Department of Legislative Services

Maryland General Assembly
2005 Session

FISCAL AND POLICY NOTE
Revised

Senate Bill 401 (Senator Pinsky, *et al.*)

Education, Health, and Environmental Affairs Health and Government Operations

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International Trade Agreement - Procurement Rules - General Assembly Approval

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This bill prohibits the Governor and any other State official, without explicit consent from the General Assembly, from: (1) binding the State to the government procurement rules of an international trade agreement; or (2) giving consent to the federal government to bind the State to the government procurement rules of an international trade agreement. The bill also declares invalid any consent previously given by the Governor or other State official to bind the State to the government procurement rules of an international trade agreement.

The bill takes effect June 1, 2005.

Fiscal Summary

State Effect: Potential increase in procurement costs, should the State choose to withdraw from the Agreement on Government Procurement (GPA) and implement price preferences for domestic contractors in State procurements.

Local Effect: None.

Small Business Effect: None.

Analysis

Bill Summary: The bill specifies that an international trade agreement includes an agreement between the federal government and a foreign country to which the State is a party at the request of the federal government, but not an agreement between the State and a foreign government to which the federal government is not a party.

Current Law: There are no similar restrictions in the statute. An opinion letter from the Office of the Attorney General states that in the absence of a statute governing the State's participation in international trade agreements, the Governor has authority to make commitments to the U.S. Trade Representative (USTR) regarding Executive Branch procurement, so long as any commitment is consistent with State law.

Background: GPA is designed to ensure that government procurement in member nations does not favor domestic products or suppliers or discriminate against foreign products or suppliers. GPA establishes three main principles: (1) nondiscrimination on the basis of national origin in the procurement of goods and services; (2) transparency in the laws, regulations, and procedures governing government procurement; and (3) competitive contracting procedures.

When GPA was expanded to cover procurement by local government entities in the early 1990s, the USTR solicited governors to include state procurement in GPA. In 1993, Governor Schaefer confirmed that the USTR could bind certain Maryland Executive Branch procurements to GPA. Governor Schaeffer excluded certain agencies, and provided for certain conditions to apply, including but not limited to small business preferences, minority business enterprise rules, recycled products preferences, and preferences for State Use Industries and Blind Industries. When negotiations were completed in 1996, GPA included the Maryland agencies bound, and noted that conditions applied to these procurements.

When GPA was updated in 2003, the USTR again solicited governors to extend the state commitments to newly included countries in GPA. Governor Ehrlich responded, offering a commitment on behalf of Maryland, with the same conditions as those specified by Governor Schaeffer in 1993.

Questions have been raised as to whether certain State laws violate the Central American Free Trade Agreement (CAFTA) by Maryland's willingness to be bound under CAFTA. CAFTA applies the provisions of the North American Free Trade Agreement (NAFTA) to five Central American countries and the Dominican Republic. While government procurement restrictions in NAFTA apply only to the federal government, CAFTA applies these rules to states that agree to be bound under the agreement.

The following State policies could potentially be considered violations of CAFTA:

- procurement price preferences for recycled products or environmentally preferable products;
- "Buy American" steel restrictions;

- prevailing wages and living wages;
- certain suspension and disbarment provisions; and
- certain labor standards and bargaining provisions.

In response to these concerns a group of seven state governors have withdrawn their consent for their states to be bound by CAFTA; however, 21 states remain bound by CAFTA.

The World Trade Organization (WTO) retains jurisdiction over violations of certain trade agreements. While the U.S. Supreme Court invalidated the Massachusetts law barring procurements with or from Burma, a WTO complaint was pending against Massachusetts at the same time. A verdict against a defendant by WTO may result in procurement sanctions against the United States or specifically state businesses.

State Fiscal Effect: If the State withdraws its consent to be bound by GPA or CAFTA, certain State policies will not face potential prosecution by WTO. However, abandoning the nondiscrimination requirements of GPA could result in discrimination in favor of domestic bids, which could increase procurement costs.

Additional Information

Prior Introductions: None.

Cross File: HB 514 (Delegate Menes, *et al.*) – Health and Government Operations.

Information Source(s): Department of General Services, Board of Public Works, Governor's Office, University System of Maryland, Maryland Department of Transportation, Department of Budget and Management, Office of the Attorney General (Opinions and Advice), Department of Legislative Services

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Analysis by: Martin L. Levine

Direct Inquiries to:
(410) 946-5510
(301) 970-5510