
CITY OF BALTIMORE

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Mayor



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June 10, 2021

The Honorable President and Members
of the Baltimore City Council
Attn: Executive Secretary
Room 409, City Hall
100 N. Holliday Street
Baltimore, Maryland 21202

Re: City Council Bill 21-0069 – Transparency in Procurement

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 21-0069 for form and legal sufficiency. It would add Subtitle 49 “General Contractor Reporting Requirements” to Article 5 of the City Code. The Subtitle would mandate that “a Contractor who enters into a service contract valued at \$100,000 or more must disclose, and agree to require all subcontractors on the contract to disclose certain facts and deidentified data including the capacity to complete the job, years’ experience, workforce and board member demographic data.

The General Assembly allows the City “to prescribe, within the limits of the federal and state constitutions, reasonable regulations necessary to preserve the public order, health, safety, or morals.” *Tighe v. Osborne*, 149 Md. 349, 356 (1925); City Charter, Art. II, §§ (27), (47). Although the bill would fall within this broad legislative power, there are several legal concerns.

This bill tries to legislate a contractual remedy for breach of a disclosure requirement that is not currently in City contracts. Legislation cannot provide additional terms to existing contracts. U.S. Const., Art I, s 10, cl. 1; *see, e.g., Garris v. Hanover Insurance Company*, 630 F.2d 1001, 1004 (4th Cir. 1980) (stricter scrutiny applies when the government enacts a law that impacts contracts to which it is a party). Legislation could require the City to insert the disclosure requirement as a term in future contracts but not existing contracts as that would violate the Constitution. *Id.* An amendment to make it clear that the bill only applies to future contracts is attached to this report.

The remedy for failing to fulfill a term of the contract would be provided for in the contract. Whether certain facts amount to a breach would generally be a factual inquiry requiring a study of the particular contract and the circumstances. *Barufaldi v. Ocean City, Chamber of Commerce, Inc.*, 196 Md.App. 1, 23 (2010). Legislating when a breach occurs, whether it is material and what remedy applies, usurps the Board of Estimates’ Charter-given authority to accept bids, disqualify bidders or contractors and establish procedures for the release of claims outside of the express terms of a contract, and of the City Solicitor’s Charter-given authority to initiate any suits in order

to demand payment of liquidated damages or otherwise direct the City's legal affairs. City Charter, Art. VI, §§ 2, 11, 15; VII, § 24, 26. "In the event of an inconsistency between the provision in the Charter and any contrary [ordinance], the provision in the Charter would control...." *Swarthmore Co. v. Kaestner*, 266 Md. 517, 526–27 (1970); City Charter, Art. III, § 11 ("The Mayor and City Council of Baltimore shall have power to pass all ordinances, not inconsistent with the Charter").

Additionally, the remedies listed are too vague to be enforced because the parties are not given the understanding of what conduct will trigger which penalty. *See, e.g., Carroll County v. Forty West Builders*, 178 Md. App. 328, 377-78 (2008) ("an enforceable contract must express with definiteness and certainty the nature and extent of the parties' obligations") (citations omitted); *Board of Trustees of Employees' Retirement System of City of Baltimore*, 317 Md. 72, 99 (1989). Courts have held a civil "provision invalid as contravening the due process of law clause of the Fifth Amendment, among others, because it required that the transactions named should conform to a rule or standard which was so vague and indefinite that no one could know what it was." *See, e.g., A.B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 238-239 (1925) (citations omitted); *see also Johnson v. U.S.*, 576 U.S. 591, 618 (2015) (Thomas, J., concurring) (discussing how the Supreme "Court's application of its vagueness doctrine has largely mirrored its application of substantive due process."). Just because there may be "some conduct that clearly falls within the provision's grasp" does not cure an otherwise vague law. *Id.* at 602.

Finally, the Charter provides that the only legislative penalties available for disobeying an ordinance are jail time and a maximum fine of \$1,000. City Charter, Art. II, § (48). A draft amendment to remove the penalty language is attached.

However, even if the bill were amended to change the penalty section to a fine or misdemeanor charge, there would be a First Amendment problem with this approach. "The First Amendment, made applicable to the States by the Fourteenth Amendment, forbids abridgment of the freedom of speech. We have held time and again that freedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all.'" *Janus v. American Federation of State, County, and Mun. Employees, Council 31*, 138 S. Ct. 2448, 2463 (2018); U.S. Const., Amend. 1.

The purpose of this legislation is to provide a penalty for failing to speak. Although it is well settled that laws requiring disclosure of truthful, factual information are permissible, the disclosure must be justified by a sufficient purpose behind the legislation. *Cal. Medical Ass'n v. FEC*, 453 U.S. 182 (1981), *Buckley v. Valeo*, 424 U.S. 1 (1975). There is not an adequate justification for the disclosure requirements in this bill because they have no relationship to the City's ability to contract with the vendor or enforce that contract. The City cannot select companies with which to do business based on the demographic information requested because the City must select the lowest responsive, responsible bidder. City Charter, Art. VI, § 11(h)(1)(ii). Nor is the City's minority and women's business requirements impacted by these disclosures. City Code, Art. 5, Subtitle 28.

