

Department of Legislative Services
Maryland General Assembly
2022 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 1353 (Delegate Wilson)
Health and Government Operations

Omnibus Procurement Reform Act ("OPRA") of 2022

This bill makes the purposes and policies of State procurement law apply to county procurements that include any State funds, and it gives the Maryland State Board of Contract Appeals (MSBCA) jurisdiction to hear and decide appeals related to those local procurements. It also makes various changes to State procurement policies and procedures related to the cancellation of solicitations, the timelines for MSBCA rulings, disclosure of information regarding awarded contracts, and costs of contract claims and bid protests that may be awarded to successful appellants.

Fiscal Summary

State Effect: General fund expenditures increase by \$1.0 million in FY 2023 for MSBCA members and staff; out-years reflect annualization and inflation. Other agencies can otherwise implement the bill with existing resources, but it may have operational and indirect financial effects. No effect on revenues.

(\$ in millions)	FY 2023	FY 2024	FY 2025	FY 2026	FY 2027
Revenues	\$0	\$0	\$0	\$0	\$0
GF Expenditure	1.00	1.22	1.26	1.29	1.32
Net Effect	(\$1.00)	(\$1.22)	(\$1.26)	(\$1.29)	(\$1.32)

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

Local Effect: The bill potentially has significant financial and operational effects on local governments, as discussed below. No effect on revenues. **This bill may impose a mandate on a unit of local government.**

Small Business Effect: Potential meaningful.

Analysis

Bill Summary: With respect to county procurements, the bill's provisions apply only to county procurements that use any State funds.

Cancellation of Solicitations

A State agency or a county (for procurements that use any State funds) may cancel a solicitation or reject all bids or proposals only if doing so is fiscally necessary or consistent with the purposes and policies of State procurement law. The bill repeals existing language that allows cancellation of a solicitation or rejection of all bids or proposals (for State procurements) if an agency determines that it is fiscally advantageous or otherwise in the best interests of the State.

Before canceling a procurement or rejecting all bids or proposals, a State agency or county must make a written determination that the action is fiscally necessary or consistent with the purposes and policies of State procurement law. A State agency or county may not take such an action to avoid a decision on a pending protest regarding the formation of a contract, unless the dispute reveals a compelling reason for the action. In the event of an appeal of an agency's or county's action, MSBCA may affirm the agency's or county's decision only if the agency or county proves, by clear and convincing evidence, that the action is fiscally necessary or consistent with the purposes and policies of State procurement law. MSBCA must award damages to a successful appellant for costs incurred to file and pursue the protest and appeal, including reasonable attorney's fees, fees for expert witnesses, and fees for technical consultants.

Bid Protests and Contract Claims

MSBCA must issue its final decision on a contract claim within 120 days (instead of 180 days under current law) from the day on which all briefs have been filed or, if later, the record has been closed.

The bill allows MSBCA to award to successful claimants the reasonable costs of filing and pursuing a contract claim for contracts other than construction contracts. It also expands the conditions under which reasonable costs may be awarded for a successful contract claim to include the conduct of agency or county personnel being inconsistent with the purposes and policies of State procurement law.

For bid protests, discovery must be limited to requests for the production of documents unless MSBCA determines that particular circumstances (instead of extraordinary circumstances) exist that support additional discovery, consistent with the procedures of the circuit court. MSBCA *must*, under specified circumstances, award reasonable costs for

a successful bid protest, *including attorney's fees* (currently not allowed) and fees for expert witnesses and technical consultants.

Disclosure of Contract Information

After the Board of Public Works (BPW) approves a contract or, if BPW approval is not required, after executing and approving a procurement contract, a State or county procurement officer must expeditiously disclose:

- the name of any successful bidder or offeror recommended for award;
- the ranking and numerical ratings, if any, of technical and financial proposals;
- the bid prices or financial proposals, including unit prices, unless it is determined that disclosure would be inconsistent with the purposes and policies of State procurement law; and
- the minority business enterprise (MBE) participation schedule or similar document for county procurements.

Current Law: In general, State procurement law has no application to or influence on local procurements (unless a local jurisdiction elects on its own to follow State procurement law). However, local procurements for school construction projects must abide by the requirements of the State's MBE Program. Also, any local construction contract that meets specified thresholds must pay prevailing wages.

Purposes of State Procurement Law

State procurement law is contained in Division II of the State Finance and Procurement Article. Section 11-201 of the Article states that the purposes and policies of Division II include:

- providing for the increased confidence in State procurement;
- ensuring fair and equitable treatment of all persons who deal with the State procurement system;
- providing safeguards for maintaining a State procurement system of quality and integrity;
- fostering effective broad-based competition in the State through support of the free enterprise system;
- promoting increased long-term economic efficiency and responsibility in the State by encouraging the use of recycled materials;
- providing increased economy in the State procurement system;
- getting the maximum benefit from the purchasing power of the State;

- simplifying, clarifying, and modernizing the law that governs State procurement;
- allowing the continued development of procurement regulations, policies, and practices in the State; and
- promoting development of uniform State procurement procedures to the extent possible.

