

CHAPTER 529

(Senate Bill 192)

AN ACT concerning

Procurement – Commercial Nondiscrimination Policy – Modifications

FOR the purpose of requiring the staff of the Maryland Commission on Human Relations to review certain complaints and make certain determinations; altering the responsibilities of the Commission and Commission staff; requiring the Commission to protect certain confidential information; altering the standard for certain findings made by Commission staff; altering the procedures to obtain a contested case hearing; requiring certain parties in a contested case hearing to provide notice on all other parties; providing the Commission with the discretion to designate the venue for a contested case hearing; authorizing an administrative law judge to affirm or reject all or part of a statement of charges; altering the scope of evidence that an administrative law judge may consider in a contested case hearing; requiring all false or frivolous allegations to be knowingly false or frivolous; authorizing the Commission to adopt certain regulations; altering certain terms; defining certain terms; making technical changes; making stylistic changes; and generally relating to the Maryland Commission on Human Relations and the Commercial Nondiscrimination Policy.

BY repealing and reenacting, with amendments,
Article – State Finance and Procurement
Section 19–103, 19–106 through 19–110, 19–116, and 19–119
Annotated Code of Maryland
(2006 Replacement Volume and 2006 Supplement)

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That the Laws of Maryland read as follows:

Article – State Finance and Procurement

19–103.

- (a) In this title the following words have the meanings indicated.

(b) “Administrative law judge” means the individual assigned by the Office of Administrative Hearings to conduct a hearing under this title.

(c) (1) “Business entity” means any person, **AS DEFINED IN § 1-101(D) OF THIS ARTICLE**, firm, sole proprietorship, partnership, corporation, limited liability company, or other business entity or a combination of any of these entities, including any financial institution, developer, consultant, prime contractor, subcontractor, supplier, or vendor, that has submitted a bid or proposal for, has been selected to engage in, or is engaged in providing goods or services to the State.

(2) “Business entity” does not include another governmental entity that is subject to Title VI of the Civil Rights Act of 1964.

(d) “Commercial customer” means a business entity that procured or attempted to procure goods or services from a business entity for business as opposed to personal, family, or household use.

(e) “Commercial Nondiscrimination Policy” means the provisions contained under this title and any regulations or documentation requirements adopted by the Maryland [Human Relations] Commission [for the Office of Minority Affairs] **ON HUMAN RELATIONS** in accordance with this title.

(F) (1) “COMMERCIAL TREATMENT” MEANS THE TREATMENT OF A VENDOR, SUPPLIER, SUBCONTRACTOR, OR COMMERCIAL CUSTOMER BY A BUSINESS ENTITY THAT AFFECTS THE CONDUCT OF BUSINESS AND THE TERMS AND CONDITIONS UNDER WHICH BUSINESS IS TRANSACTED BETWEEN TWO OR MORE BUSINESS ENTITIES.

(2) “COMMERCIAL TREATMENT” DOES NOT MEAN TREATMENT THAT IS UNRELATED TO A BUSINESS TRANSACTION OR THE CONDUCT OF BUSINESS.

[(f)] (G) “Commission” means the Maryland [Human Relations] Commission ON HUMAN RELATIONS.

(H) “COMMISSION STAFF” MEANS EMPLOYEES OF THE MARYLAND COMMISSION ON HUMAN RELATIONS DESIGNATED BY THE COMMISSION TO PROCESS, INVESTIGATE, AND PURSUE COMPLAINTS FILED UNDER THIS TITLE.

[(g)] (I) “Contract” means an agreement with a business entity that is let by or on behalf of the State for that business entity to sell or lease supplies or goods, or to provide construction, real estate development, financial, insurance, professional, or other services to the State in return for a fee or any other form of compensation to be paid or provided by the State.

[(h)] (J) (1) “Discrimination” means any disadvantage, difference, distinction, or preference in the solicitation, selection, hiring, or commercial treatment of a vendor, supplier, subcontractor, or commercial customer on the basis of race, color, religion, ancestry or national origin, sex, age, marital status, sexual orientation, or on the basis of disability or any otherwise unlawful use of characteristics regarding the vendor’s, supplier’s, or commercial customer’s employees or owners.

(2) “Discrimination” does not include lawful efforts to remedy the effects of discrimination that have occurred or are occurring in the marketplace.

