SB 301
Corporations – Board Members and Executive Officer Diversity – Procurement Preference and Reporting
Education, Health, and Environmental Affairs Committees
Position: Unfavorable

Maryland AGC, the Maryland Chapter of the Associated General Contractors of America, provides professional education, business development, and advocacy for commercial construction companies and vendors, regardless of labor policy. AGC of America is the nation's largest and oldest trade association for the construction industry. AGC of America represents more than 26,000 firms, including over 6,500 of America's leading general contractors, and over 9,000 specialty-contracting firms through a nationwide network of chapters. Maryland AGC opposes SB 301 and respectfully requests the bill be given an unfavorable report.

SB 301 would require the Board of Public Works ("BPW") to:

1) determine the racial and ethnic profile of the population of the State;
2) establish and define a threshold of "substantial similarity" between the State profile under item (1) and the race and ethnicity profile of a generic corporation; and
3) develop a process to determine the race and ethnicity of board members and executive officers of every corporation filing an annual Form 1 with the Department of Assessments and Taxation and bidding to provide goods or services to units of the State.

Based on items (2) and (3) above, each procuring unit would then have to develop a price preference of up to 5% for bidding corporations. The Department of Planning is empowered to determine the "official demographic percentages," presumably of the State's population, although that is not clear.

For corporations with assets exceeding $100,000,000, the annual Form 1 must include information on the ethnic and racial profile of its Board members only, the practices for identifying and evaluating Board candidates, identifying and appointing executive officers, including in both cases whether "demographic diversity" (not defined) is considered, and a description of the corporation's practices to promote "diversity, equity, and inclusion" (also not defined) among its Board members and executive officers.

The proposal has numerous faults, both technical and substantive. As to substance, the object of the bill is to change the demographic profile of the boards and executive officers of corporations seeking to do business with the State, using the State's procurement expenditures and providing a price preference as a lever. The apparent goal is to have corporate boards and executive officers look like the Maryland census.[1] The core of the bill is the development of the undefined standard of "substantial similarity." Does that mean that the corporation's profile as to each racial and ethnic measure must be within +/- 1% of the state's profile, or +/- 20%, or something else? Can a threshold be a range of acceptability? Can different ethnic and racial categories have different thresholds or must they all be the same? If the bill were to pass, "substantial similarity" should be defined explicitly.

[1] As of 12/10/2020, White 58.5%, Black 31.1%, Latino 10.9%, Asian 6.7%, Native American 0.7%, Hawaiian & Pacific Island 0.1%, 2 races 2.9% (does not add to 100.0 because of overlap), U.S. Census Bureau, "Quick Facts" for Maryland, www.uscensus.gov, accessed 01/19/2021 at 10:53 a.m.

While diverse boards may very well enhance a corporation's profit-making or non-profit service ability (and thus be reason enough for corporations to seek out diverse board members and executive officers), the notion that a board or set of executive officers that looks like Maryland's overall population will be suitable for all corporations has no basis. If anything, corporations structure their boards and executive officer cadres to reflect their customer base or financial movers. SB 301 mandates a specific diversity profile unrelated to the market a particular corporation serves and should be rejected.

The bill penalizes family-owned corporations, whose board members and executive officers are likely not to be diverse ethnically. This is as true of black- or brown-owned corporations as it is of white-owned corporations. Family-owned corporations, especially subchapter S corporations, are common in the construction industry. It is egregiously intrusive and unfair for the State to penalize these corporations by awarding corporations that are not family-owned a price preference. If bids are equally responsive, a diversity price preference should not be available against a family-owned corporation.

From a different standpoint, why should a partnership or LLC be denied the diversity price preference? These entities may have owner or member profiles even closer to the desired threshold than corporate bidders. The form under which a business entity operates should not determine the availability of a price preference.

The burden placed on corporations with assets over $100,000,000 is not significant from a reporting standpoint, and it is equally insignificant from the standpoint of providing valuable information. Every corporation of that size, and many smaller corporations, have thoroughly developed and implemented diversity practices, so that providing an iteration of that every year as part of a Form 1 and providing the EEO-1 will simply be boilerplate. Moreover, there is little value in tasking the Department of Assessments and Taxation with the onerous chore of compiling from the many corporate diversity and inclusion plans a recital of diversity promotion practices. There are many sources of such plans and they are widely available. Simply Google "corporate board diversity" for a sample.

Finally, the bill allows each procuring unit to set the level of preference as long as it does not exceed 5%. While allowing units flexibility to meet their particular situations may be desirable, the thrust of the bill is to change the demographic profile of corporations as a matter of general public policy. Under that rubric, a uniform diversity price preference would be a better course. There is no reason to suppose that diversity is a weightier matter for UMS construction than it is for MDOT or DGS construction.

Accordingly, for the reasons outlined above, Maryland AGC respectfully requests that SB 301 be given an unfavorable report.

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