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April 15, 2020

The Honorable Lawrence J. Hogan, Jr.
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401

RE: *Senate Bill 442*

Dear Governor Hogan:

We have reviewed and hereby approve Senate Bill 442 for constitutionality and legal sufficiency. As stated in the Fiscal and Policy Note, Senate Bill 442 “restores the applicability of the State’s Minority Business Enterprise (MBE) program to public-private partnerships (P3s) established under current law and to offshore wind projects authorized in current law. The application of the MBE program to construction projects and procurements as they relate to video lottery terminals (VLTs) is extended for three additional years – until July 1, 2023.”¹ We write this letter to make recommendations on implementation.

The Equal Protection Clause provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV. Maryland’s Constitution contains no equal protection clause, but “the concept of equal protection is embodied in the due process requirement of Article 24” of the Maryland Declaration of Rights. *Tyler v. City of College Park*, 415 Md. 475, 499 (2010). “Because a race or gender-conscious program is constitutionally suspect, the Supreme Court has essentially put the burden on a government entity with such a program to justify the program with findings based on evidence.” 91 *Opinions of the Attorney General* 181, 183 (2006). *See also Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 784 (2007)

¹ The bill takes effect July 1, 2020; provisions related to P3s and offshore wind projects terminate June 30, 2023.

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("The government bears the burden of justifying its use of individual racial classifications."). Accordingly, we believe that it is important that the P3 report and analysis due to the General Assembly by September 30, 2020 be completed and evaluated prior to implementation of the MBE provisions so that there is a strong basis in fact to support the State's ability to conduct a race-conscious remedial program in the area of P3s.

In addition, Senate Bill 442 purports to rely on the 2017 Availability and Utilization Study as the factual predicate needed to meet strict scrutiny for the VLT and Offshore Wind MBE programs. The supporting evidence, however, also includes subsequent reports by the State's disparity consultant that were presented to the General Assembly. Further, although the bill states that a subsequent report is due in 2022 for the Offshore Wind and P3 MBE programs, there is no such requirement in the bill for the VLT MBE program. A similar analysis for the VLT program should also be completed in 2022 in order to evaluate whether evidence supports continuation of the program during the 2023 session.

Sincerely,

A handwritten signature in blue ink that reads "Brian E. Frosh". The signature is fluid and cursive, with the first name "Brian" being the most prominent.

Brian E. Frosh
Attorney General

BEF/SBB/kd

cc: The Honorable John C. Wobensmith
Keiffer J. Mitchell, Jr.
Victoria L. Gruber