

**Department of Legislative Services**  
Maryland General Assembly  
2012 Session

**FISCAL AND POLICY NOTE**

House Bill 1209 (Delegate Hucker, *et al.*)  
Health and Government Operations

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**Procurement - Preferences - Businesses Located in the State**

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This bill requires a State procurement unit that uses competitive sealed bidding to allow a responsible resident bidder to resubmit a bid to match the lowest bid if the resident bidder submitted the lowest responsive bid among resident bidders, and if the lowest responsive bid overall was submitted by a nonresident bidder. It also requires a procurement unit that uses competitive sealed proposals to allow a responsible resident offeror to resubmit a proposal to match the lowest offer if the resident offeror submitted the lowest offer among resident offerors and a responsible nonresident offeror submitted a proposal (regardless of whether it was the lowest offer). In both cases, the resubmission cannot conflict with a federal law or grant affecting the procurement contract. Resident bidders or offerors are those who have their principal office in the State.

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**Fiscal Summary**

**State Effect:** No direct effect on State procurement costs because the bill still requires that the contract awards be made to the lowest responsive bid or the offer that is most advantageous to the State. Potential administrative and operational effect on State procurement to the extent that the bid resubmission process significantly increases (1) the workload of State procurement offices; (2) delays in awarding of State contracts; and (3) bid protests all of which likely negatively affect the cost effectiveness of State procurement and may ultimately increase State costs. No effect on revenues.

**Local Effect:** None.

**Small Business Effect:** Meaningful.

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## Analysis

**Current Law:** Preference for State contracts can be given to resident bidders or offerors only if a nonresident bidder or offeror with the lowest responsive bid or most advantageous proposal is from a state that gives preference to resident bidders or offerors.

### *Competitive Sealed Bidding*

Competitive sealed bidding is the preferred method of State procurement, except for human, social, cultural, or educational services, or for leases of real property. The competitive sealed bid procurement process begins with the issuance of an invitation for bids, which for most procurements must occur at least 20 days before bid opening and be posted on eMaryland Marketplace. Among other requirements, the invitation must specify whether the award will be made based on the lowest bid, the lowest evaluated bid, or (for revenue-generating procurements) the bid most favorable to the State.

Price bids are opened in public at a time and place specified in the invitation after the technical offers have been evaluated. For each opened bid, the name of the bidder and the amount of the bid must be disclosed. Bids are irrevocable after opening begins; however, a procurement officer may allow a bidder to correct or withdraw a bid if it is allowed in regulations and is approved in writing by the Office of the Attorney General. The bid is awarded to the responsible bidder who submits the responsive bid that is the lowest bid price, lowest evaluated bid price, or most favorable to the State, as specified in the invitation. A responsible bidder is a person who has the capability to perform the contract's requirements and has the integrity and reliability to ensure good faith performance. A responsive bid is one that conforms in all respects to the invitation for bids.

After bids have been opened, an award may be issued on the basis of revised bids only if all bids are rejected, all bid prices exceed the funds available for the procurement, or the procurement officer determines that all bids are unreasonable and that there is insufficient time to issue a new invitation for bids. In that case, after consulting with all the responsible bidders who submitted responsive bids, the procurement officer issues an invitation for revised bids, which does not need to meet the public notice requirements, and the process repeats.

### *Competitive Sealed Proposals*

Competitive sealed proposals are the preferred method for the procurement of human, social, cultural, or educational services, or for real property leases. They may also be used at the discretion of the head of a procurement unit. The process begins with the issuance of a request for proposals (RFP) that, among other requirements, must include

the factors, including price, that will be used in evaluating proposals and the relative importance of each factor. Public disclosure requirements for RFPs are the same as those for invitations to bid.

Discussions between the procurement unit and offerors are allowed, subject to State regulations, and offerors may revise their proposals and submit best and final offers in response to those discussions. Proposals and/or best and final offers are irrevocable under the terms specified in the RFP, except that a procurement officer may allow an offeror to correct or withdraw a proposal or best and final offer in accordance with State regulations and with written approval from the Office of the Attorney General. The contract award is made to the offeror whose proposal or best and final offer is most advantageous to the State considering the evaluation factors specified in the RFP and any modifications to those factors in the negotiation process.

### *Procurement Law Exemptions*

The University System of Maryland, Morgan State University, and St. Mary's College of Maryland are exempt from most provisions of State procurement law. In addition, the following agencies are exempted in whole or in part from most State procurement law. Any of their procurements that are subject to the exemption from State procurement law would not be subject to the bill's requirements.

- Blind Industries and Services of Maryland;
- Maryland State Arts Council;
- Maryland Health and Higher Educational Facilities Authority;
- Department of Business and Economic Development;
- Maryland Food Center Authority;
- Maryland Public Broadcasting Commission;
- Maryland State Planning Council on Developmental Disabilities;
- Maryland Automobile Insurance Fund;
- Maryland Historical Trust;
- Rural Maryland Council;
- Maryland State Lottery Agency;
- Maryland Health Insurance Plan;
- Maryland Energy Administration;
- Maryland Developmental Disabilities Administration;
- Department of Natural Resources, for conservation service opportunities;
- Maryland Stadium Authority;
- Department of General Services, for the renovation of historic structures;
- State Retirement and Pension System;

- College Savings Plan of Maryland; and
- Chesapeake Bay Trust.

**Background:** Given the regional nature of the Maryland economy, nonresident firms often work on Maryland projects, and Maryland firms often work on projects in neighboring states. For instance, a recent analysis of the Dulles Metro Rail project in Virginia conducted by the Metropolitan Washington Airports Authority found that half of the workers on the project were Maryland residents, outnumbering Virginia residents on the project.

**State Fiscal Effect:** The provisions related to competitive sealed bidding still require that the contract award be made to the responsible bidder with the lowest responsive bid, subject to the bill's bid resubmission procedures. However, the provisions related to competitive sealed proposals create confusion in the proposal evaluation process. First, they allow a resident bidder to resubmit a bid to match the lowest offer, but the lowest offer may not be the most advantageous to the State (and therefore eligible for contract award) given the other factors that determine contract award. The confusion that likely ensues from these provisions may increase the incidence of bid protests, but the fiscal effects of that increase cannot be reliably estimated.

**Small Business Effect:** Resident small businesses will have increased opportunities to be awarded State procurement contracts. However, to the extent that neighboring states invoke reciprocal procurement preferences, which seems likely, those same companies will be at a competitive disadvantage in competing for contracts in other states.

**Additional Comments:** Legislative Services notes that contract awards under competitive sealed proposals are not necessarily awarded to the offeror with the lowest offer. By law, they are awarded to the offeror whose proposal or best and final offer is most advantageous to the State.

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### **Additional Information**

**Prior Introductions:** None.

**Cross File:** None.

**Information Source(s):** Board of Public Works, Department of Budget and Management, Department of General Services, Department of Health and Mental Hygiene, Maryland Department of Transportation, University System of Maryland, Department of Legislative Services

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