

**Department of Legislative Services**  
Maryland General Assembly  
2004 Session

**FISCAL AND POLICY NOTE**  
**Revised**

Senate Bill 56 (Chairman, Education, Health, and Environmental Affairs Committee)  
(By Request – Departmental – Transportation)

Education, Health, and Environmental Affairs

Environmental Matters

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**State Ethics Law - Architectural and Engineering Services - Restrictions on  
Participation in Procurement**

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This departmental bill includes a design of specified construction projects among the architectural and engineering services that would not disqualify an individual, or a person employed by that individual, from submitting a bid or proposal for the procurement of that construction project or from assisting another individual or firm in preparing a bid or proposal for that procurement. Design services shall not involve lead or prime design responsibilities or construction phase responsibilities on behalf of the State.

The Maryland Department of Transportation (MDOT) is to report annually through September 30, 2008 on its implementation of this bill, including the impact on small business and minority business enterprises (MBEs).

The bill is effective July 1, 2004. Between July 1, 2004 and June 30, 2006, the value of contracts authorized for inclusion under the provisions of this bill is \$2.5 to \$40 million. On and after July 1, 2006, the maximum value of contracts authorized for inclusion under the provisions of this bill increases to \$100 million. The nonreporting provisions of this bill sunset June 30, 2008.

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**Fiscal Summary**

**State Effect:** Potential significant decrease in general, special, and federal fund expenditures for construction services due to fewer bid and contract claims related to ethics violations and lower bids being awarded to firms that may have had minor involvement in preliminary design contracts.

**Local Effect:** None.

**Small Business Effect:** MDOT has determined that this bill has minimal or no impact on small business (attached). Legislative Services disagrees with this assessment as discussed below. (The attached assessment does not reflect amendments to the bill.)

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## Analysis

**Current Law:** An individual, or person who employs an individual who assists an executive unit in the drafting of specifications, an invitation for bids or a request for proposals for a procurement, or the selection or award made in response to an invitation for bids or request for proposals may not: (1) submit a bid or proposal for that procurement; or (2) assist or represent another person, directly or indirectly, who is submitting a bid or proposal for that procurement.

Assisting in the drafting of specifications, an invitation for bids, or a request for proposals does not include:

- (1) providing descriptive literature such as catalogue sheets, brochures, technical data sheets, or standard specification “samples,” whether requested by an executive agency or unsolicited;
- (2) submitting written comments on a specification prepared by an agency or on a solicitation for a bid or proposal when comments are solicited from two or more persons as part of a request for information or a pre-bid or pre-proposal process;
- (3) providing specifications for a sole source procurement;
- (4) providing architectural and engineering services for programming, master planning, or other project planning services; or
- (5) providing specifications for unsolicited proposals.

The statute governing unsolicited proposals sunsets on September 30, 2008.

**State Fiscal Effect:** MDOT notes that the ability to advertise preliminary design elements and well-defined project scopes enables construction companies to partner with engineering consultant firms to complete final design concurrent with construction activities. This concurrent work decreases the length of contracts and alleviates construction delays related to design element errors. It could also reduce instances where low bids are thrown out because of the late discovery of minor involvement by a consultant firm or sub-consultant firm and unnecessary construction delays that result from questions or clarifications that are raised in the bidding process that require an

opinion from the State Ethics Commission (the commission), a process that can add several months to the procurement.

MDOT notes three examples of financial loss incurred by the State due to the inability of engineering firms to participate in the preliminary design of a construction project. A bid protest was filed against the low bidder for a detail-build project on U.S. Route 113 on the basis that the engineering firm paired with the contractor had performed a review of the preliminary stormwater management design for Maryland Department of the Environment. The commission determined that there was not a conflict in the case, but the delay of the commission's review process precluded the contractor from meeting the early completion date in the contract. The contractor then filed a claim against the State for the early completion bonus money. That claim was denied but required personnel resources from MDOT to oppose. A bidder in a second procurement was declared ineligible because a subcontractor in their proposal had prepared renderings of the bridges and assisted in developing a specification concerning aesthetics for the structures to be used. A third project was not a design-build, but resulted in a low bid being thrown out because the firm had performed topographic surveys and preliminary right-of-way plats during the design phase of the project. Awarding this contract to the second lowest bidder cost the State an additional \$235,000.

The Department of General Services notes that consultants bidding on the construction phase are often unwilling to accept the preliminary design work performed by another consultant and will add expenses to their bid to verify the correctness of the preliminary designs. Permitting the consultant who performed preliminary designs to participate in the construction contract would eliminate this cost.

**Small Business Effect:** MDOT indicates the bill will have no or minimal impact on small businesses. However, in other departmental comments on the fiscal impact of the bill, it is stated that the bill would allow a State agency to take greater advantage of including design elements in construction contracts without unfairly disqualifying engineering consultant firms, "*especially small specialty firms*" (emphasis added) and MBE firms. Legislative Services concurs with this assessment and believes that the impact on the small business community will be meaningful. This bill would create substantial and frequent new opportunities for smaller businesses to become involved in the design phase of a construction project as a prime contractor and continue on as a partner or subcontractor in the construction phase. Under current law, smaller firms unable to bid on the entire construction project are relegated to choosing between performing some preliminary design work or trying to become a subcontractor on the construction phase.

## **Additional Information**

**Prior Introductions:** None.

**Cross File:** None.

**Information Source(s):** Department of General Services, State Ethics Commission, Maryland Department of Transportation, Department of Budget and Management, University System of Maryland, Department of Legislative Services

**Fiscal Note History:** First Reader - January 20, 2004  
mh/hlb Revised - Senate Third Reader - March 25, 2004

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