

Department of Legislative Services
Maryland General Assembly
2011 Session

FISCAL AND POLICY NOTE

House Bill 12

(Delegate Beitzel, *et al.*)

Health and Government Operations

Education, Health, and Environmental Affairs

Procurement - Employee Uniforms and Equipment - Place of Manufacture

This bill prohibits public employers in the State from knowingly purchasing, furnishing, or requiring employees to purchase or acquire uniforms or safety equipment and protective accessories that are manufactured outside of the United States, subject to specified exemptions. The Board of Public Works (BPW) must adopt regulations that establish the conditions under which the bill applies with regard to the price, quality, and availability of items produced in the United States. Public employers include State agencies, counties and municipalities, school districts, and special districts in the State.

The bill applies only prospectively to contracts entered into after the bill's October 1, 2011 effective date.

Fiscal Summary

State Effect: Potential increase in State expenditures (all funds) for apparel, safety equipment, and protective accessories, beginning in FY 2013. Two-thirds of State expenditures on apparel are likely not affected by the bill, but expenditures on other items likely increase, depending on the regulations adopted by BPW. BPW can develop regulations with existing budgeted resources. Revenues are not affected.

Local Effect: Potential increase in local government expenditures, including school systems, for apparel, safety equipment, and protective accessories beginning in FY 2013. Expenditure increases will vary based on the extent to which local governments do not already purchase or rent American-made items and on the availability of comparable American-made products. **This bill imposes a mandate on a unit of local government.**

Small Business Effect: Potential meaningful.

Analysis

Bill Summary: The bill's prohibition against purchasing apparel and safety equipment manufactured outside the United States does not apply if:

- either the item is not manufactured or available for purchase in the United States, or is not manufactured or available in reasonable quantities;
- the price of the item manufactured in the United States exceeds the price of a similar item not manufactured in the United States by an unreasonable amount; or
- the quality of the item manufactured in the United States is substantially less than the quality of a similar item not manufactured in the United States.

Current Law: Chapter 48 of 1988 (the Maryland Buy American Steel Act) requires public bodies in the State to require contractors to use or supply only American steel products for public works construction or maintenance projects and for machinery or equipment that is composed of at least 10,000 pounds of steel and is to be installed at a public work site. An exception to this requirement may be granted if the head of a public body determines that:

- the price of American steel products is not reasonable, as defined in statute;
- American steel products are not produced in sufficient quantity to meet contract requirements; or
- the purchase of American steel products is inconsistent with the public interest.

In addition to Chapter 48, State procurement law establishes several exclusive purchasing requirements and procurement preferences. For purchases of supplies and services, State agencies must exhaust a series of priority preferences before engaging in a competitive procurement. First preference is given to Maryland Correctional Enterprises (MCE, the independent manufacturing arm of the Division of Correction (DOC)) if MCE provides the supplies or services. If MCE does not provide the supply or service, second preference goes to Blind Industries and Services of Maryland, followed by sheltered workshops staffed by individuals with mental or physical disabilities. Only if none of those entities provides a desired supply or service is an agency free to conduct a competitive procurement.

The University System of Maryland, Morgan State University, and St. Mary's College of Maryland have procurement autonomy and are exempted from most State procurement laws unless specifically included. The University of Maryland Medical System is an independent entity and is not considered a State procurement unit under State procurement law.

Background: According to the National Association of State Procurement Officials, at least 20 states (including Maryland) have some form of Buy American purchasing preference, although they apply to different items. In two states (Montana and Texas), the preference generally applies only in the case of a tie between two or more firms.

The 1981 Agreement on Government Procurement (GPA) was entered into by 37 countries, including the United States, to promote three main principles:

- nondiscrimination on the basis of national origin in the procurement of goods and services;
- transparency in the laws, regulations, and procedures governing government procurement; and
- competitive contracting practices.

Initially, GPA did not apply to State procurement laws but was amended to apply to them in 1996. In general, the Maryland Buy American Steel Act and other State preference programs, in addition to procurements by several designated State agencies, including the Department of General Services, are exempt from challenge under GPA in accordance with stipulations first made by Governor William Donald Schaefer and later reaffirmed by Governor Robert Ehrlich. However, other State procurement preference programs that are adopted after GPA's effective date, such as the one required by this bill, may require similar protection or be subject to challenge by GPA member nations. A 2005 letter of advice by the Attorney General's Office explains that international trade agreements that promote nondiscrimination on the basis of national origin, including GPA, do not preempt State procurement law.

