

Department of Legislative Services
Maryland General Assembly
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FISCAL NOTE
Revised

House Bill 252 (Delegates Wood and McIntosh)

Commerce and Government Matters Education, Health, and Environmental Affairs

Procurement - Unsolicited Proposals

This bill provides for a new method of State procurement based on an unsolicited proposal. The bill also requires a report each year from the Department of Budget and Management on usage of the new procurement method.

The bill is effective for six years, until the end of September 30, 2008.

Fiscal Summary

State Effect: The bill's requirements could be handled with existing budgeted resources.

Local Effect: None.

Small Business Effect: Minimal.

Analysis

Bill Summary: The bill provides that a procurement officer may contract for goods or services based on an unsolicited proposal if the unsolicited proposal:

- is in writing;
- contains a novel or innovative concept, application, approach, or method which is not available or in use by another unit, or demonstrates a novel capability of the offerer;
- has not previously been submitted to the unit by another person; and
- meets a need or is otherwise advantageous to the unit.

The bill establishes an interagency panel to review unsolicited proposals and make a determination, within 30 days, on whether or not the proposal meets the requirements.

If the panel determines that an unsolicited proposal meets the requirements, the offerer is not required to be the only available source for the contract awarded. Before awarding the contract the procurement officer shall obtain the approval of the head of the unit and any other approval required by law. A contract awarded as the result of an unsolicited proposal cannot have a term, including extensions, of more than two years. Annual contract expenditures cannot exceed \$1 million.

The bill provides that except for an unsolicited proposal for which a contract is awarded, a procurement officer shall treat the information contained in an unsolicited proposal as confidential information not subject to disclosure under any other State or local law. For unsolicited proposals for which a contract has been awarded, the provisions of law for access to public records govern disclosure of the unsolicited proposal.

The bill requires that at least 30 days prior to the execution and award of a contract based on an unsolicited proposal, the contracting unit must publish a general notice of the intent to award the contract in the *Contract Weekly*, and at least one newspaper of general circulation in the county of the agency served under the contract and if applicable, the county of the client population to be served by the agency under the contract. For notification purposes, the *Baltimore Sun* and the *Washington Post* are to be considered newspapers of general circulation in the counties in the State; and in Baltimore City and Anne Arundel and Baltimore counties, the *Afro-American* is to be considered a newspaper of general circulation.

The bill also requires that within 30 days of the execution and approval of a procurement contract pursuant to an unsolicited proposal, a unit is to publish notice of the award in the *Contract Weekly*.

The bill requires the Department of Health and Mental Hygiene (DHMH), the Department of Human Resources (DHR), the Department of Labor, Licensing, and Regulation (DLLR), the Department of Juvenile Justice (DJJ), the Department of Aging, the Office of Individuals with Disabilities, and the Department of Business and Economic Development (DBED) to implement educational outreach campaigns on the availability of the unsolicited proposal procurement method.

The bill specifies that the provisions of Public Ethics Law on participation in procurement do not apply to a person submitting an unsolicited proposal with respect to any matter related to the proposal. The bill further specifies that, like procurements done

under other methods, unsolicited proposals are subject to requirements for minority business enterprise participation and the authority of the Board of Public Works.

Each unit is to report annually to the Department of Budget and Management (DBM) and by September 30 of each year DBM is to report to the Governor and the Senate Education, Health, and Environmental Affairs Committee and House Commerce and Government Matters Committee on the impact of this Act, including specific information on the contracts awarded in the prior fiscal year. The report is to be generated from the State's electronic financial management information system.

Current Law: There are no specific provisions for contracts based on unsolicited proposals. An unsolicited contract may qualify as a sole source contract, but the procurement would be subject to the restrictions on bid participation by individuals assisting in the preparation of certain bid documents. Specifically, under the conflict of interest provisions of State Ethics Law, an individual cannot bid if the individual assisted the procurement unit in developing the specifications, an invitation for bids or a request for proposals, or the selection or award in response to an invitation for bids or request for proposals.

Current methods for procurement are:

- competitive sealed bids;
- competitive sealed proposals;
- noncompetitive negotiation;
- sole source procurement;
- emergency or expedited procurement;
- small procurement; and
- an intergovernmental cooperative purchasing agreement.

