

SENATE BILL 971

P2, C1

7lr3226
CF HB 919

By: **Senator Kagan**

Introduced and read first time: February 3, 2017

Assigned to: Education, Health, and Environmental Affairs

Committee Report: Favorable with amendments

Senate action: Adopted with floor amendments

Read second time: March 17, 2017

CHAPTER _____

1 AN ACT concerning

2 **Procurement – Nondiscrimination Clauses and State Policy Prohibiting**
3 **Discrimination**

4 FOR the purpose of altering the requirements for a certain nondiscrimination clause that
5 prohibits certain discrimination by a contractor against an employee or applicant for
6 employment; ~~requiring a certain contract for procurement to include a certain~~
7 ~~nondiscrimination clause that prohibits certain discrimination by a contractor in the~~
8 ~~formation or composition of a certain board of directors; providing that it is the policy~~
9 ~~of the State not to enter into a contract with a certain business entity that has~~
10 ~~discriminated in the formation or composition of a board of directors on the basis of~~
11 ~~certain characteristics; requiring the Maryland Commission on Civil Rights, in~~
12 conjunction with the Department of Commerce, to conduct a certain study and report
13 to the General Assembly on or before a certain date; and generally relating to
14 nondiscrimination clauses and policies prohibiting discrimination in procurement.

15 BY repealing and reenacting, with amendments,
16 Article – State Finance and Procurement
17 Section 13–219 and ~~19–101~~ 19–102
18 Annotated Code of Maryland
19 (2015 Replacement Volume and 2016 Supplement)

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

22 **Article – State Finance and Procurement**

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.

[Brackets] indicate matter deleted from existing law.

Underlining indicates amendments to bill.

~~Strike out~~ indicates matter stricken from the bill by amendment or deleted from the law by amendment.



1 13-219.

2 (a) This section is broadly applicable to all procurements by the State.

3 (b) Each contract for procurement shall include a nondiscrimination clause as
4 provided in this section.

5 (c) The nondiscrimination clause shall:

6 (1) prohibit discrimination in any manner by the contractor:

7 ~~(i)~~ against an employee or applicant for employment [because of
8 sex, race, age, color, creed, or national origin;] **ON THE BASIS OF RACE, COLOR,**
9 **RELIGION, ANCESTRY OR NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, SEXUAL**
10 **ORIENTATION, OR ON THE BASIS OF DISABILITY OR ANY OTHERWISE UNLAWFUL USE**
11 **OF CHARACTERISTICS REGARDING EMPLOYMENT; AND**

12 ~~(ii) IF APPLICABLE, IN THE FORMATION OR COMPOSITION OF A~~
13 ~~BOARD OF DIRECTORS ON THE BASIS OF RACE, COLOR, RELIGION, ANCESTRY OR~~
14 ~~NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, SEXUAL ORIENTATION, OR ON THE~~
15 ~~BASIS OF DISABILITY OR ANY OTHERWISE UNLAWFUL USE OF CHARACTERISTICS~~
16 ~~REGARDING THE FORMATION OR COMPOSITION OF A BOARD OF DIRECTORS;~~

17 (2) require the contractor to include a similar clause in every subcontract
18 except a subcontract for standard commercial supplies or raw materials; and

19 (3) require each contractor and subcontractor subject to this clause to post
20 conspicuously a notice that sets forth the provisions of the clause in a place that is available
21 to employees and applicants for employment.

22 (d) If the nondiscrimination clause is omitted from a contract or subcontract
23 subject to this section, the State may declare the contract to be void. In that event, the
24 contractor is entitled to the reasonable value of work that has been performed and
25 materials that have been provided.

26 (e) If a contractor willfully fails to comply with the requirements of the
27 nondiscrimination clause and the contract is partly executory, the State may compel the
28 contractor to continue to perform under the contract, but the State:

29 (1) is liable for no more than the reasonable value of work performed and
30 materials provided after the date on which the breach of contract was or should have been
31 discovered; and

32 (2) shall deduct any money that has been paid under the contract from the
33 money that becomes due under item (1) of this subsection.

(f) If a subcontractor willfully fails to comply with the requirements of a nondiscrimination clause, the contractor may void the subcontract. In that event, the contractor is liable for no more than the reasonable value of work performed or materials provided.

(g) (1) Any person, including an employee or prospective employee, who has information about a violation of this section or a nondiscrimination clause may inform the Board.

(2) The Board:

(i) shall cause an immediate investigation of the charge; and

(ii) if it concludes that the charge is true, may invoke any remedy available by law.

~~19-101.~~

~~(a) It is the policy of the State not to enter into a contract with any business entity that has discriminated in:~~

~~(1) the solicitation, selection, hiring, or commercial treatment of vendors, suppliers, subcontractors, or commercial customers 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; OR~~

~~(2) THE FORMATION OR COMPOSITION OF A BOARD OF DIRECTORS 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 FORMATION OR COMPOSITION OF A BOARD OF DIRECTORS.~~

~~(b) Nothing in this title shall be construed to prohibit or limit otherwise lawful efforts to remedy the effects of discrimination that have occurred or are occurring in the marketplace.~~

~~(c) A complaint of discrimination shall be filed within 4 years after the date the cause of action accrues.~~

19-102.

