

Department of Legislative Services
 Maryland General Assembly
 2015 Session

FISCAL AND POLICY NOTE

House Bill 404 (Delegate B. Barnes, *et al.*)
 Economic Matters

Procurement - Public Work Contracts - Contractor Occupational Safety and Health Requirements

This bill requires prospective bidders or offerors on public work contracts to submit a contractor safety and health plan with specified provisions and an attestation that (1) the plan meets the bill’s requirements and (2) the prospective bidder or offeror will implement the plan when performing work under the contract. It also requires the Commissioner of Labor and Industry to develop a mechanism to assess the safety and health performance indicators used by contractors and subcontractors on public work contracts valued at \$100,000 or more and to enforce the bill’s provisions.

The bill takes effect July 1, 2015.

Fiscal Summary

State Effect: General fund expenditures by the Department of Labor, Licensing, and Regulation (DLLR) increase by \$151,200 in FY 2016 to develop a health and safety rating system and enforce contractor compliance with the bill. Out-year expenditures reflect annualization, inflation, and the termination of a contractual position. General fund revenues increase minimally due to the assessment of civil penalties.

(in dollars)	FY 2016	FY 2017	FY 2018	FY 2019	FY 2020
GF Revenue	-	-	-	-	-
GF Expenditure	\$151,200	\$125,900	\$131,500	\$137,400	\$143,500
Net Effect	(\$151,200)	(\$125,900)	(\$131,500)	(\$137,400)	(\$143,500)

Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate effect

Local Effect: Although local governments have to apply the health and safety rating system developed by DLLR for each public work contractor, it is assumed that they can do so with existing resources.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary: The bill applies to “public bodies,” which include the State, a political subdivision, or a unit or instrumentality of the State or a political subdivision. A “public work” is a structure or work, including a bridge, building, ditch, road, alley, waterwork, or sewage disposal plant that is constructed for public use or benefit or is paid for wholly or partly by public money. It does not include several types of structures specified in the bill.

The commissioner must develop (1) a safety and health calculation worksheet to evaluate the safety and health performance indicators for contractors and subcontractors that perform work on a public work contract valued at \$100,000 or more and (2) a safety and health rating system to specify additional safety and health measures that the contractor or subcontractor is required to implement based on the score received on the worksheet. Within seven days of entering into a public work contract valued at \$100,000 or more, a contractor or subcontractor must complete a safety and health calculation worksheet and implement any additional safety and health measures required by its rating on the safety and health rating system.

The commissioner must develop regulations to implement the bill, and the regulations may require that prospective bidders and offerors, contractors, and subcontractors maintain any records necessary to implement the bill.

The commissioner must investigate as necessary to ensure compliance with the bill and may enter a place of business or work site to observe the safety and health measures in place, interview workers, and review and copy records necessary for determining compliance with the bill. If the commissioner determines after an investigation that a prospective bidder or offer, contractor, or subcontractor has violated the bill’s requirements, the commissioner must issue a citation and proposed order. Within 30 days after receiving a citation and order, the aggrieved party may request a *de novo* administrative hearing under the Administrative Procedure Act. If a hearing is not requested, the proposed order becomes final. If a hearing is held, the order issued by the commissioner after the hearing becomes final unless it is petitioned to judicial review within 30 days.

The commissioner must assess a civil penalty of up to \$5,000 for a first violation of the bill and up to \$10,000 for each subsequent violation. In determining the amount of a penalty, the commissioner must consider the nature of the violation and whether the party made a good faith effort to comply with the bill. If a party knowingly or recklessly violates the

bill, the commissioner may recommend to the public body that it debar the vendor for two years.

A prospective bidder or offeror, contractor, or subcontractor may not discharge or otherwise discriminate against an employee who files a complaint in good faith or has testified or will testify in a proceeding related to a violation of the bill. An aggrieved employee may submit a written complaint to the commissioner but must do so within 60 days after the alleged violation occurred. The commissioner must investigate the complaint; if the commissioner determines that there is probable cause that the complaint is valid, the commissioner must refer the matter to the Office of Administrative Hearings for findings of fact and a proposed decision.

Current Law: There are no statutory provisions related to the assessment of a contractor's or subcontractor's safety and health record either prior to or after contract award for public work projects.