[(i)] (K) “Economic development project” means a real estate development, construction, or renovation project for which the State provides:

- (1) funding or other financial assistance, other than payments in exchange for goods or services;
- (2) land;
- (3) road improvements;
- (4) tax credits; or
- (5) a below market purchase price.

[(j)] (L) (1) “Financial institution” means a person:

- (i) engaged in the business of lending money, guaranteeing loans, extending credit, securing bonds, or providing venture or equity capital; or
- (ii) that offers financial services in connection with State projects or the administration of State government.

(2) “Financial institution” includes banks, savings and loans, venture capital companies, insurance companies, bonding companies, mortgage companies, credit unions, and brokers.

[(k)] “Office” means the Office of the Executive Director of the Maryland Human Relations Commission or the Executive Director’s designee.]

[(1)] (M) “Party” means:

- (1) the person who has filed a complaint under this title;
- (2) the respondent business entity that has been alleged to have violated this title; and
- (3) the [office] **COMMISSION** that is responsible for investigating the complaint and rendering the initial findings.

[(m)] (N) “Retaliate” means to take any action that has a material negative effect against any person, business or other entity for reporting any incident of discrimination, testifying as a witness at a hearing, or providing requested assistance to [the Office] **COMMISSION STAFF** in any investigation of an incident of discrimination under this title.

[(n)] (O) “Services” includes construction, real estate development, financial, insurance, professional, and other services.

[(o)] (P) “State subcontract” means an agreement for the provision of goods or the performance of a particular portion of work to be performed under a contract with the State, where:

- (1) the party providing the goods or services is on reasonable notice that the work is to be performed under a State contract; and
- (2) the amount to be paid for such [service] **GOODS AND SERVICES** is material with respect to the overall amount of the contract.

[(p)] (Q) “State subcontractor” means the party providing goods or services under a State subcontract.

19–106.

(a) Any person may file an administrative complaint with the Commission within the limitations period set forth in § 19–101(c) of this title stating facts showing or tending to show that a business entity has within the preceding 4–year period engaged in discrimination or retaliation ~~against that person~~ in violation of this title.

(b) Within 10 business days, the Commission shall notify the business entity against whom the complaint was filed that a complaint has been received.

(C) BEFORE THE COMMENCEMENT OF AN INVESTIGATION OF AN ADMINISTRATIVE COMPLAINT, COMMISSION STAFF SHALL REVIEW THE COMPLAINT TO DETERMINE WHETHER:

(1) MEDIATION WOULD BE APPROPRIATE; AND

(2) BOTH PARTIES SHOULD BE CONTACTED TO ATTEMPT SUCH MEDIATION IN A MANNER CONSISTENT WITH THE REGULATIONS ADOPTED UNDER THIS TITLE.

19-107.

(a) [The Office] **COMMISSION STAFF** shall be responsible for [investigating] **DIRECTING AND CONDUCTING INVESTIGATIONS OF** discrimination and retaliation complaints filed under this title **IN A MANNER CONSISTENT WITH ARTICLE 49B § 3, § 10, AND § 11.**

(b) The [Office] **COMMISSION** may request [that the Commission provide] **ASSIGNMENT OF** additional State personnel or outside consultants as may be reasonably necessary or appropriate to conduct an investigation.

(c) (1) [The Office] **COMMISSION STAFF** shall exercise reasonable judgment in seeking relevant evidence from the complainant, the respondent business entity and, as necessary, external sources.

(2) This title may not be construed to require the State to fund the cost of:

(i) having State staff or other individuals travel outside the State to investigate any claim under this title; or

(ii) having witnesses travel to the State for the purpose of investigating a claim or testifying at a hearing or proceeding under this title.

(d) (1) Consistent with **ARTICLE 49B, § 13 OF THE CODE**, the Public Information Act, and the Open Meetings Act, the [Office] **COMMISSION SHALL PROTECT THE CONFIDENTIAL CHARACTER OF INFORMATION RELATING TO AN**

INVESTIGATION AND may issue protective orders for good cause to limit, or otherwise impose conditions on, access by any person to any document in the possession of a party.

(2) A protective order issued under paragraph (1) of this subsection may include:

(i) a document in the possession of the State or otherwise in the record that is not a public record; and

(ii) information disclosed in accordance with § 19–116 of this subtitle.

