

HB 1488

Department of Legislative Services
Maryland General Assembly
2014 Session

FISCAL AND POLICY NOTE

House Bill 1488

(Chair, Health and Government Operations Committee, *et al.*) (By Request - Departmental - Budget and Management)

Health and Government Operations

State Procurement - Source Selection and Protest Appeals Procedures - Revisions

This departmental bill requires a party filing an appeal about a procurement protest to submit a protest appeal bond with its protest. It also makes other changes designed to clarify and streamline the protest appeal process.

The bill takes effect June 1, 2014.

Fiscal Summary

State Effect: Potential minimal increase in general fund revenues due to payments from protest bonds. State procurement offices may experience substantial operational efficiencies due to the streamlining of protest procedures and a reduction in the number of procurement appeals filed. Any reduction in caseload for the Maryland State Board of Contract Appeals (MSBCA) results in reallocation of limited staffing to handle contract appeals.

Local Effect: None.

Small Business Effect: The Department of Budget and Management has determined that this bill has minimal or no impact on small business (attached). The Department of Legislative Services concurs with this assessment as discussed below.

Analysis

Bill Summary: A procurement file must include all internal and external correspondence regarding the procurement that is relevant to the agency's decision.

A party filing an appeal with MSBCA regarding a procurement protest must submit a bond or other form of acceptable security with its appeal. If the party fails to submit the bond or security simultaneously with the appeal, the board must dismiss the appeal. The amount of the bond must be 5% of the estimated value of the contract being appealed, including base terms and options, or 1% of the value if the protester is a small business. If MSBCA rules in favor of the protesting party, the bond is returned; if MSBCA affirms the procurement decision or the appeal is otherwise dismissed, the bond is paid to the general fund.

For an appeal of a procurement protest, MSBCA must request, in conjunction with the Office of the Attorney General (OAG), that the unit (1) submit a complete report on the actions taken with regard to the solicitation and (2) furnish a copy of the report to the protester and any other interested parties. The report by the unit must be submitted within 30 days of MSBCA's request or its decision on a dispositive motion, whichever is later. MSBCA is authorized to extend the deadline due to extraordinary circumstances.

The bill further specifies the content of the report submitted by the unit and the timetable for each party to comment on the report and rebut those comments. Failure to comply with the timetable results in resolution of the case without consideration of untimely comments or rebuttals.

In an appeal about a protest, discovery is limited to requests for documents that (1) are not privileged; (2) do not contain confidential commercial information protected under the Public Information Act; and (3) are relevant to the specific issues raised in the appeal. A party may seek additional discovery on a motion that specifically identifies (1) the additional discovery sought; (2) the issues to which the additional discovery is relevant; and (3) the reasons why the documents already available are inadequate to establish a material issue in the case. MSBCA may allow additional discovery under such a motion on a written finding that extraordinary circumstances require the additional limited discovery to avoid substantial unfairness or prejudice.

The bill establishes that, unless both parties agree to a longer period, MSBCA must issue its final decision on a protest appeal within 90 days of when all briefs have been filed or, if later, the record has been closed. The bill likewise reduces, from 180 days to 90 days, the timeframe for MSBCA to issue a final decision on a contract claim.

Current Law:

Maryland State Board of Contract Appeals

MSBCA consists of three members appointed by the Governor with jurisdiction to hear and decide appeals resulting from the final action of a State unit on:

- protests relating to the formation of a procurement contract; or
- except for a contract claim relating to a lease of real property, contract claims by contractors or units concerning breach, performance, modification, or termination.

Decisions of MSBCA are subject to judicial review.

Procurement Protest Procedures

A “protest” is defined as a complaint that relates to the formation of a procurement contract. It includes a complaint about the qualifications of a bidder or offeror or the determination of the successful bidder or offeror.

Only a prospective or actual bidder or offeror may submit a protest. The initial protest is submitted to the agency’s procurement officer within the time specified in regulation by each procurement unit. On receipt of a protest, the procurement officer must review the substance of the protest and may request additional information. The procurement officer may also discuss the protest with interested parties and, if appropriate, conduct negotiations with the party filing the protest. Unless clearly inappropriate, the procurement officer must seek the advice of OAG.

