

D39S00
Maryland State Board of Contract Appeals

Operating Budget Data

(\$ in Thousands)

| | <u>FY 02</u> | <u>FY 03</u> | <u>FY 04</u> | <u>FY 02-04</u> <u>Change</u> | <u>FY 05</u> | <u>FY 04-05</u> <u>Change</u> |
|--------------------------------------|--------------|--------------|--------------|----------------------------------|--------------|----------------------------------|
| Operations | \$455 | \$509 | \$487 | \$32 | \$517 | \$30 |
| Contractual Services | 3 | 7 | 7 | 5 | 7 | 0 |
| Contingent & Back of Bill Reductions | 0 | 0 | 0 | 0 | -1 | -1 |
| Adjusted Grand Total | \$458 | \$516 | \$495 | \$37 | \$523 | \$28 |
| General Funds | 458 | 516 | 495 | 37 | 524 | 30 |
| Contingent & Back of Bill Reductions | 0 | 0 | 0 | 0 | -1 | -1 |
| Adjusted General Funds | \$458 | \$516 | \$495 | \$37 | \$523 | \$28 |
| Annual % Change | | 12.7% | -4.1% | | 5.7% | |

- Cost containment actions have left the Maryland State Board of Contract Appeals (MSBCA) relatively unaffected. Reductions of \$1,000 took place in the fiscal 2002 and 2003 Board of Public Works actions, while fiscal 2004 included a \$36,000 reduction to keep the third board member position open until mid-November 2003.
- The fiscal 2005 allowance increases \$28,226 from the fiscal 2004 adjusted working appropriation.

Personnel Data

| | <u>FY 02</u> | <u>FY 03</u> | <u>FY 04</u> | <u>FY 02-04</u> <u>Change</u> | <u>FY 05</u> | <u>FY 04-05</u> <u>Change</u> |
|------------------------|--------------|--------------|--------------|----------------------------------|--------------|----------------------------------|
| Regular Positions | 5.0 | 5.0 | 5.0 | 0.0 | 5.0 | 0.0 |
| Contractual FTEs | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| Total Personnel | 5.0 | 5.0 | 5.0 | 0.0 | 5.0 | 0.0 |

Vacancy Data: Regular Positions

| | | |
|---------------------------------|------|-------|
| Turnover Expectancy | 0.00 | 0.00% |
| Positions Vacant as of 12/31/03 | 0.00 | 0.00% |

- Personnel remains at five positions in fiscal 2005. The third board member position was vacated and filled during fiscal 2004. No vacancies exist, and no new positions are created.

Note: Numbers may not sum to total due to rounding.

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Analysis in Brief

Issues

Mandel Commission Recommends Elimination of MSBCA: The Report of the Commission on the Structure and Efficiency of State Government (Mandel Commission) recommended that MSBCA be eliminated and the functions of the agency be shifted into the Judiciary. **The Department of Legislative Services concurs with the Mandel Commission and recommends that these findings be implemented.**

Recommended Actions

| | <u>Funds</u> | <u>Positions</u> |
|--|-------------------|------------------|
| 1. Consolidate MSBCA operations into Judiciary | \$ 523,137 | 5.0 |
| Total Reductions | \$ 523,137 | 5.0 |

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Maryland State Board of Contract Appeals

Operating Budget Analysis

Program Description

Title 15, Subtitle 2 of the State Finance and Procurement Article established the Maryland State Board of Contract Appeals (MSBCA) and vested it with the authority to hear and resolve all protests and disputes relating to the letting of contracts, and the performance, breach, modification, and termination of State contracts. Statutory qualifications to serve on the three-member panel are the ability to serve in a quasi-judicial capacity and possession of a thorough knowledge of procurement practices and processes. MSBCA's mission addresses the need to:

- resolve bid protest and contract claims before the board in the least time possible consistent with established legal requirements; and
- enhance the value and credibility of board opinions, by providing in a timely manner, written opinions in sufficient detail and with appropriate research and documentation to serve as guides to future actions by procurement authorities, the legal community and contractors doing or wishing to do business with the State.

Performance Analysis: Managing for Results

The Managing for Results data indicates that MSBCA continues to excel at turning around cases in less time than their stated goals for resolving cases. **Exhibit 1** shows that total caseload has increased 24.5% annually since fiscal 2001. The number of new contract claims has risen from 25 to 37, and the number of new bid protests has increased from 15 to 25. See **Exhibit 2**.

