
By: **Delegates Brinkley, Benson, Clagett, Moe, Snodgrass, and Poole**

Introduced and read first time: February 9, 1998

Assigned to: Commerce and Government Matters

A BILL ENTITLED

1 AN ACT concerning

2 **State Procurement Process - Competitive Sealed Proposals - Evaluation of**
3 **Past Performance**

4 FOR the purpose of modifying the competitive sealed proposal process under the
5 State procurement law to require the consideration of past performance;
6 authorizing certain exceptions in accordance with a certain procedure; requiring
7 the Board of Public Works to establish an evaluation process concerning past
8 performance; providing that the process shall provide specified factors,
9 procedures, and requirements; requiring development of a central tracking
10 system relating to past performance; prohibiting the use of past performance
11 information over a specified age; restricting access to certain information
12 relating to past performance under the public information act; specifying the
13 policy of the State in regard to evaluation of proposals under the competitive
14 sealed proposal process; defining "past performance"; and generally relating to
15 the consideration of an offeror's past performance in awarding State
16 procurement contracts under the competitive sealed proposal process.

17 BY adding to
18 Article - State Finance and Procurement
19 Section 12-110
20 Annotated Code of Maryland
21 (1995 Replacement Volume and 1997 Supplement)

22 BY repealing and reenacting, with amendments,
23 Article - State Finance and Procurement
24 Section 13-101 and 13-104
25 Annotated Code of Maryland
26 (1995 Replacement Volume and 1997 Supplement)

27 BY repealing and reenacting, without amendments,
28 Article - State Finance and Procurement
29 Section 13-102
30 Annotated Code of Maryland

1 (1995 Replacement Volume and 1997 Supplement)

2 BY adding to

3 Article - State Government

4 Section 10-616(q)

5 Annotated Code of Maryland

6 (1995 Replacement Volume and 1997 Supplement)

7 SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF
8 MARYLAND, That the Laws of Maryland read as follows:

9 **Article - State Finance and Procurement**

10 12-110.

11 (A) IN THIS SECTION, "PAST PERFORMANCE" HAS THE MEANING STATED IN §
12 13-101 OF THIS ARTICLE.

13 (B) IN THE EVALUATION OF PROPOSALS UNDER A COMPETITIVE SEALED
14 PROPOSAL PROCESS, IT IS THE POLICY OF THE STATE:

15 (1) TO ENSURE THAT THE STATE OBTAINS THE BEST VALUE IN THE
16 AWARD OF A PROCUREMENT CONTRACT;

17 (2) TO ENCOURAGE THE HIGHEST LEVEL OF PERFORMANCE BY
18 CONTRACTORS DOING BUSINESS WITH THE STATE; AND

19 (3) TO USE SIGNIFICANT RELIANCE ON PAST PERFORMANCE AS A
20 PREDICTOR OF QUALITY OF PERFORMANCE AND CUSTOMER SATISFACTION UNDER
21 THE CONTRACT TO BE AWARDED.

22 (C) (1) THE BOARD SHALL ESTABLISH BY REGULATION A PROCESS FOR
23 EVALUATION OF PAST PERFORMANCE IN THE CONSIDERATION OF COMPETITIVE
24 SEALED PROPOSALS.

25 (2) THE PROCESS ESTABLISHED BY THE BOARD SHALL:

26 (I) PROVIDE METHODS BY WHICH PAST PERFORMANCE MAY BE
27 EVALUATED;

28 (II) REQUIRE THAT A UNIT COMPLETE A PERFORMANCE REVIEW
29 FOLLOWING COMPLETION OF CONTRACT AWARDED UNDER § 13-104 OF THIS
30 ARTICLE FOR CONSIDERATION IN FUTURE CONTRACT SELECTION PROCESSES;

31 (III) PROVIDE THAT A CONTRACTOR HAS THE RIGHT TO EXAMINE
32 THE PERFORMANCE REVIEW AND SUBMIT COMMENTS CONCERNING THE REVIEW
33 BEFORE IT IS FINALIZED;

1 (IV) PROVIDE A 30-DAY APPEAL PROCESS FOLLOWING
2 FINALIZATION OF THE PERFORMANCE REVIEW WITHIN THE UNIT COMPLETING THE
3 PERFORMANCE REVIEW;

4 (V) PROVIDE FOR THE DEVELOPMENT OF A CENTRAL TRACKING
5 SYSTEM FOR PERFORMANCE REVIEWS; AND

6 (VI) PROVIDE THAT PAST PERFORMANCE INFORMATION MORE
7 THAN 3 YEARS OLD MAY NOT BE CONSIDERED IN THE EVALUATION OF AN OFFEROR'S
8 PAST PERFORMANCE.

