SB 596

Department of Legislative Services
Maryland General Assembly
2004 Session

FISCAL AND POLICY NOTE

Senate Bill 596 (Senator Klausmeier)
Education, Health, and Environmental Affairs

Procurement - Public-Private Partnership Act

This bill establishes a Public-Private Partnership Program for primary procurement units and enables the use of public-private partnerships for unsolicited proposals under certain circumstances.

The Secretary of Budget and Management is required to report to the Governor, the Senate Education, Health, and Environmental Affairs Committee, and the House Health and Government Operations Committee by September 30 of each year on: (1) the number of public-private partnership proposals awarded by each contracting unit; (2) the monetary amounts of the contracts awarded under this bill; (3) the goods or services for which the contracts were awarded; and (4) the number of contracts awarded to entities that are certified Minority Business Enterprises (MBE).

Fiscal Summary

State Effect: Potential minimal increase in procurement administration costs. The bill is enabling and could be handled with existing resources.

Local Effect: Minimal or none.

Small Business Effect: Potential minimal.

Analysis

Bill Summary: The stated purpose of the program is to develop agreements between private entities and primary procurement units to acquire, construct, or improve facilities and infrastructure. Qualifying projects include buildings for principal use by a public entity; utility facility infrastructure and improvements or equipment necessary to enhance building operation; an education facility and any depreciable property provided for use in a school facility that is operated as part of the public school system or as an institution of higher education; any improvements, together with equipment, necessary to enhance public safety and security of buildings to be principally used by a public entity; and a recreational facility.

Procurement officers may enter into public-private partnerships based on a proposal if the proposal: (1) is in writing; (2) is sufficiently detailed to allow a judgment to be made concerning the potential utility of the offer to the State; (3) is unique or innovative to State use; (4) demonstrates that the proprietary character of the offering warrants consideration of the use of sole source procurement; (5) meets a need or is otherwise advantageous to the public entity; and (6) cannot be procured through competitive methodologies. Procurement officers are required to obtain the approval of the head of the unit and any other approval required by law.

Primary procurement units must establish procedures for the submittal, evaluation, and approval of solicited and unsolicited proposals to enter into agreements authorized by the bill. Partnerships may be for a term of up to 20 years and must apply prevailing wage rates. Annual expenditures by the State under a partnership agreement may not exceed $5.0 million. Private entities are authorized to own, lease, or acquire any right to use or operate a qualifying public facility.

The bill creates an interagency panel appointed by the Governor. Procurement officers are required to forward any partnership proposals to the panel for review and a determination whether the proposal meets the requirements of this bill. The panel has 30 days to make its determination. The proposal is deemed approved if the panel fails to make a determination in 30 days.

Procurement officers are required to keep public-private partnership proposals confidential until awarded. Notice of the award of a public-private partnership must be made in the *Contract Weekly* and at least one newspaper of general circulation within 30 days of the award. The bill also specifies that providing specifications for a public-private partnership agreement does not preclude an individual from submitting a bid or proposal.

Current Law: State regulations establish procedures for public-private partnerships with businesses that can demonstrate the ability to finance, construct, or operate transportation facilities (excluding highways). However, State law does not prohibit a private entity from owning, constructing, operating, or maintaining a facility.

The Maryland Transportation Authority (MdTA) has a public-private partnership program that applies to most transportation projects except highways. The program, which is authorized by regulations but is not in statute, provides for sole-source agreements and MBE participation, but does not expressly require prevailing wage payment. The program applies only to new transportation facilities or major rehabilitation or expansion of certain facilities; it does not apply to maintenance and service.

A minority business enterprise is any private entity that is: (1) organized to engage in commercial transactions; (2) at least 51% owned and controlled by one or more individuals who are socially and economically disadvantaged; and (3) managed by one or more of the socially and economically disadvantaged individuals who own it. Until July 1, 2006, State agencies must try to set aside 25% of the total dollar value of their construction contracts with certified minority business enterprises. The goal does not apply to the Maryland Department of Transportation (MDOT) construction contracts under $50,000.

