

Department of Legislative Services
Maryland General Assembly
2025 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

House Bill 304

(Delegate Kerr, *et al.*)

Health and Government Operations

Budget and Taxation

State Procurement - Transparency and Procedures

This bill makes changes to State procurement-related processes and requirements affecting (1) change orders and contract modifications; (2) bid protests and contract claims; (3) debriefings for unsuccessful offerors; and (4) procurement ethics. **The bill takes effect July 1, 2025.**

Fiscal Summary

State Effect: Potential increase in procurement expenditures (all funds) to the extent that the bill's provisions result in direct financial costs to the State and/or delays in contract awards and performance, as discussed below, but a reliable estimate is not feasible. Revenues are not affected.

Local Effect: None.

Small Business Effect: Minimal.

Analysis

Bill Summary/Current Law:

Change Orders and Contract Modifications

Under current law, a “change order” is defined as a written directive signed by a procurement officer that instructs a contractor to make modifications authorized by a procurement contract without requiring the contractor’s consent. A procurement unit cannot require a prime contractor, nor can a prime contractor require a subcontractor, to

begin change order work until the procurement officer for the unit has issued a written change order that specifies that the work is to proceed in compliance with the terms of the contract (and the methods of pricing for the work). *The bill* modifies this requirement by allowing the written change order to specify that the work is in compliance with *either* the terms of the contract *or any changes in law or regulation*.

Current law defines a “contract modification” as a written alteration made through mutual agreement between the parties to a procurement contract. The alteration may involve revisions of specifications, delivery location, delivery date, performance period, price, quantity, or other contract provisions. *The bill* adds a requirement that all procurement contracts include a requirement for a contract modification to provide an equitable adjustment to compensate a contractor for increases in cost and time due to changes in the law. “Equitable adjustment” is not defined in State procurement law but generally refers to a change to a contract price or provision to compensate a contractor for additional costs.

Protests and Contract Claims

Under current law, a “contract claim” means a claim related to a procurement contract that has already been formed and can include issues with performance, breach, modification, or termination of the contract. Contract claims may be asserted by a contractor against the procurement unit, or by the procurement unit against the contractor. A “protest” refers to a complaint made during the formation of a procurement contract and can include complaints about the qualifications of a bidder or offeror, or the determination of which bidder or offeror will receive a contract.

A procurement officer that receives a bid protest or contract claim must review the substance of the protest or claim, discuss with interested parties, and, unless clearly inappropriate, seek the advice of the Office of the Attorney General (OAG). The procurement officer must then either resolve the protest or claim, wholly or partly deny it, or wholly or partly grant relief sought by the person that submitted the protest or claim. This decision must be reviewed by the head of the agency as well as the head of the principal procurement department or agency with jurisdiction over the procurement.

For contract claims, the reviewing authority must approve, disapprove, or modify the decision of the procurement officer within 180 days of receiving the contract claim, or a longer period that the parties agree to; there is no time limit for the review of bid protests. The reviewing authority may also remand the proceeding with instructions to the procurement officer, in which case the procurement officer must go back through the procedures described above. A decision to not pay a contract claim is a final action for the purpose of appeals to the Maryland State Board of Contract Appeals (MSBCA). Failure to reach a decision within the stated time under the law may be deemed a decision not to pay the contract claim.

The bill removes contract claims from these procedures so that the procedures apply only to *timely* protests. After the procurement officer issues a decision on a timely protest in writing, the head of the agency or principal department may designate someone to review the procurement officer's decision on their behalf; the procurement officer's action is deemed the final action of the unit. Accordingly, the consideration of a reviewing authority is no longer applicable. The bill also establishes that an agency's failure to reach a decision on the protest within 60 days after receipt of the protest may be deemed, at the sole option of the protestor, to be a decision to deny the protest.

Current law addresses contract claims specifically for construction contracts (which the bill extends to all contract claims, as described below). A contractor must file a written notice of a contract claim relating to a procurement contract for construction within 30 days after the basis of the claim is known, unless regulations specify a shorter period of time. Within 90 days after submitting a notice of a contract claim under a procurement contract for construction, a contractor must submit a written explanation including the amount of the claim, the facts on which the claim is based, and any relevant data and correspondence that may support the claim. Unless the procurement unit is part of a principal procurement department or agency, or regulations specify otherwise, the head of the procurement unit must review the claim. If the unit is part of a principal procurement department or agency, the department's Secretary must review the claim.

The reviewer of the contract claim must give the contractor written notice of a resolution of the contract claim within 90 or 180 days, depending on the amount of the claim. Recovery under a contract claim is not allowed for any expense incurred more than 30 days before the required submission of a notice of a claim or more than 120 days before the submission of the claim. If a procurement unit determines that it is responsible for a portion but not all of the amount claimed by the contractor, the unit shall pay the undisputed amount. A decision to not pay a contract claim is a final action for the purpose of appeals to MSBCA. Failure to reach a decision within the stated time under the law may be deemed a decision not to pay the contract claim. At the time of final payment, the procurement unit must release the retainage due to the contractor, along with any interest.