9 13-101.

10 (a) In this subtitle the following words have the meanings indicated.

11 (b) "Evaluated bid price" means the price of a bid after adjustment in
12 accordance with objective measurable criteria.

13 (c) (1) "Objective measurable criteria" means standards that enable the
14 State to compare the economy, effectiveness, or value of the subject of the bids.

15 (2) "Objective measurable criteria" includes standards of reliability,
16 operational costs, maintainability, useful life, and residual value.

17 (D) "PAST PERFORMANCE" MEANS PERFORMANCE BY A RESPONSIBLE
18 OFFEROR UNDER CONTRACTS INVOLVING SERVICES OR SUPPLIES THAT ARE THE
19 SAME AS OR SIMILAR TO THOSE REQUIRED UNDER A PROPOSAL, WHETHER THE
20 CONTRACTS WERE WITH THE STATE, ANOTHER GOVERNMENTAL ENTITY, A
21 COMMERCIAL ENTITY, OR NONPROFIT ENTITY, DURING A PERIOD SPECIFIED IN A
22 REQUEST FOR PROPOSALS, IN TERMS OF:

23 (1) BUSINESS PRACTICES;

24 (2) COST CONTROL;

25 (3) END USER SATISFACTION;

26 (4) PERFORMANCE OF THE OFFEROR'S PERSONNEL;

27 (5) QUALITY OF THE SERVICES OR SUPPLIES;

28 (6) TIMELINESS OF PERFORMANCE;

29 (7) RECORD OF PAYING SUBCONTRACTORS IF SUBCONTRACTORS WILL
30 BE USED UNDER A CONTRACT; AND

31 (8) OTHER FACTORS SPECIFIED IN A REQUEST FOR PROPOSALS
32 RELATED TO AN OFFEROR'S PAST PERFORMANCE.

1 13-102.

2 (a) Except as provided in Subtitle 3 of this title, all procurement by units shall
3 be by competitive sealed bids unless one of the following methods specifically is
4 authorized:

5 (1) competitive sealed proposals under § 13-104 or § 13-105 of this
6 subtitle;

7 (2) noncompetitive negotiation under § 13-106 of this subtitle;

8 (3) sole source procurement under § 13-107 of this subtitle;

9 (4) emergency or expedited procurement under § 13-108 of this subtitle;

10 (5) small procurement under § 13-109 of this subtitle; or

11 (6) an intergovernmental cooperative purchasing agreement under §
12 13-110 of this subtitle.

13 (b) (1) In awarding a procurement contract for human, social, cultural, or
14 educational service, the preferred method is by competitive sealed proposals under §
15 13-104 of this subtitle.

16 (2) In awarding a procurement contract for a lease of real property, the
17 preferred method is by competitive sealed proposals under § 13-105 of this subtitle.

18 (3) Procurement under an intergovernmental cooperative purchasing
19 agreement is appropriate in situations where the State is expected to achieve a better
20 price as the result of economies of scale or to otherwise benefit by purchasing in
21 cooperation with another governmental entity.

22 13-104.

23 (a) Competitive sealed proposals may be used if:

24 (1) the procurement is for human, social, cultural, or educational
25 services;

26 (2) with the approval of the head of a unit, the procurement officer
27 determines that specifications cannot be prepared that allow an award based on the
28 lowest bid price, the lowest evaluated bid price or, if the procurement is subject to §
29 11-202(3) of this article, the bid most favorable to the State; or

30 (3) the head of the unit determines that:

31 (i) the need to use a method other than competitive sealed bids is
32 sufficiently compelling to override the general public policy that favors awarding
33 procurement contracts on the basis of competitive sealed bids; and

1 (ii) the use of competitive sealed bidding for that procurement
2 contract is not practicable or not advantageous to the State.

3 (b) (1) Whenever procurement is based on competitive sealed proposals, a
4 procurement officer shall seek proposals by issuing a request for proposals.

5 (2) A request for proposals shall include a statement of:

6 (i) the scope of the procurement contract;

7 (ii) the factors, including PAST PERFORMANCE AND price, that will
8 be used in evaluating proposals; and

9 (iii) the relative importance of each factor.

