

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

**FISCAL AND POLICY NOTE**

House Bill 767

(Delegates Morhaim and Weldon)

Health and Government Operations

Education, Health, and Environmental Affairs

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**Procurement - Board of Contract Appeals - Jurisdiction over State Claims**

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This bill authorizes units of State government to assert contract claims against contractors, provides for review of State claims, and specifies that units of State government may appeal the final decision of a unit to the Maryland State Board of Contract Appeals (MSBCA).

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**Fiscal Summary**

**State Effect:** The bill would not materially affect State government operations.

**Local Effect:** None.

**Small Business Effect:** None. The State can currently withhold payments to force an affirmative claim on the part of the contractor. The bill simply permits MSBCA to review State affirmative claims prior to litigation.

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**Analysis**

**Bill Summary:** If the State asserts a claim it must state (1) the basis for the contract claim; (2) to the extent known, the amount, or the performance or other action, requested by the unit in the contract claim; and (3) the date by which the contractor is required to provide a written response to the contract claim. Procurement officers (1) must review the substance of the claim; (2) may request additional information or substantiation through an appropriate procedure; and (3) may discuss or, if appropriate, negotiate the contract claim with the unit or contractor.

If the unit and contractor are unable to resolve the claim, the procurement officer is required to offer a proposed decision. The proposed decision will be forwarded to the head of the unit and the head of the principal unit of which the unit is a part. The head of the unit or of the principal unit, if there is one, is the reviewing authority. The reviewing authority must approve, disapprove, or modify the proposed decision. The reviewing authority is permitted to remand a decision to the procurement officer for further action. Appeals of the final decision of a unit would be to MSBCA.

**Current Law:** Statute permits a person who has been awarded a procurement contract to file a contract claim. State units are not permitted to file contract claims with procurement officers or appeal claims to MSBCA. Current law only applies to claims filed by contractors. 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 procurement officer. The procurement officer is required to review the substance of the claim and may request additional information and discuss the claim with the appropriate parties. The procurement officer is required, unless clearly inappropriate, to discuss the claim with the Office of the Attorney General. The procurement officer is also required to send a copy of the office's written decision to the reviewing authority. The reviewing authority is 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. The reviewing authority must approve, disapprove, or modify the decision of the procurement officer. Appeals to decisions from this process are made to 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.

**Background:** The Court of Appeals held in *University of Maryland v. MFE International/NFP Architects, Inc.* 345 Md. 86, 691 A.2d 676 (1997) that the State had no statutory authority to file a contract claim against the defendants, and MSBCA had no jurisdiction over the contract claim.

This bill is a recommendation of the Task Force to Study Efficiency in Procurement (created by Chapter 386 of 2003). The task force was charged, in part, with studying the effectiveness of the dispute resolution process regarding State procurement. The task force addressed the need to permit the State to file claims and take advantage of the same

specialized procurement appellant process that contractors are afforded. The task force noted that the procurement officer and reviewing authority are not likely to find against themselves in the review process, but that the process will develop a record on which MSBCA can adjudicate.

**Additional Comments:** MSBCA notes that the State has the ability to *de facto* file affirmative claims by withholding contractor payments for performance issues. This would typically result in the contractor filing a claim. MSBCA would have original jurisdiction over that claim, since it was filed by a contractor.

*The Maryland Department of Transportation did not respond to a request for information.*

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### **Additional Information**

**Prior Introductions:** None.

**Cross File:** SB 416 (Senators Grosfeld and Jones) – Education, Health, and Environmental Affairs.

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

**Fiscal Note History:** First Reader - February 24, 2004  
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