

Department of Legislative Services
 Maryland General Assembly
 2019 Session

FISCAL AND POLICY NOTE
 First Reader

House Bill 24 (Delegate Glenn)
 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, 2019.**

Fiscal Summary

State Effect: General fund expenditures increase by \$266,400 in FY 2020; out-year expenditures reflect annualization, termination of one-time expenses, and delayed implementation of enforcement. General and special fund expenditures may increase to the extent procurement agencies must assess adequacy of safety plans submitted with bids and offers; any such costs are not reflected in this analysis. General fund revenues increase minimally, beginning in FY 2021, due to the assessment of civil penalties.

(in dollars)	FY 2020	FY 2021	FY 2022	FY 2023	FY 2024
GF Revenue	\$0	-	-	-	-
GF Expenditure	\$266,400	\$340,200	\$344,300	\$353,900	\$364,800
Net Effect	(\$266,400)	(\$340,200)	(\$344,300)	(\$353,900)	(\$364,800)

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

Local Effect: Local governments have to apply the health and safety rating system to 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, as 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 worksite 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 offeror, 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*, the public interest group 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 the Department of Labor, Licensing, and Regulation (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.

In its 2017 follow-up report, *Take the High Road*, Public Citizen identified 158 contractors that had received State construction contracts worth at least \$100,000 over the most recent five-year period, and found that:

- 46% of the identified State construction contractors had been cited for safety violations within the past 10 years by the federal Occupational Safety and Health Administration (OSHA);
- 35% of the contractors had received “serious” OSHA violations; and
- three contractors had fatalities occur at construction sites (two of them in Maryland).

State Revenues: Although DLLR advises that enforcement of the bill’s requirements can begin in fiscal 2020, the Department of Legislative Services believes that enforcement activity will be deferred until fiscal 2021, allowing time for the safety and health questionnaire and related rating system to be developed and field tested, for regulations to be adopted, and for contractors to be advised of the requirements. Based on DLLR’s experience with workplace safety enforcement, most contractors found to be in violation will likely come into compliance voluntarily, but a small number will be subject to the bill’s penalty provisions, yielding minimal general fund revenues from the bill’s penalty provisions in fiscal 2021, when enforcement begins. Revenues from the penalty provisions

are assumed to decrease gradually and plateau after about three years due to increased contractor awareness and compliance.

State Expenditures: The bill assigns four separate functions to DLLR: (1) develop a safety and health worksheet (questionnaire); (2) develop a safety and health rating system to score the questionnaire; (3) promulgate regulations to implement the bill’s provisions; and (4) enforce the bill’s provisions. These functions are beyond the current scope of responsibilities, expertise, and staffing within the commissioner’s office, so additional staff is necessary. Also, DLLR must develop a new tracking database and, potentially, an online version of the questionnaire to facilitate contractor submissions. Therefore, general fund expenditures by DLLR increase by \$266,437 in fiscal 2020, which accounts for a 90-day start-up delay from the bill’s July 1, 2019 effective date. This estimate reflects the cost of hiring one administrative officer, a half-time assistant Attorney General, and an industrial hygienist to draft regulations and develop the questionnaire and rating system; enforcement activities do not begin until the following fiscal year. It includes salaries, fringe benefits, one-time information technology (IT) costs, other one-time start-up costs, and ongoing operating expenses. Expenditures increase by \$340,158 in fiscal 2021, which reflects the termination of one-time costs (including IT), continuation of prior-year personnel costs, and the addition of one compliance officer as enforcement begins; this assumes that the compliance officer begins July 1, 2020. The assistant Attorney General position is assumed to be permanent because it will assist with enforcement, as some disciplinary cases will require administrative adjudication.

	<u>FY 2020</u>	<u>FY 2021</u>
New Positions	2.5	1.0
Salaries and Fringe Benefits	\$149,839	\$268,205
One-time IT Expenditures	52,100	0
Operating Expenses	<u>64,498</u>	<u>71,953</u>
Total State Expenditures	\$266,437	\$340,158

Future year expenditures reflect full salaries with annual increases and employee turnover as well as ongoing operating expenses.

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. However, procurement officers do not have the expertise to determine the adequacy of the safety plans submitted with bids or offers; if the intent of the bill is for procurement officers to make that determination, the cost of implementation may increase substantially, either to

train procurement officers or for various agencies that procure construction projects to hire additional staff or consultants with the appropriate expertise.

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: Substantively similar bills have been introduced in recent years. HB 977 of 2016 received a hearing in the House Economic Matters Committee, but no further action was taken on the bill. HB 404 of 2015 received an unfavorable report from the House Economic Matters Committee. SB 279 of 2015, its cross file, received an unfavorable report from the Senate Finance Committee.

Cross File: None.

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

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