10 (3) (I) SUBJECT TO SUBPARAGRAPH (II) OF THIS PARAGRAPH, A
11 REQUEST FOR PROPOSALS SHALL:

12 1. PROVIDE THAT PAST PERFORMANCE WILL BE GIVEN
13 SUBSTANTIAL WEIGHT IN RELATION TO OTHER FACTORS IN THE EVALUATION OF A
14 PROPOSAL;

15 2. DESCRIBE THE MANNER IN WHICH PAST PERFORMANCE
16 WILL BE EVALUATED AND SPECIFY THE WEIGHT THAT WILL BE GIVEN TO PAST
17 PERFORMANCE; AND

18 3. STATE THAT, FOR AN OFFEROR FOR WHOM RELEVANT
19 PAST PERFORMANCE INFORMATION IS NOT AVAILABLE, THE OFFEROR MAY NOT BE
20 EVALUATED FAVORABLY OR UNFAVORABLY ON THE BASIS OF PAST PERFORMANCE.

21 (II) IF THE PROCUREMENT OFFICER MAKES A WRITTEN
22 DETERMINATION THAT PAST PERFORMANCE, ANY COMPONENT OF PAST
23 PERFORMANCE UNDER § 13-101 OF THIS SUBTITLE, OR THE GIVING OF SUBSTANTIAL
24 WEIGHT TO PAST PERFORMANCE IN THE EVALUATION OF OFFERS IS NOT
25 APPROPRIATE IN A PROCUREMENT CONTRACT BEFORE THE ISSUANCE OF A
26 REQUEST OF PROPOSALS, THE USE OR EVALUATION OF PAST PERFORMANCE MAY BE
27 MODIFIED IN ACCORDANCE WITH THE PROCUREMENT OFFICER'S DETERMINATION
28 FOR PURPOSES OF THAT CONTRACT.

29 (c) A unit shall publish a request for proposals in the same manner as
30 required for an invitation for bids.

31 (d) (1) After receipt of proposals but before the procurement officer awards
32 the procurement contract, a unit may conduct discussions with an offeror to:

33 (i) CLARIFY AND VERIFY THE ACCURACY AND RELEVANCE OF
34 PAST PERFORMANCE INFORMATION THAT IS SUBMITTED BY THE OFFEROR FOR
35 CONSIDERATION BY THE UNIT;

36 (II) obtain the best price for the State; and

1

Article - State Government

2 10-616.

3 (Q) (1) SUBJECT TO PARAGRAPHS (2) AND (3) OF THIS SUBSECTION, A
4 CUSTODIAN SHALL DENY INSPECTION OF ANY PART OF A PUBLIC RECORD THAT
5 CONTAINS INFORMATION COLLECTED FOR THE EVALUATION OF PAST
6 PERFORMANCE IN THE AWARDING OF CONTRACTS UNDER § 13-104 OF THE STATE
7 FINANCE AND PROCUREMENT ARTICLE, INCLUDING PERFORMANCE REVIEWS
8 COMPLETED FOLLOWING COMPLETION OF A CONTRACT.

9 (2) A CUSTODIAN SHALL MAKE AVAILABLE A PERFORMANCE REVIEW TO
10 THE PERSON THAT WAS THE SUBJECT OF THE REVIEW OR TO ANY OTHER PERSON
11 THAT HAS THE CONSENT OF THE PERSON THAT WAS SUBJECT TO THE REVIEW.

12 (3) SUBJECT TO PARAGRAPH (4) OF THIS SUBSECTION, A CUSTODIAN:

13 (I) SHALL MAKE AVAILABLE PAST PERFORMANCE INFORMATION:

14 1. FOR PURPOSES OF A CENTRAL TRACKING SYSTEM
15 ESTABLISHED UNDER § 12-110(C)(2)(V) OF THE STATE FINANCE AND PROCUREMENT
16 ARTICLE; AND

17 2. TO ANY OTHER UNIT OF STATE GOVERNMENT FOR
18 EVALUATION OF AN OFFEROR; AND

19 (II) MAY MAKE AVAILABLE PAST PERFORMANCE INFORMATION TO
20 ANY OTHER GOVERNMENT ENTITY FOR EVALUATION OF AN OFFEROR.

21 (4) INFORMATION RELEASED UNDER PARAGRAPH (3) OF THIS
22 SUBSECTION IS RELEASED FOR THE SOLE PURPOSE OF EVALUATING PAST
23 PERFORMANCE AND MAY NOT BE REDISCLOSED OR RELEASED FOR ANY OTHER
24 PURPOSE.

25 (5) PARAGRAPH (4) OF THIS SUBSECTION MAY NOT BE CONSTRUED AS
26 TO PROHIBIT RELEASE OF PERFORMANCE REVIEWS RELATING TO A CLAIM OR
27 LITIGATION INVOLVING THE CONTRACT ON WHICH THE PERFORMANCE REVIEW WAS
28 BASED.

29 SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect
30 October 1, 1998.