(e) The [Office] **COMMISSION** shall exercise reasonable discretion in determining the extent of the investigation required to support [the Commission's] **COMMISSION STAFF'S** initial findings and recommendations.

(f) (1) The [Office] **COMMISSION** may investigate and adjudicate a claim of discrimination under this title only if the claim alleges that:

(i) the discrimination was committed by a business entity within the limitations period set forth in § 19–101(c) of this title; and

(ii) the discrimination occurred in the State.

(2) Discrimination is deemed to have occurred in the State only if:

(i) each party operated a place of business in, or resided in, the State at the time of the discrimination; or

(ii) the discriminatory act was committed in the State.

19–108.

(a) In determining whether to proceed further with an investigation and in making findings, [the Office] **COMMISSION STAFF** may consider any evidence provided by the complainant or the respondent business entity as to the following factors:

(1) whether there was an intent to discriminate on the part of the respondent business firm;

(2) whether there was a pattern and practice of discrimination on the part of the respondent business entity;

(3) any actions taken by the respondent business entity to remedy the alleged discrimination;

(4) the effectiveness of any prior attempts by the respondent business entity to remedy the discrimination;

(5) whether the respondent business entity has procured goods or services from or otherwise engaged in business with persons or entities of the same protected class as the complainant to an extent sufficient to demonstrate that the respondent business entity has not discriminated against such protected class in the overall context of its business; and

(6) any other evidence deemed relevant by the Commission.

(b) Based on [the Office's] A review and investigation [,the Office] **CONSISTENT WITH ARTICLE 49B, § 10 OF THE CODE, COMMISSION STAFF** shall make an initial finding of each allegation stated in the complaint, that either:

(1) the investigation produced sufficient evidence to find that the alleged discrimination or retaliation did take place (“[sustained] **PROBABLE CAUSE**”);

(2) the investigation failed to produce sufficient evidence to find that the alleged discrimination or retaliation took place (“[not sustained] **NO PROBABLE CAUSE**”);

(3) the investigation produced sufficient evidence to establish that the complainant knowingly made one or more false or frivolous allegations, and further investigation did not appear likely to produce sufficient evidence that the alleged discrimination or retaliation did take place (“false or frivolous”);

(4) the allegation has been settled or otherwise resolved with the agreement of the respondent business entity, the complainant, and the State (“settled”); or

(5) the allegation has been withdrawn (“withdrawn”).

(c) [The Office] **COMMISSION STAFF** shall make the initial findings under subsection (b) of this section based on a preponderance of the evidence.

(d) On completion of its initial investigation, [the Office] **COMMISSION STAFF** shall recommend to the Commission the appropriate action to be taken, including:

- (1) additional investigation of the complaint;
- (2) the Commission's adoption of the initial findings rendered by [the Office] **COMMISSION STAFF**;
- (3) imposition of sanctions;
- (4) imposition of remedies; or
- (5) other action consistent with this title.

(e) In determining appropriate action on a discrimination claim, the Commission may take into account any evidence provided or uncovered in the course of the investigation regarding:

- (1) the impact of the discrimination on affected parties;
- (2) the impact of any authorized remedy on the State or any other party;
- (3) actions taken by the respondent business entity to remedy the alleged discrimination;
- (4) the effectiveness of any prior attempts by the respondent business entity to remedy the discrimination;
- (5) whether the respondent business entity has procured goods or services from or otherwise engaged in business with persons or entities of the same protected class as the complainant to an extent sufficient to demonstrate that the respondent business entity has not discriminated against such protected class in the overall context of its business;
- (6) the number and scope of prior violations of this policy by the respondent business entity; and
- (7) any other evidence determined to be relevant by the Commission.

(f) (1) Except as provided in paragraph (2) of this subsection, the Commission shall make the initial findings and issue recommendations for appropriate action within 120 calendar days of the receipt of the complaint.

(2) The Commission may[:

(i)] extend the time limit set forth in paragraph (1) of this subsection for:

(I) good cause; or

(II) if the parties agree to mediate a settlement to the complaint[; and

(ii) if mediation is unsuccessful, refer the matter to the Office of Administrative Hearings].

(g) The Commission shall notify the complainant and the business entity within 5 business days of the issuance of the initial findings and recommendations, including an explanation of the reasons justifying the initial findings.

19-109.

