

HOUSE BILL 440

P2

8lr0365

By: **Delegates Rosenberg, Harrison, Kirk, Krysiak, Love, Manno, McHale, and Taylor**

Introduced and read first time: January 29, 2008

Assigned to: Health and Government Operations

Committee Report: Favorable with amendments

House action: Adopted

Read second time: March 12, 2008

CHAPTER _____

1 AN ACT concerning

2 **Procurement - Service Contracts - Notice to State Employees and Exclusive**
3 **Representatives**

4 FOR the purpose of requiring the Board of Public Works to ensure that certain
5 procurement regulations provide for procedures that are consistent with certain
6 provisions of law; requiring that notice of certain rights be given to exclusive
7 representatives of certain employees ~~and their exclusive representatives~~ at
8 certain points in the procurement process; providing that a violation of a certain
9 provision does not constitute grounds to challenge or appeal certain awards and
10 processes; providing that certain notice requirements must be met for certain
11 service contracts to be certified; ~~authorizing the Department of General Services~~
12 ~~and the Department of Budget and Management to adopt certain regulations;~~
13 ~~requiring a procurement unit in the Executive Branch of the State government~~
14 ~~to include certain information in certain required~~ altering certain notice
15 requirements included in certain plans of assistance for certain State employees
16 who will be adversely affected by certain service contracts; defining ~~certain~~
17 ~~terms~~ a certain term; and generally relating to notice requirements for certain
18 service contracts with the State.

19 BY repealing and reenacting, without amendments,
20 Article - State Finance and Procurement
21 Section 11-101(a) and (d) and 13-218(a)
22 Annotated Code of Maryland
23 (2006 Replacement Volume and 2007 Supplement)

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.

[Brackets] indicate matter deleted from existing law.

Underlining indicates amendments to bill.

~~Strike-out~~ indicates matter stricken from the bill by amendment or deleted from the law by amendment.



- 1 BY repealing and reenacting, with amendments,
 2 Article – State Finance and Procurement
 3 Section 12–101(b)
 4 Annotated Code of Maryland
 5 (2006 Replacement Volume and 2007 Supplement)
- 6 BY adding to
 7 Article – State Finance and Procurement
 8 Section 13–218.1
 9 Annotated Code of Maryland
 10 (2006 Replacement Volume and 2007 Supplement)
- 11 BY repealing and reenacting, without amendments,
 12 Article – State Personnel and Pensions
 13 Section ~~13–401, 13–402, and 13–403~~ through 13–404
 14 Annotated Code of Maryland
 15 (2004 Replacement Volume and 2007 Supplement)
- 16 BY repealing and reenacting, with amendments,
 17 Article – State Personnel and Pensions
 18 Section ~~13–404 and~~ 13–405
 19 Annotated Code of Maryland
 20 (2004 Replacement Volume and 2007 Supplement)
- 21 SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF
 22 MARYLAND, That the Laws of Maryland read as follows:
- 23 **Article – State Finance and Procurement**
- 24 11–101.
- 25 (a) In this Division II the following words have the meanings indicated
 26 unless:
- 27 (1) the context clearly requires a different meaning; or
- 28 (2) a different definition is provided for a particular title or provision.
- 29 (d) “Board” means the Board of Public Works.
- 30 12–101.
- 31 (b) (1) The Board may control procurement by units.
- 32 (2) To implement the provisions of this Division II, the Board may:
- 33 (i) set policy;

1 (ii) adopt regulations, in accordance with Title 10, Subtitle 1 of
2 the State Government Article; and

3 (iii) establish internal operational procedures consistent with
4 this Division II.

5 (3) The Board shall ensure that the regulations of the primary
6 procurement units provide for procedures that are consistent with this Division II **AND**
7 **TITLE 13, SUBTITLE 4 OF THE STATE PERSONNEL AND PENSIONS ARTICLE** and,
8 to the extent the circumstances of a particular type of procurement or a particular unit
9 do not require otherwise, are substantially the same.

10 (4) The Board may delegate any of its authority that it determines to
11 be appropriate for delegation and may require prior Board approval for specified
12 procurement actions.

13 (5) Except as limited by the [State] **MARYLAND** Constitution, the
14 Board may exercise any control authority conferred on a primary procurement unit by
15 this Division II and, to the extent that its action conflicts with the action of the
16 primary procurement unit, the action of the Board shall prevail.

17 (6) The Board, with the assistance of the Department of Budget and
18 Management, shall compile comprehensive statistics on the procurement system by
19 agency, amount, and type of procurement.

20 (7) The Board shall develop and submit to the General Assembly, in
21 accordance with § 2–1246 of the State Government Article, an annual report on the
22 procurement system that includes information on actions necessary to improve
23 effective broad-based competition in procurement.

24 13–218.

