract right.

Fiscal Summary

State Effect: None. The bill codifies existing practice.

Local Effect: None.

Small Business Effect: None.

Analysis

Bill Summary: The regulations required by the bill must prohibit the State from assessing liquidated damages for an indefinite delivery contract or an indefinite performance contract if an agency fails to request the performance of a task for which:

- an MBE was named on the participation schedule; or
- an MBE was named on the participation schedule and qualified based on the subcontractor's existing North American Industry Classification System code.

Current Law: The State's MBE program requires that a statewide goal for MBE contract participation be established biennially through the regulatory process under the

Administrative Procedure Act. In August 2013, the Governor's Office of Minority Affairs (GOMA, since renamed the Governor's Office of Small, Minority, and Women Business Affairs) announced a new statewide goal of 29% MBE participation that applied to fiscal 2014 and 2015; as no new goal has been established, the 29% goal remains in effect for fiscal 2018 and 2019.

State law requires the Board of Public Works to issue regulations governing the MBE program. Among other things, the regulations must require that:

- the solicitation document accompanying each solicitation set forth the expected degree of MBE participation based on factors in the statute;
- bidders or offerors complete a form setting forth the percentage of the total dollar amount of the contract that will be performed by an MBE;
- within 10 days of the successful prime contractor notifying subcontractors of the State's intent to award the contract, each MBE serving as a subcontractor complete and submit a document setting forth the percentage and type of work assigned to the subcontractor; and
- all contracts containing an MBE participation goal contain a liquidated damages provision that applies if the contractor fails to comply in good faith with the provisions of the MBE program or pertinent terms of the contract.

Guidance issued to contractors by GOMA regarding the enforcement of the MBE liquidated damages provisions specifies that, "The State does not assess liquidated damages to indefinite delivery [or] indefinite quantity contracts for instances where the State did not request the performance of a task for which an MBE subcontractor is named on the participation schedule."

Background: Indefinite delivery or performance contracts provide for an indefinite quantity of services for a fixed time. They are used when the State cannot determine, above a specified minimum, the precise amount of supplies or services that it will require during the contract period. Under these contracts, the State places delivery orders (for supplies) or task orders (for services) that are carried out under the terms of the base contract. Thus, unless there is a specified minimum amount for a given item in the contract, there is no assurance that supplies or services provided by a given MBE will be requested by the State during the life of the contract.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Governor's Office of Small, Minority, and Women Business Affairs; U.S. General Services Administration; University System of Maryland; Department of General Services; Board of Public Works; Maryland Department of Transportation; Department of Legislative Services

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Analysis by: Michael C. Rubenstein

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