

Department of Legislative Services  
 Maryland General Assembly  
 2011 Session

FISCAL AND POLICY NOTE

House Bill 451 (Delegate Hough, *et al.*)  
 Health and Government Operations

State Government - Council on Efficient Government

This bill establishes a Council on Efficient Government to determine whether private-sector enterprises can more effectively and efficiently provide goods and services currently provided to the State by a governmental entity. The Board of Public Works (BPW) provides staff support to the council, with other State agencies providing assistance as necessary.

Fiscal Summary

**State Effect:** General fund expenditures by BPW increase by \$92,100 in FY 2012 to provide staff to the council. Out-year expenditures reflect annualization and inflation but do not recognize potential savings that may accrue if the council’s recommendations result in lower-cost procurements. Revenues are not affected.

(in dollars)	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016
Revenues	\$0	\$0	\$0	\$0	\$0
GF Expenditure	92,100	118,900	122,800	127,000	131,400
Net Effect	(\$92,100)	(\$118,900)	(\$122,800)	(\$127,000)	(\$131,400)

*Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate effect*

**Local Effect:** None.

**Small Business Effect:** Potential meaningful.

Analysis

**Bill Summary:** At the request of a State entity or private-sector enterprise, or at its own initiative, the council must review all goods or services that are procured by the State

from governmental entities to determine if a private-sector enterprise can provide the same type and quality of good or service at a reduced cost. A governmental entity is defined as:

- the federal government,
- another state;
- a bistate or multistate agency;
- a county, municipal corporation, or other political subdivision of the State;
- a bicounty or multicounty agency;
- a primary procurement unit; or
- an affiliation, alliance, consortium, or group composed solely of governmental entities that is established for the purpose of promoting intergovernmental cooperative purchasing.

The council must also review exemptions for State entities and other provisions of State procurement law that may restrict competition from private-sector enterprises to determine if the exemptions and restrictions result in increased costs for the State.

By December 1, 2012, the council must create an inventory of goods and services that are the subject of procurements between State entities and governmental entities and classify whether the State entities may receive a cost savings or more advantageous offer from a governmental entity or private-sector enterprise. The inventory must be updated every two years and posted on BPW's website. State entities must provide information to the council when necessary.

Based on its findings, the council must make recommendations on standards, processes, and guidelines for State entities to follow when determining whether to contract with a governmental entity or private-sector enterprise. It must also develop guidelines for employees of governmental entities whose jobs will be eliminated as a result of those standards, processes, and guidelines.

The bill establishes guidelines and procedures governing the council's work. By December 1 of each year, the council must report on its recommendations, inventory, and other actions to the Governor and General Assembly.

### **Current Law:**

#### *Exemptions from State Procurement Law*

The University System of Maryland (USM), Morgan State University (MSU), and St. Mary's College of Maryland (SMCM) are exempt from most provisions of State

procurement law. However, service contracts by USM, MSU, and SMCM with a value that exceeds \$500,000 require approval from BPW. In addition, the following agencies are exempted in-whole or in-part from most State procurement law:

- Blind Industries and Services of Maryland;
- Maryland State Arts Council;
- Maryland Health and Higher Educational Facilities Authority;
- Department of Business and Economic Development;
- Maryland Food Center Authority;
- Maryland Public Broadcasting Commission;
- Maryland State Planning Council on Developmental Disabilities;
- Maryland Automobile Insurance Fund;
- Maryland Historical Trust;
- Rural Maryland Council;
- Maryland State Lottery Agency;
- Maryland Health Insurance Plan;
- Maryland Energy Administration;
- Maryland Developmental Disabilities Administration;
- Maryland Stadium Authority; and
- State Retirement and Pension System.

Procurements by these entities that are exempt from procurement law must nonetheless be made under procedures that promote the purposes underlying State procurement law.

### *Cooperative Purchasing Agreements*

An intergovernmental cooperative purchasing agreement (CPA) is defined in statute as a contract:

- entered into by at least one governmental entity and a person selected in a manner consistent with the purposes of State procurement law;
- that is available for use by the governmental entity entering the contract and at least one additional governmental entity which may, but need not be, an original party to the contract; and
- that is intended to promote efficiency and savings that can result from intergovernmental cooperative purchasing.

Alternatively, a CPA can be a contract between a primary procurement unit and a person who, at the time the CPA is awarded, has a contract with the federal government and who agrees to provide the unit with identical prices, terms, and conditions as stipulated in the

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federal contract. However, agreements between the State and other governmental entities are exempt from most requirements of State procurement law. A State primary procurement unit may participate in a CPA as an entity that:

- conducts the procurement on behalf of the participants;
- participates in the original agreement but did not conduct the procurement; or
- participates in a contract awarded by another governmental entity (often called “piggyback agreements”).

Chapter 677 of 2009 requires State and local procurement units to facilitate participation in CPAs by State and local governments and nonprofit organizations. Specifically, each State or local procurement contract for supplies or services must include a provision facilitating the participation of other State and local entities and nonprofit organizations. State and local entities are authorized to enter into CPAs with each other. State entities include departments, boards, commissions, agencies, and subunits of the Executive Branch. Local entities include counties, municipalities, bicounty or multicounty agencies, public authorities, special taxing districts, boards of education, library boards, and other political subdivisions. Nonprofit organizations may also participate.

The law exempts contracts for capital construction and improvements or other unique purchases and procurements valued at less than \$100,000 from CPAs. It also does not apply if the State or local entity determines that including the cooperative purchasing provision:

- undermines the desired timing or effect of the procurement;
- interferes with the State’s or local entity’s ability to meet goals established under the Minority Business Enterprise (MBE) program, the Small Business Reserve (SBR) program, or similar minority or small business programs operated by a local government; or
- is not in the best interest of the entity.