(a) [If the Commission determines that] **A REQUEST FOR A CONTESTED CASE HEARING IN ACCORDANCE WITH THE PROCEDURES SPECIFIED IN THIS SECTION MAY BE MADE BY:**

(1) A BUSINESS ENTITY, UPON A COMMISSION DETERMINATION OF PROBABLE CAUSE FOR one or more OF THE allegations STATED IN THE COMPLAINT AGAINST THE BUSINESS ENTITY, AND FAILURE OF TIMELY CONCILIATION; OR

(2) [are sustained or that] a complainant [has submitted] ON A COMMISSION DETERMINATION THAT THE COMPLAINANT HAS FILED a knowingly false or frivolous complaint[, the business entity against whom the allegations were made or the complainant who is claimed to have submitted a knowingly false or frivolous complaint shall be entitled to request a contested case hearing in accordance with the procedures specified in this section].

(b) (1) To submit a matter to an administrative hearing as a contested case under this title, the business entity or the complainant must request a contested

case hearing by filing a written notice with the Commission [and the complainant] within 15 calendar days of notice of the initial findings and recommendations.

(2) The notice must contain the following information:

(i) a demand that the matter be referred to the Office of Administrative Hearings for a contested case hearing in accordance with § 10-205(c)(2) of the State Government Article;

(ii) the names, addresses, and telephone numbers of the Commission, the business entity's representatives, and [the other party] **ANY OTHER PARTIES**;

(iii) a reference to this title; and

(iv) a summary of the Commission's findings and recommendations that are being submitted for resolution to the administrative law judge for the contested case hearing.

(3) THE REQUESTING PARTY SHALL IMMEDIATELY SERVE NOTICE OF THE REQUEST FOR A CONTESTED CASE HEARING UPON ALL OTHER PARTIES.

(c) If the business entity fails to properly request a contested case hearing, the initial findings and recommendations of the Commission shall become the final administrative decision of the State, and the Commission shall then be authorized to enter any order and to take any action reasonably necessary or convenient to:

(1) implement remedies under § 19-110 of this title;

(2) impose sanctions under § 19-111 of this title; and

(3) govern the conduct of the parties in the manner described under § 19-112 of this title so that the purposes of this title are achieved.

(d) (1) (i) For each contested case hearing properly requested by the business entity or by the complainant, the Commission shall [delegate the matter to] **FILE A STATEMENT OF CHARGES WITH** the Office of Administrative Hearings [to assign] **AND REQUEST A HEARING BEFORE** an administrative law judge [to conduct a hearing] in a manner consistent with the requirements of this subsection.

(ii) **THE COMMISSION MAY DESIGNATE THE VENUE FOR THE CONTESTED CASE HEARING, TAKING INTO CONSIDERATION THE CONVENIENCE OF THE PARTIES AND THE LOCATION OF THE EVIDENCE.**

(III) At the contested case hearing, the Commission shall have the burden of proof by a preponderance of the evidence.

(2) The Office of Administrative Hearings shall conduct any contested case hearing in accordance with its rules of procedure under COMAR 28.02.01.

(3) (i) At the conclusion of the contested case hearing, the administrative law judge shall issue a written decision.

(ii) The administrative law judge's written decision may:

1. affirm or reject [the initial findings and recommendations] **ALL OR PART OF THE STATEMENT OF CHARGES; OR**

2. substitute different findings [or] **AND** recommend appropriate remedies]; or

3. continue the hearing and return the case to the Commission for further investigation and findings and to report to the administrative law judge on the results of the investigation within the time frame the administrative law judge may specify].

(4) The administrative law judge's written decision shall be solely based on a preponderance of the evidence contained in the record of the contested case hearing and shall reflect the evidentiary basis for its findings.

(5) AN ADMINISTRATIVE LAW JUDGE MAY CONSIDER ANY EVIDENCE REGARDING THE FACTORS DESCRIBED IN § 19-108(A) OF THIS TITLE WHEN DETERMINING WHETHER TO SUSTAIN AN ALLEGATION PRESENTED IN A STATEMENT OF CHARGES.

(e) Notwithstanding any contrary provision in this title, unless the administrative law judge finds that one or more allegations giving rise to the Commission's findings or the business entity's challenge to the findings were frivolous or knowingly false when made, each party shall bear the cost of its own legal representation and expert witness fees.