Maryland's prevailing wage law applies to any public works contract when State funds are used to finance at least 50% of the construction costs and the project costs more than $500,000. A contractor under a public works contract is liable to the public body for liquidated damages of $20 per day per laborer or other employee who is paid less than the prevailing wage rate.

By definition, prevailing wages are the hourly wage rates paid in the locality in which the construction work is to be performed. If 50% or more of all workers in a trade are paid exactly the same rate, that rate is considered the prevailing wage. If not, then 40% or more of the employees for each work classification must be paid the same rate in order for the rate to qualify as prevailing. If less than 40% receive the same rate, a weighted average is calculated and used as the prevailing wage. Prevailing wages are based on hourly salary levels, as well as employer benefit contributions. Baltimore and Allegany counties have their own prevailing wage laws.

The Davis-Bacon Act of 1931, as amended, requires that each federal or District of Columbia contract over $2,000 for the construction, alteration, or repair of public buildings or public works shall contain a prevailing wage clause. Under the Act, contractors or their subcontractors are to pay workers employed directly upon the site of the work no less than the locally prevailing wages and fringe benefits paid on projects of a similar character.

Background: The Task Force to Study Efficiency in Procurement (created by Chapter 386 of 2003) recommended that the State should encourage agencies to develop more public-private partnerships. The task force heard testimony from the University System of Maryland (USM) concerning successful partnerships for dormitory construction. The task force did not specifically recommend a program for public-private partnerships.

Public-private partnerships have been used to finance over $5 billion of new highway projects in the U.S. and can be constructed in several ways. Recent examples of transportation partnerships include the Southern Connector in South Carolina and Interstate 895 near Richmond in which nonprofit corporations participated in the development, financing, and ownership of toll facilities. The Dulles Greenway, a 14-mile limited-access freeway extension of the Dulles Toll Road, is the first private toll highway development in Virginia in 170 years.

In some cases, public-private partnerships can supplement shortfalls in State or local budgets for transportation projects and accelerate project completion. Such partnerships also contain inherent risks for both parties. For the public entity, those risks can include higher total project cost, adverse project selection, contract management problems, and public opposition. The private partner also faces certain risks, such as public opposition, approvals- and permit-related setbacks, land acquisition obstacles, and liability.

MdTA currently has a public-private partnership program established in regulations that manages, operates, and maintains the State's seven toll facilities, and finances new revenue-producing transportation projects. It also has the authority to issue bonds. The revenues are used to provide law enforcement at facilities under MdTA's jurisdiction and to finance capital projects for MDOT. Toll revenues are estimated to reach $206.6 million at the end of fiscal 2004. Excluding reserve funds, MdTA's expenditures are expected to outstrip revenues by $134 million in fiscal 2004.

State Fiscal Effect: The Department of Budget and Management (DBM) estimates minimal expense increases related to serving on the interagency panel. USM estimates no fiscal impact. MDOT indicates that public-private partnerships could be used to construct additional facilities at BWI airport or the port facility in Baltimore. MDOT estimates that any additional expense to review proposals would be significantly outweighed by infrastructure enhancements. The Department of General Services indicates that the additional review requirements and required regulatory scheme would unduly burden procurement officers.

The Department of Legislative Services concurs with the DBM and MDOT assessments that this enabling legislation would only have an administrative impact to the extent the procurement officers accepted unsolicited proposals and determined that the projects were not possible under any other method of procurement.

The impact of the prevailing wage law provision on the cost of projects built or operated through a public-private partnership would vary according to factors such as the type of workers and the current wages in the location of the facility.

Small Business Effect: To the extent that small businesses are able to develop unique proposals and produce unsolicited proposals that are beneficial to the State, small business participation in State procurement could increase.

Additional Information

Prior Introductions: In 2003, SB 497, which would have created a transportation specific public-private partnership program, passed the Senate and was heard in the House Economic Matters Committee.

Cross File: None.

Information Sources 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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