25 (a) Each procurement contract shall include clauses covering:

26 (1) termination for default;

27 (2) termination wholly or partly by the State for its convenience if the
28 head of the primary procurement unit determines that termination is appropriate;

29 (3) variations that occur between estimated and actual quantities of
30 work in a procurement contract;

31 (4) liquidated damages, as appropriate;

32 (5) specified excuses for nonperformance;

1 (6) except for real property leases, the unilateral right of the State to
2 order in writing:

3 (i) changes in the work, if the changes are within the scope of
4 the procurement contract; and

5 (ii) a temporary stop or delay in performance;

6 (7) the obligation of the contractor to comply with the political
7 contribution reporting requirements under Title 14 of the Election Law Article, to
8 which the contractor may be subject as required under § 17-402 of this article; and

9 (8) nonvisual access for information technology as required under §
10 3-412 of this article.

11 **13-218.1.**

12 (A) IN THIS SECTION, "SERVICE CONTRACT" HAS THE MEANING STATED
13 IN § 13-401 OF THE STATE PERSONNEL AND PENSIONS ARTICLE.

14 (B) AT LEAST ~~90~~ 60 DAYS BEFORE THE ISSUANCE OF A SOLICITATION
15 FOR A SERVICE CONTRACT THAT IS NOT EXEMPT UNDER § 13-403(C) OR §
16 13-404(B) OF THE STATE PERSONNEL AND PENSIONS ARTICLE, THE UNIT
17 SHALL PROVIDE THE EXCLUSIVE REPRESENTATIVE OF THE EMPLOYEES WHO
18 MAY BE AFFECTED BY THE SERVICE CONTRACT ~~AND THEIR EXCLUSIVE~~
19 ~~REPRESENTATIVES~~ WITH WRITTEN NOTICE OF:

20 (1) WORK THAT IS BEING PROPOSED FOR CONTRACTING; AND

21 (2) CONTRACTING PROCEDURES, REQUIREMENTS, TIMETABLES,
22 AND EMPLOYEE RIGHTS AS PROVIDED IN TITLE 13, SUBTITLE 4 OF THE STATE
23 PERSONNEL AND PENSIONS ARTICLE.

24 (C) A VIOLATION OF THIS SECTION DOES NOT CONSTITUTE GROUNDS
25 TO CHALLENGE OR APPEAL AN AWARD OF A PROCUREMENT OR THE PROCESS
26 THROUGH WHICH THE PROCUREMENT WAS CONDUCTED.

27 **Article – State Personnel and Pensions**

28 13-401.

29 (a) In this subtitle the following words have the meanings indicated.

30 (b) "Service contract" means a procurement contract for services that:

1 (1) will be provided to a unit in the Executive Branch of State
2 government;

3 (2) will be performed within a State-operated facility; and

4 (3) in the estimation of the procurement officer, will exceed an annual
5 cost of \$100,000.

6 (c) "Services" has the meaning stated in § 11-101 of the State Finance and
7 Procurement Article.

8 (d) "Unit" has the meaning stated in § 11-101 of the State Finance and
9 Procurement Article.

10 13-402.

11 The policy of this State is to use State employees to perform all State functions
12 in State-operated facilities in preference to contracting with the private sector to
13 perform those functions.

14 13-403.

15 (a) A service contract may be entered into only as approved by the Board of
16 Public Works in accordance with this subtitle.

17 (b) Except as provided in subsection (c) of this section, the Board of Public
18 Works may approve a service contract for a unit only if the Board receives a
19 certification from the Department that:

20 (1) the service contract is exempt under § 13-404(b) of this subtitle; or

21 (2) the unit has complied with the requirements of § 13-404(c) of this
22 subtitle.

23 (c) If the General Assembly authorizes or requires that certain services be
24 performed by an independent contractor, the Board of Public Works may approve a
25 service contract for those services without the certification required by subsection (b)
26 of this section.

27 13-404.

28 (a) The Department may certify a service contract to the Board of Public
29 Works as provided in this section.

30 (b) The Department may certify a service contract as being exempt from the
31 preference stated in § 13-402 of this subtitle if:

32 (1) State employees are not available to perform the services;

1 (2) a conflict of interest would result if a State employee were to
2 perform the services;

3 (3) the nature of the services meets the standards set by the
4 Department for emergency appointments;

5 (4) the services are incidental to the purchase or lease of personal
6 property or real property, such as a service agreement that is part of the purchase or
7 rental of computers or office equipment; or

8 (5) a clear need exists to obtain an unbiased finding or opinion, such
9 as an expert witness in litigation.

