

Department of Legislative Services
Maryland General Assembly
2008 Session

FISCAL AND POLICY NOTE

House Bill 1528 (Delegate Lafferty)
Health and Government Operations

State Finance and Procurement - Dispute Resolution - Use of Mediation and Arbitration

This bill authorizes procurement officers to use mediation and arbitration to resolve procurement protests and contract claims, subject to the approval of reviewing authorities.

Fiscal Summary

State Effect: To the extent that State procurement officers use mediation or arbitration, State expenditures could increase by varying amounts, depending on the fees charged by mediators or arbitrators and the extent to which those fees are shared with bidders, offerors, or contractors involved in the protest or claim. Any increased costs associated with mediation or arbitration could be offset by fewer appeals of final decisions. The Board of Public Works can provide training to procurement officers with existing resources.

Local Effect: None.

Small Business Effect: Potential meaningful.

Analysis

Current Law: A procurement protest relates to the formation of a contract and includes complaints about the qualifications of a bidder or offeror or the process by which a successful bidder or offeror was selected. A contract claim arises when either a State agency or a contractor subject to a State procurement contract believes that the other

party to the contract has not abided by its terms, particularly related to performance, breach, modification, or termination of the contract.

In general, a bidder, offeror, or contractor may submit a protest or claim to the relevant procurement officer, who negotiates with the affected party to try to arrive at a satisfactory resolution. If a satisfactory resolution cannot be reached by the parties, 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 the Board of Contract Appeals (BCA). BCA's decision is considered the State's final decision on the matter and is subject to judicial review.

For contract claims related to construction contracts, a contractor must submit a claim directly to the head of the procurement unit within 30 days after the basis for the claim is known or should have been known. Within 90 days after submitting the claim, the contractor must submit a written explanation detailing the amount of the claim, the facts on which the claim is based, and relevant data to substantiate the claim. The reviewer of the claim must investigate the claim and provide a written notice of the resolution of the claim within 90 or 180 days, depending on the amount of the claim. A decision not to pay a claim may be appealed to BCA.

A procurement unit may initiate a contract claim against a contractor by sending written notice of the claim to the contractor and the procurement officer. Upon receiving the written notice, the procurement officer must review the substance of the claim, may request additional information, and may discuss the nature of the claim with the unit or the contractor. If the claim cannot be resolved among the parties, a statement of the claim and the procurement officer's ruling is forwarded for review to the head of the department in which the procurement unit is located as well as the agency director. The reviewers' decision is considered the agency's final action and may be appealed to BCA.

Background: Mediation and arbitration are both alternative dispute resolution methods. Mediation is designed to help conflicting parties resolve their disagreements without going to court. A neutral mediator meets with the opposing sides to help them find a mutually satisfactory solution. The mediator has no authority to impose a solution, and rules governing the mediation are usually mutually agreed upon by the parties involved. Arbitration is a more structured process that involves the submission of a dispute to one or more impartial persons, who issue a binding decision and award. Mediations and arbitrations are often concluded in one day but can continue for longer periods of time.

Although the total number of procurement protests and contract claims submitted to procurement units each year is not known, 14 unresolved claims were appealed to BCA in fiscal 2007 and 35 were appealed in fiscal 2006.

State Fiscal Effect: The bill leaves the use of mediation and arbitration with respect to procurement protests and contract claims to the discretion of agency and department heads. To the extent that agencies opt to use mediation and arbitration, expenditures could increase to pay fees to mediators and arbitrators. Actual expenditures will vary based on the complexity of each case, the fees billed by mediators and arbitrators, and the extent to which costs are shared with bidders, offerors, or contractors involved in the protest or claim. The latter is not specified by the bill. To the extent the use of mediation or arbitration results in fewer appeals to BCA, State expenditures for BCA could decrease, offsetting any increased costs associated with mediation or arbitration.

Any additional training for procurement officers and agency directors regarding appropriate uses of mediation or arbitration could be incorporated into current training provided by the Board of Public Works.

Small Business Effect: Small businesses that submit bid protests or contract claims to a procurement unit could be subject to mediation or arbitration, at the discretion of the agency or department head. It is not clear from the bill whether a business that is party to a protest or claim would have to share in the costs of mediation and arbitration.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Board of Public Works, University System of Maryland, Maryland State Board of Contract Appeals, Department of Budget and Management, American Arbitration Association, Mediation Resource Center, Department of Legislative Services

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Analysis by: Michael C. Rubenstein

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