The bill applies these provisions to all contract claims rather than those just related to construction. Additionally, it extends the deadline for contractors to submit a written notice of a claim from 30 to 60 days. The deadline begins upon the later of either a procurement unit denying a request for equitable adjustment or the parties reaching an impasse in negotiations. On receipt of a timely contract claim from a contractor, a procurement officer (1) must review the substance of the contract claim; (2) may request additional information or substantiation through an appropriate procedure; (3) may conduct negotiations with the contractor initiating the contract claim; and (4) must comply with any applicable regulations. Unless clearly inappropriate, the procurement officer must seek the advice of OAG on any legal issues. Consistent with the State budget and other applicable laws, the

procurement officer must resolve the contract claim by agreement of the parties, wholly or partly deny the contract claim, or wholly or partly grant the relief sought by the claimant. The secretary of the principal procurement unit or designee – or if the unit is not part of a principal department, the head of the unit or designee – must then review the contract claim and decision of the procurement officer. Like protests under the bill, the action of the procurement officer is the final action of the unit and the consideration of a reviewing authority is no longer applicable.

The bill also alters the timeline for recovery under a contract claim, stating that recovery is not allowed for any expense incurred (1) more than 60 days before the last day on which notice of a claim is permitted to be filed or (2) unless the time for submission of a claim is extended, more than 150 days before the last day on which notice of a claim is permitted to be filed.

For all contract claims, including those pending administratively in court on July 1, 2025, prior to authorizing payment on a contract claim, the procurement officer must require the contractor to supplement the claim with a certification that, to the best of the contractor's knowledge and belief, the claim is made in good faith, all supporting data is accurate and complete, and that the amount requested accurately reflects the contract claim for which the contractor believes the procurement agency is liable.

Procurement Debriefings for Unsuccessful Offerors

For contracts awarded on a basis other than price alone, *current regulations* allow an unsuccessful offeror to submit a written request for a debriefing within a reasonable time. Upon such a request, a procurement officer familiar with the selection of the contract award must provide a debriefing, which must (1) be limited to discussion of the offeror's proposal without specific discussion of proposals from competing offerors; (2) be factual and consistent with the evaluation of the unsuccessful offeror's proposal; and (3) provide information on areas in which the unsuccessful offeror's technical proposal was deemed weak or deficient. The discussion may include a summary of the procurement officer's rationale for a selection decision, but may not include discussion of the thoughts, notes, or rankings of individual members of an evaluation committee. A summary of the debriefing must be made part of the contract file.

The bill allows an unsuccessful offeror to submit a request to the procurement officer for a debriefing of a contract award. Upon receiving a request for a debriefing, the procurement officer must provide the debriefing as soon as is feasible and before the recommended contract award is presented for approval to the head of the unit or the Board of Public Works (BPW). With the exception of information reasonably determined to be confidential, proprietary, or privileged, the debriefing must include all relevant information

that has been requested by the unsuccessful offeror. The Office of State Procurement within the Department of General Services must establish guidelines for debriefings.

Conflicts of Interest

Current law prohibits individuals who assist a unit in drafting specifications, invitations for bids, or requests for proposals for a procurement – or in the selection or award process – from submitting a bid or proposal for that procurement. It also bars those individuals, or their employers during the period of assistance, from assisting or representing another party, directly or indirectly, in submitting a bid or proposal for the same procurement. Providing assistance does not include, among other things, offering technical information, brochures, literature, or samples; submitting written or oral feedback on draft specifications or solicitations when comments are solicited from at least two individuals as part of the prebid or preproposal process; and providing certain architectural and engineering services, such as planning, programming, or limited design work within specified limits. *The bill* adds that providing information that does not create an unfair competitive advantage for any bidder or offeror does not constitute assisting with a solicitation.

State Expenditures: The bill includes provisions that could have either direct effects on contract costs or operational effects that delay or extend the procurement process. The requirement to reimburse contractors through contract modifications for changes in law is a new contract requirement that could directly result in higher contract costs. As described above, contract modifications are generally negotiated and agreed to mutually by the State and a vendor. The bill compels the State to agree to contract modifications that require it to pay equitable adjustments without the benefit of negotiation.

Furthermore, extending the time limit for the filing of contract appeals by 30 days (from 30 days to 60 days) may cause longer delays in contract performance while the claims are processed. Prohibiting a contract from being presented to BPW until all requested debriefings have been conducted may substantially delay contract approvals, potentially affecting project timelines and costs. Finally, altering procurement ethics requirements to allow vendors to provide information to agencies during the development of contract solicitations increases the likelihood that unsuccessful vendors file bid protests claiming that the information provided created an unfair advantage. Even if the protests are not successful, the protests can delay contract execution and, therefore, project completion. Delays in contract award and performance can result in cost overruns for the State, but a reliable estimate is not feasible.

Additional Information

Recent Prior Introductions: Similar legislation has not been introduced within the last three years.

Designated Cross File: None.

Information Source(s): Department of Information Technology; State Board of Contract Appeals; Department of Commerce; Office of the Attorney General; Maryland State Treasurer's Office; Judiciary (Administrative Office of the Courts); Maryland State Department of Education; Maryland Higher Education Commission; Baltimore City Community College; University System of Maryland; Morgan State University; St. Mary's College of Maryland; Maryland Department of Agriculture; Department of Budget and Management; Maryland Department of Disabilities; Maryland Department of the Environment; Department of General Services; Maryland Department of Health; Department of Housing and Community Development; Department of Human Services; Department of Juvenile Services; Maryland Department of Labor; Department of Natural Resources; Maryland Department of Planning; Department of Public Safety and Correctional Services; Board of Public Works; Department of State Police; Maryland Department of Transportation; Department of Veterans and Military Families; Department of Service and Civic Innovation; Department of Legislative Services

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