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March 29, 2022

The Honorable Shane E. Pendergrass
Chair, House Health and Government Operations Committee
241 House Office Building
Annapolis, MD 21401

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

Dear Chair Pendergrass and Committee Members:

The Governor's Office of Small, Minority & Women's Business Affairs (GOSBA) offers the following information and respectfully submits recommendations for the Committee's consideration with regard to SB 487 and its potentially wide sweeping operational impact on this Office and the Minority Business Enterprise (MBE) Program as a whole.

We have organized our responses pursuant to the overarching requirements of the bill's respective provisions:

GOAL-SETTING PROVISIONS

Bill Text at Pg. 3, Lines 26-30 and Pg. 4, Lines 1-2 and 19-25 requires invitations for bids and requests for proposals to include a summary of the factors used to determine the expected degree of MBE participation for the procurement contract, including subcontracting opportunities identified for the project, any NAICS codes linked to the subcontracting opportunities, and the number of certified MBEs in those industries.

Considerations/Recommendations:

GOSBA submits for the Committee's consideration that the factors used to analyze the appropriate degree of MBE participation in a procurement are consistent and are publicly available on the Board of Public Works (BPW) web site via "BPW Advisory 2001-1¹." The subcontracting opportunities identified by the procuring unit and the accompanying NAICS codes are advisory in nature. Prime contractors are encouraged to utilize firms within the industries identified by the procuring unit and/or, where practicable, to utilize MBE subcontractors in other innovative or appropriate subcontracting categories, which the prime contractor itself has identified for the purposes of fulfilling the MBE goal requirement. Publishing the unit's identified categories could have a more limiting effect.

PRIME CONTRACTOR ACCOUNTABILITY PROVISIONS

¹ [BPW Advisory 2001-1 Procurement Review Groups: SBR Designation, MBE and VSBE Determinations](#)

Bill Text at Pg 13, Lines 15-35 requires GOSBA and the Office of State Procurement in consultation with the Office of Attorney General and the Board of Public Works to establish criteria to determine when a prime contractor has persistently failed to meet contract goals in the absence of mitigating factors and refer them to OAG for debarment.

Considerations/Recommendations:

This provision presents a significant strain on GOSBA's resources given the contract volume at each procuring unit and the work required to (1) create parameters and (2) monitor contract close-out processes across 70 state agencies.

GOSBA supports improved contract monitoring by the procuring unit and access to better compliance tracking tools throughout the life of the project. This would ensure MBE goals are being met and reduce non-compliant performance by prime contractors in real-time as opposed to post-contract.

CREATION OF AN OMBUDSMAN POSITION

Bill Text at Pg 19, Lines 14-33 and Pg 20, Lines 1-19 calls for the establishment of an Ombudsman position to act as a resource to units of State Government, Prime Contractors, and MBEs in resolving disputes related to contracts that include an MBE Goal.

Considerations/Recommendations:

Given that there are 70 units and nearly a billion dollars in awards and over a billion dollars in payments to MBEs annually (per FY2020 Annual Report figures), fulfillment of the duties proposed by this legislation would pose a Herculean feat for *one* Ombudsman without any support staff.

By way of reference, the Office of State Procurement (OSP), which fulfills similar functions as outlined in the proposed Ombudsman's duties, has over 30 personnel.

OSP Personnel

Division	No. of Personnel
Procurement Bureau	3
Goods & Services	10
Construction & AE	10
IT & Professional Services	10

As the goal of this legislation is to ensure that MBE participation is maximized and thereby touching procurements in all of the industries above, the staff supporting the Ombudsman and the Office should be sufficient to manage the volume of contracts in the respective industries as well as the internal and external stakeholder communications and investigations required.

Operationally, these tasks would more reasonably necessitate:

1 Ombudsman	1 at Grade 22 or higher
1 Compliance Administrator for Goods & Services Contracts	1 at Grade 16/17
1 Compliance Administrator for Construction & A&E Contracts	1 at Grade 16/17
1 Compliance Administrator for IT & Professional Services Contracts	1 at Grade 16/17

These are not functions that can be absorbed by GOSBA's current staff of two (2) MBE Compliance Managers, who currently work to: conduct training to the internal and vendor community, collect and report MBE data, and act in an advisory capacity to the 70 procuring units on day-to-day contract administration and best practices.

STUDY OF THE USE OF LIQUIDATED DAMAGES

Bill Text at Pg 21, Lines 13-36 and Pg 22, Line 1-6 calls for the study and a report on the use, the number of incidents, failure to use liquidated damages, and reasons for any failure to assess liquidated damages by procurement officers.

Considerations/Recommendations:

GOSBA is a proponent of liquidated damages as a deterrent for noncompliance with established MBE contract goals. It is one of the few program enforcement safeguards available to the State. Prime contractors who do not perform in good faith after winning an award are in violation of the contract. This provision gives the State a way to respond to such violations. Hesitancy by procurement staff to use this provision is likely due to inadequate understanding of how to assess liquidated damages. This could be resolved with more training and/or support.

These duties cannot be absorbed by GOSBA's current staff of two (2) MBE Compliance Managers, who currently work to conduct training to the internal and vendor community, collect and report MBE data, and act in an advisory capacity to the 70 procuring units on day-to-day contract administration and best practices. This would need to be incorporated into the duties of the Office of the MBE Ombudsman (if such a position and support staff is approved).

SMALL BUSINESS RESERVE PROGRAM EXPANSION

Bill Text Pg. 15, Lines 3-4 requires that a procurement with a total dollar value between \$50,000 and \$500,000 shall be designated for the Small Business Reserve Program.

Considerations/Recommendations:

GOSBA supports this provision, which is already in practice pursuant to Executive Order 01.01.2021.01-Increasing Small Business Participation in State Procurements².

² [Executive Order 01.01.2021.01- Increasing Small Business Participation in State Procurements](#)

GOSBA would submit to the Sponsor and Committee that many of the MBE Program shortfalls are not the result of a lack of comprehensive legislation or policy. Our MBE Program's framework is technically sound and considered the gold standard amongst diversity and inclusion programs across the nation. However, we all know that policies are only as effective as their level of enforcement.

The ultimate goal of the MBE Program's implementation is the uniform application of the legislative intent within our existing laws. As such, we believe the following three areas must be premised on greater accountability and transparency:

- MBE goal determinations at the agency level,
- contract compliance to ensure that goals set are met, and
- timely resolution of contracting disputes.

In closing, GOSBA does not believe that new legislation which imposes additional requirements is needed, but rather a greater focus on the tactical implementation of existing policies.

Respectfully submitted,

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