

Department of Legislative Services
Maryland General Assembly
2013 Session

FISCAL AND POLICY NOTE

House Bill 1113 (Delegate Bohanan)
Health and Government Operations

Procurement - Disclosure Requirements and Penalties

This bill establishes sanctions for (1) the unauthorized disclosure of specified information by a State procurement officer; (2) unlawful offers, promises, or solicitations, as specified, by a competing contractor to a procurement official; and (3) specified violations of the Maryland Public Ethics Law relating to former officials or employees of the State and procurement matters. The bill also (1) requires a procurement officer to promptly disclose improper communications relating to future employment or a business opportunity during the conduct of a procurement and (2) establishes a civil penalty for failure to do so.

Fiscal Summary

State Effect: Potential minimal increase in general fund revenues due to the bill's civil penalty provisions. The extent of any increase cannot be reliably estimated. Enforcement can be handled with existing resources.

Local Effect: Potential increase in revenues due to the bill's penalty provisions from cases heard in the circuit courts. Enforcement can be handled with existing resources.

Small Business Effect: Potential minimal.

Analysis

Bill Summary: A procurement officer who discloses information about a solicitation that the procurement officer is not authorized to disclose, as specified, is guilty of a misdemeanor and subject to a fine of at least \$100,000 and/or imprisonment for up to

five years. Such disclosure is also subject to a civil penalty of up to \$50,000 for each violation.

The bill establishes civil penalties for a competing contractor (or any officer, employee, representative or agent of the competing contractor) who knowingly (1) makes to a procurement officer an offer or promise of future employment or business opportunity; (2) engages with a procurement officer in a discussion of future employment or business opportunity; (3) offers, gives, or promises to a procurement officer money, a gratuity, or other thing of value; or (4) solicits or obtains from a procurement officer or employee of the procuring agency, any proprietary or source selection information before the award of a contract. A *person* who commits these violations is subject to a civil penalty of up to \$500,000 for each violation. An *individual* who commits these violations, however, is subject to a civil penalty of up to \$50,000 for each violation.

The bill requires a procurement officer to promptly disclose to the procurement officer's supervisor if a competing contractor, or any officer, employee, representative, agent, or consultant of any competing contractor, makes any offer or promise of future employment or business opportunity to, or engages in any discussion of future employment or business opportunity with, the procurement officer during the conduct of a procurement. A violation of the requirement is subject to a civil penalty of up to \$50,000 for each violation.

Finally, the bill makes violations of employment restrictions that apply to former officials or employees of the State, where the violation involves a procurement matter, subject to a civil penalty of up to \$50,000 for each violation plus twice the amount of compensation received by the individual as a result of the prohibited conduct.

Current Law: After a procurement solicitation is issued and until a recommendation is made by a procurement officer, a procurement officer may disclose to a person outside the Executive Department only (1) whether a decision has been made regarding a solicitation and (2) information available to the public under State law governing access to public records. During the conduct of a procurement, a competing contractor, or any officer, employee, representative, agent, or consultant of any competing contractor, is prohibited from knowingly:

- making any offer or promise of future employment or business opportunity to, or engaging in any discussion of future employment or business opportunity with, a procurement official;
- offering, giving, or promising to offer or give any money, gratuity, or other thing of value to a procurement official; or

- soliciting or obtaining from any officer or employee of an agency conducting a procurement, before the award of a contract, any proprietary or source selection information regarding the procurement.

“Procurement official” means a procurement officer or an individual who participates in the drafting of specifications for procurement.

Penalties are not specified in statute for disclosure of information by a procurement officer beyond what is authorized as specified above or for violations of the above prohibitions against certain communications or interactions of a competing contractor or any officer, employee, representative, agent, or consultant of any competing contractor. Violations, however, could result in bid protests, debarment, or disciplinary personnel actions.

A former official or employee of the State, with the exception of a former member of the General Assembly, is prohibited from assisting or representing a party other than the State in a case, contract, or other specific matter for compensation if the matter involves State government and the former official or employee participated significantly in the matter as an official or employee. A former member of the General Assembly is prohibited from assisting or representing another party for compensation in a matter that is the subject of legislative action until the end of the next regular session after the member leaves office. However, the prohibition does not apply to a former member’s representation of a municipal corporation, county, or State governmental entity.

A person who violates these prohibitions of the Maryland Public Ethics Law is subject to action by the State Ethics Commission, including issuance of an order of compliance directing the person to cease and desist from the violation. The commission can seek judicial enforcement of an order and a court can compel compliance with the order by issuing an order to cease and desist from the violation or by granting other injunctive relief. A court may also impose a fine not exceeding \$5,000 for a violation, with each day that a violation occurs being a separate offense.

Background: The requirements and sanctions included in the bill are similar to those under the federal Procurement Integrity Act (PIA) (41 U.S.C. § 423). PIA:

- prohibits disclosure of specified procurement information before the award of a contract;
- prohibits a person from obtaining such information before the award of a contract;

- requires a procurement official to take certain action relating to contact with a bidder or offeror in a procurement about possible nonfederal employment for the official; and
- prohibits a former official that took specified actions with respect to a procurement or contract involving more than \$10 million from accepting compensation from the contractor for a period of one year, unless it is a division or affiliate of the contractor that does not produce the same or similar products or services as the entity of the contractor the official was involved with.

Violations of PIA relating to disclosure or receipt of procurement information can be subject to criminal penalties, including imprisonment for up to five years, but only where the violation was for the purpose of exchanging the information for anything of value or obtaining or giving anyone a competitive advantage in the award of a contract. Violations of PIA can also be subject to civil penalties of: (1) for an individual, up to \$50,000 for each violation plus twice the amount of compensation received or offered for the prohibited conduct and (2) for an organization, up to \$500,000 for each violation plus twice the amount of compensation received or offered for the prohibited conduct. Administrative actions can also be taken, including cancellation of a procurement, rescission of a contract (for disclosure or receipt of procurement information), suspension or debarment proceedings, personnel actions, and recovery of amounts expended under a rescinded contract.

State Fiscal Effect: General fund revenues may increase as a result of the bill's civil penalty provisions. While not explicitly stated in the bill, it is assumed for the purposes of this fiscal and policy note that civil penalties will be pursued by the Board of Public Works (for violations of procurement law), the State Ethics Commission (for violations of the Maryland Public Ethics Law), and/or the Office of the Attorney General, and accrue to the general fund. The extent of any increase in general fund revenues cannot be reliably estimated.

It is assumed, for purposes of this estimate, that any enforcement of the bill by the Office of the Attorney General (civil or criminal penalties) and/or the Office of the State Prosecutor (criminal penalties) can be handled with existing resources to the extent a limited number of complaints or allegations arise. The Board of Public Works and the State Ethics Commission both indicate the bill does not significantly impact their operations.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Board of Public Works, Department of Budget and Management, State Ethics Commission, Office of the State Prosecutor, Governor's Office, Department of General Services, Maryland Department of Transportation, University System of Maryland, Department of Legislative Services

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