

Sen.Griffith_SB487_FAV.pdf

Uploaded by: Melony Griffith

Position: FAV



THE SENATE OF MARYLAND
ANNAPOLIS, MARYLAND 21401

Testimony of Senator Melony G. Griffith in Support of Senate Bill 487
Procurement – Minority Business Enterprises - Revisions
Senate Budget and Taxation Committee
Wednesday, February 16, 2022

Chair Guzzone, Vice Chair Rosapepe, and members of the Senate Budget and Taxation Committee:

This bill, Senate Bill 487, is a list of policy changes that came as a result of the Evaluation of the Minority Business Program report. I am pleased to present Senate Bill 487.

Senate Bill 487 will:

Create an MBE Ombudsman

The MBE Ombudsman is appointed by the Special Secretary for GOSBA, who must, in accordance with the State budget, allocate staff and resources to the Ombudsman to fulfill his or her duties. The Ombudsman must (1) make reasonable attempts to resolve disputes between MBEs and prime contractors, including disputes over contract scope and payments and (2) serve as a resource to units of State government, prime contractors, and MBEs in resolving disputes on relevant contracts. In resolving disputes, the Ombudsman may:

- Compel prime contractors and MBEs to provide documentation related to contract performance and payments; and
- Order any relevant payments to be made in conjunction with a dispute resolution.

In general, the Ombudsman may not disclose information received during a dispute resolution without the written consent of the party that provided the information. However, the Ombudsman may disclose information to GOSBA's Assistant Attorney General.

Enhance Reporting Requirements and Transparency

Annually, each State agency must report to GOSBA the results of each compliance assessment required to be conducted under current law for each contract that is completed in that year. The report must include specified information, including the total dollar value of payments under the contract and the total dollar value of payments to each subcontractor.

Each solicitation for bids or proposals that includes an expected degree of MBE participation must include a summary of the factors used to determine the MBE participation goal, including subcontracting opportunities identified for the project, any applicable industry



THE SENATE OF MARYLAND ANNAPOLIS, MARYLAND 21401

codes linked to those opportunities, and the number of certified MBEs identified for those opportunities.

Biennially, GOSBA, in consultation with the Attorney General and Maryland Department of Transportation, must establish statewide MBE participation goals by industry type. In establishing the goals by industry type, GOSBA must use the same methodology used to establish an overall statewide MBE participation goal in current law. In any year in which there is a delay establishing the goals by industry type, the previous year's goals apply. Agencies must annually report to GOSBA their contract awards and payments by industry type, and GOSBA must annually summarize data reported by agencies by industry type.

Improve Vendor Accountability

GOSBA must maintain and publish on its website a list of prime contractors who, based on the results of compliance assessments and in the absence of specified mitigating factors, persistently fail to meet MBE participation goals on their contracts. GOSBA may develop regulations to implement this requirement. Persons who persistently fail to meet MBE contract participation goals are not considered responsible bidders or offerors for the purpose of participating in State procurements.

The bill expands the requirement that prime contractors pay undisputed amounts to their subcontractors within 10 days to include all contractors, not just construction contractors. It also expands State agencies' authority to withhold progress payments from prime contractors that do not pay their subcontractors undisputed amounts in a timely fashion to include all prime contractors, not just those working on construction contracts.

The bill repeals authority for State agencies to assess liquidated damages against contractors that fail to comply in good faith with provisions of the MBE program.

Codify Small Business Set Asides

The bill codifies Executive Order 01.01.2021.01, which generally requires State procurements with a value between \$50,000 and \$500,000 to be automatically set aside for small businesses by designation to the Small Business Reserve (SBR) program. The set-aside requirement does not apply to (1) purchases from preferred providers; (2) specified procurements involving federal dollars; (3) procurement of human, social, cultural, or educational services; or (4) term and master contracts. GOSBA may waive this requirement when it is not practicable to reserve a procurement for small businesses.

Authorize MBE Graduation

MELONY G. GRIFFITH

Legislative District 25
Prince George's County

PRESIDENT PRO TEMPORE

Budget and Taxation Committee



James Senate Office Building
11 Bladen Street, Room 220
Annapolis, Maryland 21401
301-858-3127 · 410-841-3127
800-492-7122 Ext. 3127
Melony.Griffith@senate.state.md.us

THE SENATE OF MARYLAND
ANNAPOLIS, MARYLAND 21401

In conjunction with the establishment of a mentoring program for MBEs, the Special Secretary for GOSBA may authorize an MBE that has graduated from the program and has been decertified to retain or regain its MBE certification for a limited period of time in exchange for serving as a mentor to MBEs.

Thank you for the opportunity to present Senate Bill 487, I respectfully request a favorable report.

SB0487 - MBE - Procurement Revisions - LOI_FINAL.p

Uploaded by: Patricia Westervelt

Position: INFO

February 16, 2022

The Honorable Guy Guzzone
Chairman, Senate Budget and Taxation Committee
3 West Miller Senate Office Building
Annapolis, MD 21401

Re: Letter of Information – Senate Bill 487 – Procurement Minority Business Enterprise – Revisions

Dear Chairman Guzzone and Committee Members:

The Maryland Department of Transportation (MDOT) takes no position on Senate Bill 487 but offers the following information for the Committee's consideration.

