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May 21, 2019

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

RE: House Bill 680 and Senate Bill 433 – "State Procurement – State Funded Construction Projects – Payment of Employee Health Care Expenses"

Dear Governor Hogan:

We have reviewed House Bill 680 and Senate Bill 433, "State Procurement – State Funded Construction Projects – Payment of Employee Health Care Expenses," for constitutionality and legal sufficiency. While we approve these bills, we believe there is a significant risk that a reviewing court would declare a severable provision in the legislation unconstitutional and, thus, that provision should not be given effect.[1]

The provision that raises a concern is an exemption provided in the legislation for minority business enterprises. As described in the Fiscal and Policy Note, House Bill 680 and Senate Bill 433 require "the Board of Public Works (BPW) to adopt regulations that require all bidders, contractors, and subcontractors on State-funded construction projects to pay employee health care expenses, as defined by the bill. The bill does not apply to minority business enterprises (MBEs) or businesses with 30 or fewer employees."[2] The use

[1] We apply a "not clearly unconstitutional" standard of review for the bill review process. 93 *Opinions of the Attorney General* 154, 161 n.12 (2008). "This standard of review reflects the presumption of constitutionality to which statutes are entitled and the Attorney General's constitutional responsibility to defend enactments of the Legislature, while also satisfying the duty to provide the Governor with our best legal advice." *Id.*

[2] The minority business enterprise and small business exceptions are found on page 4, lines 28-31 of House Bill 680, and on page 5, lines 4-7 of Senate Bill 433.

of race and gender in a government program raises an issue under the Equal Protection Clause of the U.S. Constitution. The Equal Protection Clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. Maryland's Constitution contains no equal protection clause, but "the concept of equal protection is embodied in the due process requirement of Article 24" of the Maryland Declaration of Rights. *Tyler v. City of College Park*, 415 Md. 475, 499 (2010).

A government program that uses a racial classification is constitutional only if it is narrowly tailored to support a compelling government interest, which is the strict scrutiny test. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).[3] "Because a race or gender-conscious program is constitutionally suspect, the Supreme Court has essentially put the burden on a government entity with such a program to justify the program with findings based on evidence." 91 *Opinions of the Attorney General* 181, 183 (2006). *See also Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1,* 551 U.S. 701, 784 (2007) ("The government bears the burden of justifying its use of individual racial classifications."). The Fourth Circuit has affirmed that "to justify a race-conscious measure, a state must identify that discrimination, public or private, with some specificity, and must have a strong basis in evidence for its conclusion that remedial action [is] necessary." *H.B. Rowe Company v. W. Lyndo Tippett,* 615 F.3d 233, 241 (4th Cir. 2010) (internal citations deleted). *See also Croson*, 488 U.S. at 505 ("[B]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate."). Courts further require that such evidence be "corroborated by significant anecdotal evidence of racial discrimination." *Rowe*, 615 F.3d at 241.

In addition to identifying a compelling state interest with sufficient evidence, under the second prong of the strict scrutiny test the government program must be narrowly tailored to accomplish the aims of the program. Any use of a racial or gender classification must be closely related to the evidence provided. *See Gratz v. Bollinger*, 539 U.S. 244 (2004) (invalidating, as not narrowly tailored, an admissions policy that automatically distributed one-fifth of points needed to guarantee admission to every single

[3] Under the federal constitutional standard, a gender-based classification is subject to intermediate scrutiny, which requires that it serve an important governmental objective and be substantially related to achievement of those objective. *United States v. Virginia*, 518 U.S. 515, 532-33 (1996). Article 46 of the Maryland Declaration of Rights, however, would most likely require sex based classifications to meet strict scrutiny.

underrepresented minority applicant solely because of the applicant's race). In *Rowe*, the Fourth Circuit listed the relevant factors used to determine whether a statute is narrowly tailored:

> (1) the necessity of the policy and the efficacy of alternative race neutral policies; (2) the planned duration of the policy; (3) the relationship between the numerical goal and the percentage of minority group members in the relevant population; (4) the flexibility of the policy, including the provision of waivers if the goal cannot be met; and (5) the burden of the policy on innocent third parties.

