

Department of Legislative Services
 Maryland General Assembly
 2017 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 1510 (Delegate Glenn, *et al.*)
 Economic Matters

Procurement - Public Work Contracts - Contractor Occupational Safety and Health Requirements

This bill requires prospective bidders or offerors on public work contracts to submit a contractor safety and health plan with specified provisions and an attestation that (1) the plan meets the bill’s requirements and (2) the prospective bidder or offeror will implement the plan when performing work under the contract. It also requires the Commissioner of Labor and Industry to develop a mechanism to assess the safety and health performance indicators used by contractors and subcontractors on public work contracts valued at \$100,000 or more and to enforce the bill’s provisions.

The bill takes effect July 1, 2017.

Fiscal Summary

State Effect: General fund expenditures by the Department of Labor, Licensing, and Regulation (DLLR) increase by \$257,700 in FY 2018; out-year expenditures reflect annualization, inflation, termination of one-time expenses, and delayed implementation of the bill’s enforcement provisions. General fund revenues increase minimally, beginning in FY 2019, due to the assessment of civil penalties.

(in dollars)	FY 2018	FY 2019	FY 2020	FY 2021	FY 2022
GF Revenue	\$0	-	-	-	-
GF Expenditure	\$257,700	\$368,300	\$372,700	\$387,100	\$402,300
Net Effect	(\$257,700)	(\$368,300)	(\$372,700)	(\$387,100)	(\$402,300)

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

Local Effect: Although local governments have to apply the health and safety rating system developed by DLLR for each public work contractor, it is assumed that they can do so with existing resources. Revenues are not affected.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary: The bill applies to “public bodies,” which include the State, a political subdivision, or a unit or instrumentality of the State or a political subdivision. A “public work” is a structure or work, including a bridge, building, ditch, road, alley, waterwork, or sewage disposal plant that is constructed for public use or benefit or is paid for wholly or partly by public money. It does not include several types of structures, as specified in the bill.

The commissioner must develop (1) a safety and health calculation worksheet to evaluate the safety and health performance indicators for contractors and subcontractors that perform work on a public work contract valued at \$100,000 or more and (2) a safety and health rating system to specify additional safety and health measures that the contractor or subcontractor is required to implement based on the score received on the worksheet. Within seven days of entering into a public work contract valued at \$100,000 or more, a contractor or subcontractor must complete a safety and health calculation worksheet and implement any additional safety and health measures required by its rating on the safety and health rating system.

The commissioner must develop regulations to implement the bill, and the regulations may require that prospective bidders and offerors, contractors, and subcontractors maintain any records necessary to implement the bill.

The commissioner must investigate as necessary to ensure compliance with the bill and may enter a place of business or work site to observe the safety and health measures in place, interview workers, and review and copy records necessary for determining compliance with the bill. If the commissioner determines after an investigation that a prospective bidder or offeror, contractor, or subcontractor has violated the bill’s requirements, the commissioner must issue a citation and proposed order. Within 30 days after receiving a citation and order, the aggrieved party may request a *de novo* administrative hearing under the Administrative Procedure Act. If a hearing is not requested, the proposed order becomes final. If a hearing is held, the order issued by the commissioner after the hearing becomes final unless it is petitioned to judicial review within 30 days.

The commissioner must assess a civil penalty of up to \$5,000 for a first violation of the bill and up to \$10,000 for each subsequent violation. In determining the amount of a penalty, the commissioner must consider the nature of the violation and whether the party made a good faith effort to comply with the bill. If a party knowingly or recklessly violates the

bill, the commissioner may recommend to the public body that it debar the vendor for two years.

A prospective bidder or offeror, contractor, or subcontractor may not discharge or otherwise discriminate against an employee who files a complaint in good faith or has testified or will testify in a proceeding related to a violation of the bill. An aggrieved employee may submit a written complaint to the commissioner but must do so within 60 days after the alleged violation occurred. The commissioner must investigate the complaint; if the commissioner determines that there is probable cause that the complaint is valid, the commissioner must refer the matter to the Office of Administrative Hearings for findings of fact and a proposed decision.

Current Law: There are no statutory provisions related to the assessment of a contractor's or subcontractor's safety and health record either prior to or after contract award for public work projects.

Background: In its 2012 report *The Price of Inaction*, Public Citizen concluded that construction injuries and fatalities on both public and private construction projects cost Maryland \$712.8 million between 2008 and 2010. During that time period, Public Citizen found that Maryland had 18,600 construction accidents, of which 11,000 required days away from work or job transfer. Also, 55 construction-related fatalities in Maryland were reported in those years. The report recommended that public construction contracts be awarded only to companies that have strong safety records.

Partially in response to the Public Citizen report, Chapter 625 of 2014 required DLLR to establish a workgroup with broad representation to:

- analyze the effects of instituting a safety and health prequalification requirement for public work contractors;
- study the effectiveness of such prequalification requirements being used in other jurisdictions;
- study safety and health requirements and practices used by State agencies; and
- make recommendations regarding safety and health prequalification requirements.