Background: In its 2012 report *The Price of Inaction*, Public Citizen concluded that construction injuries and fatalities on both public and private construction projects cost Maryland \$712.8 million between 2008 and 2010. During that time period, Public Citizen found that Maryland had 18,600 construction accidents, of which 11,000 required days away from work or job transfer. Also, 55 construction-related fatalities in Maryland were reported in those years. The report recommended that public construction contracts be awarded only to companies that have strong safety records.

Partially in response to the Public Citizen report, Chapter 625 of 2014 required DLLR to establish a workgroup with broad representation to:

- analyze the effects of instituting a safety and health prequalification requirement for public work contractors;
- study the effectiveness of such prequalification requirements being used in other jurisdictions;
- study safety and health requirements and practices used by State agencies; and
- make recommendations regarding safety and health prequalification requirements.

The workgroup's report, submitted in fall 2014, recommended against a blanket prequalification requirement for public work projects because (1) precluding contractors with poor safety records from public work projects shifts the hazard to private-sector projects and (2) the group did not want to leave the determination of a bidder's safety and health record up to a procurement officer. Instead, it recommended that such determinations should be handled on the project site by the prime contractor or project manager.

The workgroup recommended that:

- prospective bidders or offerors be required to have a written occupational safety and health plan that addresses the recognition and avoidance of construction site hazards before submitting bids for public work;
- contractors not be required to submit the plan to a public body, but instead be required to attest to its existence and that elements of the plan would be implemented on the project;
- winning contractors on projects valued at \$100,000 or more be required to submit safety and health performance data on a questionnaire developed by the commissioner and that the data include lagging and leading indicators;
- each questionnaire be scored to identify additional safety measures that the contractor must implement on the project; and
- project managers be responsible for confirming what additional safety measures, if any, must be implemented.

The workgroup did not agree on a mechanism for enforcing compliance with its recommendations. The bill reflects some of the enforcement proposals discussed by the workgroup, but the report indicates that at least one member strongly objected to its enforcement provisions. It also states that all members of the workgroup agreed that procurement officers and third parties should not be responsible for enforcement.

State Fiscal Effect: The bill assigns three separate functions to DLLR: (1) develop a safety and health worksheet (questionnaire); (2) develop a safety and health rating system to score the questionnaire; and (3) enforce the bill's provisions. These functions are beyond the current scope of responsibilities and staffing within the commissioner's office, so additional staff is necessary. Therefore, general fund expenditures by DLLR increase by \$151,171 in fiscal 2016, which accounts for a 90-day start-up delay from the bill's July 1, 2015 effective date. This estimate reflects the cost of hiring one administrative officer, one office clerk, and a contractual assistant Attorney General for nine months to draft regulations, develop the questionnaire and rating system, and conduct ongoing enforcement activities. It includes salaries, fringe benefits, one-time start-up costs, and ongoing operating expenses.

Positions	2.5
Salaries and Fringe Benefits	\$128,300
Operating Expenses	<u>22,871</u>
Total FY 2016 State Expenditures	\$151,171

Future year expenditures reflect full salaries with annual increases and employee turnover as well as annual increases in ongoing operating expense; they also reflect the termination of the contractual position at the end of fiscal 2016.

The bill does not specify who applies the rating system developed by DLLR to score each contractor's questionnaire. This analysis assumes that it is not the procurement officer who selects the winning bid or proposal because the questionnaires are submitted after contracts are finalized, when the procurement officer's function is complete. Presumably, the procurement officer's only role is to ensure that the required attestations are submitted, which can be accomplished within the normal bid or proposal review process.

Based on the workgroup's recommendations, it is assumed that the project manager scores each questionnaire. With the use of the scoring system developed by DLLR, this function should be relatively straightforward and can also be accomplished as part of the project manager's oversight function. However, project managers will have to undergo training in the use of the scoring system, which could detract from other duties and delay the completion of ongoing projects.

Small Business Effect: Small construction companies that work on public work projects may have to implement additional worksite health and safety measures based on their scores on the new questionnaire. Contractors with poor health and safety records may find it harder to win bids for public work projects.

Additional Information

Prior Introductions: None.

Cross File: SB 279 (Senator Montgomery, *et al.*) - Finance.

Information Source(s): Department of Labor, Licensing, and Regulation; Department of General Services; Public School Construction Program; Public Citizen; Office of Administrative Hearings; University System of Maryland; Maryland Department of Transportation; Department of Legislative Services

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