

Department of Legislative Services
Maryland General Assembly
2024 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

House Bill 292

(Delegate Kerr, *et al.*)

Health and Government Operations

Budget and Taxation

State Procurement - Maryland State Board of Contract Appeals - Attorney's
Fees

This bill authorizes the Maryland State Board of Contract Appeals (MSBCA) to award reasonable attorney’s fees to an “interested party” who prevails in appealing a bid protest and alters the conditions under which MSBCA may award attorney’s fees for a contract claim.

Fiscal Summary

State Effect: Potential increase in general and special fund expenditures to the extent that interested parties successfully appeal bid protests or contract claims to MSBCA and are awarded attorney’s fees. Expenditures may further increase to the extent that the bill causes vendors to file more protests and claims. A reliable estimate is not feasible because future outcomes cannot be predicted, but any increase is likely minimal, as discussed below. No effect on revenues.

Local Effect: None.

Small Business Effect: Meaningful.

Analysis

Bill Summary: An “interested party” means an actual or prospective bidder, offeror, or contractor that may be aggrieved by the solicitation or award of a contract, or by a protest.

For *all* contract claims, MSBCA may award the reasonable costs of filing and pursuing a claim, including reasonable attorney’s fees, if the board finds that the conduct of the unit

in processing the claim is in bad faith, without substantial justification, *or in violation of the law*.

Current Law: A “contract claim” is a claim that relates to a procurement contract, including breach, modification, or termination of a procurement contract. A “protest” means a complaint that relates to the formation of a procurement contract, including about the qualifications of a bidder or offeror or the determination of a successful bidder or offeror.

Contract claims and bid protests must first be filed with the unit of State government responsible for the contract or procurement; the unit is then responsible for reviewing the claim or protest and issuing a final determination. A prospective bidder or offeror, or a bidder or offeror, may appeal an agency’s final decision regarding a bid protest to MSBCA. Similarly, a contractor may appeal an agency’s final decision regarding a contract claim to MSBCA.

MSBCA may award a prospective bidder, prospective offeror, bidder, or offeror the reasonable costs of filing and pursuing a bid protest, *but not attorney’s fees*, if MSBCA sustains the appeal and finds that there has been a violation of law or regulation.

For contract claims related to *construction* contracts, MSBCA may award the contractor the reasonable costs of filing and pursuing a claim, including reasonable attorney’s fees, if MSBCA finds that the conduct of agency personnel is in bad faith or without substantial justification. State law does not allow for the awarding of reasonable costs for claims related to all other contracts.

State Expenditures: Currently, MSBCA may order the payment of reasonable attorney’s fees only for appeals of contract claims related to construction contracts. Expanding the authority to include all successful appeals of bid protest and all contract claims may increase payments by agencies to prevailing vendors. Federal funds may not be used to pay court-ordered penalties, so the bill affects only general and special funds, even if federal funds are involved in payment of a contract.

However, recent history indicates that few appeals of bid protests and contract claims decided by MSBCA are successful. In the last five years, only 1 of 74 contract claims was successful and only 5 of 77 bid protests were successful. Although the 1 successful contract claim included a request for attorney’s fees, they were not awarded because the contractor was defending against a claim by the State rather than having filed their own claim.

The prospect of possibly being reimbursed for reasonable attorney’s fees if they prevail may prompt more vendors to file bid protests or contract claims against the State. A substantial increase may require more procurement staff and assistant Attorneys General

to handle the appeals, but a reliable estimate is not feasible in the absence of experience under the bill.

Small Business Effect: Small businesses that prevail in appeals of bid protests or contract claims before MSBCA may be reimbursed for reasonable attorney’s fees. MSBCA notes, however, that claims for attorney’s fees require separate litigation to determine what constitutes “reasonable.”

Additional Information

Recent Prior Introductions: Similar legislation has not been introduced within the last three years.

Designated Cross File: SB 667 (Senator Charles) - Budget and Taxation.

Information Source(s): State Board of Contract Appeals; Board of Public Works; Department of General Services; Department of Legislative Services

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