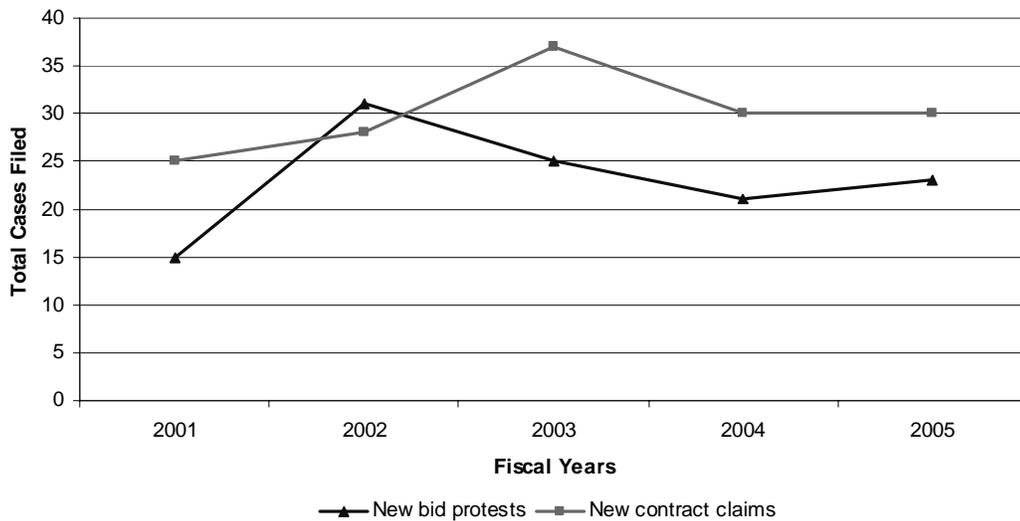
MSBCA aims to return decisions in bid protests within three months, as bid protests necessitate a delay in the performance of a contract. The board has been able to complete this task about 90% of the time. Additionally, the board aims to issue decisions in contract claim cases within six month of the close of the record. This goal has been achieved 100% of the time.

**Exhibit 1
Program Measurement Data
Board of Contract Appeals
Fiscal 2001 – 2005**

| | <u>Actual 2001</u> | <u>Actual 2002</u> | <u>Actual 2003</u> | <u>Est. 2004</u> | <u>Est. 2005</u> | <u>Ann. Chg. 01-03</u> | <u>Ann. Chg. 03-05</u> |
|--------------------------------------|------------------------|------------------------|------------------------|----------------------|----------------------|--------------------------------|--------------------------------|
| New bid protests | 15 | 31 | 25 | 21 | 23 | 29.1% | -4.1% |
| Appeals requiring a written decision | 10 | 15 | 11 | 18 | 19 | 4.9% | 31.4% |
| Decisions issued within three months | 90% | 80% | 91% | 88% | 84% | 0.6% | -3.9% |
| New contract claims | 25 | 28 | 37 | 30 | 30 | 21.7% | -10.0% |
| Cases resolved prior to hearing | 24 | 24 | 26 | 27 | 27 | 4.1% | 1.9% |
| Opinions issued within six months | 100% | 100% | 100% | 100% | 100% | 0.0% | 0.0% |
| Total new cases filed | 40 | 59 | 62 | 51 | 53 | 24.5% | -7.5% |

Source: Maryland State Board of Contract Appeals

**Exhibit 2
Maryland State Board of Contract Appeals Caseload
Fiscal 2001 – 2005**



Source: Maryland State Board of Contract Appeals

Fiscal 2004 Actions

Impact of Cost Containment

Cost containment actions decreased the fiscal 2004 appropriation by \$36,000. This action required MSBCA to leave the vacant third commissioner seat open until mid-November 2003.

Governor’s Proposed Budget

The MSBCA budget increase is almost entirely due to personnel costs. The third board member position – which was vacant from June to November 2003 – has been filled, which explains the increase in object 1 costs. Other changes in the budget include minor offsetting changes in garage rent and telecommunications costs.

**Exhibit 3
Governor’s Proposed Budget
Maryland State Board of Contract Appeals
(\$ in Thousands)**

| | FY 03 | FY 04 | FY 05 | FY 04-05 | FY 04-05 |
|--------------------------------------|----------------------|-----------------------|-------------------------|----------------------|------------------------|
| | <u>Actual</u> | <u>Approp.</u> | <u>Allowance</u> | <u>Change</u> | <u>% Change</u> |
| General Funds | \$516 | \$495 | \$524 | \$30 | 6.0% |
| Contingent & Back of Bill Reductions | 0 | 0 | -1 | -1 | |
| Adjusted General Funds | \$516 | \$495 | \$523 | \$28 | 5.7% |
| | | | | | |
| Adjusted Grand Total | \$516 | \$495 | \$523 | \$28 | 5.7% |

Where It Goes:

Personnel Expenses

| | |
|--|------|
| Filled Board Member Position..... | \$24 |
| Increments and other compensation..... | 7 |
| Employee and retiree health insurance..... | -1 |
| Retirement..... | -4 |
| Other personnel changes..... | 1 |

Other Changes

| | |
|---------------------------------------|----|
| Telecommunications cost increase..... | 2 |
| Garage rent..... | -1 |

Total **\$28**

Note: Numbers may not sum to total due to rounding.

