

February 8, 2022

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

**Re: Letter of Information – House Bill 389 – Procurement Minority Business Enterprise – Revisions**

Dear Chair Pendergrass and Committee Members:

The Maryland Department of Transportation (MDOT) takes no position on House Bill 389 but offers the following information for the Committee's consideration.

House Bill 389 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):**

House Bill 389 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 House Bill 389 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):**

House Bill 389 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):**

House Bill 389 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):**

House Bill 389 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):**

House Bill 389 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.

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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 House Bill 389.

Respectfully submitted,

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