

Department of Legislative Services
Maryland General Assembly
2021 Session

FISCAL AND POLICY NOTE
Enrolled - Revised

House Bill 1091

(Delegate Reznik)

Appropriations and Health and
Government Operations

Education, Health, and Environmental Affairs

State Procurement - Emergency and Expedited Procurements - Revisions and
Reporting

This bill establishes a statutory definition of “emergency” for the purpose of deciding when to use an emergency procurement and requires the Special Secretary for the Governor’s Office of Small, Minority, and Women Business Affairs (GOSBA), in consultation with the Secretary of Transportation and the Attorney General, to establish guidelines for each State agency to consider when determining the appropriate minority business enterprise (MBE) participation goal and outreach for an emergency procurement contract. It also alters the requirements for emergency procurements, including requiring, under specified circumstances, that emergency procurements be approved in advance by the Chief Procurement Officer (CPO). In addition, it extends authority to conduct expedited procurements to all agencies. Finally, it codifies and expands reporting requirements related to emergency procurements. The Board of Public Works (BPW) may adopt regulations to implement the bill. **The bill takes effect July 1, 2021; however, the provisions related to prior approval of and other requirements for emergency procurements, expansion of expedited procurements, and new reporting requirements take effect October 1, 2021.**

Fiscal Summary

State Effect: General fund expenditures may increase minimally for periodic contractual support to complete mandated annual reports. Otherwise, GOSBA, BPW, the Department of General Services (DGS), and other State agencies can likely implement the bill with existing budgeted resources. However, logistical and staffing issues likely result in delayed emergency procurements. No effect on revenues.

Local Effect: None.

Small Business Effect: Minimal.

Analysis

Bill Summary: An “emergency” is an occurrence or condition that creates an immediate and serious need for services, materials, or supplies to avoid or mitigate serious damage to public health, safety, or welfare that cannot be met through normal procurement methods.

Conditions for Emergency Procurements

After obtaining the approval of the agency head for an emergency procurement, a procurement officer must obtain approval of the use of emergency procurement procedures from CPO or CPO’s designee. Prior approval by CPO is not necessary if delaying an emergency procurement by up to 48 hours would likely result in imminent harm. CPO must approve or disapprove the request within 48 hours; if CPO does not respond within 48 hours, the request is considered to be approved.

Requirements and Procedures for Emergency Procurements

In conducting an emergency procurement, a procurement officer must make reasonable efforts to solicit at least three oral quotes. Before awarding an emergency procurement contract, a procurement officer must evaluate the prospective contractor’s ability to perform the contract based on the contractor’s (1) length of time in business; (2) level of relevant experience; and (3) history of successful procurement contracts with the State and other jurisdictions. The procurement officer must also execute a written contract, which must include provisions addressing the contractor’s ability to perform the contract within the emergency timeframe.

The bill adds more requirements and limitations for emergency procurement contracts with a value of at least \$1.0 million. It limits upfront payments (before or at contract execution) to \$2.0 million plus 30% of the contract value in excess of \$2.0 million. Unless authorized by BPW, the agency may not make any additional payments under such contracts until at least 30 days after the execution of the contract. Within seven days of the execution of an emergency contract with a value of at least \$1.0 million, an agency must submit a copy of the contract to BPW, which may review the contract at a regularly scheduled meeting or at an emergency meeting called for that purpose. BPW may direct the agency to take any action, including canceling or rescinding the contract, that it deems appropriate.

If supplies or commodities procured under an emergency contract are not delivered and used within one month after the date the contract is awarded, the agency must submit specified monthly reports to BPW and specified committees of the General Assembly until all supplies and commodities have been delivered and used.

Notification and Reporting Requirements

Notice of the award of an emergency procurement must be published on eMaryland Marketplace (eMM) on the day of execution and approval of the contract, or as soon as practicable thereafter.

