

**Department of Legislative Services**  
 Maryland General Assembly  
 2012 Session

**FISCAL AND POLICY NOTE**

House Bill 523 (Delegate Rosenberg, *et al.*)  
 Health and Government Operations

**Board of Public Works - Procurement Contracts - Economic Inclusion Plans**

This bill requires the Board of Public Works (BPW) to approve an economic inclusion plan for each State procurement contract worth at least \$25.0 million, specifies the provisions that must be included in an approved plan, and establishes penalties for a contractor that does not act in good faith to carry out the plan.

**Fiscal Summary**

**State Effect:** General and special fund expenditures by multiple State agencies increase by \$836,600 in FY 2013 to hire additional procurement staff to implement and monitor the bill’s requirements. Out-year costs reflect annualization, inflation, and reduced costs for information technology services. Procurement costs (all funds) may increase to the extent that contractors either pass on higher costs to the State or refrain from participating in State procurement, thereby reducing competition for State contracts. BPW can develop regulations with existing budgeted resources. Any revenues or expenditures associated with the bill’s penalty provisions are expected to be minimal.

(in dollars)	FY 2013	FY 2014	FY 2015	FY 2016	FY 2017
Revenues	\$0	\$0	\$0	\$0	\$0
GF Expenditure	753,000	718,500	763,600	797,100	832,100
SF Expenditure	83,700	79,800	84,800	88,600	92,500
Net Effect	(\$836,600)	(\$798,300)	(\$848,500)	(\$885,600)	(\$924,500)

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

**Local Effect:** None.

**Small Business Effect:** Potential meaningful for small businesses that participate in State contracts of at least \$25.0 million.

## Analysis

**Bill Summary:** An economic inclusion plan must be drafted by the contractor in collaboration with the State agency that awarded the contract and local community groups. The plan must include at least six components specified in the bill that promote the involvement of minority business enterprises (MBEs) and locally owned businesses and the training and employment of local residents. These include specific economic and workforce inclusion goals and processes for helping local workers with job-readiness skills and customized training.

Procurement units that award eligible contracts must develop appropriate definitions for locally owned businesses, local residents, and local community groups. BPW must develop regulations to carry out the bill's requirements.

The contracting agency may waive the requirement for an economic inclusion plan for emergency procurements or if a waiver request satisfies the requirements for waivers under the State MBE program or in regulations developed by BPW.

State contractors must act in good faith to carry out approved economic inclusion plans, subject to the determination of the contracting agency. If an agency determines that a contractor did not act in good faith, the contractor may be liable for damages equal to three times the value of any loss suffered by the State, civil penalties not exceeding \$20,000, and imprisonment for up to five years. The contractor may also be subject to contract termination, referral to the Attorney General for appropriate action, or initiation of any other specific remedy identified in the contract or allowed in statute.

### **Current Law:**

*MBE Program:* The State's MBE program establishes a goal that at least 25% of the total dollar value of each agency's procurement contracts be awarded to MBEs; long-standing subgoals of 7% for African American-owned businesses and 10% for woman-owned businesses were repealed by Chapters 252 and 253 of 2011. Instead, Chapters 252 and 253 authorize the Governor's Office of Minority Affairs (GOMA), in consultation with the Maryland Department of Transportation (MDOT) and the Office of the Attorney General, to establish guidelines for each unit to consider while determining whether to set subgoals for individual procurements based on existing categories for minority groups. There are no penalties for agencies that fail to reach the 25% target. Instead, agencies are required to use race-neutral strategies to encourage greater MBE participation in State procurements.

An MBE is a legal entity, other than a joint venture, that is:

- organized to engage in commercial transactions;
- at least 51% owned and controlled by one or more individuals who are socially and economically disadvantaged; and
- managed by, and the daily business operations of which are controlled by, one or more of the socially and economically disadvantaged individuals who own it.

The MBE program is scheduled to terminate July 1, 2012, but has been extended five different times in the past.

