

February 18, 2020

To: The Honorable Kumar P. Barve  
Chair, House Environment and Transportation Committee

The Honorable Maggie McIntosh  
Chair, House Appropriations Committee

From: The Office of the Attorney General

Re: House Bill 313 -Public-Private Partnership Agreements - Minority Business Enterprise Program

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The Office of the Attorney General submits the following written testimony in support of House Bill 313, with amendment, to reinstate the application of the Minority Business Enterprise (“MBE”) Program to public-private partnership agreements.

Maryland’s commitment to diversity and inclusion dates back more than 30 years with the establishment of the Minority Business Enterprise (“MBE”) Program in 1978. Since then, Maryland has aggressively sought ways to remedy discrimination and create a level playing field for minority and women business owners and entrepreneurs in every major industry within the State, including gaming, offshore wind, medical cannabis, and public-private partnership agreements. In each of these instances, the Office of the Attorney General has advised that consistent with constitutional and federal law the State can only consider race in the implementation of its programs where there is a strong basis in evidence of discrimination. Courts have held that this evidence should consist of statistical data showing the underutilization of minority-owned firms relative to their availability in the jurisdiction’s marketplace and anecdotal data showing the existence of discriminatory barriers to the full and fair participation of minority-owned firms. Maryland performs an availability and

utilization (or “disparity study”) approximately every five years to determine whether there is sufficient evidence to continue the MBE Program.

The MBE Program was first applied to public-private partnerships by House Bill 560 in 2013. That enactment relied upon the State’s February 17, 2011 disparity study, entitled *The State of Minority– and Women–Owned Business Enterprise: Evidence from Maryland* (“2011 Disparity Study”), which concluded that discrimination against minority and women business owners in Maryland’s market area remains a significant problem in both the public and private markets in which the State does business. Although not expressly required by House Bill 560, before implementation of the MBE provisions, an analysis of the 2011 Disparity Study was needed to determine whether it applied to the types of work likely to be performed in conjunction with the development and/or improvement of State infrastructure through a public-private partnership agreement. That analysis, conducted by the Maryland Department of Transportation (“MDOT”), found that the industry categories for public private partnership projects would likely include goods and services in industry categories that are routinely procured by State agencies in the normal course of business, and those categories were included in the 2011 Disparity Study.

In addition to being based on strong evidence of discrimination, race-conscious public programs must also be “narrowly tailored” to that evidence. One of the ways that courts evaluate whether a program is narrowly tailored is to consider the duration of the program as well as whether the program is periodically evaluated to determine if the evidence supports its continued implementation. For that reason, House Bill 560 provided that unless further action was taken by the General Assembly, the MBE provisions would sunset in June of 2016.

In February of 2017, MDOT issued a new disparity study, entitled *Business Disparities in the Maryland Market Area* (“the 2017 Disparity Study”), which evaluated the continued compliance of the MBE Program with the requirements of the *Croson*<sup>1</sup> decision and any subsequent federal or constitutional requirements.<sup>2</sup> Based on the 2017 Disparity Study, the Maryland General Assembly determined that there was a compelling interest to apply remedial measures and it reenacted the MBE Program under the State Finance and Procurement Article during the 2017 Session. The 2017 Disparity Study is the most recent

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<sup>1</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

<sup>2</sup> A copy of the entire 2017 Disparity Study is available at <http://www.mdot.maryland.gov/newMDOT/MBE/Documents/2016%20MD%20Disparity%20Study.pdf>.

data evaluating the availability and utilization of minority-owned firms in Maryland's product and geographic market.

Based on the above, the Office of the Attorney General offers three amendments to ensure that SB 442 comports with federal and constitutional law:

Amendment 1 creates a new Section 2 requiring MDOT, in consultation with the Office of the Attorney General and the Governor's Office of Small, Minority, and Women Business Affairs, to analyze the MBE Program requirements of § 10A-404 of the State Finance and Procurement Article and the 2017 Disparity Study to determine the compliance of the requirements with any federal and constitutional requirements and submit a report on the analysis to the General Assembly on or before September 30, 2020.

Amendment 2 creates a new Section 3 requiring a similar analysis to be conducted again in 2022 after the submission of the next disparity study, which is mandated by Chapter 340 (2017). This is intended to help prevent the MBE provisions in § 10A-404 of the State Finance and Procurement Article from sunseting prior to an analysis of the 2022 disparity study and a determination of whether that study supports continued application of the MBE Program to public-private partnership agreements.

Amendment 3 simply adds language, in a new Section 4, to provide that the MBE provisions will sunset on June 30, 2023 without further action by the General Assembly.

With the addition of the proposed amendments, the Office of the Attorney General believes that House Bill 313 will ensure that the implementation of the MBE provisions pass constitutional muster, and the State will be able to expand opportunities for small, minority and women business owners to participate in the public-private partnership agreements authorized by the P3 statute.

cc: Members of the Environment and Transportation and Appropriations Committees

**AMENDMENTS:**

**Amendment No. 1:**

SECTION 2. AND BE IT FURTHER ENACTED, That the Certification Agency designated by the Board of Public Works under § 14–303(b) of the State Finance and Procurement Article to certify and decertify minority business enterprises, in consultation with the Office of the Attorney General and the Governor’s Office of Small, Minority, and Women Business Affairs, shall initiate an analysis of the MBE Program requirements of § 10A-404 of the State Finance and Procurement Article, as enacted by Section 1 of this Act, and the disparity study entitled “Business Disparities in the Maryland Market Area” published on February 8, 2017, to evaluate the compliance of the requirements with any federal and constitutional requirements and submit a report on the analysis to the Legislative Policy Committee of the General Assembly, in accordance with § 2–1246 of the State Government Article, before September 30, 2020.

**Amendment No. 2:**

SECTION 3. AND BE IT FURTHER ENACTED, That the Certification Agency designated by the Board of Public Works under § 14–303(b) of the State Finance and Procurement Article to certify and decertify minority business enterprises, in consultation with the Office of the Attorney General and the Governor’s Office of Small, Minority, and Women Business Affairs, shall initiate an analysis of the MBE Program requirements of § 10A-404 of the State Finance and Procurement Article, as enacted by Section 1 of this Act, and the disparity study submitted pursuant to Chapter 340 of the 2017 Laws of Maryland to evaluate the compliance of the requirements with any federal and constitutional requirements and submit a report on the analysis to the Legislative Policy Committee of the General Assembly, in accordance with § 2–1246 of the State Government Article, before December 1, 2022.

**Amendment No. 3:**

SECTION 4. AND BE IT FURTHER ENACTED, That Section 1 of this Act shall take effect July 1, 2020. It shall remain effective for a period of 3 years and, at the end of June 30, 2023, with no further action required by the General Assembly, Section 1 of this Act shall be abrogated and of no further force and effect.