Within 15 days after awarding a contract or modification by emergency procurement that exceeds \$50,000, an agency must submit to BPW and the appropriate control agency specified information about the procurement, including the justification for the use of the emergency procurement procedure, that the Code of Maryland Regulations (COMAR) currently requires to be submitted within 45 days.

Within 60 days (instead of 90 days under current law) of the end of each fiscal year, each primary procurement unit must submit to CPO (instead of the Governor and the General Assembly) a report required under current law on each procurement contract that was awarded during the preceding fiscal year. In addition to procurements carried out by the primary procurement unit, the report must include procurements subject to review by the unit. The report must also include additional specified information about each contract. Within 90 days of the end of each fiscal year, CPO must submit to the Governor and specified committees of the General Assembly a consolidated report that includes each of the reports from primary procurement units.

By December 31, 2021, the Special Secretary of GOSBA must report to specified committees of the General Assembly on the status of establishing the guidelines for MBE participation contract goals.

A reporting requirement in current law related to the use of noncompetitive negotiated procurement is transferred from the Department of Budget and Management to DGS, consistent with the same reporting requirement under COMAR.

Current Law: As statute allows procurements with a value of \$50,000 or less to be conducted as small procurements, COMAR specifies that emergency procurement and expedited procurement procedures are only for procurements with a value greater than \$50,000.

Emergency Procurements

There is no statutory definition of “emergency,” but COMAR defines an “emergency” as a sudden and unexpected occurrence or condition that agency management could not foresee and that requires an action to avoid or to mitigate serious damage to public health, safety, or welfare.

Statute authorizes an agency's procurement officer to make an emergency procurement with the approval of the agency head. With approval, the procurement officer may use any method considered to be the most appropriate to avoid or mitigate serious damage to public health, safety, or welfare, and must:

- obtain as much competition as possible under the circumstances;
- limit the emergency procurement to only those items, both in type and quantity, that are necessary to avoid or mitigate serious damage to public health, safety, or welfare; and
- after awarding the procurement contract, submit to BPW a written report that gives the justification for use of the emergency procurement procedure. COMAR requires the report to be filed with BPW and the control agency within 45 days of contract award, and requires inclusion of additional specified information about the contract.

Expedited Procurements

Only the Maryland Port Commission (MPC) or the Maryland Aviation Administration may engage in expedited procurements. Prior to the initiation of an expedited procurement, both the agency head and BPW must approve the procurement and find that:

- urgent circumstances require prompt action; and
- the need for expedited procurement outweighs the benefits of conducting the procurement on the basis of either competitive sealed proposals or competitive sealed bids.

In conducting an expedited procurement, the procurement officer must attempt to obtain as much competition as reasonably possible. COMAR requires notice of each expedited procurement to be submitted to BPW within 30 days of contract award, including specified information about each procurement.

Notification and Reporting Requirements

Within 30 days after the execution and approval of either an emergency or expedited procurement, notification of the contract award must be posted on eMM.

Within 90 days of the end of each fiscal year, each primary procurement unit must submit a report to the Governor and the General Assembly on each procurement contract awarded during the prior fiscal year. The report must include specified information, including the procurement method used and the basis for the contract award.

Primary Procurement Units

Primary procurement units are authorized to conduct their own procurements for specified goods and services without the approval of any other Executive Branch agency but still subject to the general oversight of BPW. They are:

- the State Treasurer;
- DGS;
- the Maryland Department of Transportation;
- MPC;
- the University System of Maryland;
- Morgan State University; and
- St. Mary's College of Maryland.

