

Department of Legislative Services
Maryland General Assembly
2021 Session

FISCAL AND POLICY NOTE
Third Reader

Senate Bill 175

(Senator Ellis)

Education, Health, and Environmental Affairs

Health and Government Operations

**Procurement - Performance and Payment Security - Requirements and
Limitations**

This bill specifies that the State or other public bodies may not require a contractor to provide payment or performance security on specified contracts until the time of contract ratification. It further specifies that the Board of Public Works (BPW) may not require a prospective contractor on an energy performance contract (EPC) to provide a guarantee of projected energy savings before an EPC is ratified.

Fiscal Summary

State Effect: None. The bill either reflects current practice or, in some cases, is procedural in nature with no material effect on governmental finances.

Local Effect: None. The bill generally reflects current practice.

Small Business Effect: None.

Analysis

Bill Summary: With respect to payment and performance security, the bill applies to the following types of contracts:

- State contracts for construction, construction-related services, services, or supplies valued at \$100,000 or less that require payment of security under federal law or other federal requirements;

- construction contracts by the State or any other public body valued at more than \$100,000;
- State contracts for supplies, services, or construction-related services valued at more than \$100,000 and the procurement officer determines that circumstances warrant payment of security; and
- construction contracts by a public body (other than the State or a unit of State government) with a value that exceeds \$50,000 but not \$100,000, under specified circumstances.

Current Law:

For purposes of contract security, a “public body” is defined as:

- the State;
- a county, municipal corporation, or other political subdivision;
- a public instrumentality; or
- any governmental unit authorized to award a contract.

Bid, Payment, and Performance Security

Depending on the size and type of a procurement contract, there are three types of security that the State must or may require under current law:

- bid security protects the State against a bidder withdrawing a bid before a contract is awarded or refusing to sign a contract if the bid is awarded;
- performance security guarantees the performance of a contract by a contractor; and
- payment security guarantees that a contractor will pay all of its suppliers and subcontractors for labor and materials, leaving the project free of any liens.

Current law does not specify when in the contracting process payment or performance security must be provided; bid security must be provided at the time of bid submission (and is not affected by the bill).

In general, performance and payment bonds may not be required for procurements valued at \$100,000 or less, unless required by federal law or a condition of federal assistance.

Bid, performance, and payment security are all required on *construction* contracts valued at more than \$100,000 or if federal law or a condition of federal assistance requires security. The amount of the performance security is determined by the procurement officer. The amount of payment security must be at least 50% of the total amount payable under the contract.

For contracts other than for construction exceeding \$100,000 in cost, a procurement officer *may* require performance and payment security.

Energy Performance Contracts

State law defines an “EPC” as an agreement for the provision of energy services, including electricity, heating, ventilation, cooling, steam, or hot water, in which a person agrees to design, install, finance, maintain, or manage energy systems or equipment to improve the energy efficiency of a building or facility in exchange for a portion of the energy savings. Primary procurement units in the State are authorized to enter into EPCs with a duration of no more than 15 years, subject to the approval and control of BPW.

Before approving an EPC, BPW must ensure that projected annual energy savings under the contract will exceed the projected annual payments under the contract. It must also determine, based on a review by the Maryland Energy Administration, whether the proposed energy technology is appropriate for the time period covered by the contract. BPW may require prospective contractors to furnish appropriate guarantees to ensure that projected savings are realized. Statute does not specify when contractors must provide these guarantees, but the Department of General Services advises that it usually occurs well after a contract is ratified.

Additional Information

Prior Introductions: None.

Designated Cross File: None.

Information Source(s): Baltimore City; Montgomery and Worcester counties; City of Laurel; Maryland Municipal League; Department of General Services; Board of Public Works; Maryland Department of Transportation; Maryland Energy Administration; Department of Legislative Services

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