(f) If the administrative law judge finds that one or more allegations giving rise to the Commission's findings or the business entity's challenge to the findings was frivolous or knowingly false when made, the administrative law judge may require the party who made the frivolous or knowingly false allegations to bear all or a portion of the other party's legal fees and expert witness fees.

(g) The business entity, the Commission, and the complainant shall cooperate in good faith to have the contested case hearing concluded within 180 days after the business entity issues its notice for a contested case hearing.

(h) If the Commission determines that one or more allegations are **KNOWINGLY** false or frivolous, the complainant making the allegations shall be entitled to a contested case hearing on the allegations that are determined to be **KNOWINGLY** false or frivolous in accordance with the procedures set forth in this section, except that all references to the business entity with respect to matters of contested case hearing rules and procedure shall apply to the complainant.

(i) If the complainant fails to properly request a contested case hearing regarding a determination of a **KNOWINGLY** false or frivolous allegation as provided in this title, the initial findings and recommendations shall become the final administrative decision of the State in accordance with § 19-112 of this title.

(j) (1) If a timely contested case hearing is not requested, the Commission may vacate the [Office's] **COMMISSION STAFF'S** recommended remedy on written notice to all parties within 5 business days after the time for requesting a contested case hearing has expired.

(2) In the absence of notice, the Commission shall be deemed to have approved the [Office's] **COMMISSION STAFF'S** recommended remedy.

(k) [If the Commission vacates the Office's proposed remedy, the Commission shall initiate a contested case hearing by filing a request for a contested case hearing with the Office of Administrative Hearings in compliance with the requirements of this title.

(l) To the extent that procedures and standards stated in this title differ from those contained in Title 10, Subtitle 2 of the State Government Article, this title shall govern but in all other respects, the provisions of the State Government Article shall govern.

19-110.

(a) When an allegation is sustained by an administrative law judge under this title, the administrative law judge may take additional evidence on the appropriate remedy to be recommended, including evidence relating to factors set forth in [§ 19–108(f)] § **19–108(E)** of this subtitle and any other evidence deemed relevant by the administrative law judge.

(b) If the administrative law judge sustains an allegation, the administrative law judge may order any one or more of the following actions:

(1) any remedy that is agreed to by the respondent business entity, the complainant, and the Commission;

(2) referral of the respondent business entity to the Board of Public Works for a determination of debarment pursuant to §§ 16–306 and 16–307 of this article to preclude the business entity from:

(i) bidding on or receiving contract awards on State projects;
and

(ii) participating in State contracts as a subcontractor, vendor, or supplier for a period of not more than 3 years;

(3) rescission, suspension, or termination of any current contract between the respondent business entity and the State under the terms of that contract;

(4) exercise of any other rights or remedies available to the State under any current contract between the respondent business entity and the State;

(5) finding that the respondent business entity is not a “responsible bidder” within the meaning of this article with respect to specific contracts that the State has put out for bids or intends to put out for bids;

(6) referral of the matter for criminal prosecution of fraud and other violations under State law if appropriate under the circumstances; or

(7) mediation.

19–116.

Every contract that the State enters into shall include the following language:

“As a condition of entering into this agreement, upon the [Maryland Human Relations Commission’s] request **OF THE MARYLAND COMMISSION ON HUMAN RELATIONS**, and only after the filing of a complaint against the company under Title 19 of the State Finance and Procurement Article, as amended from time to time, the company agrees to: provide to the State within 60 days after the request a truthful and complete list of the names of all subcontractors, vendors, and suppliers that the company has used in the past 4 years on any of its contracts that were undertaken within the State of Maryland, including the total dollar amount paid by the contractor on each subcontract or supply contract. The company further agrees to cooperate in any investigation conducted by the State pursuant to the State’s Commercial Nondiscrimination Policy as set forth under Title 19 of the State Finance and Procurement Article of the Annotated Code of Maryland, to provide any documents relevant to any investigation that is requested by the State. The company understands and agrees that violation of this clause shall be considered a material breach of this agreement and may result in contract termination, disqualification by the State from participating in State contracts, and other sanctions.”

19–119.

(a) [The] **IN ACCORDANCE WITH TITLE 10 OF THE STATE GOVERNMENT ARTICLE, THE** Commission shall [recommend] **ADOPT** regulations [as may be required from time to time] to implement this title.

(b) The Commission may establish documentation and reporting requirements to further the purposes and intent of this title.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect October 1, 2007.

Approved by the Governor, May 17, 2007.