A bidder or offeror may request a waiver from an MBE contract or subcontract goal. A waiver may be granted only if the bidder or offeror reasonably demonstrates that certified MBE participation could not be obtained, or could not be obtained at a reasonable price, and if the agency head determines that the public interest is served by a waiver.

Failure to comply with MBE contract provisions, or to secure a waiver, can result in contract termination, referral to the Attorney General for appropriate action, or initiation of any other specific remedy identified in the contract.

#### *Procurement Law and Exemptions*

BPW, consisting of the Governor, State Treasurer, and Comptroller, must approve most State procurements. However, capital contracts for roads, bridges, or highways by MDOT or the Maryland Transportation Authority (MDTA) are not subject to BPW control. Moreover, statute exempts multiple State agencies from State procurement law. Most are relatively small agencies that generally do not have procurement contracts of \$25 million or more, except for the University System of Maryland (USM), Morgan State University (MSU), and St. Mary's College of Maryland (SMCM).

State law designates procurement control units that have statutory authority to control procurement for specified goods and services for other State agencies (also subject to final approval by BPW). The control units are the Department of General Services (DGS, for supplies, construction, construction-related services, and real property leases), the Department of Budget and Management (DBM, for services and motor vehicle leases), the State Treasurer (for banking, financial services, and insurance), and the Department of Information Technology (DoIT, for information processing and telecommunications equipment and services).

**Background:** State Center is a public-private partnership between State Center LLC, the State of Maryland, and the City of Baltimore that proposes to build a 28-acre transit-oriented development in Baltimore City with office space, housing, parking,

shops, and other amenities. In May 2011, the State Center Development Team executed an economic inclusion plan in collaboration with neighborhood groups that promotes significant involvement of minority-, women-, and locally owned businesses in the development of State Center, as well as the training and employment of local residents in the ongoing transformation of the State Center area. Specifically, the plan establishes contracting and procurement goals of having 35% of construction-related and design- and engineering-related contracts awarded to minority-, women-, and locally owned businesses. In addition, the plan's workforce inclusion goal is for at least 50% of work hours to be performed by local residents, with a minimum of 20% of total jobs going to local residents.

As a public-private partnership that is responsible for its own procurement, State Center would not be subject to the provisions of this bill because its procurement activity is separate from State procurement.

**State Fiscal Effect:** The bill's fiscal effects fall into two categories: administrative costs to implement the bill and procurement costs related to the bill's requirements.

*Administrative Costs:* The number of State contracts that exceed the \$25 million level set by the bill fluctuates each year. BPW identified nine contracts of at least \$25 million approved during fiscal 2011, which are summarized in **Exhibit 1**; MDOT indicates that a handful of road construction contracts related to the InterCounty Connector and one bridge repair contract (none of which were subject to BPW approval) also exceeded \$25 million. However, DBM advises that, because many large contracts are for multiple years, the number of contracts exceeding that level can be substantially higher in some years if several multi-year contracts expire at the same time. Legislative Services also notes that many of the large contracts identified in Exhibit 1 and by DBM are for products (e.g., helicopters, buses) or services (e.g., health insurance, wireless communication systems) that may not easily lend themselves to an inclusion plan and may therefore qualify for a waiver under the bill.

Calculating a fiscal estimate for the bill is complicated by the fact that it is not clear whether the bill applies to capital construction projects funded by MDOT or MDTA; by law, those contracts are not subject to BPW oversight, but the bill specifies that BPW must approve economic inclusion plans "for each State procurement for \$25,000,000 or more." Procurement contracts by USM, MSU, SMCM, and other agencies specifically exempt from procurement law are not affected.

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**Exhibit 1**  
**State Contracts Valued at \$25 Million or More**  
**Awarded in Fiscal 2011**  
**(\$ in Millions)**

<u>Agency</u>	<u>Purpose</u>	<u>Amount</u>
MDOT	State Police helicopters	\$72.3
Transit Administration	Hybrid diesel electric buses	38.5
DoIT	Public safety wireless comm.	345.0
Aviation Administration	BWI Airport security system	28.3
DBM	State employee benefits	57.5
Human Resources	Child support enforcement	25.8
Veterans Affairs	Charlotte Hall management	120.0
Transit Administration	Architectural/engineering	80.0
Transit Administration	Architectural/engineering	80.0

Note: The Maryland Transit Administration awarded two contracts of equal value.