The procurement officer must resolve the protest by agreement of the parties, wholly or partly deny the protest, or wholly or partly grant the relief sought by the protester. Unless otherwise provided by regulation, the procurement officer’s written decision is reviewed promptly by the head of the unit and the head of the principal department or other equivalent unit of which the unit is part. The reviewing authority must approve, disapprove, or modify the decision of the procurement officer; the reviewing authority’s decision is the final action of the unit. Alternatively, the reviewing authority may remand the proceeding with instructions to the procurement officer, who must then repeat the review and decision process in accordance with those instructions.

A prospective or actual bidder or offeror may appeal the unit’s final action to MSBCA within 10 days after receipt of notice of the final action. MSBCA must give protest appeals priority over other matters not involving protests and decide them expeditiously. It may require each party to file a brief; if briefs are required, the board establishes the order and time limits for filing briefs after consultation with both parties. A party may

obtain discovery about any matter that is not privileged and is relevant to the subject matter involved in the case. For protests, discovery is limited to requests for the production of documents unless MSBCA determines that extraordinary circumstances require additional limited discovery to avoid substantial unfairness or prejudice.

In an appeal from a decision about a *contract claim*, MSBCA must issue its final decision within 180 days of when all briefs have been filed or, if later, the record has been closed.

A procurement file must include all internal and external correspondence regarding the procurement.

Small Businesses

A “small business” is defined as either a certified minority-owned business or a business other than a broker that is independently owned and operated, not a subsidiary of another firm, and not dominant in its field of operation. In addition, to qualify as a small business under the Small Business Reserve program, a business must meet *either* of the following criteria in its most recently completed three fiscal years:

- the firm did not employ more than 25 people in its retail operations; 50 people in either its wholesale or construction operations; or 100 people in either its service, manufacturing, or architectural and engineering operations; *or*
- average gross sales did not exceed \$2.0 million for manufacturing operations, \$3.0 million for retail operations, \$4.0 million for wholesale operations, \$4.5 million for architectural and engineering services, \$7.0 million for construction operations, and \$10.0 million for service operations.

The option to meet either of these criteria is in effect until September 30, 2014. Thereafter, both criteria must be met.

Background: In May 2013, Treya Partners completed a comprehensive review of State procurement policies and procedures on behalf of the Board of Public Works. Treya’s analysis found that the number and duration of protest appeals in Maryland were both greater than in comparable states. It attributed these findings to “the relative ease with which vendors can dispute procurement awards as well as an amenable culture....” Specifically, Treya found that agencies spend almost as much time on procurement appeals and protests as they spend on the actual procurement awards. It also found that, while Maryland receives about 30 procurement appeals each year, comparable states for which data is available receive only a handful. Nevada, which requires protesters to submit a bond as required by the bill, received only one appeal in the most recent year.

Small Business Effect: The bill makes it more difficult for small businesses to protest procurement awards by State agencies by making them submit a protest bond for 1% of the contract value. However, it also makes it less likely that contract awards made to small businesses will be protested, which can delay their execution and harm the financial viability of a small business. On balance, the effects on small businesses are likely minimal.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): State Board of Contract Appeals, Department of Budget and Management, Department of Health and Mental Hygiene, Maryland Department of Transportation, Department of Legislative Services

Fiscal Note History: First Reader - March 11, 2014
ncs/ljm

Analysis by: Michael C. Rubenstein

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

ANALYSIS OF ECONOMIC IMPACT ON SMALL BUSINESSES

TITLE OF BILL: State Procurement-Source Selection and Protest Appeals Procedures-Revisions

BILL NUMBER: HB 1488

PREPARED BY: Maryland Dept of Transportation and Budget and Management

PART A. ECONOMIC IMPACT RATING

This agency estimates that the proposed bill:

WILL HAVE MINIMAL OR NO ECONOMIC IMPACT ON MARYLAND SMALL BUSINESS

OR

WILL HAVE MEANINGFUL ECONOMIC IMPACT ON MARYLAND SMALL BUSINESSES

PART B. ECONOMIC IMPACT ANALYSIS

The small business impact will be minimal. Small businesses will only be impacted if they appeal. The average number of appeals is about 30 a year based on the Treya Partners study. If half of them are from small businesses, then 15 appeals resulting from perhaps hundreds if not thousands of procurements would impact small businesses. The impact on small businesses has been mitigated by lowering the value of bonds to 1%. Furthermore, if the appellant is successful, or the procurement is remanded to the agency, then the bond or security is returned to the appellant.