

Department of Legislative Services
 Maryland General Assembly
 2004 Session

FISCAL AND POLICY NOTE

House Bill 430 (Delegates Morhaim and Weldon)
 Health and Government Operations

Procurement - Alternative Dispute Resolution Pilot Program

This bill requires the primary procurement units to develop and implement an Alternative Dispute Resolution (ADR) Pilot Program for the resolution of claims under construction contracts. Unless the parties otherwise agree, the pilot program will use nonbinding mediation. The cost of each mediation is shared equally between the parties to the claim. The bill also requires the Office of the Attorney General (OAG) to report on specified topics to the Governor and the General Assembly by January 1, 2006.

The bill takes effect October 1, 2004 and terminates on September 30, 2006.

Fiscal Summary

State Effect: General fund expenditures could increase by \$70,000, special fund expenditures could increase by \$25,000, and higher education funds could increase by \$25,000 in FY 2005. Future year expenditures reflect the program’s September 30, 2006 termination.

(in dollars)	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Revenues	\$0	\$0	\$0	\$0	\$0
GF Expenditure	70,000	75,000	20,000	0	0
SF Expenditure	25,000	35,000	10,000	0	0
Higher Ed Exp.	25,000	35,000	10,000	0	0
Net Effect	(\$120,000)	(\$145,000)	(\$40,000)	\$0	\$0

Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate effect

Local Effect: None.

Small Business Effect: Potential minimal impact on small businesses involved in any construction contracts for which the contractor files a claim and either party elects to use the ADR program.

Analysis

Bill Summary: The bill states that it is the policy of Maryland to encourage the use of alternative dispute resolution to resolve procurement claims and disputes to the maximum extent possible. Mediation must be agreed to by each party prior to the notice of a decision of a claim by the reviewing authority. After a decision has been made by the reviewing authority, mediation may be requested only at the discretion of the contractor.

This bill requires OAG to establish and maintain a list of individuals qualified to serve as mediators. If mediation is agreed to by both parties prior to the decision of a reviewing authority, or requested by the contractor after the decision of a reviewing authority, the mediator must either be agreed to by the interested parties or chosen by the contractor from a list of three possible mediators furnished by OAG.

The report from OAG must detail the effectiveness and fiscal impact of the pilot program and must include (1) a statistical analysis of the type and size of each case mediated; (2) the outcome of any proceeding under the provisions of this bill; and (3) an estimate of any cost savings or additional costs resulting from the alternative dispute resolution process.

Current Law: The primary procurement units are:

- the State Treasurer;
- the Department of Budget and Management (DBM);
- the Department of General Services (DGS);
- the Maryland Department of Transportation (MDOT);
- the University System of Maryland (USM);
- the Maryland Port Commission;
- the Department of Public Safety and Correctional Services (DPSCS); and
- Morgan State University.

Section 15-219 of the State Finance and Procurement Article details the current process to file and resolve contract claims for construction contracts. Appeals to decisions of this process are made by the Maryland State Board of Contract Appeals (MSBCA). MSBCA has jurisdiction to hear appeals on the final action of a unit of State government (1) on a

protest relating to the formation of a procurement contract; or (2) on a contract claims concerning breach, performance, modification, or termination.

Written notice of a contract claim for construction must be filed by the claimant within 30 days after the basis for the claim was or should have been known. Within 90 days of the filing, unless extended by the unit against which the claim is being made, the claimant is required to submit a written explanation that states (1) the amount of the contract claim; (2) the facts on which the contract claim is based; and (3) all relevant data and correspondence that may substantiate the contract claim.

Claims are reviewed by the head of the unit engaged in the procurement. In the case of a unit that is a part of a principal department, the Secretary of the principal department is the reviewing authority. If the amount of the claim is under the amount to which an accelerated procedure may be used with MSBCA, the reviewing authority has 90 days to issue a decision unless the parties agree to an extension. For any other claim, the reviewing authority has 180 days to issue a decision unless the parties agree to an extension.

Background: The provisions of this bill mirror a recommendation of the Task Force to Study Efficiency in Procurement (Chapter 386 of 2003). The task force's Dispute Resolution Subcommittee reviewed this issue during 2003. Input on an ADR program was solicited from State agencies, the contractor community, and the legal community.

State Expenditures: MDOT advises that each case could cost the department between \$16,930 and \$47,367 based on staff time, the need for a contractual expert to represent the department in the mediation, and the department's share of costs for the mediator. MDOT also notes that the State Highway Administration (SHA) annually receives approximately 13 contract claims. The department's estimated total cost is between \$220,090 and \$615,771. SHA indicates that it has participated in mediation once and that the SHA share of the mediator costs was \$5,400.

DGS was unable to quantify the fiscal impact of the proposal but indicated that it could result in substantial additional expenditures. The department noted that any claims that went through a potentially costly mediation may still result in appeals to the court system. DGS further notes that the impact would be directly related to the volume of claims.

DPSCS estimates that one additional part-time contractual position with a background in construction contract resolution would be required to prepare, compile, and present the department's case before a mediator. DPSCS also notes that the department would be responsible for the State share of mediation in which it participates. The department noted that it has had only had one contract claim in the past three years.

DBM and the State Treasurer indicate that they would not directly participate in any mediations as they are not involved in construction contracts. DBM estimates that some minor administrative costs may be incurred to participate in the pilot program's development. USM indicated that the only fiscal impact to the system would be any USM share of mediator costs, and that such costs would be minimal.

The Department of Legislative Services (DLS) does not concur with MDOT and DPSCS estimates that substantial additional resources would be required to develop, implement, or carry out the provisions of an ADR pilot program. DLS notes that the MDOT estimate of \$5,400 for the State share resulted from only one mediation, and that actual costs could vary. Experts and contractual positions would not be required to perform the functions of the agency's existing Assistant Attorney's General, procurement officers, and administrators. Instead of time spent on appeals before MSBCA, those agency staff would be able to devote time and resources to the mediation. Only if mediation were unsuccessful and the agencies were required to bear the costs of the mediation and the staff resources necessary for an appeal to MSBCA would existing resources be stretched beyond the current requirements for dealing with contract claims.

DLS believes the Board of Public Works estimate of \$20,000 for procurement personnel training is reasonable and also concurs that the State would incur real costs related to the State share of mediations. DLS estimates an average of \$5,000 per case for 10 cases resulting from claims at DGS, DPSCS, and other general fund agencies; five claims resulting from contracts with MDOT; and five claims resulting from contracts at USM could be handled through the ADR pilot program in fiscal 2005. The estimates of the number of mediations is based on concern that not all eligible claimants would feel comfortable in a mediation pilot program and that start delays would further reduce the available pool of cases for mediation. The fiscal 2006 cost is based on increased awareness of the program resulting in an estimated 15 general fund, 7 special fund, and 7 higher education mediations. Fiscal 2007 estimates reflect the September 30, 2006 termination.

Small Business Effect: Small businesses that participate in claims that are mediated may incur fewer costs associated with litigating contract claims against the State.

Additional Information

Prior Introductions: None.

Cross File: SB 212 (Senator Grosfeld) – Education, Health, and Environmental Affairs.

Information Source(s): Department of General Services, Board of Public Works, University System of Maryland, Maryland Department of Transportation, Department of Budget and Management, Department of Legislative Services

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