Source: Board of Public Works

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The bill requires procurement units to administer a waiver process, monitor contractor compliance with economic inclusion plans, determine whether contractors make good faith efforts to comply with the terms of the plans, and administer penalties to contractors that do not make a good faith effort. These responsibilities are in addition to procurement units' responsibilities under current law to manage and monitor compliance with contract terms and the existing MBE program.

Based on a review of recent procurement history and input from several procurement control units, Legislative Services estimates that the following agencies that are subject to State procurement law are most likely to have contracts that exceed the \$25 million limit in a given year:

- Budget and Management;
- General Services;
- Health and Mental Hygiene;
- Human Resources;
- Information Technology;
- Public Safety and Correctional Services; and
- Transportation (for nonroad projects).

If it is determined that road and bridge construction projects for MDOT and MDTA are also subject to the bill, the fiscal effects outlined below will also extend to those contracts, and MDOT may require additional staff. To the extent that other agencies have contracts that exceed the \$25 million limit in a given year, it is assumed that the appropriate control unit will absorb much of the responsibility for carrying out the bill's requirements with respect to those contracts.

Legislative Services assumes that procurement control agencies incur additional costs to develop procedures for granting waivers, collaborating with contractors to develop inclusion plans, and monitoring compliance with those plans. Those procedures are shared with units that actually procure the contracts and implement the procedures. The control units continue to hold other units accountable for implementing those procedures and providing assistance and training as necessary, as well as managing their own contracts.

Therefore, general and special fund expenditures increase by \$836,642 in fiscal 2013, which accounts for the bill's October 1, 2012 effective date. This estimate reflects the cost of hiring 10 new procurement officers (2 each for the 3 control units listed above and 1 each for the remaining 4 agencies) to develop and implement procedures for assessing and granting waiver requests, developing inclusion plans in collaboration with contractors, and monitoring contractor compliance with plan goals and requirements. It includes salaries, fringe benefits, one-time start-up costs, and operating expenses, particularly for initial information technology services to integrate the bill's requirements into existing contract management systems.

Position(s)	10
Salaries and Fringe Benefits	\$532,917
Information Technology	237,500
Other Operating Expenses	<u>66,225</u>
<b>Total FY 2013 State Expenditures</b>	<b>\$836,642</b>

Future year expenditures reflect full salaries with annual increases and employee turnover as well as annual increases in ongoing operating expenses and reduced ongoing expenditures for information technology. Expenditures are general funds for all agencies except MDOT, which are special funds from the Transportation Trust Fund.

*Procurement Costs:* The bill requires contractors on affected contracts to provide local residents with job-readiness skills and industry-specific training and to offer job placement services. These services will increase the cost associated with these contracts, which contractors will undoubtedly pass on to the State in the form of higher contract bids and proposals. Alternatively, these requirements may dissuade some bidders or offerors from participating in State procurement because the required activities are

beyond their expertise. Such reduced competition for State contracts may result in higher bids or proposals. Legislative Services cannot reliably estimate the size of these increased costs, but it may be substantial given that the bill only applies to large contracts.

**Small Business Effect:** Small businesses that are prime contractors or subcontractors on contracts valued at \$25.0 million or more will have to develop economic inclusion plans that provide job training and job placement services to local residents. Legislative Services assumes that any costs associated with those services are passed on to the State, but that they increase the administrative burden on small businesses involved in managing large State contracts.

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### **Additional Information**

**Prior Introductions:** None.

**Cross File:** None.

**Information Source(s):** Charles, Frederick, and Montgomery counties; cities of Frederick and Havre de Grace; Board of Public Works; Department of Budget and Management; Department of Information Technology; Governor's Office; Department of Labor, Licensing, and Regulation; Department of Legislative Services

**Fiscal Note History:** First Reader - February 15, 2012  
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Analysis by: Michael C. Rubenstein

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