Impact of Cost Containment

The fiscal 2005 allowance reflects the elimination of \$1,331, the appropriation for matching employee deferred compensation contributions up to \$600, contingent upon enactment of a provision in budget reconciliation legislation.

Issues

1. Mandel Commission Recommends Elimination of MSBCA

The report of the Commission on the Structure and Efficiency of State Government (Mandel Commission) recommends that MSBCA be eliminated and the functions of the agency be shifted into the Judiciary. The commission rests its findings on the fact that MSBCA has a cost per case ratio higher than any other adjudicatory agency or the State Judiciary. The commission found that the caseload handled by MSBCA was not sufficient to create inordinate hardship on the Judiciary, in order for the Judiciary to absorb the functions of MSBCA.

Additionally, the Mandel Commission reports that the policies and practices of MSBCA create inefficiencies for the contracting and procurement process. The commission cited the following examples of inefficient operation:

- the bid protest process too easily allows a dissatisfied bidder to hold up the performance of a State contract;
- contract appeals for payment disputes can be handled by the courts, both at a faster rate and without any extra required expertise; and
- contract claims are filed and consolidated for trial at MSBCA, instead of being resolved immediately at the agency level.

The commission believes the first inefficiency results from the lack of filing fees for cases brought to MSBCA. Once the administrative challenges are exhausted at the agency level, the bid protestor can appeal to MSBCA without fee, and at little cost (should they decide to be represented by counsel). Once the protest is lodged with MSBCA, the contract cannot be performed by the winning bidder. The commission argues that if the function of MSBCA were shifted to the Judiciary, the same threshold for injunctive relief for other civil cases – substantial likelihood of prevailing on the claim – would apply to bid protests. This would deter frivolous bid protests and only allow injunctive relief where the threshold is met. The commission argues that court-required filing fees would have the same deterring effect on frivolous claims.

The second example cited by the commission rests its findings on the fact that once a contract is performed, any payment disputes can be addressed by the District or circuit courts (based on the amount in dispute – the circuit court hears disputes exceeding \$25,000). However, this fails to account for the advantages created by expertise contained in a specialized court.

The third inefficiency raised by the Mandel Commission is that the 30-day statute of limitations on claims (Finance and Procurement Article §15-219) forces claims to be submitted and then consolidated for trial at MSBCA rather than being handled administratively as they arise. In the case that the claims are substantial enough to make the contractor unable to comply, the contractor could seek declaratory judgment in the courts.

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Legislative Alternatives

Independent of the Mandel Commission, Senate Bills 211 and 416 have been introduced in the 2004 legislative session. While not eliminating MSBCA, Senate Bill 211 would add more oversight and transparency to the selection process of board members. The bill would require that:

- commissioners be admitted to practice law in Maryland by the Court of Appeals; and
- a selection committee be established which would submit a list of qualified candidates to the Governor, who must either chose one from the list or request a new list from the committee.

Senate Bill 416 has also been introduced and would change the scope of the Board's current jurisdiction over State claims. The Court of Appeal found in *University of Maryland v. MFE Incorporated/NLP Architects, Incorporated* that claims by the State are not subject to MSBCA jurisdiction. 345 Md. 86, 691 A.2d 676 (1993). The bill would change the jurisdiction so that all claims are subject to the MSBCA purview, both those raised by the contractors and by the State.

Potential Problems

The elimination of MSBCA does present potential problems. The creation of an adjudicatory unit to handle specific subject matter is not without precedent. At the federal level, Congress and the federal Judiciary have established specific courts for:

- patents and other intellectual property – the Court of Appeals for the federal circuit;
- U.S. Bankruptcy Courts at the District Court level; and
- U.S. Immigration Courts

The uniformity of law generated over specific subject matter helps prevent the localization or regionalization of judicial precedent. When dealing with specialized and technical subject matter, it also can serve the greater efficiency of the Judiciary to have specialized court. This way the general District and circuit courts do not have their dockets bogged down resolving technical and specialized subject matter. However, to roll the function of MSBCA into the Judiciary will not likely result in the due process rights of either contractors or State units being compromised.

