

**Maryland General Assembly
Department of Legislative Services**

**Proposed Regulations
State Procurement Regulations**
(DLS Control No. 20-005)

Overview and Legal and Fiscal Impact

The regulations revise the regulations governing State procurement to reflect recent statutory changes and make technical changes.

The regulations present no legal issues of concern.

There is no fiscal impact on State or local agencies.

Regulations of COMAR Affected

State Procurement Regulations:

General Provisions: Terminology: COMAR 21.01.02.

Applicability: COMAR 21.01.03.

State Procurement Organization: Board of Public Works: COMAR 21.02.01.

Department of Budget and Management: COMAR 21.02.03.

Department of General Services: COMAR 21.02.05.

Procurement Advisory Council – Open Meetings: COMAR 21.02.08.

Procurement Methods and Project Delivery Methods: General Provisions:
COMAR 21.05.01.

Procurement by Competitive Sealed Bidding: COMAR 21.05.02.

Procurement by Competitive Sealed Proposals: COMAR 21.05.03.

Intergovernmental Cooperative Purchasing: COMAR 21.05.09.

Procurement of Human, Social, Cultural, and Educational Services: COMAR 21.05.12.

Contract Terms and Conditions: Mandatory Contract Provisions – All Contracts
(except as provided under COMAR 21.05.07, 21.07.02, and 21.07.03): COMAR 21.07.01.

Mandatory Construction Contract Clauses: COMAR 21.07.02.

Mandatory Terms and Conditions for Purchase Orders Over \$25,000: COMAR 21.07.03.

Administrative and Civil Remedies: Protests: COMAR 21.10.02.

Socioeconomics Policies: Small Business Procurements: COMAR 21.11.01.

Minority Business Enterprise Policies: COMAR 21.11.03.

Procurement from Maryland Correctional Enterprises, Blind Industries and Services of Maryland, and Certified Sheltered Workshops: COMAR 21.11.05.

Veteran-Owned Small Business Enterprises: COMAR 21.11.13.

Procurement Reporting Requirements: Reporting Requirements: COMAR 21.13.01.

Legal Analysis

Background

In recent years, several pieces of legislation have been enacted that affect State procurement procedures. Most significantly, Chapter 588 and 589 of 2017 made various changes to State procurement law to improve the efficiency of the process, which included the removal of the Department of Budget and Management, the Department of Public Safety and Correctional Services, and the Department of Information Technology as primary procurement units. Additional changes affecting State procurement were enacted by Chapter 273 of 2019 (exemption from State procurement law from certain services procured by the Board of Trustees of the Maryland Teachers and State Employees Supplemental Retirement Plans), Chapter 524 of 2019 (reporting of security violations and significant attempted security violations involving an election system), Chapter 403 of 2019 (mandatory contract provision regarding foreign influence or control of election service providers), Chapters 315 and 316 of 2019 (qualification of small businesses for the exclusive purpose of pursuing out-of-state contracts and certification of minority businesses enterprises certified by a federal or county program), and Chapter 635 of 2017 (procurement of janitorial products from Blind Industries and Services of Maryland).

Summary of Regulations

The regulations revise the regulations governing State procurement. The regulations make various changes to reflect that the Department of Budget and Management (DBM), the Department of Public Safety and Correctional Services (DPSCS), and the Department of Information Technology (DoIT) are no longer primary procurement units, including:

- altering the procurement contracts for which the Board of Public Works (BPW) has delegated approval and award authority to the Department of General Services (DGS);
- repealing the delegation by BPW of approval and award authority of certain procurement contracts to DBM, DPSCS, and DoIT;
- repealing the regulations governing the review and approval of solicitations and contracts for certain procurement contracts by DBM;
- specifying the powers the Secretary of General Services has regarding the procurement of services, information technology, and leasing; and
- adding regulations governing the control of certain service contracts, the procurement of state-owned motor vehicles and rental vehicles, and the acquisition of temporary personnel services by DGS;

Among other things, the regulations also:

- exempt certain procurements by the Board of Trustees of the Maryland Teachers and State Employees Supplement Retirement Plans from the application of the regulations;
- increase from \$50,000 to \$100,000, the minimum amount of a sole source procurement contract for which BPW has delegated approval and award authority to the Department of Transportation and the Maryland Port Commission;
- require the Secretary of General Services, through the Office of State Procurement within DGS, to publish a Maryland State Procurement Manual that contains procurements standards, guidance, procedures, and best practices for agencies under the procurement authority of DGS;
- increase from \$50,000 to \$200,000, the cap on the value of a maintenance contract for which DGS may establish policies and procedures allowing State agencies to enter into the contract without concurrence of DGS;
- authorize a using agency to write DGS and present a justification for exempting a specific procurement for a commodity, rather than all procurements for a specific commodity, from DGS award authority;
- repeal the provisions governing the operation of a regularly scheduled purchase program for commodities and the development of term contracts for various commodities by DGS;
- repeal the authority of DGS to delegate its purchase authority for the procurement of perishables;
- prohibit the system security configuration for online bid submission through the eMaryland Marketplace from allowing bids to be opened prior to the time and date established in the solicitation for competitive sealed bids;
- provide that electronic receipt, bid opening, and posting of the required information satisfy the requirements of the regulation governing the receipt, opening, and posting of competitive sealed bids;
- require that competitive sealed proposals received electronically remain locked via the eMaryland Marketplace per approved security configurations until the established due date;
- increase from \$25,000 to \$50,000 the minimum value of a procurement to be made through an intergovernmental cooperative purchasing agreement for which certain solicitation notice is required to be given;

- alter the required provision for all contracts regarding termination for default to allow for termination if the contract fails to provide any required annual and renewable bond 30 days prior to the expiration of the current bond;
- require mandatory contract provisions for all State Board of Elections contracts with an election service provider regarding ownership, investment in, or control by a foreign national and actual or attempted security violations;
- alter the means by which a protest may be filed;
- require the Governor’s Office of Small, Minority, and Women Business Affairs to certify a business as a small business for the exclusive purpose of pursuing out-of-State contracts if the business meets certain conditions;
- require that a business that has received certification from a federal or county minority business enterprise program that uses a certification process substantially similar to the process established in current regulations be eligible for certification by the Department of Transportation as a State-certified minority business enterprise under certain circumstances;
- alter the conditions under which a State unit or State aided or controlled entity is required to include in a maintenance contract that has a component for housekeeping or janitorial services a requirement that a prime contractor procure janitorial products from Blind Industries and Services of Maryland; and
- require DGS, rather than DBM, to prepare and submit to BPW and the General Assembly a certain annual report regarding noncompetitive negotiated procurements.

Legal Issues

The regulations present no legal issues of concern.

Statutory Authority and Legislative Intent

BPW cites §§ 3-405, 3-502, 4-204, 11-101, 11-201 through 11-203, 11-205, 12-101, 12-104, 12-105, 12-107, 12-108, 12-202 through 12-204, 13-102 through 13-107, 13-107.1, 13-108 through 13-111, 13-202, 13-207, 13-210, 13-211, 13-216, 13-217 through 13-219, 13-221 through 13-223, 13-225, 13-317, 14-101 through 14-108, 14-201 through 14-208, 14-301 through 14-308, 14-401, 14-501 through 14-505, 14-601 through 14-605, 15-110 through 15-112, 15-201 through 15-223, 16-202, 17-104, 17-401, 17-402, 17-801 through 17-804, 19-114 of the State Finance and Procurement Article, § 3-103 of the Natural Resources Article, §§ 14-204, 14-205, and 14-405 of the Education Article, § 10-507 of State Government Article, §§ 14-101 through 14-108 of the Election Law Article, §§ 5-101 and 5-503 of the General Provisions Article, § 3-515 of the Correctional Services Article, Chapter 471 of 1991, Chapter 608 of 1999,

Chapter 198, 216, 268, 283, 293, 328, and 715 of 2009, Chapters 428, 495, 619, and 713 of 2010, Chapters 252, 253, and 254 of 2011, Chapter 154 of 2012, Chapters 343, 344, and 415 of 2015, Chapters 119, 313, and 581 of 2016, Chapters 108, 111, 268, 340, 438, 586, 587, 588, 589, 630, 708, 709, and 774 of 2017, Chapters 335, 336, 481, 482, 624 and 633 of 2018, Chapter 273, 316, 356, 403 of 2019 as statutory authority for the regulations.