615 F.3d at 241.

The State has a valid MBE program that requires the Special Secretary for the Governor's Office of Minority Affairs, in consultation with the Secretary of Transportation and the Attorney General, to establish biennially a Statewide goal for MBE participation on State procurement contracts. The current MBE program is based on findings in a 2017 disparity study entitled "Business Disparities in the Maryland Market Area," which found substantial and statistically significant adverse disparities consistent with discrimination in the utilization of minority- and women-owned firms in State contracting. During the 2017 legislative session, the General Assembly determined that the study provides a strong basis in evidence demonstrating persistent discrimination against minority- and women-owned businesses. State Finance and Procurement Article ("SFP") § 14-301.1(3). The General Assembly went on to make a number of other findings based on the evidence presented in the disparity study. SFP § 14-301.1(4)-(11). The legislature ultimately concluded that "State efforts to support the development of competitively viable minority- and women-owned business enterprises will assist in reducing discrimination and creating jobs for all citizens of Maryland." SFP § 14-301.1(12).

The State has a compelling interest to ensure that requiring bidders, contractors, and subcontractors on State-funded construction projects to pay employee health care expenses will not discriminate against MBEs who wish to do business with the State. Before the State exempts all MBEs from the requirement that they provide employee health care coverage, however, there must be a legally sufficient factual predicate demonstrating that imposing the requirement on MBEs would actually be discriminatory. At the direction of the General Assembly, the BPW conducted a study of healthcare coverage provided by contractors and subcontractors bidding on construction-related State projects from July 1

through September 30, 2018.[4] The report indicated that 75% of those contractors and subcontractors provided health care coverage, but the report did not provide any level of detail about the contractors and subcontractors providing health care coverage or not, such as whether they are MBEs. In accordance with constitutional requirements, we believe that before the exemption for MBEs could be implemented, the State would need to confirm that there is a strong basis to conclude that imposing the requirement of providing for health care coverage would constitute discrimination against minority- and women-owned businesses. The legislative record appears to be devoid of any evidence upon which the State could rely in this regard to defend the exemption.[5]

Moreover, even if the compelling interest prong is met, the exemption for MBEs must be narrowly tailored to achieve the State's compelling interest in remedying discrimination. A court would likely find that the exemption at issue is not narrowly tailored. For example, the legislation flatly exempts an MBE who meets the definition under SFP § 14-301(f) without requiring that the firm be a certified MBE or prescribing any business size standards based on number of employees or annual gross receipts. Thus, in the absence of an MBE certification or determination that it is a small business, an MBE could employ 300 employees or have annual gross receipts in excess of $50 (or even $100) million and still get the exemption under the bill. Additionally, before implementing any race- or gender-based criteria, the State should first engage in a "good faith consideration of workable race-neutral alternatives" to achieve the State's goals. *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). The legislation also fails to include a planned duration for the MBE exemption or mandate that the State periodically review the program to evaluate whether any race considerations are still necessary. *Id.* at 341-42. *Accord Belk*, 269 F.3d at 344 (stating that the Fourth Circuit "has emphasized that "[t]he use of racial preferences must be limited so that they do not outlast their need; they may not take on a life of their

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[4] BPW, "Workforce Health Care Study Report," (November 1, 2018), https://bpw.maryland.gov/Publications/FY2018%20Workforce%20Health%20Care%20Study%20Report.pdf.

[5] As introduced, the bills would have provided price preference of at least 4% for employers who provide health insurance coverage for their employees and for MBEs regardless. We advised that the provision for MBEs "raises significant questions under the Equal Protection Clause." (Letter to The Honorable Bonnie Cullison from Kathryn M. Rowe, dated March 5, 2019.) In addition, written and oral testimony submitted by an opponent of the bills stated that "[t]here is no evidence that a 4% blanket price preference is required to address current or past discrimination, thus raising issues under the U.S. Constitution were this provision to be enacted." (Testimony on Senate Bill 433 from Maryland Chapter of the Associated General Contractors of America before the Senate Education, Health and Environmental Affairs Committee, March 5, 2019.)

own") (quoting *Hayes v. North State Law Enforcement Ass'n*, 10 F.3d 207, 216 (4th Cir. 1993)).

In conclusion, it is our view that a reviewing court would likely determine that the exemption for MBEs from the requirement that bidders on State construction projects provide health care coverage for their employees is unconstitutional. We believe, however, that provision is likely severable from the other provisions in the bills. General Provisions Article, § 1-210. As a result, while we approve the bills, the MBE exemption should not be applied.

Sincerely,

Brian E. Frosh
Attorney General

BEF/SBB/kd

cc: The Honorable John C. Wobensmith
Chris Shank
Victoria L. Gruber