

Department of Legislative Services
 Maryland General Assembly
 2025 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 304 (Delegate Kerr)
 Health and Government Operations

State Procurement - Transparency and Procedures

This bill makes changes to State procurement-related definitions, 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.

Fiscal Summary

State Effect: General fund expenditures increase by \$106,700 in FY 2026 for legal staffing; out-year expenditures reflect annualization and inflation. Potential significant increase in contract costs to the extent that the bill’s provisions result in direct financial costs to the State and/or delays in contract awards and contract performance, as discussed below, but a reliable estimate is not feasible. Revenues are not affected.

(in dollars)	FY 2026	FY 2027	FY 2028	FY 2029	FY 2030
Revenues	\$0	\$0	\$0	\$0	\$0
GF Expenditure	106,700	128,700	134,300	140,300	146,300
Net Effect	(\$106,700)	(\$128,700)	(\$134,300)	(\$140,300)	(\$146,300)

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

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. *The bill* adds a requirement that all procurement contracts include a requirement for a change order to compensate a contractor for increases in cost and time due to changes in the law, and it makes conforming changes to the definition of a change order.

Under current law, 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* expands this definition to include modifications required due to changes in law or regulation that increase the contractor’s cost or time to perform the contract.

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.

Current law outlines procedures for what a procurement officer must do upon receiving a protest or contract claim. The procurement officer 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 protests. It also establishes a 45-day time limit for the reviewing authority's decision on a bid 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 90 days. The deadline begins upon the earlier of either a procurement unit denying a request for equitable adjustment or the parties reaching an impasse in negotiations. An “equitable adjustment” refers to a change to a contract price or provision to compensate a contractor for additional costs.

The bill also adds that at any time prior to receiving payment on a contract claim and on written request by the procurement officer, the contractor must provide a procurement unit 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.

Current law states that MSBCA may award to a contractor the reasonable costs of filing and pursuing a claim, including reasonable attorney’s fees, if the board finds that the conduct of the procurement unit in processing a contract claim is in bad faith, without substantial justification, or in violation of the law. *The bill* expands this provision to also allow MSBCA to award reasonable costs to contractors defending *against* a claim initiated by a procurement unit, under the same circumstances.

Under current law, any party to an MSBCA decision, including a procurement unit, may appeal the final decision of MSBCA to a court of competent jurisdiction. *The bill* requires appeals of MSBCA’s decisions to go to the Appellate Court of Maryland.

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 requires that, upon request of an unsuccessful offeror, a procurement unit provide a debriefing of a contract award. With the exception of information subject to a confidentiality agreement, the debriefing must include all relevant information obtained

from a proposal by, or discussions with, a competing offeror that is reasonably necessary to determine whether (1) all evaluation procedures required by law were properly interpreted and performed; (2) the procurement advances the purposes and policies for State procurement; (3) the conduct of unit personnel was biased, in bad faith, or without substantial justification; and (4) the unit failed to produce any document required by law or regulation. A failure to comply with these provisions by a procurement officer may be remedied by MSBCA.

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:

Legal Challenges

The bill includes multiple provisions that either require enhanced legal review during the procurement and contract management processes or that increase the State’s litigation risk from bidders and offerors. Examples include:

- expanded requirements for debriefing sessions that may require disclosing (1) proprietary information about other offerors and (2) misconduct by procurement officers (or risk action by MSBCA);
- determining whether information shared with a unit does or does not create an unfair advantage for a bidder or offeror; and
- negotiating with vendors to determine whether a change in law or regulation is responsible for increased time or cost to perform a contract.

These and other provisions likely increase the workload for OAG, which provides legal advice to procurement units and adjudicates bid protests, contract claims, and judicial

appeals on behalf of the State. Therefore, general fund expenditures increase by \$106,659 in fiscal 2026, which accounts for the bill’s October 1, 2025 effective date. This estimate reflects the cost for OAG to hire one assistant Attorney General to manage the increased workload resulting from advising procurement units on the bill’s requirements – particularly for the debriefing process – and adjudicating bid protests, contract claims, and appeals from contractors. It includes a salary, fringe benefits, one-time start-up costs, and ongoing operating expenses.

Position	1.0
Salary and Fringe Benefits	\$99,290
Operating Expenses	<u>7,369</u>
Total FY 2026 State Expenditures	\$106,659

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

Procurement Costs

The bill also includes numerous 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 change orders for changes in law or regulation is a new contract requirement that could directly result in higher contract costs. Similarly, allowing MSBCA to require the State to pay attorney’s fees for contractors that are defending a contract claim by a procurement unit may also directly increase State expenditures. Extending the time limit for the filing of contract appeals by 60 days (from 30 days to 90 days) may cause longer delays in contract performance while the claims are processed. The expanded requirements for debriefing sessions not only increase the litigation risk to the State, but also likely delay contract awards while procurement officers seek legal counsel about what they can and cannot say during the debriefing sessions. These delays in awarding or performing contracts can have financial consequences for the State that cannot be quantified in advance, but could be significant.

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

Fiscal Note History: First Reader - January 31, 2025
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