State Fiscal Effect:

Effects on Emergency Procurements

The requirement to evaluate each potential contractor's ability to perform an emergency contract likely delays the execution of emergency contracts. Such evaluations, currently done in a more informal manner, require that the procurement officer document his or her compliance by collecting relevant information from each potential contractor. This process likely takes time and, therefore, causes delays in the execution of the contract. Similarly the requirement to obtain prior approval for each emergency procurement from CPO may, in some instances, delay the execution of emergency contracts needed to protect public health, safety, and welfare, although the bill provides an exception for instances in which prior approval likely results in imminent harm. The requirement to post notice of emergency contract awards on eMM on the day of contract approval may be operationally disruptive in instances where multiple contracts are needed over several days to address an emergency, although the bill does provide some flexibility if it is not practicable to do so.

BPW can review emergency contracts with a value of at least \$1.0 million with existing resources. To the extent that it requires that contracts be canceled or rescinded, State expenditures decrease and the delivery of emergency goods and services is disrupted, but any such effect is not reflected in this analysis.

Effects on the Office of the Chief Procurement Officer

The bill assigns new responsibilities to CPO that have the potential to strain its staff. The Department of Legislative Services (DLS) believes, however, that additional permanent staff are not necessary, but some contractual support may be needed. The primary

responsibility assigned to CPO is the prior review and approval of the use of emergency procurement processes by other agencies. A recent evaluation by DLS found that fewer than 100 emergency procurements are reported to BPW each year. Several factors likely minimize the number of those procurements requiring CPO approval. First, DGS is undertaking administrative efforts to reduce the use of emergency procurements in response to findings from the DLS evaluation. Second, the expanded use of expedited procurements by all agencies may further reduce the overall number of emergency procurements. Finally, the exception for likely imminent harm may reduce the number of procurements requiring advance approval. Assuming that the approval from the agency head, required under current law, is or can be done expeditiously in most cases, it is assumed that the review and approval process by CPO can similarly be done expeditiously and with little additional burden on CPO staff. As approval must be given before solicitation, there is likely little or no paperwork (*i.e.*, an actual contract) to be reviewed prior to giving approval. In most cases, the nature of the emergency requiring the use of an emergency procurement will be self-evident. As noted above, however, logistical issues may result in meaningful delays in some instances (but not longer than 48 hours).

The bill also requires CPO to consolidate the annual procurement reports from the other six primary procurement units into a report for the Governor and specified committees of the General Assembly. As the bill gives CPO 30 days to complete this task each year, permanent staff is not warranted. Nevertheless, to the extent existing staff cannot handle this task, CPO may require contractual assistance each year to prepare the consolidated report in the limited time available. Any additional work necessary to prepare its own annual report can also be carried out by existing staff (or, if necessary, the contractual staff). The upgrade and expansion in the functionality of eMM, expected to be completed in fiscal 2022, should facilitate the reporting process. Nevertheless, should contractual support be necessary, DLS believes that contractual expenses of \$10,000 annually for temporary staff support would address the reporting requirement. As COMAR already requires DGS (essentially CPO) to prepare an annual report on the use of noncompetitive negotiations, that provision has no fiscal or operational impact.

Effects on State Agencies

The bill also includes provisions that likely strain the staffing resources of State agencies that conduct emergency procurements but also do not require additional staff. The bill requires procurement officers to (1) secure CPO approval for emergency procurements; (2) post emergency procurements on eMM immediately, if practicable; (3) report emergency procurements to BPW within 15 days (instead of 45 days); (4) submit emergency procurement contracts with a value of at least \$1.0 million to BPW within seven days of execution; and (5) complete annual procurement reports in 60 days instead of 90 days. DLS believes that, given the limited number of emergency procurements conducted by most State agencies, they can implement these changes with existing

resources. In some limited cases, the tighter deadlines for disclosures and reports may require reallocation of staff from other procurement-related tasks and/or result in delayed procurements.

Additional Information

Prior Introductions: None.

Designated Cross File: SB 829 (Senator Lam) - Education, Health, and Environmental Affairs.

Information Source(s): University System of Maryland; Department of Budget and Management; Department of General Services; Department of Public Safety and Correctional Services; Department of Human Services; Board of Public Works; Maryland Department of Transportation; Department of Legislative Services

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