The Department of Legislative Services recommends that the findings of the Mandel Commission be implemented and that the Maryland State Board of Contract Appeals be eliminated, with its functions absorbed by the Judiciary. State Finance and Procurement Articles Title 15, Subtitle 2 governs the creation, scope, and administration of MSBCA. These provisions would be repealed, with an elimination of the agency. Such a repeal could be effected through budget reconciliation legislation.

Recommended Actions

| | <u>Amount Reduction</u> | | <u>Position Reduction</u> |
|---|------------------------------------|----|--------------------------------------|
| 1. Consolidate operations into the Judiciary. The Committee on Efficiency in State Government recommended that the operations of the Maryland State Board of Contract Appeals be consolidated into the State Judiciary. This should result in cost savings to the State, as well as increased efficiency in the procurement industry dispute resolution process. These recommendations should be implemented. As a result, the 5.00 positions should be abolished, along with a \$523,137 reduction in the allowance. | \$ 523,137 | GF | 5.0 |
| Total General Fund Reductions | \$ 523,137 | | 5.0 |

Current and Prior Year Budgets

Current and Prior Year Budgets Maryland State Board of Contract Appeals (\$ in Thousands)

| | <u>General Fund</u> | <u>Special Fund</u> | <u>Federal Fund</u> | <u>Reimb. Fund</u> | <u>Total</u> |
|----------------------------------|--------------------------------|--------------------------------|--------------------------------|-------------------------------|---------------------|
| Fiscal 2003 | | | | | |
| Legislative Appropriation | \$525 | \$0 | \$0 | \$0 | \$525 |
| Deficiency Appropriation | 0 | 0 | 0 | 0 | 0 |
| Budget Amendments | 0 | 0 | 0 | 0 | 0 |
| Cost Containment | -1 | 0 | 0 | 0 | -1 |
| Reversions and Cancellations | -8 | 0 | 0 | 0 | -8 |
| Actual Expenditures | \$516 | \$0 | \$0 | \$0 | \$516 |
| Fiscal 2004 | | | | | |
| Legislative Appropriation | \$531 | \$0 | \$0 | \$0 | \$531 |
| Cost Containment | -36 | 0 | 0 | 0 | -36 |
| Budget Amendments | 0 | 0 | 0 | 0 | 0 |
| Working Appropriation | \$495 | \$0 | \$0 | \$0 | \$495 |

Note: Numbers may not sum to total due to rounding.

Fiscal 2004

The \$36,000 decrease resulting from the Board of Public Works cost containment action reflects a directive by BPW to have MSBCA leave the third board seat vacant through mid-November 2003.

**Object/Fund Difference Report
Maryland State Board of Contract Appeals**

| <u>Object/Fund</u> | <u>FY03 Actual</u> | <u>FY04 Working Appropriation</u> | <u>FY05 Allowance</u> | <u>FY04 - FY05 Amount Change</u> | <u>Percent Change</u> |
|--------------------------|------------------------|---|---------------------------|--------------------------------------|---------------------------|
| Positions | | | | | |
| 01 Regular | 5.00 | 5.00 | 5.00 | 0 | 0% |
| Total Positions | 5.00 | 5.00 | 5.00 | 0 | 0% |
| Objects | | | | | |
| 01 Salaries and Wages | \$ 492,159 | \$ 461,107 | \$ 489,302 | \$ 28,195 | 6.1% |
| 02 Technical & Spec Fees | 6,900 | 11,899 | 11,899 | 0 | 0% |
| 03 Communication | 3,946 | 4,742 | 6,645 | 1,903 | 40.1% |
| 04 Travel | 144 | 0 | 0 | 0 | 0.0% |
| 07 Motor Vehicles | 3,975 | 5,500 | 4,680 | -820 | -14.9% |
| 08 Contractual Services | 6,743 | 7,490 | 7,390 | -100 | -1.3% |
| 09 Supplies & Materials | 999 | 2,000 | 2,000 | 0 | 0% |
| 11 Equip - Additional | 392 | 608 | 608 | 0 | 0% |
| 13 Fixed Charges | 733 | 1,525 | 1,944 | 419 | 27.5% |
| Total Objects | \$ 515,991 | \$ 494,871 | \$ 524,468 | \$ 29,597 | 6.0% |
| Funds | | | | | |
| 01 General Fund | \$ 515,991 | \$ 494,871 | \$ 524,468 | \$ 29,597 | 6.0% |
| Total Funds | \$ 515,991 | \$ 494,871 | \$ 524,468 | \$ 29,597 | 6.0% |

Note: The fiscal 2004 appropriation does not include deficiencies, and the fiscal 2005 allowance does not reflect contingent reductions.