Generally, a notice must be published in the *Contract Weekly* after the execution and award of a contract. For contracts pursuant to competitive sealed bids or proposals, notification is required within 30 days of the contract award and is only required for contracts of \$25,000 or more, unless a lower amount is specified by the Board of Public Works by regulation. For contracts awarded pursuant to a sole source procurement or an emergency or expedited procurement, the notification is required within 30 days of the execution and award of the contract. There is no notification requirement for small procurements or intergovernmental cooperative agreement procurements.

The laws on access to public records govern disclosure of information related to procurement. Access to procurement documents may be denied because the documents contain confidential financial or commercial information or trade secrets. The laws

governing procurement, however, provide that the following are open to public inspection: a summary of the final evaluation of a proposal; after an award, all proposals; and, at and after any bid opening, the contents of a bid and any document submitted with the bid.

Background: Joint Resolution 9 of 1999 established the Task Force on Regulatory Reform to examine:

- the existing process for the review of regulations under the Regulatory Review and Evaluation Act (RREA); and
- at least two titles of the Code of Maryland Regulations (COMAR) for the purpose of looking at ways to:
 - eliminate obsolete language;
 - apply a cost/benefit analysis and small business impact statement; and
 - identify regulatory requirements that may exceed federal standards.

The task force recommended two pieces of legislation as a result of its work:

- altering the RREA process so members of the public and other State agencies are involved in the review of an agency's existing regulations; and
- clarifying the law regarding State contracts for unsolicited proposals for innovative goods and services.

Testimony to the task force suggested a number of regulations for the task force to review, and the list was narrowed down to two: (1) DHMH regulations on food and drink transportation; and (2) Board of Public Works regulations on unsolicited vendor offers and how these regulations interact with sole source procurement procedures.

According to the report: (1) the regulations on unsolicited proposals provided no clear guidelines for the submission and evaluation of unsolicited proposals; (2) the regulatory language is vague and conflicting; (3) the regulations and existing statutory language can be read to counteract each other; (4) the interplay between the regulations for unsolicited proposals and those for sole source procurements leave uncertainty regarding the practical applicability of the regulations for unsolicited proposals; and (5) barriers are raised by the conflict of interest provisions of State Ethics Law for unsolicited proposals for innovative technologies. There is a disincentive for a vendor with an innovative product with capabilities not publicly known to assist a procurement unit in developing specifications for a contract if the vendor cannot bid for the contract.

Two bills reflecting the task force recommendations, House Bill 383 and Senate Bill 315, were introduced in the 2001 session and received unfavorable votes in the respective committees, Commerce and Government Matters and Economic and Environmental Affairs.

This bill is not the legislation recommended by the task force.

State Fiscal Effect: Morgan State University and the University System of Maryland advise that the bill would have no significant fiscal impact.

The Department of Public Safety and Correctional Services (DPSCS) advises that the bill's requirements will add to the work load of the procurement staff, but can be handled with current resources. The DPSCS further advises that there will be other costs associated with the advertising requirements of the bill.

The Maryland Department of Transportation (MDOT) advises that the additional expenses for advertising would be approximately \$500 per advertisement, resulting in an estimated additional expense for the agency of \$5,000 per year. MDOT further advises that the additional handling and reporting expenses for the agency would be nominal.

The Department of General Services (DGS) notes that the impact on the agency will depend upon the number of unsolicited proposals received that must be reviewed, and since the quantity of unsolicited proposals is unknown, the fiscal impact is indeterminate.

The Department of Health and Mental Hygiene (DHMH) advises that current resources could absorb the additional workload associated with unsolicited proposals, but a large number of proposals would require additional staffing.

The Department of Budget and Management (DBM) advises that the administrative costs to process, review, and report on procurements based on unsolicited proposals will vary by agency, but should be minimal and handled with existing resources. DBM further advises that there will probably only be a small number of contracts awarded each year under this new procurement method and the benefits associated with the contracts, while impossible to quantify, would outweigh the presumed minimal costs.

Legislative Services advises that the use of unsolicited proposals may result in benefits for the State associated with innovative technologies.

Additional Information

Prior Introductions: None.

Cross File: SB 719 (Senator Hollinger, *et al.*) – Education, Health, and Environmental Affairs.

Information Source(s): Department of General Services, Morgan State University, Maryland State Treasurer's Office, Department of Health and Mental Hygiene, University System of Maryland, Department of Transportation, Department of Budget and Management, Department of Public Safety and Correctional Services, Department of Legislative Services

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