
March 1, 2023

The Honorable Joseline A. Pena-Melnyk
Chair, House Health and Government Operations Committee
Room 241, House Office Building
Annapolis MD 21401

RE: Letter of Information – House Bill 646 - State Procurement – Minority Business Enterprises and Small Business Enterprises – Procurement Forecast, Employee Performance, and Outreach (Small Business Protection Act of Maryland)

Dear Chair Pena-Melnyk and Committee Members:

The Maryland Department of Transportation (MDOT) takes no position on House Bill 646 but provides the following information for the Committee's consideration.

When determining eligibility for a merit increase or performance-based promotion for a procurement officer, House Bill 646 requires the unit to consider the efforts of the procurement officer in meeting MBE goals. If a unit does not meet its MBE goals, then the procurement officer may not receive a merit increase or promotion, and may be terminated or reassigned if the unit fails to meet its MBE goals over three consecutive fiscal years. This would present issues of personnel management and could bring into question the defensibility of termination. Procurement officers are Career Service employees that are represented by the Maryland Professional Employees Council, which provides certain protections of employment.

House Bill 646 would punish procurement officers for the failures of contract administrators to enforce contract requirements regarding MBE participation. Pursuant to COMAR 21.11.03.13, certain actions must be taken by agency personnel responsible for contract administration before the procurement officer can take meaningful enforcement action. If the personnel responsible for contract administration failed to follow the requirements of COMAR, the procurement officer would be powerless to act, yet the procurement officer would be punished, nonetheless. Across the MDOT, there are currently 14 vacant procurement officer positions, for a vacancy rate of 17%, and 6 vacant procurement manager positions, for a vacancy rate of 15% vacancy. The punitive measures in this bill would make recruitment and retention even more difficult.

Further, the bill does not appear to consider circumstances that prevent the contractor from meeting MBE commitments through no fault of the contractor or the agency, such as the MBE subcontractor's loss of a license or failure to file required paperwork. In the case of indefinite quantity, work-order based contracts, the contractor could be unable to meet the MBE goal because the agency has not issued the kind of work that is to be performed by MBE subcontractors.

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House Bill 646 may compromise constitutionally required aspects of the MBE program, which require some level of flexibility in administration. MBE goals cannot act as quotas and penalizing Procurement Officers or MBE Liaisons for the failure of a prime contractor to achieve an MBE goal may encourage treating the aspirational goals as harsh quotas, thereby undermining the constitutionality of the program.

Regarding the provision on procurement forecasts, the MDOT already provides an annual procurement forecast to the Governor's Office of Small & Minority, & Women-Owned Business (GOSBA) as part of the statutory requirements for the MBE and SBR Programs. However, House Bill 646 would require the MDOT to also include an estimate of the MBE goals for each procurement. This would require the Procurement Review Group to meet twice to set goals: first when the Procurement Forecast is completed and again when the agency decides to move forward with the procurement. Depending upon the length of time between the completed forecast and the published solicitation, in order to comply with the constitutional requirements of "narrow-tailoring," the goals will need to be recalculated. The impact may mean an increase or decrease in the originally forecasted MBE goal.

The MDOT would like to note that it is not opposed to the provisions for the GOSBA, in consultation with primary procurement units including the MDOT, to identify potential contracting opportunities, increase outreach efforts to small businesses, and assist small businesses with complying with procedures. MDOT's Office of Small Minority Business Policy has the primary responsibility for the department's outreach efforts to small and minority business stakeholders, and historically reaches more than 2,000 stakeholders on an annual basis. This office also supports outreach through activities such as The Annual Business Opportunities and Entrepreneurial Training Summit

The MDOT looks forward to continued collaboration to ensure that our efforts to provide safe transportation infrastructure are also leveraged to support broader goals of economic development and equity in the State.

The Maryland Department of Transportation respectfully requests the Committee consider this information when deliberating House Bill 646.

Respectfully submitted,

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