More specifically, § 12-101(b) of the State Finance and Procurement Article authorizes BPW to set policy and adopt regulations to implement State procurement law. BPW is also authorized to delegate any of its procurement authority that it determines to be appropriate for delegation. Sections 13-103, 13-104, 13-107, 13-108, and 13-110 of the State Finance and Procurement Article govern competitive sealed bids, competitive sealed proposals, sole source procurements, emergency procurements, and intergovernmental cooperative purchasing, respectively. Section 13-218 of the State Finance and Procurement Article requires each procurement contract to include clauses covering termination for default. Section 14-103(c) of the State Finance and Procurement Article requires, to the extent practicable, a State or State aided or controlled entity to include in a maintenance contract that has a component for housekeeping or janitorial services a requirement that the prime contract procure janitorial products from Blind Industries and Services of Maryland under certain circumstances. Section 14-203 of the State Finance and Procurement Article requires the Secretary of General Services, the Secretary of Transportation, the Chancellor of the University System of Maryland, and the President of Morgan State University to specify by regulation the criteria that a business must meet to qualify as a small business. The regulations must require the qualification of a business as a small business for the exclusive purpose of pursuing out-of-state contracts if the business meets certain conditions. Section 14-303(a) and (b)(1)(ii) of the State Finance and Procurement Article require BPW to adopt regulations consistent with State procurement law to carry out the minority business enterprise program, including a provision that promotes and facilitates certification of minority business enterprises that have received certification from a certain federal or county program if the business meets certain conditions. Section 15-111(c) of the State Finance and Procurement Article requires DBM to submit to BPW and the General Assembly a report on each class of procurement for which the procedure for noncompetitive negotiated procurement has been approved. Section 15-217 of the State Finance and Procurement Article governs the initiation of a protest. Chapter 403 of 2019 prohibits the State Board of Elections from approving a contract with an election service provider unless the contract includes a clause requiring the election service provider to provide the State Board with certain notice regarding ownership or investment in the election service provider or control of the election service provider by a foreign national. The remaining cited authority is not relevant to these regulations.

The relevant cited authority is correct and complete. As discussed below under “Technical Corrections and Special Notes,” the regulations comply with the legislative intent of the law.

Technical Corrections and Special Notes

In response to suggestions from the Department of Legislative Services, staff for BPW agrees to make the following changes to the regulations:

- including capital construction-related service change orders in COMAR 21.02.01.04B(1);
- removing the reference to Title 10, Subtitle 3 of the State Finance and Procurement Article from COMAR 21.02.01.04B(8);
- making several technical corrections to COMAR 21.01.03.01(35-4), 21.02.05.03B and .04A, and 21.13.01.09.

The Department of Legislative Services raised three potential legal issues regarding the regulations with BPW staff. First, the requirement that certain information be recorded at the time of bid opening is being repealed in COMAR 21.05.02.11B, which currently governs the opening and recording of competitive sealed bids. The recordation of the information, however, would still be required under § 13–103(d)(1)(ii) of the State Finance and Procurement Article. According to BPW staff, this change was requested by DGS. The intent is to align the regulation with the new eMaryland Marketplace system for the immediate posting of bid information. The information would still be recorded as part of the procurement record under COMAR 21.05.01.07. Second, COMAR 21.05.02.11D states that electronic bid opening satisfies the requirements of the regulation, which governs receipt, opening, and posting of competitive sealed bids. BPW staff was asked how electronic bid opening would satisfy the requirement of § 13-103(d)(1)(i), which requires bids to be opened in public. BPW staff responded that this change was also requested by DGS to align the regulation with the use of the new eMaryland Marketplace system and bid opening and posting would be performed online through the new system at a set date and time. Bid documentation would be uploaded at that time for view by the public. Finally, the proposed change to COMAR 21.13.01.09 would require DGS, rather than DBM, to submit a certain report regarding the use of noncompetitive negotiated procurement methods. Section 15-111(c) of the State Finance and Procurement Article, however, still requires DBM to submit the report. BPW staff advises that DBM no longer approves the use of these methods as a result of Chapters 588 and 589 of 2017. The reporting requirement should have been updated at that time to correct the reference. The Department of Legislative Services concurs with the assessment that the changes in the regulations comply with legislative intent.

Fiscal Analysis

There is no fiscal impact on State or local agencies.

Agency Estimate of Projected Fiscal Impact

BPW advises that the regulations have no fiscal effect because they are clarifying, technical, and procedural in nature. The Department of Legislative Services concurs and notes that the regulations largely implement statutory changes, most notably provisions of Chapter 590 of 2017, among others.

Impact on Budget

There is no impact on the State operating or capital budget.

Agency Estimate of Projected Small Business Impact

BPW advises that the regulations have minimal or no economic impact on small businesses in the State. The Department of Legislative Services concurs.

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