

Department of Legislative Services
Maryland General Assembly
2004 Session

FISCAL AND POLICY NOTE
Revised

House Bill 1107

(Delegate Weldon, *et al.*)

Health and Government Operations

Education, Health, and Environmental Affairs

State Procurement Law - Revision

This bill alters membership and procedures of the Maryland State Board of Contract Appeals (MSBCA), authorizes reverse auction bids for procurements valued at less than \$1 million and adds services and equipment to authorized procurements for this method, and makes specified revisions to eligibility provisions of procurement law. The bill also provides for various reports from specified agencies on the implementation, effectiveness, and outcomes of the various provisions of the bill.

The bill is effective July 1, 2004 with certain reporting provisions terminating December 31, 2004.

Fiscal Summary

State Effect: The various provisions of the bill could reduce State contract costs significantly.

Local Effect: None.

Small Business Effect: Potential significant impact on small businesses due to reverse auction bidding expansions and the MSBCA expedited and accelerated procedure changes.

Analysis

Bill Summary/Current Law: The major provisions of this bill, with a discussion of current law, are as follows:

Fraud, Waste, and Abuse Prevention

The bill requires the procurement advisor to the Board of Public Works (BPW) to consult with the general counsel of BPW and the procurement advisory council and make recommendations to BPW for the award of financial incentives to individuals whose reports of fraud, waste, or abuse in the procurement process result in the recovery of damages under State procurement law.

The State Finance and Procurement Article currently requires the procurement advisor to: (1) prevent and detect fraud, waste, and abuse in the procurement process and foster competition in the expenditure of State funds; (2) conduct investigations into procurement policies, practices, and procedures, as appropriate; and (3) investigate complaints by State employees concerning fraud, waste, and abuse in the procurement process and any alleged violation of the procurement law or regulations.

Notification Provisions and Annual Contract Costs for Unsolicited Proposals

The bill authorizes primary procurement units to award contracts for unsolicited proposals valued at more than \$1 million in annual contract costs.

Membership Terms and Nominating Procedures for Members of MSBCA

This bill requires that at least one member of the board be authorized by the Court of Appeals to practice law in Maryland.

Threshold for Expedited and Accelerated Procedures before MSBCA

This provision codifies existing practice found in the Code of Maryland Regulations and increases the amounts under which expedited (from \$10,000 to \$50,000) and accelerated (from \$50,000 to \$100,000) procedures may be selected. A person may be represented by counsel in an appeals hearing under these provisions. The bill also authorizes sole proprietors, corporate officers or directors, general partners, limited liability company members, persons with at least 10% ownership, or other principal of a contractor who have not been admitted to practice law in the State to represent that contractor in an expedited procedure before the board.

Current regulations specify that in appeals where the amount in dispute is \$10,000 or less, the appellant may elect to have the appeal processed under a “Small Claims (Expedited)” procedure requiring decision of the appeal, when possible, within 120 days after the appeals board receives written notice of the appellant’s election to use this procedure. An appellant may elect the “Accelerated” procedure rather than the “Small Claims (Expedited)” procedure. In appeals where the amount in dispute is \$50,000 or less, the

appellant may elect to have the appeal processed under an “Accelerated” procedure requiring decision of the appeal, when possible, within 180 days after the appeals board receives written notice of the appellant’s election to use this procedure.

Reverse Auction Bidding

The bill provides that services and equipment, excluding information technology services and construction contracts, are authorized uses of reverse auction bidding and removes the \$1 million minimum value for use of reverse auction bidding. Reverse auctions allow the State to request supplies and then have businesses bid on the price at which they would supply those supplies. The auction lasts for a specified time and the lowest bidder receives the contract with the State. The head of a primary procurement unit may authorize reverse auction bid procurement if the head determines it is in the best interests of the State. Statute specifies the development of contracts, procedures for bidding, and required notifications for reverse auction bids.

The Department of Legislative Services (DLS) is required to submit a report to the Senate Education, Health, and Environmental Affairs and the House Health and Government Operations committees on or before January 1, 2007 that evaluates the impact of reverse online auctions on State expenditures and administrative efficiency.

Study Provisions

The bill requires BPW to review the level of delegation of its procurement responsibilities to units of State government and whether there are appropriate safeguards and accountability measures in place to promote the purposes of the State’s procurement law. BPW must report its findings, including any recommendations for revisions to State procurement law, to the Governor and the General Assembly by December 1, 2004.

DLS, with the assistance and cooperation of BPW, is required to conduct a study that reviews all exemptions from Division II of the State Finance and Procurement Article. The study must include: (1) the extent of any exemptions; (2) the original justification for exemptions and whether the circumstances continue to exist; (3) any procurement policies and procedures developed by the entity and the extent to which the policies and procedures comply with the purposes of State procurement law; (4) the existence of any accountability measures for determining the efficiency, effectiveness, and economy with which the entity is using State resources; and (5) the date of, and findings from, the most recent legislative audit of the entity. The report must be submitted to the Governor and the General Assembly on or before December 1, 2004.

Background: MSBCA provisions of this bill are recommendations of the Task Force to Study Efficiency in Procurement (Chapter 386 of 2003). The task force reviewed these

issues during 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 depoliticize the appointments process of MSBCA by providing for a nominating committee and a longer term of office. The task force also addressed the board's considerable backlog and felt that all members of the board should be able to prepare findings of fact and offer decisions. The task force noted that the backlog of cases is directly related to vacancies on the board and the inability of nonattorney members to write opinions for the board.

The task force recommended that the \$1 million floor be removed from the authorization of reverse auction bidding. The task force also recommended that non-attorneys be authorized to represent contractors before MSBCA in expedited proceedings. Members of the task force represented the recommendation as similar to a defendants' right to self-representation in the criminal and civil court systems.

State Expenditures: The various provisions of the bill could reduce overall State contract costs. Increasing utilization of reverse auction bidding could directly reduce contract costs for a wider range of State contracts. The U.S. Department of Justice estimates recovery of over \$1 billion in civil damages under the whistleblower provisions of the False Claims Act since 1986. A defined fraud, waste, and abuse program with the ability to recover damages could mitigate the cost of fraud, waste, and abuse. The changes to membership requirements could increase the efficiency of the dispute resolution process for bid protest and contract claims. This could directly reduce MSBCA costs and also indirectly reduce contract costs. DLS advises that the impact of these provisions cannot be reliably estimated at this time.

DLS advises that the reporting and staffing requirements of the bill could be handled with existing resources.

Small Business Effect: The new membership requirement for MSBCA may speed the resolution of protests and claims that go before the board, resulting in faster resolution for small businesses. The reverse auction provisions may enable more small businesses to participate in State contracts for a broader variety of contracts.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Office of the Attorney General, 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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