Maryland State Board of Contract Appeals, Contract Claims, and Bid Protests

MSBCA is an independent agency in the Executive Branch that consists of three full-time members qualified to serve in a quasi-judicial capacity and possessing thorough knowledge of procurement practices and processes. The chairman and other members are appointed to five-year terms by the Governor with the advice and consent of the Senate. MSBCA may employ staff in accordance with the State budget (it currently has five positions, which includes the three members of the board). MSBCA adjudicates bid protests and contract disputes between State agencies and contractors or vendors doing business with the State. Matters involved in bid protests include the bidding process and other concerns relating to the formation of procurement contracts. Issues in contract disputes include breach, performance, modification, and termination. MSBCA decisions are subject to judicial review.

For contract claims, MSBCA must issue its final ruling within 180 days of when all briefs are filed or, if later, the record has been closed. For contract claims related only to a construction contract, 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 agency personnel is in bad faith or without substantial justification.

For bid protests, discovery must be limited to requests for the production of documents unless MSBCA determines that extraordinary circumstances require additional discovery to avoid substantial unfairness or prejudice. MSBCA *may*, under specified circumstances, award a successful bid protester the reasonable costs of filing and pursuing a protest, *but not including attorney's fees*.

Disclosures

For procurements conducted using competitive sealed proposals, agencies must publish on eMaryland Marketplace notice of contract awards exceeding \$50,000 within 30 days of contract award. The same is true of procurements using competitive sealed proposals, but statute does not include the 30-day requirement for those procurements.

For contracts that require approval by BPW, the meeting agenda for each meeting includes some of the information required by the bill, including the names and bid or proposal prices

for each bidder or offeror and the rankings of the technical and cost proposals. It does not include numerical ratings or MBE participation schedules.

State Expenditures:

Maryland State Board of Contract Appeals Jurisdiction

The bill significantly expands the jurisdiction of MSBCA to hear and decide bid protests and contract claims related to local contracts that include any State funds. MSBCA advises that, with only three board members and two staff, it lacks capacity to handle any increase in its case load, and the Department of Legislative Services (DLS) concurs. The bill's requirement that contract claims be decided within 120 days instead of 180 days puts a significant strain on MSBCA. Moreover, given the likelihood that county procurement officers are not familiar with all intricacies and nuances of State procurement law, the possibility for a monumental increase in protests and claims across all 24 counties is quite high.

Therefore, general fund expenditures increase by \$1,000,188 in fiscal 2023, which accounts for the bill's October 1, 2022 effective date. This estimate reflects the cost of MSBCA adding six new members and two new staff to hear, process, and decide the expected increase in bid protests and contract claims, including meeting the shorter timeframe for deciding contract claims. It includes salaries, fringe benefits, one-time start-up costs, and ongoing operating expenses.

Positions	8.0
Salaries and Fringe Benefits	\$931,220
Operating Expenses	<u>68,968</u>
Total FY 2023 State Expenditures	\$1,000,188

Future year expenditures reflect full salaries with annual increases and employee turnover as well as annual increases in ongoing operating expenses. DLS notes that a statutory change is necessary because current law limits the board to three members. In the absence of legislative change, expenditures are less but MSBCA likely is overwhelmed and experiences significant delays in hearing and deciding cases.

Procurement Process

The bill's other provisions do not have a direct effect on State expenditures, but they do have an operational effect and potentially an indirect effect on expenditures. The bill expands MSBCA's authority to award reasonable costs to successful claimants and protesters, including attorney's fees on bid protests and contract claims for nonconstruction

contracts. These provisions may increase State expenditures in the event of successful claims or protests.

Some of the bill's requirements are duplicative of provisions in current law and/or create administrative inefficiencies that may affect the timing and cost of State procurements. For instance, making it more difficult to cancel a procurement may lead the State to have to accept bids or offers that are not in its best interest.

Local Expenditures: The bill significantly affects local government finances and operations. The bill is not clear regarding what it means for the purposes and policies of State procurement law to apply to specified local procurements. The statement of purpose in statute is fairly broad and can be interpreted any number of ways. If the bill is interpreted to require local governments to abide by all requirements in Division II for affected contracts, county governments advise that it likely requires them to substantially expand their procurement staffs and pay to train their procurement officers in the requirements of State procurement law, including, for instance, preferences for preferred providers, the Small Business Reserve Program, the MBE program, master contracting, qualification-based selection, and more. Moreover, any deviations from these requirements may be interpreted to be grounds for a bid protest or contract claim, exposing local governments to substantial liability and delays in their procurement processes.

The bill may result in county governments in essence having two parallel procurement systems, one for contracts without State funds and one for contracts with State funds. This can create confusion and increase the likelihood of mistakes occurring during the procurement process (which in turn exposes the counties to more liability). A significant number of local procurements include State funds, including public school, courthouse, and community college construction projects as well as educational, health care, and environmental services.

Small Business Effect: Small businesses have greater access to the bid protest or contract claim process with the possibility of being reimbursed for more of their costs, especially for bid protests and nonconstruction contract claims.

Additional Information

Prior Introductions: None.

Designated Cross File: None.

Information Source(s): Governor's Office of Small, Minority, and Women Business Affairs; Maryland State Board of Contract Appeals; Baltimore, Charles, and Frederick

counties; Maryland Association of Counties; Judiciary (Administrative Office of the Courts); Department of General Services; Board of Public Works; Department of Legislative Services

Fiscal Note History: First Reader - March 7, 2022
fnu2/ljm

Analysis by: Michael C. Rubenstein

Direct Inquiries to:
(410) 946-5510
(301) 970-5510