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Changes to Maryland MBE Law: Contractors Be Wary

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The State of Maryland has always been aggressive in providing opportunities for minorities to do business with the State. For example, in 2008 its Minority Business Enterprise program (MBE) was instrumental in generating \$1.3 billion dollars in contracts to minority- and womenowned businesses. However, despite the success, some may think that the most recent MBE legislation goes too far in creating onerous burdens on contractors doing business with the State.

Effective October 1, 2009, "unless otherwise provided by law," House Bill 389 and Senate Bill 611 prohibits a prime contractor from including a certified MBE in a bid or proposal submitted to the State without requesting, receiving or obtaining the MBE's authorization. If the MBE's name is submitted with the bid or proposal, the contractor must use the MBE's services to perform the contract. Finally, the contractor may not use or pay the MBE solely to use its name in the bid or proposal in order to meet MBE participation requirements. If a contractor violates any of these provisions, he can wind up in jail and pay a substantial fine. The new law is controversial because, unlike certain existing acts which are prohibited by the statute, the contractor who violates the new prohibitions may be guilty of a crime whether or not the contractor acted with intent to violate the MBE statute. Any contractor who violates the statute is guilty of a felony and, upon conviction, is subject to a fine of up to \$20,000 or imprisonment of up to five years, or both.

The new law is incorporated into the prohibited acts and penalties section of the State Finance and Procurement Code. All of the prohibited acts, prior to the amendment, required fraudulent or willful intent to be found guilty. A contractor is prohibited from (1) fraudulently obtaining or attempting to obtain an MBE certification; (2) aiding another contractor in fraudulently obtaining an MBE certification; (3) willfully impeding a State official from investigating the qualifications of a business entity that has requested MBE certification; (4) fraudulently obtaining, attempting to obtain, or aiding another person in fraudulently obtaining or attempting to obtain public money; and (5) willfully falsifying, concealing or covering up a material fact, making a false or fraudulent statement, or using a document that the person knows contains a false or fraudulent statement in any MBE matter.

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The new law does not identify what other law creates an exception which may shield a contractor from prosecution. Arguably, there are procurement regulations which create exceptions to the prohibited acts. For example, COMAR 21.11.03.12 provides that if after submission of bid but before execution of a contract the contractor determines that a proposed MBE subcontractor has or will become unavailable, the contractor must notify the procurement officer immediately. Presumably, the procurement officer will then either allow the contractor to submit a replacement MBE subcontractor or will grant a waiver.

Regardless of whether possible exceptions may exist, a contractor doing business with the State needs to be aware that he may be guilty of a crime if his conduct is proscribed by the new law, whether or not the contractor acted with intent to violate the MBE statute. The new law will give contractors pause and alter the way in which they go about complying with MBE participation requirements.

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