Department of Legislative Services

Maryland General Assembly
2022 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 996 (Senator Patterson)
Budget and Taxation

State Procurement - Small Business Reserve Program

This bill raises the participation goal for the Small Business Reserve (SBR) program from 15% to 30% of the total value of contracts awarded. It also requires small businesses registered for SBR to have their principal office located in Maryland. Finally, it requires the Governor's Office of Small, Minority, and Women Business Affairs (GOSBA) to establish standards and guidelines for SBR *at least* every five years.

Fiscal Summary

State Effect: State procurement costs (all funds) increase due to more limited competition for State contracts, as discussed below. Expenditures (all funds) may increase further for staffing to the extent agencies expand outreach to and participation of small businesses in State procurement, but a reliable estimate is not feasible. Revenues are not affected.

Local Effect: None.

Small Business Effect: Meaningful.

Analysis

Current Law:

Small Business Reserve Program

SBR requires most State agencies to structure their procurements so that at least 15% of the total dollar value of their procurements is made directly to small businesses; Chapter 438 of 2017 raised the goal from 10% to 15%. Under regulations governing the program, each agency must prepare an annual forecast of its total procurement spending. The agency must then develop a plan to allocate at least 15% of its forecasted spending to contracts for small businesses serving as prime contractors. Under Chapter 438, an agency can apply toward its total SBR participation goal only payments made under a contract that is *designated* as an SBR procurement (not all payments to small businesses). The Special Secretary of Small, Minority, and Women Business Affairs must, in consultation with the Attorney General, establish standards and guidelines for participation in SBR every five years.

The University System of Maryland, Morgan State University, and St. Mary's College of Maryland are exempt from most provisions of State procurement law, including SBR.

Chapter 75 of 2004 established SBR and defined a "small business" 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, Chapters 538 and 539 of 2012 (as amended by Chapter 76 of 2014) established that, to qualify as a small business under SBR, 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.

Small businesses self-report their small business status by registering on eMaryland Marketplace Advantage, the State's online procurement portal. Chapter 119 of 2016 transferred responsibility for administering SBR from the Department of General Services (DGS) to GOSBA and repealed its termination date, making the program permanent.

Governor's Executive Order

Executive Order 01.01.2021.01, signed by the Governor on January 6, 2021, requires that any procurement by an Executive Branch agency for goods, supplies, services, maintenance, construction, construction-related services, architectural services, and engineering services with a total dollar value between $50,000 and $500,000 be designated for SBR, except for:

- procurements from a preferred provider;
- procurement involving expenditures of federal dollars, if inclusion in SBR conflicts with federal law or grant requirements;

- small procurements;
- procurements of human, social, cultural, or educational services; and
- certain term or master contracts, as determined by GOSBA and the Office of State Procurement (OSP).

A procurement is exempt from designation for SBR if GOSBA certifies, concurrently with the review of any waiver determinations for certified minority business enterprise contract goals, that it is not practicable to do so. OSP within DGS must assist GOSBA in establishing procedures and guidelines for the efficient exemption of procurements from SBR.

The Executive Order does not contravene federal law or affect the State's receipt of federal funding, and its provisions are severable.

Reciprocal Preference

In general, State procurement law does not authorize agencies to give preference to resident bidders or offerors over nonresident bidders or offerors. However, reciprocal preferences are allowed in instances where a nonresident bidder or offeror is from a state or jurisdiction that does give preference to resident bidders or offerors. "Preference" is defined as a percentage preference, an employee residency requirement, or any other provision that favors a resident over a nonresident.

State agencies may apply reciprocal preferences when using either competitive sealed bidding or competitive sealed proposals to procure supplies or services, including architectural and engineering services, construction-related services, or energy performance contracts. For competitive sealed bidding, an agency may give a preference to a bidder from the State only if (1) the resident bidder is a responsible bidder; (2) the lowest responsive bid is by a bidder from another state; (3) the state in which the nonresident bidder is located gives a preference to its residents; and (4) the preference does not conflict with a federal law or grant affecting the contract.

For competitive sealed proposals, an agency may apply a preference to a resident offeror if (1) a responsible nonresident offeror submits a proposal; (2) the state in which the nonresident offeror is located gives a preference to its residents; and (3) the preference does not conflict with a federal law or grant affecting the contract. Procuring agencies may request specified information from nonresident bidders or offerors regarding any resident preference given by the state in which they are located. The agencies may give the same preference given by the state in which the nonresident bidder or offeror is located.

State Expenditures: Raising the SBR performance goal from 15% to 30% has little practical effect on State agencies because they are not meeting the current 15% goal. As noted above, contract awards to small businesses only count toward the SBR goal if the contract is designated for the SBR program. In fiscal 2020, the most recent data available, Maryland awarded 10.6% of the value of its contracts to small businesses, but only 2.4% was for designated SBR contracts. These outcomes are consistent with performance in prior years. As both performance figures are well below the 15% goal, raising the goal has little practical effect because it is unlikely that agencies meet the current goal any time soon. However, to the extent that raising the goal causes agencies to expand their efforts to award contracts to small businesses, they may require additional staff to conduct outreach and manage a higher volume of SBR contracts.

The bill limits SBR registration only to businesses that have their principal office in the State. This not only limits the number of firms available to agencies to meet the higher goal, but it also restricts competition for SBR contracts only to Maryland-based firms. Moreover, by designating more contracts only for small businesses, the bill reduces the number of contracts open to broader competition from all vendors, further reducing competition for State contracts. Reducing competition for contracts has been shown to increase contract pricing, thereby increasing State procurement costs. A reliable estimate of any such increase is not feasible.

Requiring GOSBA to establish standards and guidelines at least every five years has no practical effect on GOSBA's finances or operations.

Small Business Effect: As small businesses have exclusive rights to bid on SBR contracts, broadening the goal and requiring the principal office to be in Maryland may enhance their ability to participate in State contracting. However, as the current goal is not met, it is not clear that the bill would have this effect. Nevertheless, under the bill, small businesses in Maryland are disadvantaged to the extent they do business, or attempt to do business, with other states, including all neighboring states. States surrounding Maryland, among others, have reciprocal preferences similar to Maryland's. Accordingly, the bill's preference for Maryland-based small businesses likely triggers the reciprocal preferences in those states. This means that Maryland businesses are excluded from participating in small business-related procurement in those states since Maryland is excluding nonresident businesses from participating in SBR.

Additional Information

Prior Introductions: None.

Designated Cross File: HB 1458 (Delegate D. Barnes) - Rules and Executive Nominations.

Information Source(s): Department of General Services; Governor's Office of Small, Minority, and Women Business Affairs; University System of Maryland; Maryland Department of Transportation; Department of Legislative Services

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