

Department of Legislative Services
Maryland General Assembly
2006 Session

FISCAL AND POLICY NOTE
Revised

Senate Bill 897

(Senator Lawlah, *et al.*)

Education, Health, and Environmental Affairs

Economic Matters

Procurement - Commercial Nondiscrimination Policy

This bill establishes a commercial nondiscrimination policy that prohibits the State from entering into a procurement contract with a business entity that has discriminated against subcontractors, suppliers, vendors, or commercial customers on the basis of race, color, religion, ancestry, or national origin, sex, age, marital status, sexual orientation, or disability. The bill also establishes a process to adjudicate complaints of discrimination and provides for penalties against any business that is found to have violated the commercial nondiscrimination policy. The bill requires that specific certifications relating to nondiscrimination be included in State procurements and contracts.

Fiscal Summary

State Effect: None. The Maryland Commission on Human Relations (MCHR) should not experience a significant increase in its caseload. If the number of discrimination claims is greater than expected, general fund expenditures for MCHR could increase accordingly.

Local Effect: None.

Small Business Effect: Potentially meaningful. Small businesses that do business with the State and are suspected of engaging in discrimination could be subject to an investigation by MCHR and adjudication of a claim against them.

Analysis

Bill Summary: Any person, including those not affected by any alleged discrimination, may file a complaint with MCHR alleging that a business entity has engaged in

discriminatory actions within the preceding four years. The nondiscrimination policy does not apply to any behavior that occurred prior to the bill's effective date. Business entities subject to the new policy include any person, firm, sole proprietorship, partnership, corporation, limited liability company, or other business entity either engaged in providing goods or services to the State or bidding to provide goods or services to the State; other governmental entities subject to Title VI of the Civil Rights Act of 1964 are not businesses for the purpose of this bill. Any entity involved in an economic development project with the State must also comply with the provisions of this bill.

MCHR is charged with investigating all complaints of discrimination against businesses. While investigating complaints, MCHR may consider evidence showing: an intent to discriminate; a pattern or practice of discrimination; any actions taken by the accused entity to remedy the alleged discrimination; and prior business dealings with persons of the same protected class as the victim, sufficient to show that the accused entity has not discriminated against the class of the victim in the overall context of its business. MCHR may only investigate and adjudicate a claim of discrimination if the discrimination was alleged to have occurred in the State.

If MCHR sustains a complaint against a business, the business entity found to have committed discrimination may request a contested case hearing from the Office of Administrative Hearings (OAH). The Administrative Law Judge (ALJ) assigned by OAH may, after completing the hearing, affirm the initial findings, make new recommendations, or refer the case back to the MCHR for further review. The decision of the ALJ is subject to judicial review. Complainants and businesses who knowingly make false statements or who bring frivolous cases before OAH are subject to sanctions.

If the ALJ sustains an allegation, the ALJ may impose sanctions on the business entity found to have committed discrimination. Sanctions may include debarment from bidding on or entering into contracts with the State, preclusion from participating in State contracts as a subcontractor for up to three years, cancellation of any current contracts, finding that the business is not a responsible bidder on future contracts, referral of the case for criminal prosecution, and/or mediation.

Every State contract and subcontract must include a clause whereby a contractor warrants that it will comply with the State's commercial nondiscrimination policy, and every State contract must require the contractor to provide any information necessary to investigate a claim of discrimination. All requests for bids or proposals for State contracts must include a certification by the bidder that it has not engaged in discrimination in bidding on the contract.

Current Law: There is no existing statute addressing discrimination by a contractor or subcontractor in a State procurement contract. State law provides that a person may be

debarred from entering into a contract with the State on several grounds, including conviction for a variety of specified offenses; an admission in writing or under oath of an act that constitutes grounds for conviction of certain offenses; being a successor, assignee, subsidiary, or affiliate of a debarred person; or operating in a manner designed to evade or defeat the purpose of the State Finance and Procurement Article. A person may also be debarred from entering into a contract with the State for any cause the Board of Public Works determines to be so serious as to affect the integrity of the procurement process.

In the landmark U.S. Supreme Court case, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), the court found that state and local minority business contract set-aside programs are permissible devices, but must be evaluated under the strict-scrutiny standard. The analysis required a program to be narrowly tailored to meet a compelling governmental interest. The court reiterated the same strict-scrutiny standard in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) for federal contract set-asides based on race.

In 2003, the City of Charlotte, North Carolina enacted a commercial nondiscrimination policy similar to the policy proposed in the bill. The city noted at the time of its implementation that cities with similar policies had not experienced a great number of claims, and the claims have been found to have but a nominal impact on staffing. Officials with the City of Charlotte report that no claims have been filed under the city's commercial nondiscrimination policy since it was enacted in 2003.

State Fiscal Effect: MCHR advises that it will need to add seven new positions, including three attorneys, two investigators, one management analyst, and one legal secretary to handle the increased caseload it expects to result from this bill. It notes that it has experienced severe reductions in its legal staff in recent years and has no excess capacity among its legal personnel to handle new cases. It projects the total cost of the new positions and related operating expenses to be \$456,169 in fiscal 2007, increasing thereafter based on inflation.

Based on the experience of Charlotte with its commercial nondiscrimination policy, the Department of Legislative Services does not anticipate an increase in MCHR's caseload from this policy, and therefore believes the increased staffing is not warranted at this time. However, given MCHR's current staffing configuration and the complexity of cases that could stem from claims of discrimination, any increase in MCHR's caseload would warrant an increase in staffing commensurate with the increased caseload. Any such increase in staffing could be requested during the annual budget process. State expenditures would increase accordingly.

Additional Information

Prior Introductions: HB 919 of 2005, a similar bill, was heard by the House Health and Government Operations committee and later withdrawn.

Cross File: HB 1486 (Delegate Branch, *et al.*) – Economic Matters.

Information Source(s): Judiciary (Administrative Office of the Courts), Department of General Services, Board of Public Works, Governor's Office, Department of Business and Economic Development, Office of Administrative Hearings, University System of Maryland, Maryland Department of Transportation, Department of Budget and Management, Office of the Attorney General, Department of Legislative Services

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