

Department of Legislative Services
Maryland General Assembly
2020 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 1588 (Delegate Kipke)
Rules and Executive Nominations

Procurement - Major Information Technology Development Projects

This bill requires a procurement contract for a major information technology (IT) development project to include terms and conditions governing the indemnification obligations and limitation of liability for the contractor; the limitations of liability must be reasonable and may not exceed twice the value of the contract. The bill also (1) establishes a related risk assessment process through which the Secretary of Information Technology may recommend an increased limitation of liability for a project and (2) requires the Chief Procurement Officer (CPO) and Secretary of Information Technology to examine the existing major IT development project procurement process and make recommendations to ensure that personnel with required expertise are available to work on an awarded contract. The recommendations must be submitted to the General Assembly by December 1, 2021.

Fiscal Summary

State Effect: General fund expenditures by the Department of Information Technology (DoIT) increase, potentially significantly, to the extent that security assessments are conducted under the bill. Limiting liability for major IT development projects may affect State expenditures, as discussed below. Revenues are not affected.

Local Effect: The bill does not directly affect local governmental operations or finances.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary:

Major IT Development Projects – Contracts and Limitations of Liability

The terms and conditions for major IT projects may not limit the liability of a contractor for (1) intentional or willful misconduct, fraud, or recklessness or (2) claims for bodily injury, including death and damage to real property or tangible personal property resulting from the negligence of the contractor or an employee of the contractor.

Review of Major IT Development Projects – Risk Assessments

After reviewing a major IT development project, if the Secretary of Information Technology believes the project may present an exceptional risk to the State, the Secretary must conduct a risk assessment prior to approving the project. The risk assessment must consider the nature, processing, and use of sensitive or personally identifiable information.

If the risk assessment concludes that the project presents an exceptional risk, and the limitations of liability discussed above are not adequate to protect the interest of the State, the Secretary may recommend that the unit of State government affected increase the limitation of liability amount. Any such calculation must (1) be in writing; (2) describe the risks to the State; (3) explain why the limitations of liability are not sufficient; and (4) recommend a reasonable maximum alternative limitation of liability, calculated as a multiple of the contract value. The CPO must review any such recommendation and may approve the recommended change.

Current Law/Background:

Department of Information Technology

DoIT and the Secretary of Information Technology are, among other things, responsible for (1) developing and enforcing IT policies, procedures, and standards; (2) providing technical assistance, advice, and recommendations to any unit of State government; and (3) developing and maintaining a statewide IT master plan. The following agencies/institutions are exempt from oversight by DoIT:

- public institutions of higher education solely for academic or research purposes;
- the Maryland Port Administration;
- the University System of Maryland;
- St. Mary's College of Maryland;

- Morgan State University; and
- the Maryland Stadium Authority (added by Chapter 150 of 2018).

A unit of State government must submit its IT project requests to DoIT for review; the unit must designate projects which it considers major IT development projects. The Secretary of Information Technology is responsible for overseeing the implementation of all major IT development projects, regardless of how the project is being funded.

The Secretary of Information Technology must review and, with the advice of the Secretary of Budget and Management, approve any major IT development projects and specifications for consistency with all statewide plans, policies, and standards. In reviewing a project, the Secretary may change a unit's designation of a major IT development project. Major IT development projects may be eligible for funding through the Major IT Development Project Fund (MITDPF).

Major Information Technology Development Project Fund

In order to centralize State oversight and funding for major Executive Branch IT projects, Chapters 467 and 468 of 2002 established a review and approval process for major IT development projects and the related MITDPF. The process and fund are both managed by DoIT. MITDPF is used to pay for major IT development projects in general funded agencies. Among other sources of revenue, the fund consists of money received from IT agreements involving resource sharing, but certain government entities (including the Maryland Public Broadcasting Commission, as well as the Legislative Branch and the Judiciary) are exempt from paying any money into the fund. Special funded agencies manage funding for their major IT projects, although their projects remain subject to the review, approval, and oversight of DoIT.

For a project to be eligible for funding through MITDPF, it must (1) be estimated to cost at least \$1.0 million; (2) support critical business functions associated with the public health, education, safety, or financial well-being of the citizens of Maryland; or (3) be determined to require special attention and consideration by the Secretary.

Chief Procurement Officer and Procurement Improvement Council

Chapter 590 of 2017 established the position of CPO within the Department of General Services (DGS). Except for procurement activity by a primary procurement unit other than DGS, the CPO is the head of all procurement activity for the Executive Branch and also controls procurement for DGS.

Chapter 590 also renamed the Procurement Advisory Council as the Procurement Improvement Council (PIC). PIC's responsibilities include, among other things, ensuring

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that the State's procurement system is utilizing the most advanced procurement methods and management techniques, advising the Board of Public Works on problems in the procurement process and making recommendations for improvement of the process, and advising the General Assembly on proposed legislation in order to enhance the efficiency and transparency of State procurement.

State Expenditures:

Risk Assessments

DoIT advises that it does not currently have staff with the expertise necessary to perform the risk assessments required under the bill. Moreover, it is unclear at this time how many, if any, risk assessments would be necessary in any given year, as that determination is at the discretion of the Secretary of Information Technology. DoIT advises that the Secretary is unlikely to approve any project believed to present an exceptional risk to the State, and a risk assessment is only necessary as a prerequisite to project approval.

To the extent that DoIT is required to conduct risk assessments, general fund expenditures increase, potentially significantly, to do so. Specifically, DoIT must rely on consultant assistance to conduct the assessments at a rate of \$130 to \$150 per hour. Risk assessments of this type take approximately two to four weeks to conduct, with additional time following the assessment to analyze the findings and prepare reports; DoIT estimates that employing the necessary consultant assistance for an entire year of risk assessments would cost about \$390,000.

Limitations of Liability

Currently, DoIT and agencies carrying out major IT projects have flexibility to set terms and conditions on major IT procurements, including contractor liability. Sometimes, those terms allow for unlimited contractor liability on IT projects. A precise effect on State finances for limiting liability for major IT development projects to two times the contract value cannot be reliably estimated, as it likely has both positive and negative effects. Smaller companies, or companies that would otherwise be unable or unwilling to accommodate the potential risk of a project with unlimited liability under the current system, may choose to bid on projects with limited liability under the bill. This increased competition may result in less costly contracts for the State. Conversely, DGS advises that setting liability at two times the contract value may not adequately cover all of the risks associated with a project. In the event of project failure, the State would be responsible for any additional costs beyond the liability limitation set by the bill.

Small Business Effect: Since small businesses are less likely to be able to accommodate risk from taking on large projects, limiting liability to twice the value of a contract for

major IT development projects may encourage more small businesses to apply for and result in more small businesses obtaining State contracts for those projects.

Additional Information

Prior Introductions: None.

Designated Cross File: SB 832 (Senator Jennings) - Education, Health, and Environmental Affairs.

Information Source(s): Department of Information Technology; Department of General Services; Department of Legislative Services

Fiscal Note History: First Reader - April 17, 2020
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Analysis by: Richard L. Duncan

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