Senate Bill 487 modifies the State's Minority Business Enterprise (MBE) Program based on recommendations made in the Department of Legislative Services (DLS) Office of Program Evaluation and Government Accountability (OPEGA) Evaluation of the Minority Business Enterprise Program (DLS Report), published January 2022. The following information is substantially similar to the comments the MDOT submitted to DLS and included in *Appendix A* of the Report at pages 85-91.

(Page 5, line 21-33; Page 10 lines 22-29; Page 11 lines 1-3; Page 12 lines 4-8):

Senate Bill 487 requires the Governor's Office of Small, Minority, & Women-Owned Business Affairs (GOSBA) to establish an overall goal, as well as additional statewide goals, by industry type for the purpose of agency-level reporting and tracking spend patterns. The MDOT believes that a more practical and efficient approach to tracking spend patterns would be to track the MBE participation in the State's six major procurement categories: (1) Construction, (2) Architecture-Engineering and Other Construction-Related Professional Services ("AE-CRS"), (3) Maintenance, (4) Information Technology ("IT"), (5) Services, and (6) Commodities, Supplies, and Equipment ("CSE"). The proposed industry-level goals in Senate Bill 487 could present significant policy and legal implications. Tracking spend patterns and investigating the implications of a new goal structure would help to determine the impact before making any changes to the overall goals and subgoals.

(Page 4, lines 23-28; Page 18 lines 14-17):

Senate Bill 487 amends the statutory definition of MBE to include graduated firms that have been authorized to retain certification because they are a part of GOSBA's mentoring program. This means that firms who no longer meet small business size standards will remain MBE-certified. However, one of the narrow tailoring components of the MBE Program is that firms must be small businesses in order to be certified MBEs. Allowing firms that no longer meet size standard requirements could render the MBE Program overinclusive.

In addition to the potential constitutional issue, it is important to note that although a firm may “graduate” from one or more North American Industry Classification System (NAICS) Codes, it can remain certified with respect to other NAICS Codes. Therefore, unless and until a firm “graduates” from all the NAICS Codes in which it is certified, the firm remains an MBE and may continue to participate as MBEs with respect to the NAICS Codes in which they continue to meet size standards. Preventing firms from “graduating” the MBE Program will be administratively burdensome and discourage firms from becoming mentors.

(Page 8 Lines 21-27):

Senate Bill 487 repeals the statutory authorization to assess liquidated damages against contractors who, notwithstanding good faith efforts, fail to comply with MBE requirements, particularly with respect to achieving the goals to which they have committed. The General Assembly initially authorized the assessment of liquidated damages because, even if the authority was infrequently exercised, the ability to impose such damages under the appropriate circumstances is an important tool in ensuring compliance, and the fact that liquidated damages could be imposed may act as a deterrent. Therefore, repealing the liquidated damages provision without considering the potential benefits seems premature. If the objective is to address contract compliance, the State should delay amending the statute pending an assessment of the usefulness of liquidated damages and why they are not being imposed by performing an analysis of contracts to determine (1) why the goal was not achieved, (2) what documentation the agency obtained to monitor and ensure contract compliance, (3) whether liquidated damages was considered, and (4) if so, why liquidated damages were not imposed.

(Page 11, lines 4-24):

Senate Bill 487 amends the statute to require each agency to include a compliance assessment for each contract in its annual report to GOSBA. To facilitate the collection of data for the disparity study and other initiatives, the State may want to consider modifying the bill to require the names and payments of both the MBE and non-MBE contractors.

(Page 12 Lines 27 -33, Page 13 Lines 1-25):

Senate Bill 487 amends the Small Business Reserve (SBR) Program to require qualifying State procurements with a value between \$50,000 and \$500,000 to be automatically set-aside for designation and solicitation under the Small Business Reserve (SBR) Program. To obtain a certification number to participate on projects set-aside for the SBR Program, firms must complete a self-attestation with the GOSBA through the State’s eProcurement system, eMaryland Marketplace (eMMA). Under current law, firms that are certified as MBEs, Disadvantaged Business Enterprises (DBEs) and Small Business Enterprises (SBEs) are not eligible to participate on SBR projects unless they go through the additional self-registration process for the SBR Program. Having separate certification/registration processes for participation in the various programs hinders the ability of the more than 7,000 firms certified by the Office of MBE to participate on SBR projects.

The Honorable Guy Guzzone
Page Three

Notably, all certified MBE, DBE, and SBE firms have already been through a process wherein they have demonstrated that they meet federal Small Business Administration (SBA) small businesses size standards. Therefore, the State could potentially increase participation of small businesses (including minority-owned firms) as prime contractors if the statute was changed to allow certified MBEs, DBEs, and SBEs to participate on SBR projects without going through a separate registration process.

The Maryland Department of Transportation respectfully requests the Committee consider this information when deliberating Senate Bill 487.

Respectfully submitted,

R. Earl Lewis, Jr.
Deputy Secretary
Maryland Department of Transportation
410-865-1006