
CITY OF BALTIMORE

BRANDON M. SCOTT,
Mayor



DEPARTMENT OF LAW
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BALTIMORE, MD 21202

March 23, 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 21-0033 – Imari’s LGBTQ Procurement Preference Act

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 21-0033, which would create a LGBTQ Business Enterprise program to be administered by the Minority and Women’s Business Opportunity Office. The bill establishes the eligibility and revocation requirements for firms seeking to participate in the program, authorizes the City to employ various affirmative procurement initiatives to promote the award of City contracts to participants in the program, requires certain annual reports on the program and periodic hearings and review of the program, provides for the appeal of adverse determinations by the Minority and Women’s Business Opportunity Office, sets certain penalties and generally relates to the City’s procurement requirements.

A vendor preference program intended to remedy discrimination is constitutionally suspect and to be legally viable, must be supported by statistical evidence showing past discrimination against the group in that particular market. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498 (1989). Proof of general societal discrimination will not sustain the program in the face of an Equal Protection challenge. *Id.*, at 501-4.

The Law Department is not aware of a disparity study conducted in the City providing this data for LGBTQ businesses. Data proving past discrimination against LGBTQ businesses in Baltimore would provide the evidentiary basis needed for the program to withstand a constitutional challenge.

A program giving preference to LGBTQ businesses restricts the Board of Estimates’ authority to award contracts and determine the fiscal policy of the City. Section 11(a) of Article VI of the Charter states that the “Board of Estimates shall be responsible for awarding contracts and supervising all purchasing by the City as provided in this section and elsewhere in the Charter.” A program giving preferences to businesses based on factors like whether the business is owned by individuals who identify as LGBTQ would interfere with the authority and discretion of the BoE by directing which bidders are qualified to work on certain projects. The City Council cannot by ordinance alter the authority granted in the Charter to the Board of Estimates. Baltimore City Charter, Art. III, § 11. A vendor preference program would also interfere with the Charter’s requirement that contracts be awarded to the lowest responsible bidder. However, Section 11(i) of Article VI of the Charter provides

that “the City Council may by ordinance, establish programs that grant purchasing preferences to local, small, *or disadvantaged businesses.*” (City Charter, Art. VI, § 11(i)) (emphasis added). If the intent is to include the LGBTQ program in the category of “disadvantaged” businesses referenced in that section of the Charter, the bill should be amended to reflect that intent. If that is the case, no charter amendment is needed.

If these requirements were met, the Law Department could approve the bill for form and legal sufficiency.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'Ashlea Brown', with a stylized, cursive script.

Ashlea Brown

A handwritten signature in blue ink, appearing to read 'Hilary Ruley', with a stylized, cursive script.

Hilary Ruley

Cc: Matthew Stegman
Nina Themelis
Nikki Thompson
Elena DiPietro
Hilary Ruley
Victor Tervalá