It is the intent of the State to avoid becoming a passive participant in private sector commercial discrimination:

(1) by refusing to procure goods and services from business entities that:

~~(I) discriminate in the solicitation, selection, hiring, or commercial treatment of vendors, suppliers, subcontractors, or commercial customers on the basis of race, color, religion, ancestry or national origin, sex, age, marital status, sexual orientation, or on the basis of disability or other unlawful forms of discrimination; OR~~

~~(II) DISCRIMINATE IN THE FORMATION OR COMPOSITION OF A BOARD OF DIRECTORS ON THE BASIS OF RACE, COLOR, RELIGION, ANCESTRY OR NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, SEXUAL ORIENTATION, OR ON THE BASIS OF DISABILITY OR OTHER UNLAWFUL FORMS OF DISCRIMINATION; AND~~

(2) by providing a procedure for receiving, investigating, and resolving complaints of discrimination, AS DESCRIBED IN ITEM (1) OF THIS SUBSECTION, filed against business entities that:

[(1)] (I) have submitted a bid or proposal; or

[(2)] (II) have been selected to engage in, or are engaged in, providing goods or services to the State.

~~19-103.~~

~~(i) (1) "Discrimination" means any disadvantage, difference, distinction, or preference in:~~

~~(I) 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; OR~~

~~(II) THE FORMATION OR COMPOSITION OF A BOARD OF DIRECTORS ON THE BASIS OF RACE, COLOR, RELIGION, ANCESTRY OR NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, SEXUAL ORIENTATION, OR ON THE BASIS OF DISABILITY OR OTHER UNLAWFUL USE OF CHARACTERISTICS REGARDING THE FORMATION OR COMPOSITION OF A BOARD OF DIRECTORS.~~

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

~~19-114.~~

~~Every contract and subcontract shall contain a nondiscrimination clause that reads as follows:~~

~~“As a condition of entering into this agreement, the company represents and warrants that it will comply with the State’s Commercial Nondiscrimination Policy, as described under Title 19 of the State Finance and Procurement Article of the Annotated Code of Maryland. As part of such compliance, the company may not discriminate on the basis of race, color, religion, ancestry or national origin, sex, age, marital status, sexual orientation, or on the basis of disability or other unlawful forms of discrimination in the solicitation, selection, hiring, or commercial treatment of subcontractors, vendors, suppliers, or commercial customers OR IN THE FORMATION OR COMPOSITION OF A BOARD OF DIRECTORS, nor shall the company retaliate against any person for reporting instances of such discrimination. The company shall provide equal opportunity for subcontractors, vendors, and suppliers to participate in all of its public sector and private sector subcontracting and supply opportunities, provided that nothing contained in this clause shall prohibit or limit otherwise lawful efforts to remedy the effects of marketplace discrimination that have occurred or are occurring in the marketplace. The company understands and agrees that a material violation of this clause shall be considered a material breach of this agreement and may result in termination of this agreement, disqualification of the company from participating in State contracts, or other sanctions. This clause is not enforceable by or for the benefit of, and creates no obligation to, any third party.”~~

~~19-115.~~

~~All requests for bids or proposals issued for State contracts shall include the following certification to be completed by the bidder:~~

~~“The undersigned bidder hereby certifies and agrees that the following information is correct:~~

~~In preparing its bid on this project, the bidder has considered all proposals submitted from qualified, potential subcontractors and suppliers, and has not engaged in “discrimination” as defined in § 19-103 of the State Finance and Procurement Article of the Annotated Code of Maryland; to wit: discrimination in the solicitation, selection, or commercial treatment of any subcontractor, vendor, supplier, or commercial customer OR IN THE FORMATION OR COMPOSITION OF A BOARD OF DIRECTORS on the basis of race, color, religion, ancestry or national origin, sex, age, marital status, sexual orientation, or on the basis of disability or other unlawful forms of discrimination. Without limiting the foregoing, “discrimination” also includes retaliating against any person or other entity for reporting any incident of “discrimination”. Without limiting any other provision of the solicitation for bids on this project, it is understood and agreed that, if this certification is false, such false certification will constitute grounds for the State to reject the bid submitted by the bidder on this project, and terminate any contract awarded based on the bid. As part of its bid or proposal, the bidder shall provide to the State a list of all instances within the immediate past 4 years where there has been a final adjudicated determination in a legal or administrative proceeding in the State of Maryland that the bidder discriminated against its subcontractors, vendors, suppliers, or commercial customers OR~~

~~DISCRIMINATED IN THE FORMATION OR COMPOSITION OF A BOARD OF DIRECTORS, and a description of the status or resolution of that complaint, including any remedial action taken. As a condition of submitting a bid or proposal to the State, the bidder agrees to comply with the State's Commercial Nondiscrimination Policy as described under Title 19 of the State Finance and Procurement Article of the Annotated Code of Maryland."~~

~~19-116.~~

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

~~"As a condition of entering into this agreement, upon the request of the Commission on Civil Rights, 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, OR ANY INFORMATION REQUESTED BY THE COMMISSION TO INVESTIGATE THE FORMATION OR COMPOSITION OF A BOARD OF DIRECTORS. 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."~~

SECTION 2. AND BE IT FURTHER ENACTED, That the Maryland Commission on Civil Rights, in conjunction with the Department of Commerce, shall:

(1) study strategies for increasing the diversity on boards of directors of for-profit and nonprofit entities in Maryland; and

(2) on or before December 1, 2017, report to the General Assembly, in accordance with § 2-1246 of the State Government Article, on their findings and recommendations.

SECTION 3. AND BE IT FURTHER ENACTED, That this Act shall take effect October 1, 2017.