Local entities may join existing contracts if participation:

- provides a cost savings in purchase price or administrative burden; or
- furthers other goals, including operational and energy-efficiency goals related to the purchase, operation, or maintenance of the supply or service.

Although exempt from Chapter 677, USM and other public institutions of higher education in the State participate in CPAs.

## *Procurement Preferences and Exemptions*

State procurement law establishes several exclusive purchasing requirements and procurement preferences. For purchases of supplies and services, State agencies must exhaust a series of priority preferences before engaging in a competitive procurement. First preference is given to Maryland Correctional Enterprises (MCE, the independent manufacturing arm of the Division of Correction) if MCE provides the supplies or services. If MCE does not provide the supply or service, second preference goes to Blind Industries and Services of Maryland, followed by sheltered workshops staffed by individuals with mental or physical disabilities. Only if none of those entities provides a desired supply or service is an agency free to conduct a competitive procurement.

The State's MBE program establishes a goal that at least 25% of the total dollar value of each agency's procurement contracts be awarded to MBEs, including 7% to African American-owned businesses and 10% to woman-owned businesses. There are no penalties for agencies that fail to reach these targets. Instead, agencies are required to use race-neutral strategies to encourage greater MBE participation in State procurements.

Chapter 75 of 2004 established the SBR program, which requires all State procurement units to structure their procurements so that at least 10% of the total dollar value of their procurements is made directly to small businesses.

**Background:** A December 2009 report required by Chapter 677 and conducted by the State's Procurement Advisory Council (PAC) identified 18 piggyback agreements in which the State has participated to purchase items as diverse as office supplies, pharmaceuticals, and train locomotives. It also identified numerous purchasing cooperatives used by the State and local governments, including those operated by the Baltimore Regional Cooperative Purchasing Committee and the Metropolitan Washington Council of Governments. The Department of General Services (DGS) has more than 200 indefinite-quantity contracts for commodities that are available for use by all agencies. Of those, six are CPAs. In order to take full advantage of the State's purchasing power, DGS prohibits agencies from purchasing a commodity from an alternate source if it is available from an indefinite-quantity contract.

Including the prohibition associated with indefinite-quantity contracts, the PAC report identified several ways in which CPAs may impede vendors from participating in State procurement. Specifically, the administrative convenience of CPAs and their potential to derive maximum benefit from the purchasing power of the State and multiple governmental entities can run counter to the goal of fostering maximum competition by allowing all businesses to bid on all procurement opportunities. When the State first authorized State participation in CPAs in 1997 (Chapter 680), it recognized the potential for small businesses to be excluded from State procurement, so it precluded State

participation in federal contracts if the State's participation was valued at less than \$250,000. That restriction was removed in 2004 (Chapter 143) following a recommendation by the Task Force to Study Efficiency in Procurement.

**State Fiscal Effect:** BPW advises that it can staff the council with existing resources, but that doing so will impose on the day-to-day responsibilities of the Procurement Advisor and other BPW staff. However, the Department of Legislative Services (DLS) believes that the permanent nature of the council, the breadth of responsibilities assigned to it, and the prevalence of cooperative purchasing activities by the State will require additional resources to carry out the bill's requirements. The council is charged not only with developing an inventory of goods and services subject to CPAs, but assessing whether cost savings can be generated by purchasing those items through alternate means. As noted above, the State participates in 18 piggyback contracts, and DGS alone has more than 200 indefinite-quantity contracts with exclusive purchase clauses, each of which would have to be assessed. In addition, the council is charged with reviewing exemptions for State entities and other provisions of State procurement law that restrict competition for goods and services. This would include reviewing the effects of the MBE, SBR, and other preference programs on competition and costs.

Therefore, general fund expenditures by BPW increase by \$92,111 in fiscal 2012, which accounts for the bill's October 1, 2011 effective date. This estimate reflects the cost of hiring one regular full-time employee with specialized knowledge of State procurement law and practices to serve as the Procurement Advisor's liaison to the council. It also includes contractual costs for BPW to hire a consultant on an annual basis with expertise in conducting cost-benefit analyses to assist in determining whether more advantageous arrangements are available. It includes a salary, fringe benefits, one-time start-up costs, and ongoing operating expenses.

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Salaries and Fringe Benefits	\$48,318
Contractual Services	37,500
Other Operating Expenses	<u>6,293</u>
<b>Total FY 2012 State Expenditures</b>	<b>\$92,111</b>

Future year expenditures reflect a full salary with 4.4% annual increases and 3% employee turnover as well as 1% annual increases in ongoing operating expenses.

Based on the council's recommendations, the State may recognize some long-term savings on procurement costs if it is determined that current CPAs and other procurement practices are not cost-efficient and that greater cost savings can be realized by purchasing items directly from private-sector enterprises.

**Small Business Effect:** The effect of the council's analysis and recommendations may generate mixed results for small businesses. On one hand, the council may remove barriers posed by CPAs and exclusive-purchase agreements to direct small business participation in procurement for goods and services. On the other hand, to the extent that MBE and SBR preferences are found to impede competition for goods and services, small businesses that benefit from those programs may encounter more limited opportunities to participate in State procurement.

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### **Additional Information**

**Prior Introductions:** None.

**Cross File:** None.

**Information Source(s):** Board of Public Works, Department of Budget and Management, Department of General Services, Maryland Department of Transportation, University System of Maryland, Department of Legislative Services

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