A successful challenge by a member nation before the World Trade Organization (WTO) also does not preempt State procurement law; only federal action can preempt State law. However, it would prompt the federal government to encourage the State to modify its procurement law to conform to GPA requirements. Failure on the State's part to make those modifications could subject the United States to trade sanctions imposed by WTO. If federal action were taken against Maryland and a federal court were to hold that State law was preempted by GPA, the Attorney General's Office advised that any action would only be applied prospectively.

State Fiscal Effect: The State's fiscal 2011 working appropriation includes at least \$9.0 million for apparel and uniforms, of which \$6.3 million is general funds. Of the total amount, about two-thirds (67%) is spent by five agencies or divisions: DOC, the Department of State Police (DSP), the State Highway Administration (SHA), the Department of Juvenile Services (DJS), and the Maryland Transit Administration (MTA).

Additional funds in miscellaneous personnel and other budget line items may also be spent on apparel and uniforms, so actual spending may be somewhat higher. The Department of Legislative Services (DLS) cannot provide a reliable estimate of current spending on safety equipment and protective gear because there is no budget sub-object for that category of expenditures.

The Department of General Services and MCE both advise that DOC, SHA, MTA, and DJS purchase almost all their uniforms and apparel exclusively from MCE, which produces all of its products in Maryland correctional facilities. DSP also advises that all of the uniforms it purchases are made in the United States. Therefore, uniform expenditures by DOC, SHA, MTA, DJS, and DSP generally are not affected by this bill because they already purchase American-made apparel. Consequently, DLS estimates that as much as two-thirds of State expenditures on uniforms and apparel would not be affected by this bill.

Among the remaining State agencies representing one-third of apparel expenditures, several advise that they expect that American-made apparel, when it is available, is likely to be more expensive than comparable items produced overseas. DLS cannot estimate the extent to which expenditures increase as a result of the proposed legislation because of the three exemptions included in the bill. For instance, DLS cannot predict how often comparable apparel will be available, or whether it meets the cost and quality criteria included in the bill. The extent to which expenditures increase depends largely on the regulations developed by BPW, which will establish thresholds for the bill's application to the purchase of American-made apparel and safety equipment. To the extent that the regulations limit the bill's application, expenditures for apparel and safety equipment may increase only minimally. Since the bill does not apply to contracts entered into before October 2011, DLS assumes that any fiscal impact begins in fiscal 2013 because most procurement contracts take effect at the beginning of the fiscal year.

A fiscal estimate for safety equipment and protective accessories is not possible given the lack of information on State expenditures for those items. One agency, the Maryland Port Administration, indicates that costs for fire retardant clothing could double or triple under the bill's requirements. Therefore, to the extent that American-made alternatives to products produced overseas are available, DLS also concludes that the cost of those items may be higher than items manufactured overseas and purchased by State agencies.

Local Fiscal Effect: To the extent local governments do not already purchase American-made apparel, safety equipment, and protective accessories, expenditures for those items likely increase. Of the four county governments (including Baltimore City) that provided fiscal estimates, two indicated that there would be little or no effect because they already purchase American-made products. The remaining two counties said costs may increase but could not provide reliable estimates of the increase because they will

vary depending on the availability and price of comparable American-made items and the regulations to be developed and adopted by BPW.

Small Business Effect: Small businesses in the State that produce and/or supply American-made apparel, safety equipment, and protective accessories may benefit from increased State purchasing activity for those products. Conversely, small businesses that only produce and/or supply affected items that are made overseas may not be eligible for future State purchasing contracts.

Additional Information

Prior Introductions: HB 1465 of 2010 passed the House, but no further action was taken in the Senate.

Cross File: None.

Information Source(s): Allegany, Montgomery, and Talbot counties; Baltimore City; Department of Budget and Management; Maryland State Department of Education; Department of General Services; Department of Juvenile Services; Department of State Police; Maryland Correctional Enterprises; Maryland Department of Transportation; National Association of State Procurement Officials; Department of Legislative Services

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