The workgroup's report, submitted in fall 2014, recommended against a blanket prequalification requirement for public work projects because (1) precluding contractors with poor safety records from public work projects shifts the hazard to private-sector projects and (2) the group did not want to leave the determination of a bidder's safety and health record up to a procurement officer. Instead, it recommended that such determinations should be handled on the project site by the prime contractor or project manager.

The workgroup recommended that:

- prospective bidders or offerors be required to have a written occupational safety and health plan that addresses the recognition and avoidance of construction site hazards before submitting bids for public work;
- contractors not be required to submit the plan to a public body, but instead be required to attest to its existence and that elements of the plan would be implemented on the project;
- winning contractors on projects valued at \$100,000 or more be required to submit safety and health performance data on a questionnaire developed by the commissioner and that the data include lagging and leading indicators;
- each questionnaire be scored to identify additional safety measures that the contractor must implement on the project; and
- project managers be responsible for confirming what additional safety measures, if any, must be implemented.

The workgroup did not agree on a mechanism for enforcing compliance with its recommendations. The bill reflects some of the enforcement proposals discussed by the workgroup, but the report indicates that at least one member strongly objected to its enforcement provisions. It also states that all members of the workgroup agreed that procurement officers and third parties should not be responsible for enforcement.

State Revenues: Enforcement of the bill's requirements likely does not begin until fiscal 2019, once the safety and health questionnaire and related rating system have been developed and contractors have been advised of the requirements. Most contractors found to be in violation of the bill's requirements will likely come into compliance voluntarily, but a small number will be subject to the bill's penalty provisions, yielding minimal general fund revenues from the bill's penalty provisions in fiscal 2019, when enforcement begins; revenues from the penalty provisions are assumed to decrease gradually and plateau after about three years due to increased contractor awareness and compliance.

State Expenditures: The bill assigns three separate functions to DLLR: (1) develop a safety and health worksheet (questionnaire); (2) develop a safety and health rating system to score the questionnaire; and (3) enforce the bill's provisions. These functions are beyond the current scope of responsibilities and staffing within the commissioner's office, so additional staff is necessary. Also, DLLR must develop a new tracking database and, potentially, an online version of the questionnaire to facilitate contractor submissions. Therefore, general fund expenditures by DLLR increase by as much as \$257,668 in fiscal 2018, which accounts for a 90-day start-up delay from the bill's July 1, 2017 effective date. This estimate reflects the cost of hiring one supervisor and a half-time assistant Attorney General to draft regulations and develop the questionnaire and

rating system; enforcement activities do not begin until the following fiscal year. It includes salaries, fringe benefits, one-time information technology (IT) costs, other one-time start-up costs, and ongoing operating expenses. Expenditures increase by \$368,327 in fiscal 2019, which reflects the termination of one-time costs (including IT), continuation of prior-year personnel costs, and the addition of one safety compliance officer and one health compliance officer (industrial hygienist) as enforcement begins; this assumes that the compliance officers begin July 1, 2018.

	<u>FY 2018</u>	<u>FY 2019</u>
New Positions	1.5	2.0
Salaries and Fringe Benefits	\$103,509	\$293,959
One-time IT Expenditures	97,000	0
Operating Expenses	<u>57,159</u>	<u>74,368</u>
Total State Expenditures	<u>\$257,668</u>	<u>\$368,327</u>

Future year expenditures reflect full salaries with annual increases and employee turnover as well as annual increases in ongoing operating expenses.

The bill does not specify who applies the rating system developed by DLLR to score each contractor’s questionnaire. This analysis assumes that it is not the procurement officer who selects the winning bid or proposal because the questionnaires are submitted after contracts are finalized, when the procurement officer’s function is complete. Presumably, the procurement officer’s only role is to ensure that the required attestations are submitted, which can be accomplished within the normal bid or proposal review process.

Based on the workgroup’s recommendations, it is assumed that the project manager scores each questionnaire. With the use of the scoring system developed by DLLR, this function should be relatively straightforward and can also be accomplished as part of the project manager’s oversight function. However, project managers will have to undergo training in the use of the scoring system, which could divert them from other duties and delay the completion of ongoing projects. Affected State agencies (likely including DLLR, the Department of General Services, and the Maryland Department of Transportation) can likely provide the training to project managers with existing resources (including the new DLLR staff included in this analysis).

Small Business Effect: Small construction companies that work on public work projects may have to implement additional worksite health and safety measures based on their scores on the new questionnaire. Contractors with poor health and safety records may find it harder to win bids for public work projects.

Additional Information

Prior Introductions: HB 977 of 2016 received a hearing from the House Economic Matters Committee, but no further action was taken on the bill. HB 404 of 2015, a substantively similar bill, received an unfavorable report from the House Economic Matters Committee. SB 279, its cross file, received an unfavorable report from the Senate Finance Committee.

Cross File: None.

Information Source(s): Carroll, Montgomery, and St. Mary's counties; University System of Maryland; Public School Construction Program; Department of Budget and Management; Department of General Services; Department of Labor, Licensing, and Regulation; Board of Public Works; Maryland Department of Transportation; Public Citizen; Department of Legislative Services

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