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May 14, 2019

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

RE: Senate Bill 516 – “Clean Energy Jobs”

Dear Governor Hogan:

We have reviewed and hereby approve Senate Bill 516, “Clean Energy Jobs,” for constitutionality and legal sufficiency. It is our view that the bill is not clearly unconstitutional; nevertheless, we discuss below how two provisions should be implemented to be consistent with federal and State constitutional requirements.¹

Senate Bill 516 increases the State’s Renewable Energy Portfolio Standard and makes changes to the State’s current offshore wind application and approval process. Among other things, the bill requires that an applicant,

as a condition to the [Public Service] Commission’s approval of the offshore wind project, sign a memorandum of understanding with the Commission that requires the applicant to use best efforts and effective outreach to obtain, as a goal, contractors and subcontractors for the project that are minority business enterprises, to the extent practicable, as supported by a disparity study.

(Page 25, lines 24-29.) In addition, the bill requires that an applicant enter into a “community benefit agreement.” The bill specifies several items for inclusion in the community benefit agreement, including that the agreement “provides for best efforts and

¹ We apply a “not clearly unconstitutional” standard of review for the bill review process. 71 *Opinions of the Attorney General* 266, 272 n.11 (1986).

effective outreach to obtain, as a goal, the use of a workforce including minorities, to the extent practicable.” (Page 26, lines 21-23.)

The use of race and gender in a government program raises an issue under the Equal Protection Clause of the U.S. Constitution. 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). In the context of Minority Business Enterprise (“MBE”) programs, the use of numerical goals based on individual racial classifications must meet strict scrutiny. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989). “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) (“The government bears the burden of justifying its use of individual racial classifications.”).

No doubt exists that the government has a compelling interest in remedying identified past and present race discrimination. *Croson*, 488 U.S. at 509. MBE goal programs are permissible, however, only when the governmental entity seeks to address discrimination by the government entity itself, or to prevent the public entity from acting as a “passive participant” in a system of racial exclusion practiced by elements of local industry by allowing tax dollars “to finance the evil of private prejudice.” *Id.* at 492; *Associated Utility Contractors of Maryland v. Mayor and City Council of Baltimore*, 83 F. Supp. 2d 613, 619 (D. Md. 2000).

Nevertheless, while Senate Bill 516 is aimed at providing equal opportunities to minority and women business enterprises as well as to minority job seekers, the required actions are, in our view, facially race and gender neutral. The required actions are legitimate outreach activities that will likely expand opportunities for minority- and women-owned businesses, as well as minority job applicants. *See Peightal v. Metropolitan Dade Co.*, 26 F.3d 1545, 1557-1558 (11th Cir. 1994) (presentations at job fairs and other events created to apprise minorities of government career opportunities are race-neutral); *Parents Involved*, 551 U.S. at 789 (Kennedy, J. concurring) (addressing the issue of race-conscious recruitment, among other race-conscious techniques, and stating that “it is unlikely any of them would demand strict scrutiny to be found permissible”). Accordingly,

so long as the provisions related to MBEs and a minority workforce are implemented as outreach measures and not as numerical goals or preferences based on race or gender, the bill is not clearly unconstitutional.

We also note that when the State's current offshore wind program was created via enactment of Chapter 3 of 2013, the Maryland Department of Transportation's expert at the time analyzed the State's disparity study and concluded that there was a strong basis in fact to support the State's desire to conduct a race-conscious remedial program in the area of offshore wind energy. *See Letter of Dr. Jon Wainwright to Abigail Hopper, Energy Advisor to the Governor* (February 12, 2013) at 3-4. On the basis of that evidence, Attorney General Gansler advised Governor O'Malley that the State had a compelling governmental interest that justified the enactment of Chapter 3's MBE provisions. *See Bill Review Letter for House Bill 226 to Governor Martin O'Malley from Attorney General Douglas F. Gansler* (April 8, 2013).

After the MBE provisions enacted in the 2013 sunset, those provisions were re-enacted in 2017 by the legislature. Chapter 438 of 2017. Section 3 of Chapter 438 also directed that

the Certification Agency designated by the Board of Public Works under § 14-303(b) of the State Finance and Procurement Article to certify and decertify minority business enterprises, in consultation with the Office of the Attorney General and the Maryland Public Service Commission, shall initiate an analysis of the disparity study entitled "Business Disparities in the Maryland Market Area" published on February 8, 2017, to determine if it applies to the type of work that will likely be performed by an approved applicant with respect to an offshore wind project under § 7-704.1 of the Public Utilities Article and submit a report on the analysis to the Legislative Policy Committee of the General Assembly, in accordance with § 2-1246 of the State Government Article, before December 1, 2017.²

² According to the Department of Legislative Services ("DLS"), the General Assembly never received the report from the Maryland Department of Transportation. *See* DLS "2018 Mandated Reports Review," at 18.

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If an analysis of the current disparity study is conducted, it can be used to determine whether numerical goals may be established in the future consistent with constitutional standards. In the meantime, the provisions of Senate Bill 516 should be implemented as race neutral outreach measures and not as numerical goals or preferences on the basis of race or gender.

Sincerely,

A handwritten signature in black ink, appearing to read "Brian E. Frosh". The signature is fluid and cursive, with a long horizontal stroke at the end.

Brian E. Frosh
Attorney General

BEF/SBB/kd

cc: The Honorable John C. Wobensmith
Chris Shank
Victoria L. Gruber