

Department of Legislative Services
 Maryland General Assembly
 2006 Session

FISCAL AND POLICY NOTE

Senate Bill 417 (Senator Conway, *et al.*)
 Education, Health, and Environmental Affairs

Procurement - Board of Contract Appeals - Award of Costs

This bill authorizes the Board of Contract Appeals to reimburse attorneys' fees to bidders or offerors who file successful bid protests. It also expands the types of contracts for which the Board of Contract Appeals can award contractors the reasonable costs stemming from filing a contract claim to all procurement contracts.

Fiscal Summary

State Effect: General and special fund (Transportation Trust Fund) expenditures could increase up to \$525,000 in FY 2007, which accounts for the bill's October 1, 2006 effective date. Also, the bill could result in more appeals being filed with the Board of Contract Appeals, which could increase the cost to the State, perhaps significantly, if the board sustains more appeals than it has in the past. Future years reflect annualization and inflation.

(in dollars)	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Revenues	\$0	\$0	\$0	\$0	\$0
GF/SF Exp.	525,000	707,000	714,100	721,200	728,400
Net Effect	(\$525,000)	(\$707,000)	(\$714,100)	(\$721,200)	(\$728,400)

Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate effect

Local Effect: None.

Small Business Effect: Potentially meaningful. This bill could make it easier for a small business with limited resources to file a contract claim or procurement protest if it believes it has been treated unfairly during a State procurement or contract. It could also increase the size of the award that a small business could receive in the event that the board sustains its claim or protest.

Analysis

Bill Summary: The Board of Contract Appeals (BCA) may reimburse a bidder or offeror or a prospective bidder or offeror any attorneys' fees that arise from pursuing a protest if the following conditions are met:

- the bidder or offeror has appealed an agency's final action on a protest to BCA;
- BCA sustains the appeal; and
- BCA finds that the agency has violated the law or existing regulation.

BCA may also award to a contractor any reasonable costs associated with filing and pursuing a contract claim related to any procurement contract unless BCA finds that the conduct of the procurement unit was substantially justified or that special circumstances make an award unjust.

Current Law: BCA may not reimburse a bidder or offeror for any attorneys' fees it incurs in pursuing a procurement protest.

BCA may reimburse a contractor for any reasonable costs associated with filing and pursuing a contract claim only for construction contracts, (not all procurement contracts), and only if it finds that a procurement unit behaved in bad faith or without substantial justification.

Background: BCA is an independent State agency responsible for hearing and deciding most appeals arising from procurement protests or contract claims.

A procurement protest arises when a bidder or offeror believes that a State procurement was conducted improperly. A contract claim arises when a firm under contract with a State agency believes that the State has not abided by the terms of the contract, particularly related to performance, breach, modification, or termination of the contract.

A protest or claim is submitted to a procurement officer, who negotiates with the affected party to try to arrive at a satisfactory resolution. If the procurement officer is unable to reach a satisfactory resolution, the procurement officer issues a written decision. The decision is subject to immediate review by the head of the department in which the procurement unit is located as well as by the agency director. The result of this review is considered the agency's final action. The party that submitted the protest or claim may then appeal the agency's final action to BCA.

State Fiscal Effect: Based on past experience, BCA estimates that it sustains two to four contract disputes and one to two procurement protests each year. Attorneys' fees for

these cases total between \$650,000 and \$700,000. Although the federal government pays 80% to 90% of these claims if the appeal stems from a project that is at least partially funded by federal funds, federal law prohibits federal funds from being used to pay for attorneys' fees. Therefore, the State would be responsible for all attorneys' fees. In fiscal 2007, expenditures could increase \$487,500 to \$525,000 reflecting a partial year of funding.

The bill could also encourage more bidders, offerors, and contractors to file protests and contract claims which in turn could lead to fewer settlements if they are confident that they will prevail because they know they will recoup their attorneys' fees if they are successful. If that occurs, more appeals would likely reach BCA, and that in turn could increase the number of cases it sustains. In addition, with the bill expanding the types of procurement contracts subject to reimbursement of attorneys' fees, more projects could be subject to protests and contract claims. Both of these factors could increase State costs considerably, in future years; this impact cannot be reliably estimated at this time.

Additional Information

Prior Introductions: HB 1313 of 2003, a similar bill, was heard in Commerce and Governmental Matters, but no further action was taken.

Cross File: HB 663 (Delegate Benson) – Health and Government Operations.

Information Source(s): Board of Contract Appeals, Department of Legislative Services

Fiscal Note History: First Reader - March 1, 2006
ncs/rhh

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