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The Honorable Joseline A. Pena-Melnyk  
Chair, House Health and Government Operations Committee  
Room 241, House Office Building  
Annapolis MD 21401

***RE: Letter of Opposition – House Bill 1166 – Omnibus Procurement Reform Act (“OPRA”) of 2023***

Dear Chair Pena-Melnyk and Committee Members:

The Maryland Department of Transportation (MDOT) respectfully opposes House Bill 1166, as it will likely result in an increase of the filing of protests, contract claims, and appeals, substantially increasing the workload of procurement officers, and reducing the competitiveness of contracts.

House Bill 1166 would require procurement officers to expeditiously disclose the following information after making a recommendation for award of a procurement: (1) name of successful bidder/offeree; (2) technical and financial rankings and numerical ratings; (3) bid prices or financial proposals, including unit prices, unless disclosure would be inconsistent with SFP 11-201(a); and (4) the Minority Business Enterprise (MBE) participation schedule, which identifies the certified MBEs that a bidder or offeror agrees to use in the performance of the contract.

Presently, the information outlined in 3 and 4 above is not required to be disclosed, beyond the total amount of the recommended award, and is generally only disclosed if there is a protest concerning award of the contract. Even in those instances in which this sensitive information is disclosed as part of a protest, it is only disclosed to the contractor involved in the protest, and is required to be kept confidential. House Bill 1166 would require this information be disclosed publicly by the Procurement Officer (PO). Bidders do not want their bid prices/financial proposals disclosed to their competitors, and if bidders know that this information is required to be disclosed, it could have a chilling effect on competition and lead to fewer bids. In addition, required disclosure of this information will cause contractors to file more protests, as they will be able to challenge the PO and agency’s weighing of financial proposals and MBE involvement, both of which involve some level of subjective evaluation. More protests result in further delays in the award of contracts and the start of work under those contracts, as well as increased litigation costs in defending these protests.

If the contract award recommendation requires Board of Public Works (BPW) approval, then the name of the successful bidder or offeror, technical and financial rankings, and bid prices are already disclosed through BPW agenda items, which are available to the public. However, some of the information to be disclosed, such as the financial proposal, is proprietary and confidential, to guarantee that procurements can remain competitive. The Public Information Act (PIA)

already requires disclosure upon request, subject to limitations and conditions stated in the PIA. The standard for disclosure stated in House Bill 1166 is inconsistent with the privacy and confidentiality interests protected by the PIA.

House Bill 1166 also modifies the circumstances under which a unit may cancel a solicitation or reject all bids/proposals; when there is an appeal of such action, the unit must prove that the action was fiscally necessary and compliant with procurement policies.

If the Maryland State Board of Contract Appeals (MSBCA) sustains an appeal and finds that there has been a violation of law or regulation, then the MSBCA will award compensable damages, including fees for attorneys, expert witnesses, and technical consultants. The potential impact on the MDOT of allowing offerors/bidders to obtain attorney's fees, expert witness, and technical consultant fees at both the agency decision and Board level cannot be understated; if enacted, offerors/bidders will retain attorneys, experts and technical consultants from the time of bidding and throughout the life of the contract, to look for grounds to protest or file contract claims, knowing that any successful protest or contract claim will result in the Board awarding those costs to the offeror/bidder/contractor. Earlier engagement of attorneys, expert witnesses and technical consultants will inevitably lead to an increased number of protests and contract claims, and increased defense costs, as we will also need to engage our own experts earlier in the process. Awarding damages may encourage more protests and appeals.

House Bill 1166 would dramatically transform State procurement law, particularly with respect to the MSBCA's handling of protests and contract claims and would strongly tilt the contract dispute resolution process in favor of contractors/offerors/bidders, and against State agencies such as the MDOT. It is highly likely to encourage more protests and appeals, which would burden procurement officers with additional workload, disrupt the procurement process, and delay contract awards.

The MDOT looks forward to continued collaboration to ensure that our efforts to provide safe transportation infrastructure are also leveraged to support broader goals of economic development and equity in the State.

For these reasons, the Maryland Department of Transportation respectfully requests the Committee grant House Bill 1166 an unfavorable report.

Respectfully submitted,

Pilar Helm  
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Maryland Department of Transportation  
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