10 (c) The Department may certify a service contract that is not exempt under
11 subsection (b) of this section only if:

12 (1) the unit that seeks to enter into the service contract has complied
13 with § 13-405 of this subtitle; and

14 ~~(2)~~ the Department finds that:

15 ~~(1) THE UNIT THAT SEEKS TO ENTER INTO THE SERVICE~~
16 ~~CONTRACT HAS COMPLIED WITH § 13-405 OF THIS SUBTITLE;~~

17 ~~[(i)] (2)~~ the potential economic advantage of entering into the
18 service contract is not outweighed by the preference stated in § 13-402 of this subtitle;

19 ~~[(ii)] (3)~~ the service contract does not adversely affect the
20 affirmative action efforts of this State;

21 ~~[(iii)] (4)~~ the service contract includes adequate control
22 mechanisms to ensure that the services will be performed in accordance with the
23 service contract; ~~and~~

24 ~~(iv)] (5)~~ the service contract complies with all of the
25 requirements of Division II of the State Finance and Procurement Article; ~~AND~~

26 ~~(6) AT LEAST 15 DAYS BEFORE CERTIFYING THE SERVICE~~
27 ~~CONTRACT, THE DEPARTMENT HAS NOTIFIED EMPLOYEES WHO MAY BE~~
28 ~~AFFECTED BY THE SERVICE CONTRACT AND THEIR EXCLUSIVE~~
29 ~~REPRESENTATIVES IN WRITING OF THE FOLLOWING:~~

30 ~~(1) THE DEPARTMENT'S INTENT TO CERTIFY THE SERVICE~~
31 ~~CONTRACT;~~

~~(H) THAT EMPLOYEES AND THEIR EXCLUSIVE REPRESENTATIVES MAY REVIEW AND RECEIVE A COPY, AT NO CHARGE, OF THE SERVICE CONTRACT, THE PROPOSED CERTIFICATION, AND THE INFORMATION RELIED ON BY THE DEPARTMENT IN MAKING THE PROPOSED CERTIFICATION; AND~~

~~(H) THAT EMPLOYEES AND THEIR EXCLUSIVE REPRESENTATIVES MAY SUBMIT COMMENTS TO THE DEPARTMENT REGARDING THE PROPOSED CERTIFICATION.~~

~~(D) THE DEPARTMENT OF GENERAL SERVICES AND THE DEPARTMENT OF BUDGET AND MANAGEMENT MAY ADOPT REGULATIONS TO CARRY OUT THE REQUIREMENTS OF THIS SECTION.~~

~~(E) (1) WHEN A NONEXEMPT SERVICE CONTRACT UNDER SUBSECTION (C) OF THIS SECTION IS CERTIFIED, THE DEPARTMENT SHALL NOTIFY EMPLOYEES WHO MAY BE AFFECTED BY THE SERVICE CONTRACT AND THEIR EXCLUSIVE REPRESENTATIVES IN WRITING OF THE EMPLOYEES' AND THEIR EXCLUSIVE REPRESENTATIVES' RIGHT TO:~~

~~(I) RECEIVE, WITHOUT CHARGE, A COPY OF THE CERTIFICATION DOCUMENT AND THE SERVICE CONTRACT; AND~~

~~(II) COMMENT ON THE CERTIFICATION AND THE SERVICE CONTRACT BEFORE THE BOARD OF PUBLIC WORKS.~~

~~(2) THE DEPARTMENT'S NOTIFICATION TO EMPLOYEES AND THEIR EXCLUSIVE REPRESENTATIVES REQUIRED BY PARAGRAPH (1) OF THIS SUBSECTION MUST BE PERFORMED AT LEAST 15 DAYS BEFORE THE SERVICE CONTRACT IS CONSIDERED BY THE BOARD OF PUBLIC WORKS.~~

13-405.

(a) A unit that seeks to enter into a service contract that is not exempt under § 13-403(c) or § 13-404(b) of this subtitle shall submit to the Department the information required by this section.

(b) The unit shall submit a demonstration that the unit has taken formal and positive steps to consider alternatives to the service contract, including reorganization, reevaluation of service, and reevaluation of performance.

(c) (1) The unit shall submit calculations that:

(i) compare the cost of the service contract with the cost of using State employees; and

1 (ii) show savings to this State, over the duration of the service
2 contract, of 20% of the contract or \$200,000, whichever is less.

3 (2) In calculating the cost comparison required by this subsection, a
4 unit shall include:

5 (i) direct costs, including fringe benefits;

6 (ii) indirect overhead costs, including the proportional share of
7 existing administrative salaries and benefits, rent, equipment costs, utilities, and
8 materials, but only to the extent that those costs are attributed solely to the service in
9 question and would not exist if the service were not performed by State employees;

10 (iii) any continuing or transitional costs that would be directly
11 associated with contracting for the services, including unemployment compensation
12 and the cost of transitional services; and

13 (iv) additional costs of performance of the services by State
14 employees, including salaries and benefits of additional staff and the cost of additional
15 space, equipment, and materials needed to perform the services.

16 (d) (1) The unit shall submit a formal plan of assistance for all State
17 employees who will be adversely affected by the service contract.

18 (2) The plan of assistance shall include:

19 (i) efforts to place affected employees in vacant positions in the
20 unit or in another unit;

21 (ii) provisions in the service contract, if feasible, for the hiring
22 by the contractor of displaced employees; and

23 (iii) prior notification to affected employees [by the earlier of:

24 1. the day the contract is signed; or

25 2. 6 months before the day the adverse effect will occur]

26 **IN ACCORDANCE WITH § 13-218.1 OF THE STATE FINANCE AND PROCUREMENT**
27 **ARTICLE AND § 13-404 OF THIS ARTICLE.**

28 SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect
29 October 1, 2008.