

BILL: House Bill 1166 - Omnibus Procurement Reform Act (“OPRA”) of 2023

COMMITTEE: House Health and Government Operations

DATE: March 6, 2023

POSITION: Oppose

Upon review of House Bill 1166 - Omnibus Procurement Reform Act (“OPRA”) of 2023, the Maryland Department of General Services (DGS) provides these comments for your consideration.

House Bill 1166 requires the following of both State and county entities, with the resulting impact included:

- Procurement officers must disclose the name of successful bidders, ranking and numerical ratings, bid prices or financial proposals, and the Minority Business Enterprise participation schedule. *Portions of this information are proprietary and confidential and should not be posted publicly in order to maintain competition among vendors. Award information is currently posted on eMaryland Marketplace Advantage (eMMA) within 30 days of an award.*
- Procurement officers must make a written determination and include it in the procurement file. *It is current practice for procurement officers to make a written determination explaining why it is in the best interest of the State to cancel the procurement or reject all bids/proposals and obtain approval from the “appropriate Department head or designee” (control agency) before cancelling the procurement. These reasons may include:*
 - *The absence of a continued need for the procurement;*
 - *The State agency no longer can reasonably expect to fund the procurement;*
 - *Proposed amendments to the solicitation would be of such magnitude that a new solicitation is desirable;*
 - *Prices exceed available funds and it would not be appropriate to adjust quantities to come within available funds;*
 - *There is reason to believe that the bids or proposals may not have been independently arrived at in open competition, may have been collusive, or may have been submitted in bad faith;*
 - *Bids received indicate that the needs of the State agency can be satisfied by a less expensive equivalent item differing from that on which the bids or proposals were invited; or*
 - *All otherwise acceptable bids or proposals received are at unreasonable prices.*

- May cancel a solicitation or reject all bids or proposals with Board of Public Works approval if it is fiscally necessary or consistent with Division II of the State Finance and Procurement Article. May not cancel a solicitation to avoid a decision on a pending protest or appeal unless the unit determines a compelling reason. ***If a procurement officer is prohibited from canceling a procurement the result may be a cost increase to the State. The State would be prohibited to exit a contract in order to obtain a new one with more competitive pricing and/or more enhanced/updated goods or services. The extension of an existing contract with outdated goods and services could potentially threaten the health and wellbeing of clients in need of new goods or services. Vendors may not be able to offer the same prices initially proposed or continue to be available for work once the appeal process is completed. If an appellant is successful, it does not guarantee they would be awarded the contract; the procurement may still need to be cancelled in order to update the solicitation and conduct new procurement.***
- The Maryland State Board of Contract Appeals must award damages to compensate a successful appellant in an appeal for the costs incurred, limited to reasonable attorney's fees, fees for expert witnesses, and fees for technical consultants incurred at the unit and appeals board levels. ***Providing vendors the ability to recover costs opens the door to frivolous protests. If costs incurred are paid for, a vendor may appeal purely because they did not receive an award. An increased number of appeals may also directly impact the procurement process, including: the procurement cycle time would significantly increase while the procurement officer is occupied with the appeal process; contract modifications would have to be made to existing contracts to keep goods and services in place during the protest and appeal process. These extensive modifications would adversely interrupt and delay the procurement process.***
- Removes the ability of municipalities, counties, and the State to raise the defense of sovereign immunity for a contract action when in a judicial proceeding. These jurisdictions are also prohibited from impairing the right of a contractor to have a contract dispute resolved by the State Board of Contract Appeals or de novo* court proceedings. ***Procurement officers would be burdened with taking the time to gather documents during discovery. The Office of the Attorney General would be impacted by defending a procurement officer at the State Board of Contract Appeals. An unintended consequence is removing the ability to raise sovereign immunity in defense of contract actions thus possibly inhibiting future contract litigation.***

*de novo: "A second time; afresh. A trial or a hearing that is ordered by an appellate court that has reviewed the record of a hearing in a lower court and sent the matter back to the original court for a new trial, as if it had not been previously heard nor decided."

For additional information, contact Ellen Robertson at 410-260-2908.