Rather, while this bill seeks to increase transparency in procurement, the additional information will shed no light on the government's procurement decisions as the information to be disclosed is not used to select companies with which the City does business. Thus, there is not a sufficient purpose for compelling the speech *legislatively*. If the City wishes to compel vendors to disclose information, the City can do that as a market participant by putting the requirement to make disclosures in the contract. *See, e.g., US v. Kokinda*, 497 U.S. 720, 725 (1990) (Supreme Court explained "long-settled principle that governmental actions are subject to a lower level of First Amendment scrutiny when 'the governmental function operating . . . [is] not the power to regulate or license, as a law maker, . . . but, rather, as proprietor, to manage [its] internal operation[s].").

The City cannot legislatively require that companies must speak; even truthful speech, and even companies with which the City does business. Although these businesses have no right to enter into contracts with the City, once they do so the City cannot exact more from those vendors than the contract already requires in a way that violates the Constitution:

For at least a quarter-century, this [Supreme] Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests-especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which (it) could not command directly.' *Speiser v. Randall*, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460. Such interference with constitutional rights is impermissible.

Perry v. Sindermann, 408 U.S. 593, 597 (1972) (cited with approval by *Elrod v. Burns*, 427 U.S. 347, 359 (1978)); *accord Delong v. U.S.*, 621 F.2d 618, 624 (4th Cir. 1980); *State v. Burning Tree Club, Inc.*, 315 Md. 254 (1989).

To facilitate the contractual remedies desired, the bill needs to be amended to require the City include terms in prospective contracts that require disclosures. In that way, the City has contractual remedies available for breaches of those required contract terms. To retain the statutory penalties for failure to speak would be an impermissible way for the Mayor and City Council to "produce a result which (it) could not command directly," namely via the penalties in the Contract. The City cannot exact compliance with its contracts via statutory penalties that go beyond the scope of the bargained for exchange. The requisite amendment is attached to this bill report.

Additionally, lines 5 and 6 on page 4 must be deleted because they would allow an administrative entity to carry out the legislative function of deciding what disclosures are required. "The rule is plain and well established that legislative or discretionary powers or trust devolved by law or charter in a council or governing body cannot be delegated to others, but ministerial or administrative function may be delegated to subordinate officials." *City of Baltimore v. Wollman*,

123 Md. 310, 342 (1914); accord *Andy's Ice Cream v. City of Salisbury*, 125 Md. App. 125, 161 (1999); see also 72 Op. City Sol. 18, 20 (1980) (citing 73 C.J.S. §75, p. 381-382).

The reason is simple: “municipal delegation of ministerial authority must contain sufficient guidelines to ensure that the officers carrying out the delegations will act in accordance with the legislative will, and not employ their own unbounded discretion.” *Andy's Ice Cream*, 125 Md. at 162; accord *Dyer v. Board of Education of Howard County*, 216 Md. App. 530, 540 (2014). Here, there is no way to delegate to the Department of Finance or any other City administrative official the power to pick new information required for disclosure because it could not come with sufficient guidelines; it would always be an exercise of discretion, which cannot be delegated. City Charter, Art. II, §§ (27), (47). An amendment to remove this language is attached to the bill.

Subject to all of the necessary amendments, the bill could be approved for form and legal sufficiency.

Very truly yours,



Hilary Ruley
Chief Solicitor

cc: James L. Shea, City Solicitor
Matthew Stegman, Mayor's Office of Government Relations
Elena DiPietro, Chief Solicitor, General Counsel Division
Victor Tervalá, Chief Solicitor
Ashlea Brown, Assistant Solicitor

AMENDMENTS TO COUNCIL BILL 21-0069
(1st Reader Copy)

Proposed by: Law Dep't

Amendment 1- No Retroactivity

On page 5, after Line 27, insert “SECTION 4. THAT THIS ORDINANCE ONLY OPERATES PROSPECTIVELY TO CONTRACTS ENTERED INTO BY THE PARTIES AFTER THE EFFECTIVE DATE OF THIS ORDINANCE.”

Amendment 2- Removal of Automatic Breach and Administrative Penalties

On page 4, delete lines 19 through 32 and on Page 5 delete line 1.

Amendment 3- Requiring the City Insert Disclosure Requirement in Future Contracts

On page 3, in lines 21 through 23, delete “A CONTRACTOR WHO ENTERS INTO A SERVICE CONTRACT VALUED AT \$100,000 OR MORE MUST DISCLOSE, AND AGREE TO REQUIRE ALL SUBCONTRACTORS ON THE CONTRACT TO DISCLOSE.”

And replace with “ANY SERVICE CONTRACT VALUED AT \$100,000 OR MORE ENTERED INTO BY THE MAYOR AND CITY COUNCIL OF BALTIMORE MUST CONTAIN A TERM REQUIRING THAT THE CONTRACTOR PROVIDE THE CITY WITH THE FOLLOWING INFORMATION FOR ITSELF AND ANY OF ITS SUBCONTRACTORS:”

Amendment 4 – Retaining Discretionary Legislative Function

On page 4 delete lines 5 and 6.